

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

SHIRLEY L. PHELPS-ROPER,)	
)	
Plaintiff,)	
)	
v.)	No. 06-cv-4156-FJG
)	
)	
JEREMIAH W. NIXON, et al.)	
)	
Defendants.)	
_____)	

**BRIEF *AMICUS CURIAE* OF JUDICIAL WATCH, INC.
IN SUPPORT OF DEFENDANTS**

Paul J. Orfanedes*
James F. Peterson*
JUDICIAL WATCH, INC.
501 School Street, S.W., Suite 500
Washington, D.C. 20024
(202) 646-5172
(202) 646-5199 (fax)
porfanedes@judicialwatch.org

Harvey M. Tettlebaum (Mo. Bar 20005)
HUSCH & EPPENBERGER, LLC
P.O. Box 1251
235 East High Street
Jefferson City, MO 65102
(573) 761-1107
(573) 634-7854
harvey.tettlebaum@husch.com

* Motion for admittance
pro hac vice pending

Counsel of Record for Amicus Curiae

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Judicial Watch, Inc. (AJudicial Watch@) respectfully submits this brief *amicus curiae* in support of Defendants Jeremiah W. Nixon, *et al.*, and urges that the constitutionality of Mo. Rev. Stat. § 578.501 (Afuneral protection law@),¹ also known as ASpc. Edward Lee Myers=Law,@ be upheld.

INTEREST OF THE *AMICUS CURIAE*

Judicial Watch is a not-for-profit organization that seeks to promote integrity, transparency, and accountability in government, politics, and public life. With more than 5,000 active supporters in Missouri, Judicial Watch regularly monitors significant developments in the law, pursues public interest litigation, and files *amicus curiae* briefs on issues of public concern, among other activities. Judicial Watch seeks to participate as *amicus curiae* as this is one of the first courts in the nation to consider the weighty First Amendment issues raised in this matter. It is Judicial Watch's view that Missouri's funeral protection statute is well within the constitutional authority of the legislature and should be upheld.

INTRODUCTION

The U.S. Supreme Court has long recognized our Aprofound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open@ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). Even in a society that values the right to wide-open and robust speech as highly as we do, however, there are some places where such uninhibited speech is

¹ Mo. Rev. Stat. § 578.501 provides, in pertinent part: AIt 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.@

not appropriate.

Consider, as an example, one public place where speech is particularly inappropriate. At Arlington National Cemetery, outside Washington, D.C., a solemn and profound ceremony is reenacted every hour at the ATomb of the Unknowns,@also known as the Tomb of the Unknown Soldier. The following is a description of that very special ceremony:

The Changing of the Guard

The guard is changed every hour on the hour Oct. 1 to March 31 in an elaborate ritual. From April 1 through September 30, there are more than double the opportunities to view the change because another change is added on the half hour and the cemetery closing time moves from 5 to 7 p.m.

An impeccably uniformed relief commander appears on the plaza to announce the Changing of the Guard. Soon the new sentinel leaves the Quarters and unlocks the bolt of his or her M-14 rifle to signal to the relief commander to start the ceremony. The relief commander walks out to the Tomb and salutes, then faces the spectators and asks them to stand and stay silent during the ceremony.

The relief commander conducts a detailed white-glove inspection of the weapon, checking each part of the rifle once. Then, the relief commander and the relieving sentinel meet the retiring sentinel at the center of the matted path in front of the Tomb. All three salute the Unknowns who have been symbolically given the Medal of Honor. Then the relief commander orders the relieved sentinel, "Pass on your orders." The current sentinel commands, "Post and orders, remain as directed." The newly posted sentinel replies, "Orders acknowledged," and steps into position on the black mat. When the relief commander passes by, the new sentinel begins walking at a cadence of 90 steps per minute.

The Tomb Guard marches 21 steps down the black mat behind the Tomb, turns, faces east for 21 seconds, turns and faces north for 21 seconds, then takes 21 steps down the mat and repeats the process. After the turn, the sentinel executes a sharp "shoulder-arms" movement to place the weapon on the shoulder closest to the visitors to signify that the sentinel stands between the Tomb and any possible threat. Twenty-one was chosen because it symbolizes the highest military honor that can be bestowed -- the 21-gun salute.

....

The Guards of Honor at the Tomb of the Unknowns are highly motivated and are proud to honor all American service members who are "Known But to God."

See <http://www.arlingtoncemetery.org/ceremonies/sentinelsotu.html> (emphasis added).

The Changing of the Guard ceremony is not just open to the public; spectators are encouraged. A key aspect of this solemn ceremony, however, is that spectators remain silent. Speech of any kind, much less wide-open and robust speech, is uniquely inappropriate. This common sense principle, that there nonetheless are times and places where wide-open and robust speech is not appropriate, underlies Missouri's funeral protection law.

I. Overview of the Supreme Court's Precedent.

U.S. Supreme Court precedent acknowledges that our national commitment to uninhibited speech is strong enough to recognize that A[e]ven protected speech is not equally permissible in all places and at all times.@ *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799 (1985). Hence, the government retains the power to regulate the time, place and manner of speech, so long as it is not the content of the speech that is being targeted.² *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Within this framework, the Supreme Court has recognized that there are certain times and places where uninhibited, robust, and wide-open speech is not appropriate. Most frequently, but not

² The types of regulations, if any, that the government may impose vary depending on the Aplace@ of the speech. *Perry Education Ass'n v. Perry Local Educators=Ass'n*, 460 U.S. 37, 44 (1983). Specifically, the Supreme Court has recognized three types of fora: Athe traditional public forum, the public forum created by government designation, and the nonpublic forum.@ *Cornelius*, 473 U.S. at 802. Public streets and sidewalks are the archetype of the Atraditional public forum.@ *Perry*, 460 U.S. at 45. Content-neutral time, place, and manner restriction may be imposed on traditional public forums in order to promote a significant government interest where ample alternative means of communication continue to exist. *Ward v. Rock Against Racism*, 491U.S. 781, 791 (1989).

exclusively, the Court has recognized that one such place includes the home. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court considered an ordinance prohibiting residential picketing in the suburb of Brookfield, Wisconsin. The ordinance was enacted following peaceful picketing that occurred on a public street outside the home of a doctor who performed abortions at clinics in nearby towns. *Id.* at 482-83. After narrowly construing the ordinance to prohibit only focused picketing taking place in front of a particular residence, the Court upheld the ordinance. *Id.* Even though the picketing occurred outside the home, arguably in the traditional public forum of a public street, the picketers' message was forced on the recipient in the privacy of his home. The Court held that the First Amendment protects the rights of recipients when figuratively, and perhaps literally, trapped within the home because of the unique and subtle impact of such picketing and no ready means of avoiding the speech. *Id.* at 487. The Court concluded that individuals are not required to endure speech in their homes and that the government may protect this freedom. *Id.* at 485.

Places where speech is not appropriate B essentially Aspeech-free zones@B are not limited to the home. The Supreme Court has recognized that public transportation vehicles are not appropriate venues for political speech. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *see also Public Utilities Comm'n of the Dist. Of Columbia v. Pollak*, 343 U.S. 451 (1952). In *Lehman*, the Court upheld a restriction on political advertising in streetcars because riders were unable to avoid viewing the political speech. 418 U.S. at 301. According to the Court, riders used the streetcars As a matter of necessity, not of choice@ and, therefore, could not avoid the speech. *Id.* at 302. While noting that a streetcar was not a traditional public forum, the Court held that eliminating the Arisk@ of imposing intrusive speech on a captive audience is a Areasonable legislative objective[]@ of the government. *Id.* at 304. While the streetcar was not a traditional public forum, and thus a lower level of scrutiny applied,

the case is illustrative of the principle that not every public place is appropriate for wide open and robust political speech. *See also United States v. Kokinda*, 497 U.S. 720 (1990) (upholding regulation prohibiting solicitation on sidewalk outside of post office because the sidewalk was not a traditional public forum).

Another place the Court has found not appropriate for wide-open and robust speech is outside of abortion clinics. *Hill v. Colorado*, 530 U.S. 703, 728 (2000) (States and municipalities plainly have a substantial interest in controlling the activity around certain public and private places). The Court upheld a statute establishing a narrow, but definite, speech-free zone around persons entering medical facilities as a content-neutral time, place, and manner restriction on speech. The Court stated that [i]t may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription. 530 U.S. at 716 (citing *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975)). The Court continued that the interest in avoiding verbal and visual assault has been repeatedly identified in our cases. *Id.* The Court also recognized the government's significant interest in regulating a zone of privacy around certain public and private places including health care facilities. *Id.* at 728.

The other places around which government has an interest in maintaining speech-free zones include varied locations such as courthouses, foreign embassies, and polling sites. In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Supreme Court reviewed a statute prohibiting picketing in or near a courthouse. The Court stated that the restriction on picketers' First Amendment rights was constitutional because a State has legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create *Id.* at 562-63. Similarly, the Court approved a restriction by the District of Columbia on picketers carrying signs critical of a foreign government and congregating near a foreign embassy. *Boos v. Barry*, 485 U.S. 312 (1988). The Court found that a

500 foot ban on expressive acts or attempts to harass or coerce foreign diplomats was permissible under the First Amendment. *Id.* at 329-30. In yet another context, the Court upheld a law prohibiting the display or distribution of campaign materials within 100 feet of the entrance of a polling site. *Burson v. Freeman*, 504 U.S. 191 (1992). The Court found that the “campaign-free zone” served a compelling government interest in “protecting the rights of . . . citizens to vote freely for the candidates of their choice [and in protecting] the right to vote in an election conducted with integrity and reliability.” *Id.* at 207-09. As in *Cox* and *Boos*, the Court in *Burson* upheld the government’s interest in creating a narrowly drawn “speech-free zone.” *See also Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (upholding anti-noise ordinance for property adjacent to school grounds).

These cases demonstrate the wide range of settings in which wide-open and robust speech is not appropriate. As discussed herein, Missouri’s funeral protection law fits comfortably within this well established precedent.

II. Missouri’s Funeral Protection Law.

This Court should uphold the constitutionality of Missouri’s funeral protection law as it is entirely consistent with the well-established precedent recognizing that wide-open and robust speech is not always appropriate in all fora. Further, the statute is a content-neutral time, place and manner regulation on speech and should upheld by this Court.

A funeral is not an appropriate place for wide-open and robust speech, any more than outside a private home, medical facility, or at Arlington National Cemetery. In *Frisby*, the Court remarked on the “unique nature of the home, the last citadel of the tired, the weary, and the sick . . .” 487 U.S. at 484. The Court in *Hill* noted that patients at medical facilities often have “particularly vulnerable physical and emotional conditions.” *Hill*, 530 U.S. at 716. Because of these special vulnerabilities, narrowly-drawn

limitations on speech were upheld because of the government's interest in protecting the Area. *Id.* at 716 (the state of Colorado responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults. . . .).

Here, the state of Missouri has similarly recognized that uninhibited, robust and wide-open political speech is not appropriate at funerals. In *Lehman*, the Court described it as a necessity for persons to venture out and travel on public transportation and that the First Amendment did not require that they be subjected to political speech. Plainly, it is even more of a necessity for people who seek to pay their last respects at private funerals. If wide-open and robust speech is not appropriate on a streetcar or bus, it certainly is no more appropriate at a funeral. As such, funeral attendees constitute a uniquely vulnerable audience which the legislature properly may protect from wide-open and robust speech.

A. The Funeral Protection Law Is Content-Neutral Time, Place, and Manner Restriction.

A content-neutral restriction on the time, place, and manner of speech must be narrowly tailored, serve a significant government interest, and leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Clark v. CCNV*, 468 U.S. 288, 293 (1984); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

1. Content Neutral.

In *Hill v. Colorado*, the Supreme Court held that AGovernment regulation of expressive activity is >content neutral= if it is justified without reference to the content of regulated speech.@ 530 U.S. at 720. In other words, if the statute Amakes no reference to the content of the speech@ and applies equally to persons of any viewpoint, then the statute is content neutral. *Id.* at 719. The Court reached this conclusion in *Hill* even though the law at issue, which created a floating zone of privacy around persons entering an abortion clinic, was motivated specifically by the actions of abortion protesters. The Court nonetheless found the law content neutral and offered these illustrations:

A statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports B >the specific locations where [that] discourse occurs.= A statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food would also not be >content based= even if it were enacted by a racist legislature that hated civil rights protesters (although it might raise separate questions about the State=s legitimate interest at issue) Similarly, the contention that a statute is >viewpoint based= simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support.

Id. at 724.

Like in *Hill*, in this case, Missouri=s funeral protection law Amakes no reference to the content@ of the speech it seeks to regulate. Rather, the statute places restrictions on the time and place at which a picketer may communicate a message in proximity to a funeral. Accordingly, because on its face it is not aimed at any particular viewpoint, the statute is content neutral.

2. **Narrowly Tailored**

The Supreme Court also has declared that A[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy.@ *Frisby*, 487 U.S. at 485 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)).

This requirement is satisfied if the Aregulation promotes a substantial government interest that would be achieved less effectively absent the regulation.@ *Ward v. Rock Against Racism*, 491 U.S. at 799.

The requirement that the regulation be Anarrowly tailored@ does not mean that it must employ the Aleast restrictive means@ that will vindicate the substantial governmental interest. As explained in *Ward*:

Lest any confusion on the point remain, we reaffirm that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

491 U.S. at 798.

Missouri's funeral protection law is not an absolute ban on speech activity and is narrowly focused on the place of speech (Ain front of or about any location at which a funeral is held@). Because the Supreme Court and the Eighth Circuit have concluded that virtually identical restrictions on the place of speech were narrowly tailored, Missouri's funeral protection law also is a narrowly tailored restriction.

In *Frisby*, the Supreme Court reviewed an ordinance that imposed a complete ban on residential picketing. 487 U.S. at 485. After adopting a narrowing construction of the ordinance such that it restricted only picketing taking place Ain front of@a particular residence, the Court concluded that the ordinance was narrowly tailored. *Id.* This was because, narrowly interpreted, the ordinance

restricted only the intrusion on residential privacy. *Id.* at 486. The Court viewed picketers targeting a residence as distinct from those seeking to disseminate a message to the general public *Id.* Thus, according to the Court, even if some of the picketers had a broader communicative purpose, this did not transform a residence into an appropriate venue for speech. *Id.* Hence, the ordinance in *Frisby* was narrowly tailored because it only sought to eliminate speech in front of a residence. *Id.* at 487.

Applying *Frisby*, the Eighth Circuit also found an ordinance prohibiting picketing before, about, or immediately adjacent to a residence to be narrowly tailored. *Douglas v. Brownwell*, 88 F.3d 1511 (8th Cir. 1996). The Eighth Circuit rejected an argument challenging the ordinance that, under *Frisby*, a ban on picketing is only valid immediately in front of a particular residence. *Id.* at 1520.

According to the Court:

[W]e do not read *Frisby* as requiring us to strike down the ordinance as not narrowly tailored simply because the ordinance extends beyond the area solely in front of the targeted residence. Rather, the question is whether the ordinance is specifically aimed at protecting the residents of [the Town] from unwanted and unavoidable speech and does not sweep within its ambit other activities that constitute an exercise of First Amendment rights.

Id. at 1520. In other words, a statute is narrowly tailored if it avoids restricting other protected speech.

See also *Cox*, 379 U.S. at (upholding a ban on picketing in or near a courthouse); *Veneklase v. City of Fargo*, 248 F.3d 738, 747 (8th Cir. 2001) (upholding a statute that prohibited picketing inside of, in front, or about any premises).

In this case, Missouri's funeral protection law uses the same narrowly tailored language upheld in *Frisby* and *Douglas*. The statute pertains only to the area in front of or about a funeral and, thus, is a narrowly tailored restriction.

3. Significant Government Interests.

Missouri has a significant interest in establishing a speech-free zone in front of or about a funeral because of a funeral's unique setting and purpose. Similar to the special nature of the area outside a medical facility (*Hill*), a courthouse (*Cox*), an embassy (*Boos*), or a polling place (*Burson*), the government has significant interests in protecting the area outside a private funeral. These interests include protection of intrusive speech as well as the prevention of violent confrontations between picketers and grieving families.

Another critical interest is the concern that funeral attendees may be deprived of their own First Amendment rights, specifically the right to freely exercise the customs of their religious faiths during funeral services. Many religious customs are invoked during funerals and many funerals are held in church buildings. As stated by the Kansas Court of Appeals, in another case involving picketing of funerals, "the right of free exercise would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another private party" *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 22 Kan. App. 2d 537, 549, 921 P.2d 821, 830 (Kan. App. 1996) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949)). See also *Tompkins v. Cyr*, 995 F. Supp. 664, 681 n.10 (N.D. Tex. 1998) ("The Court is troubled by the notion that a person may be subjected to focused picketing at their place of worship. Indeed, the right to engage in quiet and reflective prayer without being subjected to unwarranted intrusion is an essential component of freedom of religion. The government certainly has a significant interest in protecting this important First Amendment right."). Hence, Missouri has significant interest in protecting the unique area outside funerals.

4. Ample Alternative Means of Communication.

Finally, Missouri's funeral protection law allows for ample alternative channels for communication. The statute in no way limits a person's freedom to protest, speak, publish and otherwise take full advantage of their First Amendment rights anywhere other than in front of or about a funeral. To the extent that the statute arguably limits the opportunity to communicate with a target audience, *i.e.*, persons attending a funeral, such an objection is without merit. As the Supreme Court expressly stated in *Ward*, the mere fact that a restriction may reduce to some degree the potential audience for [petitioner's] speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate. 491 U.S. at 802. In this case, Missouri's funeral protection statute does not limit any of the many other available and proper avenues to communicate a message.

