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Note

***543 PROTECTING THE LIVING AND THE DEAD: HOW MISSOURI CAN ENACT A CONSTITUTIONAL
FUNERAL-PROTEST STATUTE**

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[Phelps-Roper v. Koster, 734 F. Supp. 2d 870 \(W.D. Mo. 2010\).](#)

I. Introduction

The self-proclaimed “most hated family in America,” the Phelpses of the Westboro Baptist Church (WBC), have caused great pain across the country. [\[FN1\]](#) Their highly publicized protests have sparked wide-ranging debate about what the First Amendment protects and where such protection ends. Members of the WBC believe that Americans ignore God’s commandments by committing sins, particularly by supporting homosexuality, and that God exercises his rage and fury at this disobedience by causing catastrophic events and death. [\[FN2\]](#) WBC members picket near funerals to “warn society of God’s wrath.” [\[FN3\]](#) After the WBC held a picket near the funeral of a soldier in St. Joseph, Missouri, the state legislature enacted [Missouri Revised Statutes sections 578.501 and 578.502](#). [\[FN4\]](#) These statutes prohibited protesting within a certain space and time at funerals. [\[FN5\]](#) On August 16, 2010, the United States District Court for the Western District of Missouri struck down the funeral-protest laws in *Phelps-Roper v. Koster*, holding that they were unconstitutional*[544](#) restrictions on free speech. [\[FN6\]](#) The case is now on appeal to the United States Court of Appeals for the Eighth Circuit. [\[FN7\]](#)

This Note will analyze the constitutionality of Missouri’s funeral-protest statutes under the First Amendment. [\[FN8\]](#) This Note argues that, with certain changes, Missouri’s funeral-protest statutes should pass constitutional muster. In Part II, this Note analyzes the facts and holding of *Phelps-Roper v. Koster*. Next, in Part III, this Note explores the legal background of the First Amendment, time, place, and manner restrictions, and how other courts have decided cases involving funeral-protest laws. Part IV examines the court’s rationale in *Phelps-Roper v. Koster*. Lastly, Part V explains where the district court erred and how Missouri’s funeral-protest statutes can be changed to become constitutional time, place, and manner restrictions. This Note concludes with a challenge to the Missouri legislature to draft and enact a constitutional funeral-protest statute and a hope that discussion by the Supreme Court of the United States will allow Missouri to do so.

II. Facts And Holding

Fred Phelps founded the WBC in Topeka, Kansas, in 1955. [FN9] Members of the WBC believe, among other things, that God punishes America for tolerating the “sin” of homosexuality by killing Americans. [FN10] The congregation engages in picketing and protesting to express its religious beliefs. [FN11] The WBC has participated in more than 47,000 anti-gay protests. [FN12] Many of these protests have taken place near the funerals of American soldiers. [FN13] The purpose is to warn mourners that unless they ask for forgiveness, they will suffer and die. [FN14] WBC members carry large, colorful signs that express messages *545 such as “God Hates Fags,” “Divorce Plus Remarriage Equals Adultery; God Hates Adultery,” “God Hates the USA,” “America is Doomed,” “Thank God for Dead Soldiers,” “God is America's Terror,” “Priests Rape Boys,” “Fags Doom Nations,” and “9-11: Gift from God.” [FN15]

Only sixteen days after Missouri enacted its funeral-protest statutes, WBC member Shirley Phelps-Roper filed suit in the United States District Court for the Western District of Missouri. [FN16] She sought entry of a declaratory judgment finding that the statutes were unconstitutional under the First Amendment as well as a preliminary injunction prohibiting enforcement of the statutes. [FN17]

[Missouri Revised Statutes section 578.501.2](#) provided, inter alia:

It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. 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. [FN18]

The statute defined the term “funeral” to include “the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.” [FN19] The legislature also enacted a contingent back-up provision, [section 578.502](#), that would become effective “on the date the provisions of [section 578.501](#) are finally declared void or unconstitutional by a court of competent jurisdiction.” [FN20] [Section 578.502](#) was identical to [section 578.501](#), except that instead of barring picketing or other protest activities “in front of *546 or about” any location where a funeral is held, it prohibited the same activities “within three hundred feet” of any location where a funeral is held. [FN21]

The district court denied Phelps-Roper's motion for preliminary injunction because she did not show a likelihood of success on the merits of her claims. [FN22] The United States Court of Appeals for the Eighth Circuit reversed the district court's ruling, finding that Phelps-Roper was likely to succeed on the merits of her claims, and held that she was entitled to a preliminary injunction. [FN23] A petition for writ of certiorari to the U.S. Supreme Court was denied. [FN24]

Following the entry of the preliminary injunction, Phelps-Roper challenged the constitutionality of [Missouri Revised Statutes sections 578.501](#) and [578.502](#) under the First Amendment. [FN25] She filed a motion for summary

judgment on these counts in the United States District Court for the Western District of Missouri. [\[FN26\]](#)

The court first analyzed [section 578.501](#). [\[FN27\]](#) The court determined the statute was content-neutral and therefore subject to intermediate scrutiny. [\[FN28\]](#) The district court found the government had no compelling interest in protecting funeral attendees from protestors. [\[FN29\]](#) The court also concluded that the statute was not narrowly tailored because it burdened considerably more speech than necessary to advance the government's interest. [\[FN30\]](#) The court thus *547 determined [section 578.501](#) violated the free speech clause of the First Amendment and granted Phelps-Roper's motion for summary judgment. [\[FN31\]](#)

The court then discussed whether [section 578.502](#) violated Phelps-Roper's right to free speech under the First Amendment. [\[FN32\]](#) The court determined “that [s]ection 578.502 suffer[ed] from the same constitutional defects as [s]ection 578.501.” [\[FN33\]](#) Phelps-Roper's motion for summary judgment to declare [section 578.502](#) unconstitutional was also granted. [\[FN34\]](#)

In conclusion, the district court held that both statutes failed to serve a significant government interest and were not narrowly tailored to meet that interest. [\[FN35\]](#) For these reasons, [Missouri Revised Statutes sections 578.501 and 578.502](#) were declared unconstitutional violations of the First Amendment. [\[FN36\]](#)

III. Legal Background

A. Freedom of Speech

The First Amendment of the United States Constitution states, “Congress shall make no law abridging the freedom of speech....” [\[FN37\]](#) Although the language is absolute, the U.S. Supreme Court does allow regulation of speech in certain circumstances. Important to the Court's analysis of speech regulations are the classification of content, type of forum, vagueness, and overbreadth doctrines. [\[FN38\]](#) This Note will discuss in more detail certain time, place, and manner restrictions on free speech, including how the U.S. Supreme Court and other courts have applied these doctrines to funeral-protest statutes. [\[FN39\]](#)

1. Content Classification

In determining the constitutionality of a speech regulation, a court will first determine whether the regulation is content-based or content-neutral. [\[FN40\]](#) Because of the First Amendment, the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”*548 [\[FN41\]](#) To be content-neutral, the speech regulation must be both viewpoint-neutral and subject-matter neutral. [\[FN42\]](#) Viewpoint-neutral means the government may not regulate speech because of the beliefs or ideas of the message. [\[FN43\]](#) Subject-matter neutral means the government may not regulate speech based on topic. [\[FN44\]](#)

Content-based speech regulations are “presumptively invalid” and are subject to strict scrutiny. [\[FN45\]](#) Such a regulation can be upheld only when necessary to serve a compelling state interest and when narrowly drawn to achieve that end. [\[FN46\]](#) A law regulating speech is content-neutral if it applies to all speech regardless of the message. [\[FN47\]](#)

When a speech regulation is content-neutral, it is subject to intermediate scrutiny and survives if it is “narrowly tailored to serve a significant government[] interest and leave[s] open ample alternative channels for communication.” [\[FN48\]](#) As a guideline for lower courts in deciding whether a regulation is content-based or content-neutral, the U.S. Supreme Court has stated:

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.” [\[FN49\]](#)

2. Types of Forums

The constitutionality of speech regulations also depends upon the forum where the speech is being regulated. The U.S. Supreme Court has identified *549 three types of fora: “the traditional public forum, the public forum created by government designation, and the nonpublic forum.” [\[FN50\]](#)

a. The Traditional Public Forum

A traditional public forum receives the highest level of constitutional protection. [\[FN51\]](#) A public forum is “a public place where people traditionally gather to express ideas and exchange views.” [\[FN52\]](#) Public streets and parks are classic examples of public fora. [\[FN53\]](#) To impose a content-based regulation in a public forum, the state must show the “regulation is necessary to serve a compelling state interest and is narrowly tailored.” [\[FN54\]](#) The state may also enforce time, place, and manner regulations in public forums that are content-neutral. [\[FN55\]](#) As long as the public forum speech restriction is narrowly tailored in serving a significant government interest and leaves open ample alternative channels of communication, it does not violate the First Amendment. [\[FN56\]](#)

b. 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.” [\[FN57\]](#) A designated public forum is generally available for speakers. [\[FN58\]](#) State university facilities used by students [\[FN59\]](#) and school board meetings open to the public [\[FN60\]](#) are examples of designated public fora. Content-based and content-neutral speech regulations for a designated public forum are analyzed in the same way as those in traditional public fora. [\[FN61\]](#) The government may restrict speech in a designated public *550 forum to certain groups or for certain topics. [\[FN62\]](#) The government may not discriminate against speech on the basis of viewpoint and any restriction must be “reasonable in light of the purpose served by the forum.” [\[FN63\]](#)

c. The Non-Public Forum

The non-public forum is any government forum not classified in the aforementioned categories. [\[FN64\]](#) The

interior of a public cemetery is an example of a non-public forum. [\[FN65\]](#) The government is allowed to restrict access to a non-public forum as long as the restriction is reasonable and not created to suppress expression purely because the government opposes the speaker's view. [\[FN66\]](#)

3. Vagueness and Overbreadth

A government speech regulation may be unconstitutionally vague if a reasonable person cannot tell what speech is permitted and what speech is prohibited. [\[FN67\]](#) The U.S. Supreme Court has explained that this doctrine requires that a statute characterize the 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.” [\[FN68\]](#)

A government speech regulation may be unconstitutional because it is overbroad. [\[FN69\]](#) An overbroad statute attempts to regulate unprotected speech, but does so in a way that encompasses constitutionally protected speech as well. [\[FN70\]](#) The Court explained the overbreadth doctrine by stating that “some broadly written statutes may have such a deterrent effect on free expression *551 that they should be subject to challenge even by a party whose own conduct may be unprotected.” [\[FN71\]](#) To successfully challenge a law because of substantial overbreadth, a plaintiff must show there is a real danger that the statute will considerably impair the First Amendment protection of parties not before the court. [\[FN72\]](#)

B. Time, Place, and Manner Restrictions

Time, place, and manner restrictions regulate “when, where, or how a public speech or assembly may occur.” [\[FN73\]](#) “[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech,” even on speech in a public forum, as long as the restriction is reasonable “without reference to the content of the regulated speech, is narrowly tailored to serve a significant governmental interest, and leave[s] open ample alternative channels for communication of information.” [\[FN74\]](#) The U.S. Supreme Court and other federal and state courts have addressed time, place, and manner restrictions in various instances.

1. United States Supreme Court Cases

In *Frisby v. Shultz*, the U.S. Supreme Court upheld an ordinance that prohibited picketing “before or about” any residence as a constitutionally valid time, place, and manner restriction. [\[FN75\]](#) The ordinance was passed in response to targeted picketing by anti-abortion protestors in front of a doctor's home. [\[FN76\]](#) The Court determined the statute was content-neutral and was narrowly tailored to serve the significant government interest of “protecting the well-being, tranquility, and privacy of the home.” [\[FN77\]](#) The ordinance allowed picketing in the area and even on the street, but not picketing focused on one person's home. [\[FN78\]](#) The Court stated:

The First Amendment permits the government to prohibit offensive speech as intrusive when the “captive” audience cannot avoid the objectionable speech. The target of the focused picketing banned by the ordinance is just such a “captive.” The resident is figuratively, and perhaps literally, trapped within the home, and because*552 of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. [\[FN79\]](#)

In *Madsen v. Women's Health Center, Inc.*, the Court upheld a state court order restricting speech in a thirty-six foot buffer zone around an abortion clinic. [\[FN80\]](#) The Court also upheld noise restrictions imposed by the order that prohibited anti-abortion protestors from “singing, chanting, whistling, shouting, yelling, using bullhorns, auto horns,” or sound amplification, or making other sounds “within earshot of patients inside the clinic.” [\[FN81\]](#) These orders were constitutional time, place, and manner restrictions because they served the significant government interest of protecting people entering and leaving the facility and did not burden more speech than necessary. [\[FN82\]](#)

In *Hill v. Colorado*, the Court upheld a Colorado law that prohibited approaching without consent within eight feet of a person who was within 100 feet of a health care facility, for purposes of oral protest, education, or counseling, [\[FN83\]](#) finding it to be a reasonable time, place, and manner restriction. [\[FN84\]](#) While the effect of this law was to stop anti-abortion speech, the Court determined the law was content-neutral because it was facially neutral, applying to all speech regardless of its message, and its purpose was to protect those entering health care facilities. [\[FN85\]](#)

In 2011, the U.S. Supreme Court decided *Snyder v. Phelps*, a case involving a claim of intentional infliction of emotional distress against the WBC. [\[FN86\]](#) While the Court ultimately concluded that Snyder could not recover on his intentional infliction of emotional distress claim, it stated that the holding of the case was narrow, and limited the reach of the opinion to the particular facts of the case. [\[FN87\]](#) Although state funeral-protest laws were not directly at issue in *Snyder*, the Court went to great lengths to distinguish time, place, and manner restrictions from the tort claim that it ultimately invalidated. [\[FN88\]](#) In fact, Court commentators have stated that the *Snyder* decision “sends a clear signal to the lower courts that they should not interpret anything in [the] opinion as casting any doubt about [funeral-protest] statutes.” [\[FN89\]](#)

*553 Chief Justice Roberts, writing for the majority, stated that even speech protected by the First Amendment is not tolerable in all places at all times. [\[FN90\]](#) The Court noted that restrictions on the time, place, and manner of protests are appropriate in some circumstances; when and where the WBC can conduct its protests and picketing “is not beyond the Government’s regulatory reach.” [\[FN91\]](#) The Court explicitly noted that Maryland, the location of the protest in question, in addition to forty-three other states and the federal government, had laws imposing restrictions on funeral picketing at the time the case was decided. [\[FN92\]](#) The Court stated that funeral-protest laws “raise very different questions from the tort verdict at issue in this case.” [\[FN93\]](#)

Justice Alito’s dissent made specific reference to the majority’s reliance upon funeral-protest statutes to protect funeral attendees in the future. [\[FN94\]](#) He stated, “[t]he Court suggests that the wounds inflicted by vicious verbal assaults at funerals will be prevented or at least mitigated in the future by new laws that restrict picketing within a specified distance of a funeral.” [\[FN95\]](#) Justice Alito explicitly stated that he would have upheld such laws. [\[FN96\]](#) Further, he argued that the plaintiff should be allowed to recover for intentional infliction of emotional distress because the funeral laws were inadequate to protect funeral attendees, in that “the verbal attacks that severely wounded [Snyder] in this case complied with the new Maryland law regulating funeral picketing.” [\[FN97\]](#) Justice Breyer concurred in the opinion and stated that the majority “[did] not hold or imply that the State is always powerless to provide private individuals with necessary protection.” [\[FN98\]](#)

2. Other Approaches to State Funeral-Protest Laws

As the Snyder Court noted, the federal government and forty-four states have enacted statutes restricting protests near cemeteries or funerals. [\[FN99\]](#) State laws take one of three approaches in restricting funeral protesting. [\[FN100\]](#) The *554 majority of states restrict the location and time period available for protesting. [\[FN101\]](#) These laws enforce a buffer zone around funerals and memorial services during specific times. [\[FN102\]](#) Other states define funeral protesting as disorderly conduct and prohibit it because of noise or other disruptive reasons. [\[FN103\]](#) Several states have enacted laws that combine elements of the first two approaches. [\[FN104\]](#) This requires imposing a buffer zone and also forbidding disturbances of a service by noise or other means. [\[FN105\]](#) A number of courts have thus had occasion to address the constitutionality of such statutes.

In *Phelps-Roper v. Strickland*, Shirley Phelps-Roper sought declaratory and injunctive relief from Ohio's Funeral Protest Provision, which prohibited picketing and other protest activities within 300 feet of a funeral or burial service, one hour before and until one hour after the service. [\[FN106\]](#) The United States Court of Appeals for the Sixth Circuit upheld the Ohio law as a reasonable, content-neutral regulation of the time, place, and manner of speech. [\[FN107\]](#)

The Sixth Circuit determined that Ohio had a significant government interest in protecting funeral attendees, because the living have a privacy right “in the character and memory of the deceased.” [\[FN108\]](#) The court compared the buffer zone to those in *Frisby*, *Madsen*, and *Hill*, and noted that “the size of a buffer zone necessary to protect the privacy of an entire funeral gathering can be expected to be larger than that necessary to protect the privacy of a single residence, or a single individual entering a medical clinic.” [\[FN109\]](#) Moreover, the 300-foot buffer zone was narrowly tailored because it took into account the logistical problem of large numbers of people moving from the funeral location*555 to the burial site. [\[FN110\]](#) The court noted that the First Amendment does not mean *Phelps-Roper* was entitled to the best means of communication. [\[FN111\]](#) Because the Ohio Funeral Protest Provision only restricted picketing for a limited time and within a limited space, it left open ample alternative channels of communication for *Phelps-Roper*. [\[FN112\]](#)

In *Phelps-Roper v. Heineman*, Shirley Phelps-Roper moved for a preliminary injunction against state officials alleging that Nebraska's funeral picketing statute was unconstitutional. [\[FN113\]](#) The Nebraska Funeral Picketing Law (NFPL) restricted picketing one hour before, during, and two hours after a funeral. [\[FN114\]](#) Picketing was defined in the statute as “protest activities within three hundred feet of a cemetery, mortuary, church, or other place of worship during a funeral.” [\[FN115\]](#) The NFPL did not apply to “funeral processions on public streets or highways.” [\[FN116\]](#)

The United States District Court for Nebraska held that the NFPL was content-neutral because the law's purpose was found on the face of the statute and nothing in the plain language suggested content or viewpoint discrimination. [\[FN117\]](#) The district court held that the Nebraska government had a significant interest in protecting the privacy of family members during the funeral or memorial service for a relative and that the family of the deceased is a captive audience. [\[FN118\]](#) Further, the district court held that the 300-foot buffer zone was narrowly tailored to protect the government's interest. [\[FN119\]](#) Finally, the court held that the law left open ample alternatives for communication and thus denied *Phelps-Roper*'s motion for preliminary injunctive relief. [\[FN120\]](#)

On appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court order. [\[FN121\]](#) In a short opinion, the appellate court found that the district court was required to follow the precedent established by *Phelps-Roper v. Nixon*, which determined that it was improbable the government could prove it had a significant

interest in protecting funeral attendees. ^{*556} The district court's attempts to distinguish the Nebraska law from the Missouri laws were not persuasive. The Eighth Circuit majority did not address or distinguish *Snyder v. Phelps*, which was decided by the U.S. Supreme Court before this appeal. Further, the court did not address Phelps-Roper's challenge to the statute nor did it determine the constitutional issues. The appellate court reversed the district court's order denying the preliminary injunction and remanded the case.

A previous Eighth Circuit case, *Olmer v. City of Lincoln*, dealt with a similar restriction on funeral protests. The City of Lincoln passed an ordinance that restricted focused picketing in certain areas around churches and other religious locations a half-hour before, during, and after any scheduled religious activity. The Eighth Circuit found that the government has no compelling interest in protecting an individual from unwanted speech outside of the residential context. The court did not agree with the city that religious premises ought to receive the same protection as private residences. The Eighth Circuit held that the ordinance was an unconstitutional time, place, and manner regulation.

IV. Instant Decision

In *Phelps-Roper v. Koster*, the United States District Court for the Western District of Missouri held that Missouri Revised Statutes sections 578.501 and 578.502 violated Phelps-Roper's First Amendment right to free speech.

First, the court determined whether the speech restrictions created by sections 578.501 and 578.502 were content-based or content-neutral in order to establish the proper standard of review. Phelps-Roper argued the statutes were content-based speech restrictions because they were enacted specifically to silence the speech of the WBC and targeted funeral picketing. ^{*557} When the case was initially reviewed at the preliminary injunction stage, the district and appellate courts found the statutes were content-neutral because the provisions were facially neutral. In the instant decision, the district court remained convinced that the statutes were content-neutral and therefore subject to intermediate scrutiny. In determining whether these statutes were a constitutional time, place, and manner restriction on speech as applied to traditional public fora, the court analyzed whether each statute served a significant government interest, was narrowly tailored, and left open ample alternative channels of communication.

The court first analyzed section 578.501. Phelps-Roper argued the statute did “not suggest on its face what government interest it [wa]s supposed to advance.” She also contended that *Olmer v. City of Lincoln* controlled - that the government has no compelling interest in protecting individuals from unwanted speech outside of the residential context. The State argued the government had “a significant interest in preserving and protecting the sanctity and dignity of memorial and funeral services, as well as protecting the privacy of family and friends of the deceased during a time of mourning and distress.” The State claimed the *Olmer* opinion needed to be revisited since the U.S. Supreme Court had recently granted certiorari in *Snyder v. Phelps*, a case that would be discussing similar issues. Finally, the State argued it may have additional significant interests such as protecting the safety of funeral attendees and protesters.

The district court found the *Olmer* opinion to be controlling. Whether the U.S. Supreme Court would

overrule *Olmer* in its consideration of *Snyder v. Phelps* was not for the court to determine in this case. [FN146] The court concluded that the State did not demonstrate it had considered the protection of mourners and protestors at funerals when enacting the statute, thus the state failed to tie the statute to a significant government interest. [FN147] Because [section 578.501](#) failed to serve a significant government interest, the court rendered*558 it unconstitutional and granted Phelps-Roper's motion for summary judgment. [FN148]

Although Phelps-Roper succeeded on the merits of her claim regarding [section 578.501](#), the court nevertheless continued its analysis of the statute on the grounds that the Supreme Court would be considering a similar issue regarding government interest in *Snyder v. Phelps*. [FN149] The court analyzed whether [section 578.501](#) was narrowly tailored. [FN150] Phelps-Roper argued that *Olmer* controlled and that the floating buffer zone created by the statute was not narrowly tailored to prevent disruptions of funeral services. [FN151] She contended the ordinance found unconstitutional in *Olmer* was narrower than this statute because [section 578.501](#) banned all picketing and protesting, whereas the ordinance in *Olmer* only banned funeral protests and focused picketing. [FN152] She argued [section 578.501](#) prohibited all expressive activity, whether the speech was welcome or not. [FN153] Because the prohibited zone floated with time and space, Phelps-Roper reasoned that those engaging in protests would have little or no notice that their protest was illegal. [FN154] The State presented two short arguments that the statute was narrowly tailored. [FN155] It argued that the law only burdened the speech necessary to further the significant government interest. [FN156] The State also claimed the law was not a general ban on all protesting, but was aimed specifically to eliminate the disruption of funeral services and to protect both mourners and protestors. [FN157]

The court determined the State failed to demonstrate that [section 578.501](#) was narrowly tailored to eliminate the interruption of funeral services and to protect funeral attendees and protestors. [FN158] Additionally, the court found the law burdened substantially more speech than necessary to further the government interest because it could criminalize speech funeral attendees wanted to hear, including speech from counter-protestors. [FN159] Because the law was not narrowly tailored, the court again concluded [section 578.501](#) violated the free speech clause of the First Amendment. [FN160] PhelpsRoper's*559 motion for summary judgment was also granted on this alternative basis. [FN161]

The final prong in the intermediate scrutiny analysis required a determination of whether [section 578.501](#) provided ample alternative channels through which Phelps-Roper could deliver her message. [FN162] The court chose not to go through this analysis since the statute had already failed to meet the previous criteria. [FN163] Further, the court found it did not need to consider whether [section 578.501](#) was unconstitutionally vague. [FN164]

The court did not thoroughly analyze [Missouri Revised Statutes section 578.502](#). [FN165] It succinctly determined that [section 578.502](#) suffered from the same constitutional problems as [section 578.501](#). [FN166] The court stated that changing the language of the statute from “in front of or about” to “within three hundred feet of or about” did not render [section 578.502](#) constitutional. [FN167] The court determined [section 578.502](#) also failed to advance a significant government interest and was not narrowly tailored to achieve that interest. [FN168] Phelps-Roper's motion for summary judgment to declare [section 578.502](#) unconstitutional was also granted. [FN169]

The United States District Court for the Western District of Missouri granted Phelps-Roper's motion for summary judgment declaring [Missouri Revised Statutes sections 578.501](#) and [578.502](#) unconstitutional because (1) the statutes

did “not advance a significant government[] interest” and (2) were not “narrowly tailored to meet that government interest.” [\[FN170\]](#)

The State filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. [\[FN171\]](#)

V. Comment

Despite Missouri's current failure, it is possible to enact a constitutional funeral-protest law. For instance, it is constitutional to ban noise or physical disruptions that interfere with a funeral or memorial service. [\[FN172\]](#) It is constitutional*560 to impose a law making sure there is an unobstructed entrance and exit from a funeral or memorial service. [\[FN173\]](#) It is constitutional to impose a limited buffer zone. [\[FN174\]](#) While these principles are clear, not much else is. This Part argues that the district court erred in finding no significant governmental interest in protecting funeral attendees. The current statute's remaining constitutional defect - the physical scope of the restriction - is easily corrected by the legislature.

A. Missouri's Significant Government Interest

The government has a significant interest in protecting funeral attendees. Although neither [Missouri Revised Statutes section 578.501](#) nor 578.502 facially state a significant government interest, that information was expressly contained within the underlying legislation, Senate Bill 578. [\[FN175\]](#) The bill stated “immediate action [wa]s necessary to protect the emotional well-being of persons paying respects to the deceased” to preserve “public health, welfare, peace and safety.” [\[FN176\]](#) These interests are significant and are supported by U.S. Supreme Court cases.

The U.S. Supreme Court has recognized the privacy rights of individuals to control the body and death images of deceased family members. [\[FN177\]](#) The Court stated that “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.” [\[FN178\]](#) This right of privacy also extends to the living “to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.” [\[FN179\]](#)

This same reasoning ought to apply to funeral attendees and particularly to family members of the deceased. The Court has stated that burial rites are seen as “a sign of respect a society shows for the deceased and for the surviving family members.” [\[FN180\]](#) Many believe places where the dead are laid to rest *561 are hallowed grounds. [\[FN181\]](#) The unique emotional condition of family members mourning the loss of a loved one and the importance of funeral rites for those grieving support the government's interests in protecting funeral attendees.

Further, funeral attendees are a captive audience who are in a vulnerable condition such that they cannot escape the “unwarranted public exploitation” of a funeral protest. [\[FN182\]](#) In *Frisby v. Schultz*, the U.S. Supreme Court upheld an ordinance that banned focused picketing of the home because a person in the home is “left with no ready means of avoiding the unwanted speech.” [\[FN183\]](#) Just as a person in the home cannot escape unwanted speech, neither can a funeral attendee without giving up the opportunity to pay last respects to the deceased. In *Hill v. Colorado*, the Court found that persons entering health care facilities “are often in particularly vulnerable physical and

emotional conditions” and thus upheld a statute providing a buffer zone around the facilities. [\[FN184\]](#) Funeral attendees are also emotionally vulnerable as they cope with the loss of loved one. For these reasons, Missouri has a significant interest in protecting funeral attendees and the court's failure to recognize that interest in *Phelps-Roper v. Koster* is contrary to all of these Court rulings.

The *Koster* decision is also contrary to dicta in *Snyder v. Phelps*. [\[FN185\]](#) In *Snyder*, the U.S. Supreme Court said that the WBC's “choice of where and when to conduct its picketing [wa]s not beyond the [g]overnment's regulatory reach [and wa]s ‘subject to reasonable time, place, [and] manner restrictions’....” [\[FN186\]](#) *Snyder* gave the Eighth Circuit the opportunity to revisit *Olmer v. City of Lincoln* [\[FN187\]](#) and determine that the government has a significant interest in protecting individuals from unwanted speech outside of the residential context. The Eighth Circuit refused this opportunity when it considered *Phelps-Roper v. Troutman*, making no reference to *Snyder* and instead relied on an old opinion. [\[FN188\]](#) This issue needs to and likely will be addressed by the Supreme Court.

For the reasons stated above, the Eighth Circuit erred in *Troutman* when it determined the government has no significant interest in protecting funeral *562 attendees. [\[FN189\]](#) The court did not discuss why the government does not have a significant interest in protecting funeral attendees. [\[FN190\]](#) Instead, the court in *Troutman* followed the precedent of *Phelps-Roper v. Nixon*, which was based on *Olmer* - a 1999 decision. [\[FN191\]](#) While the WBC began protesting funerals in 1993, it did not gain notoriety until the 1998 funeral of Matthew Shepherd, the victim of a gay hate crime. [\[FN192\]](#) At the time of the *Olmer* decision in 1999, it is difficult to believe the Eighth Circuit imagined that a small church consisting of only family members in Kansas could conduct more than 47,000 pickets in nearly 850 cities. [\[FN193\]](#) Funeral attendees were not facing the same harassment caused by the WBC as we know it today. With this changing circumstance, the Eighth Circuit should have been obliged to reconsider the significant interest in protecting these individuals. Individuals attending a funeral, mourning the loss of a loved one, deserve the privacy to do so, especially in light of the 47,000 widespread intrusions.

The Sixth Circuit in *Phelps-Roper v. Strickland* more persuasively reasoned that the government has a significant interest in protecting funeral mourners. [\[FN194\]](#) Funeral mourners cannot escape the WBC's speech because each mourner has a personal interest in honoring and grieving the dead that cannot be fulfilled if he or she is not present at the funeral. [\[FN195\]](#) Funeral attendees are mandated to visit the location of the memorial event. [\[FN196\]](#) The court's statement that attendance at a funeral is not “voluntary” further supports this idea. [\[FN197\]](#) Individuals attend funerals because they are compelled by tradition and a sense of obligation. [\[FN198\]](#) In *Snyder v. Phelps*, the U.S. Supreme Court held that Mr. Snyder was not a captive audience at his son's funeral. [\[FN199\]](#) However, the Court determined this in the context of an intrusion upon seclusion claim seeking money damages. [\[FN200\]](#) This issue needs to be discussed in the *563 context of a government's content-neutral, time, place, and manner restriction. While the First Amendment trumps a private tort action in this area, [\[FN201\]](#) that is not to say that the government never has the power to restrict such speech. *Frisby v. Shultz* stands for the proposition that “the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it,” [\[FN202\]](#) and a properly drafted statute can provide that protection. An “audience” at a funeral cannot avoid the WBC without protection from the government. This protection must be provided. The only remaining issue is how to properly draft the statute.

B. Narrow Tailoring by the Legislature

[Missouri Revised Statutes sections 578.501](#) and [578.502](#) can become narrowly tailored with a simple change. [Section 578.501](#) restricts “picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral.” [\[FN203\]](#) [Section 578.502](#) restricts the same activities during the same times but “within three hundred feet of or about any location at which a funeral is held.” [\[FN204\]](#) One problem with the statutes that make them not narrowly tailored is that “funeral” is defined to include “processions held in connection with [burial and cremation,]” creating a restricted area that “floats.” [\[FN205\]](#) Because the protest-prohibited area moved and changed depending upon where and when the procession traveled, the statutes in their current forms are too broad. This problem can be easily corrected by redefining the protest-prohibited areas so that no more than the activities that actually target or disrupt a funeral are illegal. To do this, the legislature must only prohibit picketing “in front of or about” or “within three hundred feet” of static locations such as churches, cemeteries, mortuaries, or any other place of worship during a funeral.

In *Frisby v. Schultz*, the U.S. Supreme Court upheld an ordinance that prohibited targeted picketing of a person's home even though the ordinance did not specify a prohibited distance. [\[FN206\]](#) The picketing was prohibited because it was focused on a particular place, the home. [\[FN207\]](#) Similarly, the picketing prohibited by the Missouri statutes is focused specifically on funeral or *564 memorial services. Frisby supports the use of the “in front of or about” language of [section 578.501](#). [\[FN208\]](#)

Therefore, it is possible that Frisby could support a flexible, site-by-site prohibition on protesting that could be seen or heard by funeral attendees. Regardless, even if after redefining the prohibited areas, the “in front of or about” language of [section 578.501](#) were still found to be too broad, the 300-foot restriction of [section 578.502](#) ought to be found narrowly tailored. [\[FN209\]](#) In *Hill v. Colorado*, the Court upheld a statute that restricted speech within 100 feet of the entrance to any health care facility. [\[FN210\]](#) Although Hill only upheld a 100-foot buffer zone, the 300-foot buffer zone of the Missouri statute is reasonable in the context of a funeral, since most funerals typically require moving large numbers of people.

After redefining the prohibited areas, the statutes would be narrowly tailored because neither completely silence funeral protestors. They provide a specified time limit prohibiting protesting only one hour before and until one hour after a funeral or memorial service. [\[FN211\]](#) Outside of these favorable time and space limitations, funeral protestors may say what they want, wherever and whenever they want, without limitation.

C. WBC's Ample Alternative Channels of Communication

[Missouri Revised Statutes sections 578.501](#) and [578.502](#) leave open ample alternative channels of communication because funeral protestors are free to express their respective messages outside of the times and places set forth in the statutes. In *Frisby v. Schultz*, the U.S. Supreme Court held that an ordinance prohibiting focused picketing of a person's home provided “ample alternative channels of communication” because the protestors were not completely barred from residential neighborhoods. [\[FN212\]](#) The protestors still had the opportunity to enter neighborhoods, march, go door-to-door, distribute literature, or contact residents by telephone. [\[FN213\]](#) Under the Missouri statutes, funeral protestors actually have more channels of communication than the Frisby protestors. The Missouri statutes

only restrict picketing and protesting for one hour before and until one hour after a funeral or burial service, unlike the ordinance in Frisby, which prohibited focused picketing of the home twenty-four hours a day. [\[FN214\]](#) Funeral protesters can protest at funeral sites outside of the prohibited time period and can protest outside of the banned areas as well. Perhaps more important, the Missouri statutes do not restrict the WBC's ability*565 to protest on other sidewalks, even in the same town and at the same time as the funeral. The statutes also do not restrict the WBC's ability to protest outside of a military facility.

The district court viewed the First Amendment in a very robust way by allowing Phelps-Roper to not only disseminate her message, but to direct it at a particular audience in a particular location. However, the Supreme Court has said that “the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.” [\[FN215\]](#) Not targeting a protest at a funeral or staying 300 feet away for merely one hour before and until one hour after is only a minor restriction that leaves open alternative channels for communication.

VI. Conclusion

[Missouri Revised Statutes sections 578.501](#) and [578.502](#) were among the first funeral-protest statutes challenged by the WBC. [\[FN216\]](#) With splits among the federal circuits regarding the constitutionality of various funeral-protest laws, the statutes' discussion in the U.S. Supreme Court seems inevitable. In *Snyder v. Phelps*, the Court was at pains to distinguish time, place, and manner restrictions from the intentional infliction of emotional distress claim it ruled against. [\[FN217\]](#) Supreme Court commentators emphasized that the *Snyder* decision “sends a clear signal to the lower courts that they should not interpret anything in [the] opinion as casting any doubt about [funeral-protest] statutes.” [\[FN218\]](#) While the holding in *Snyder* is good news for Missouri, it is not the end of the story. The Missouri legislature must revise [sections 578.501](#) and [578.502](#) to redefine the areas where protesting is prohibited. It is the hope of this Note that, with revisions by the Missouri legislature and a discussion by the U.S. Supreme Court, Missouri will finally be able to protect the living and the dead from the great harm caused by the WBC.

[\[FNa1\]](#). B.J., University of Missouri, 2010; J.D. Candidate, University of Missouri School of Law, 2013; Senior Note and Comment Editor, *Missouri Law Review*, 2012-13. I am grateful to Professor Erin Hawley for her advice and guidance during the drafting and editing processes. I thank Joseph Blumberg and the editors of the *Missouri Law Review* who gave their time and provided their input for my work. This Note is dedicated to my parents, John and Laurie, and my brother and sister for their love, encouragement, and support.

[\[FN1\]](#). America's Most Hated Family, BBC NEWS (Mar. 30, 2007, 11:39 AM), <http://news.bbc.co.uk/2/hi/6507971.stm>.

[\[FN2\]](#). *Phelps-Roper v. Koster*, 734 F. Supp. 2d 870, 872 (W.D. Mo. 2010).

[\[FN3\]](#). *Id.* at 873.

[\[FN4\]](#). *MO. REV. STAT. §§ 578.501,....502* (Supp. 2006), invalidated by *Koster*, 734 F. Supp. 2d 870; *Koster*, 734 F. Supp. 2d at 873-74.

[FN5]. See [MO. REV. STAT. §§ 578.501](#),.....502.

[FN6]. See [Koster, 734 F. Supp. 2d at 880, 881](#).

[FN7]. The state filed a notice of appeal on September 15, 2010. Notice of Appeal, [Phelps-Roper v. Koster, 734 F. Supp. 2d 870 \(W.D. Mo. 2010\)](#), appeal docketed, No. 10-3076 (8th Cir. Sep. 15, 2010). The appeal was pending as of this Note's publication. Id.

[FN8]. [Phelps-Roper v. Koster](#) also discusses a number of other issues: whether Defendants Koster and Nixon were proper parties on the basis of Eleventh Amendment immunity, the application of the funeral-protest statutes by local law enforcement officials, and whether the statutes violated certain provisions of Missouri's Constitution. See [Koster, 734 F. Supp. 2d at 875, 881](#). This Note will only focus on the First Amendment issues.

[FN9]. See About Westboro Baptist Church, GODHATESFAGS, [http:// godhatesfags.com/wbcinfo/aboutwbc.html](http://godhatesfags.com/wbcinfo/aboutwbc.html) (last visited Mar. 1, 2012).

[FN10]. See [Koster, 734 F. Supp. 2d at 872](#).

[FN11]. Id.

[FN12]. About Westboro Baptist Church, *supra* note 9.

[FN13]. See [Koster, 734 F. Supp. 2d at 873](#).

[FN14]. Westboro Baptist Church FAQ, GODHATESFAGS, [http:// www.godhatesfags.com/faq.html#Funeral](http://www.godhatesfags.com/faq.html#Funeral) (last visited Nov. 10, 2011).

[FN15]. [Koster, 734 F. Supp. 2d at 873](#).

[FN16]. [Sections 578.501](#) and [578.502](#) were signed into law by the governor on July 5, 2006. [Id. at 874](#). Phelps-Roper filed the complaint for declaratory and injunctive relief on July 21, 2006. Complaint for Declaratory and Injunctive Relief, [Phelps-Roper v. Nixon, 504 F. Supp. 2d 691 \(W.D. Mo. 2007\) \(No. 06-4156-CV-C-NKL\), 2006 WL 2515872](#).

[FN17]. [Phelps-Roper v. Nixon, 504 F. Supp. 2d 691, 694 \(W.D. Mo. 2007\)](#), rev'd, [509 F.3d 480 \(8th Cir. 2007\)](#), modified on reh'g and rev'd, [545 F.3d 685 \(8th Cir. 2008\)](#).

[FN18]. [MO. REV. STAT. § 578.501.2](#) (Supp. 2006), invalidated by [Koster, 734 F. Supp. 2d 870](#).

[FN19]. [Id. § 578.501.3](#) (Supp. 2006), invalidated by [Koster, 734 F. Supp. 2d 870](#).

[FN20]. [Id. § 578.503 \(Supp. 2006\)](#), invalidated by [Koster, 734 F. Supp. 2d 870](#).

[FN21]. [Id. §§ 578.501.2,....502.2 \(Supp. 2006\)](#), invalidated by [Koster, 734 F. Supp. 2d 870](#).

It shall be unlawful for any person to engage in picketing or other protest activities within three hundred feet of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. 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.

[Id. § 578.502.2 \(emphasis added\)](#).

[FN22]. See [Nixon, 504 F. Supp. 2d at 699](#).

[FN23]. [Phelps-Roper v. Nixon, 509 F.3d 480, 488-89 \(8th Cir. 2007\)](#), modified on reh'g, [545 F.3d 685 \(8th Cir. 2008\)](#). Later, the Eighth Circuit granted a petition for rehearing in Phelps-Roper v. Nixon when a newly decided Eighth Circuit case modified the standard for demonstrating a sufficient likelihood of success on the merits. [Nixon, 545 F.3d at 688](#). The holdings remained the same under the modified standard. [Id. at 694](#).

[FN24]. [Nixon v. Phelps-Roper, 129 S. Ct. 2865 \(2009\)](#).

[FN25]. [Koster, 734 F. Supp. 2d at 871](#). The case name changed because Chris Koster replaced Jeremiah W. Nixon as Attorney General for the State of Missouri.

[FN26]. [Id. at 872](#).

[FN27]. [Id. at 877](#).

[FN28]. [Id. at 878](#).

[FN29]. [Id. at 878-79](#).

[FN30]. [Id. at 880](#).

[FN31]. [Id.](#)

[FN32]. [Id.](#)

[FN33]. [Id. at 881](#).

[FN34]. [Id.](#)

[\[FN35\]](#). *Id.* at 879-81.

[\[FN36\]](#). *Id.*

[\[FN37\]](#). U.S. CONST. amend. I, § 3. The First Amendment was made applicable to the states by the Fourteenth Amendment. [Gitlow v. New York](#), 268 U.S. 652, 666 (1925).

[\[FN38\]](#). See *infra* Part III.A.1-3.

[\[FN39\]](#). See *infra* Part III.B.1-2.

[\[FN40\]](#). See, e.g., [Turner Broad. Sys., Inc. v. F.C.C.](#), 512 U.S. 622, 641-42 (1994).

[\[FN41\]](#). [Police Dept. of Chicago v. Mosley](#), 408 U.S. 92, 95-96 (1972).

[\[FN42\]](#). See, e.g., [Perry Educ. Ass'n v. Perry Local Educators' Ass'n](#), 460 U.S. 37, 45 (1983).

[\[FN43\]](#). BLACK'S LAW DICTIONARY 1140 (9th ed. 2009).

[\[FN44\]](#). *Id.*

[\[FN45\]](#). [Turner](#), 512 U.S. at 653; [R.A.V. v. City of St. Paul](#), 505 U.S. 377, 382 (1992).

[\[FN46\]](#). [Turner](#), 512 U.S. at 653.

[\[FN47\]](#). [Ward v. Rock Against Racism](#), 491 U.S. 781, 791 (1989).

[\[FN48\]](#). [Turner](#), 512 U.S. at 642; [Ward](#), 491 U.S. at 791 (quoting [Clark v. Cmty. for Creative Non-Violence](#), 468 U.S. 288, 293 (1984)) (internal quotation marks omitted).

[\[FN49\]](#). [Ward](#), 491 U.S. at 791 (citations omitted) (quoting [Clark](#), 468 U.S. at 293).

[\[FN50\]](#). [Frisby v. Schultz](#), 487 U.S. 474, 479-80 (1988) (quoting [Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.](#), 473 U.S. 788, 802 (1985)) (internal quotation marks omitted).

[\[FN51\]](#). [Perry Educ. Ass'n v. Perry Local Educators' Ass'n](#), 460 U.S. 37, 45 (1983).

[\[FN52\]](#). BLACK'S LAW DICTIONARY 1349-50 (9th ed. 2009).

[\[FN53\]](#). [Perry](#), 460 U.S. at 45.

[FN54]. *Id.* (citing [Carey v. Brown](#), 447 U.S. 455, 461 (1980)).

[FN55]. *Id.*

[FN56]. *Id.* (citing [U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns](#), 453 U.S. 114, 132 (1981); [Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.](#), 447 U.S. 530, 535-36 (1980); [Grayned v. City of Rockford](#), 408 U.S. 104, 115 (1972); [Cantwell v. Connecticut](#), 310 U.S. 296 (1940); [Schneider v. New Jersey](#), 308 U.S. 147 (1939)).

[FN57]. [Int'l Soc'y for Krishna Consciousness, Inc. v. Lee](#), 505 U.S. 672, 678 (1992).

[FN58]. [Widmar v. Vincent](#), 454 U.S. 263, 264-65 (1981).

[FN59]. *Id.* at 267-69.

[FN60]. [City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n](#), 429 U.S. 167, 174-75 (1976).

[FN61]. [Int'l Soc'y for Krishna Consciousness, Inc.](#), 505 U.S. at 678; see *supra* notes 54-56 and accompanying text.

[FN62]. [Good News Club v. Milford Cent. Sch.](#), 533 U.S. 98, 106 (2001) (citing [Rosenberger v. Rector and Visitors of Univ. of Va.](#), 515 U.S. 819, 829 (1995)).

[FN63]. *Id.* at 106-07 (quoting [Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.](#), 473 U.S. 788, 806 (1985)) (internal quotation marks omitted).

[FN64]. See [Int'l Soc'y for Krishna Consciousness, Inc.](#), 505 U.S. at 678-79.

[FN65]. [Phelps-Roper v. Nixon](#), 545 F.3d 685, 691 (8th Cir. 2008) (citing [Warner v. City of Boca Raton](#), 420 F.3d 1308, 1310 n.1 (11th Cir. 2005); [Griffin v. Sec'y of Veterans Affairs](#), 288 F.3d 1309, 1322 (Fed. Cir. 2002); [Warren v. Fairfax Cnty.](#), 196 F.3d 186, 201 (4th Cir. 1999); [Jackson v. City of Stone Mountain](#), 232 F. Supp. 2d 1337, 1353 (N.D. Ga. 2002)). The WBC pickets and protests take place on public streets and sidewalks, traditional public fora. [Phelps-Roper v. Koster](#), 734 F. Supp. 2d 870, 873 (W.D. Mo. 2010).

[FN66]. [Int'l Soc'y for Krishna Consciousness, Inc.](#), 505 U.S. at 678-79 (citing [Cornelius](#), 473 U.S. at 800).

[FN67]. See, e.g., [Connally v. Gen. Constr. Co.](#), 269 U.S. 385, 391 (1926).

[FN68]. [Kolender v. Lawson](#), 461 U.S. 352, 357 (1983).

[FN69]. See [Members of the City Council of L.A. v. Taxpayers for Vincent](#), 466 U.S. 789, 796 (1984).

[\[FN70\]](#). See *id.*

[\[FN71\]](#). *Id.* at 798.

[\[FN72\]](#). *Id.* at 801.

[\[FN73\]](#). BLACK'S LAW DICTIONARY 1620 (9th ed. 2009).

[\[FN74\]](#). [Ward v. Rock Against Racism, 491 U.S. 781, 791 \(1989\)](#) (quoting [Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 \(1984\)](#)).

[\[FN75\]](#). [487 U.S. 474, 487-88 \(1988\)](#).

[\[FN76\]](#). [Id.](#) at 476.

[\[FN77\]](#). [Id.](#) at 482, 484.

[\[FN78\]](#). [Id.](#) at 486.

[\[FN79\]](#). [Id.](#) at 487 (citations omitted).

[\[FN80\]](#). [512 U.S. 753, 757 \(1994\)](#).

[\[FN81\]](#). [Id.](#) at 772.

[\[FN82\]](#). See *id.* at 759, 772.

[\[FN83\]](#). [530 U.S. 703, 707 \(2000\)](#).

[\[FN84\]](#). See *id.* at 737.

[\[FN85\]](#). [Id.](#) at 719-20.

[\[FN86\]](#). [131 S. Ct. 1207 \(2011\)](#).

[\[FN87\]](#). [Id.](#) at 1220.

[\[FN88\]](#). See *id.* at 1218.

[FN89]. Nina Totenberg, High Court Rules for Anti-Gay Protestors at Funerals, NPR (Mar. 2, 2011), <http://www.npr.org/2011/03/02/134194491/high-court-rules-for-military-funeral-protesters> (internal quotation marks omitted).

[FN90]. [Snyder, 131 S. Ct. at 1218](#) (citing [Frisby v. Schultz, 487 U.S. 474, 479 \(1988\)](#)).

[FN91]. Id. (citing [Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 \(1984\)](#)) (internal quotation marks omitted).

[FN92]. Id. (citing Brief for The American Legion as Amicus Curiae in Support of Petitioner at 18-19 n.2, [Snyder, 131 S. Ct. 1207 \(No. 09-751\), 2010 WL 2224730, at *18-19](#)).

[FN93]. Id.

[FN94]. Id. at 1227 (Alito, J., dissenting).

[FN95]. Id.

[FN96]. Id.

[FN97]. Id.

[FN98]. Id. at 1221 (Breyer, J., concurring).

[FN99]. Id. at 1218 (majority opinion).

[FN100]. Stephen R. McAllister, [Funeral Picketing Laws and Free Speech, 55 U. KAN. L. REV. 575, 580 \(2007\)](#).

[FN101]. Id.

[FN102]. Id.

[FN103]. Id.

[FN104]. Id. at 581.

[FN105]. Id.

[FN106]. [539 F.3d 356, 358 \(6th Cir. 2008\)](#). The Ohio statute provides:

Every citizen may freely speak, write, and publish the person's sentiments on all subjects, being responsible for the abuse of the right, but no person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place. No person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any funeral procession.

As used in this section, "other protest activities" means any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service or a funeral procession.

[OHIO REV. CODE ANN. § 3767.30 \(West 2006\)](#).

[\[FN107\]](#). [Strickland, 539 F.3d at 373](#).

[\[FN108\]](#). [Id. at 365](#).

[\[FN109\]](#). [Id. at 371](#).

[\[FN110\]](#). [Id.](#)

[\[FN111\]](#). [See id. at 372](#).

[\[FN112\]](#). [Id.](#)

[\[FN113\]](#). [720 F. Supp. 2d 1090, 1094 \(D. Neb. 2010\)](#), rev'd sub nom. [Phelps-Roper v. Troutman, 662 F.3d 485 \(8th Cir. 2011\)](#) (per curiam).

[\[FN114\]](#). [NEB. REV. STAT. § 28-1320.03\(1\) \(2006\)](#).

[\[FN115\]](#). [Id. § 28-1320.02\(2\) \(2006\)](#), amended by 2011 Neb. Laws 284 (Mar. 16, 2011) (amended to extend prohibition from three hundred to five hundred feet); [Heineman, 720 F. Supp. 2d at 1106](#).

[\[FN116\]](#). [NEB. REV. STAT. § 28-1320.02\(1\)](#).

[\[FN117\]](#). [Heineman, 720 F. Supp. 2d at 1098](#).

[\[FN118\]](#). [Id. at 1100](#).

[\[FN119\]](#). [See id. at 1106](#).

[\[FN120\]](#). [Id. at 1108](#).

[FN121]. [Phelps-Roper v. Troutman, 662 F.3d 485, 488 \(8th Cir. 2011\)](#) (per curiam).

[FN122]. [Id. at 489](#). Phelps-Roper v. Nixon was decided by the Eighth Circuit in the preliminary injunction stage of the instant decision. [545 F.3d 685, 688 \(8th Cir. 2008\)](#).

[FN123]. [Troutman, 662 F.3d at 489](#).

[FN124]. See [id. at 487-90](#).

[FN125]. [Id. at 489-90](#).

[FN126]. [Id. at 490](#).

[FN127]. [192 F.3d 1176 \(8th Cir. 1999\)](#).

[FN128]. [Id. at 1178](#).

[FN129]. See [id. at 1182](#).

[FN130]. [Id.](#)

[FN131]. See [id.](#)

[FN132]. [734 F. Supp. 2d 870, 882 \(W.D. Mo. 2010\)](#).

[FN133]. [Id. at 877](#).

[FN134]. [Phelps-Roper v. Nixon, 509 F.3d 480, 485 \(8th Cir. 2007\)](#), modified on reh'g, [545 F.3d 685 \(8th Cir. 2008\)](#).

[FN135]. See [Koster, 734 F. Supp. 2d at 877-78](#).

[FN136]. [Id. at 878](#).

[FN137]. [Id.](#) (citing [Ward v. Rock Against Racism, 491 U.S. 781, 791 \(1989\)](#)).

[FN138]. [Id. at 877](#).

[FN139]. [Id. at 878](#).

[FN140]. [192 F.3d 1176 \(8th Cir. 1999\)](#).

[FN141]. [Koster, 734 F. Supp. 2d at 878](#); see [Olmer, 192 F.3d at 1182](#).

[FN142]. [Koster, 734 F. Supp. 2d at 878](#).

[FN143]. [Id. at 878](#); see [Snyder v. Phelps, 580 F.3d 206 \(4th Cir. 2009\)](#), cert. granted, [130 S. Ct. 1737 \(2010\)](#), aff'd, [131 S. Ct. 1207 \(2011\)](#).

[FN144]. [Koster, 734 F. Supp. 2d at 878](#).

[FN145]. [Id. at 878-79](#).

[FN146]. [Id. at 879](#).

[FN147]. [Id.](#)

[FN148]. [Id.](#)

[FN149]. [Id.](#); see [Snyder v. Phelps, 580 F.3d 206 \(4th Cir. 2009\)](#), cert. granted, [130 S. Ct. 1737 \(2010\)](#), aff'd, [131 S. Ct. 1207 \(2011\)](#).

[FN150]. [Koster, 734 F. Supp. 2d at 879-80](#).

[FN151]. [Id. at 879](#).

[FN152]. [Id.](#); [Olmer v. Lincoln, 192 F.3d 1176, 1178 \(8th Cir. 1999\)](#).

[FN153]. [Koster, 734 F. Supp. 2d at 879](#).

[FN154]. [Id. at 880](#).

[FN155]. See [id.](#)

[FN156]. [Id.](#)

[FN157]. [Id.](#)

[FN158]. [Id.](#)

[\[FN159\]](#). Id.

[\[FN160\]](#). Id.

[\[FN161\]](#). Id.

[\[FN162\]](#). See id.

[\[FN163\]](#). Id.

[\[FN164\]](#). Id.

[\[FN165\]](#). See id. at 880-81.

[\[FN166\]](#). Id. at 881.

[\[FN167\]](#). Id. (internal quotation marks omitted).

[\[FN168\]](#). Id.

[\[FN169\]](#). Id.

[\[FN170\]](#). Id. at 880-81.

[\[FN171\]](#). Notice of Appeal, *supra* note 7.

[\[FN172\]](#). See, e.g., [Ward v. Rock Against Racism, 491 U.S. 781, 803 \(1989\)](#) (upholding noise limitations for concerts in Central Park); [Grayned v. City of Rockford, 408 U.S. 104, 120-21 \(1972\)](#) (upholding a noise ordinance against constitutional challenge when applied to individuals engaged in a noisy demonstration near a school); McAllister, *supra* note 101, at 612.

[\[FN173\]](#). See, e.g., Respect for America's Fallen Heroes Act, [Pub. L. No. 109-228, 120 Stat. 387 \(2006\)](#); McAllister, *supra* note 101, at 612.

[\[FN174\]](#). See, e.g., [Hill v. Colorado, 530 U.S. 703, 734-35 \(2000\)](#) (upholding a “floating buffer zone” as a legitimate time, place, and manner regulation in the context in which it applied); McAllister, *supra* note 101, at 612.

[\[FN175\]](#). S.B. 578, 93rd Gen. Assemb., 2d Sess. (Mo. 2006).

[FN176]. *Id.*

[FN177]. See [Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 \(2004\)](#).

[FN178]. *Id.*

[FN179]. *Id.* at 168-69 (quoting [Schuyler v. Curtis, 42 N.E. 22, 25 \(N.Y. 1895\)](#)) (internal quotation marks omitted).

[FN180]. *Id.* at 168.

[FN181]. [Brown v. Lutheran Church, 23 Pa. 495, 500 \(1854\)](#).

[FN182]. [Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 \(2004\)](#).

[FN183]. [487 U.S. 474, 487 \(1988\)](#).

[FN184]. [530 U.S. 703, 729 \(2000\)](#).

[FN185]. See *supra* notes 87-98 and accompanying text.

[FN186]. [131 S. Ct. 1207, 1218 \(2011\)](#) (quoting [Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 \(1984\)](#)).

[FN187]. [192 F.3d 1176, 1182 \(8th Cir. 1999\)](#).

[FN188]. [662 F.3d 485, 489 \(8th Cir. 2011\)](#). In *Troutman*, the Eighth Circuit relied on *Phelps-Roper v. Nixon*, which relied on *Olmer v. Lincoln*. [Phelps-Roper v. Nixon, 545 F.3d 685, 692 \(8th Cir. 2008\)](#) (“Because of our holding in *Olmer*, we conclude *Phelps-Roper* is likely to prove any interest the state has in protecting funeral mourners from unwanted speech is outweighed by the First Amendment right to free speech.”).

[FN189]. [Troutman, 662 F.3d at 489](#).

[FN190]. See *id.*

[FN191]. See *id.*; [Nixon, 545 F.3d at 692](#); [Olmer, 192 F.3d at 1182](#).

[FN192]. [Phelps-Roper v. Koster, 734 F. Supp. 2d 870, 872-73 \(W.D. Mo. 2010\)](#); Barbara Bradley Hagerty, A Peek Inside the Westboro Baptist Church, NPR NEWS (Mar. 2, 2011), <http://www.npr.org/2011/03/02/134198937/a-peek-inside-the-westboro-baptist-church>. The WBC did not begin picketing at funerals of soldiers until 2005. [Koster, 734 F. Supp. 2d at 873](#).

[FN193]. [GODHATESFAGS, http://godhatesfags.com/](http://godhatesfags.com/) (last visited Mar. 2, 2012).

[FN194]. See [539 F.3d 356, 362-66 \(6th Cir. 2008\)](#).

[FN195]. [Id. at 362](#) (quoting [Phelps-Roper v. Taft, 523 F. Supp. 2d 612, 618-19 \(N.D. Ohio 2007\)](#)).

[FN196]. [Id.](#)

[FN197]. [Id. at 366](#).

[FN198]. [Id.](#)

[FN199]. [Snyder v. Phelps, 131 S. Ct. 1207, 1220 \(2011\)](#).

[FN200]. See [id.](#) The Court held this because the WBC remained far away from the funeral, did not interfere with the funeral, and because Snyder could only see the tops of the picketers' signs. [Id.](#)

[FN201]. See [id.](#)

[FN202]. [Hill v. Colorado, 530 U.S. 703, 716 \(2000\)](#) (citing [Frisby v. Schultz, 487 U.S. 474, 487 \(1988\)](#)).

[FN203]. [MO. REV. STAT. § 578.501.2](#) (Supp. 2006), invalidated by [Phelps-Roper v. Koster, 734 F. Supp. 2d 870 \(W.D. Mo. 2010\)](#).

[FN204]. [MO. REV. STAT. § 578.502.2](#) (Supp. 2006), invalidated by [Koster, 734 F. Supp. 2d 870](#).

[FN205]. [Id. §§ 578.501.3,.....502.3](#).

[FN206]. [Frisby, 487 U.S. at 477, 482](#).

[FN207]. See [id. at 482](#).

[FN208]. [MO. REV. STAT. § 578.501.2](#).

[FN209]. [Id. §§ 578.501.2,.....502.2](#).

[FN210]. [530 U.S. 703, 707 \(2000\)](#).

[FN211]. [MO. REV. STAT. §§ 578.501.2,.....502.2](#).

[FN212]. [Frisby, 487 U.S. at 484.](#)

[FN213]. [Id.](#)

[FN214]. See [MO. REV. STAT. §§ 578.501.2,.....502.2; Frisby, 487 U.S. at 476.](#)

[FN215]. [Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 \(1981\)](#) (citing [Adderley v. Florida, 385 U.S. 39, 47-48 \(1966\)](#); [Poulos v. New Hampshire, 345 U.S. 395, 405 \(1953\)](#)).

[FN216]. See [Phelps-Roper v. Nixon, 504 F. Supp. 2d 691 \(W.D. Mo. 2007\)](#), rev'd, [509 F.3d 480 \(8th Cir. 2007\)](#), modified on reh'g and rev'd, [545 F.3d 685 \(8th Cir. 2008\)](#). In addition to attacking the constitutionality of the Missouri statutes, members and supporters of the WBC also initially challenged funeral statutes in Ohio and Kentucky. [Phelps-Roper v. Taft, 523 F. Supp. 2d 612 \(N.D. Ohio 2007\)](#), aff'd in part sub nom. [Phelps-Roper v. Strickland, 539 F.3d 356 \(6th Cir. 2008\)](#); [McQueary v. Stumbo, 453 F. Supp. 2d 975 \(E.D. Ky. 2006\)](#).

[FN217]. See [Snyder v. Phelps, 131 S. Ct. 1207 \(2011\)](#).

[FN218]. Totenberg, supra note 90 (internal quotation marks omitted).

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