



ISSN 1935-0007

*Cite as:* 2011 (6) AELE Mo. L. J. 101  
Civil Liability Law Section – June 2011

## **Funeral Protests and the First Amendment**

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### **❖ Introduction**

The U.S. Supreme Court recently upheld the free speech rights of members of a controversial church that pickets the funerals of fallen members of the military, carrying signs stating things like, “Thank God For Dead Soldiers,” “God Hates Fags,” “Don’t Pray for the USA,” and various anti-Catholic church slogans.

Members of this small church have conducted such protests at almost 600 military funerals, as well as at funerals of police officers, firefighters, and the victims of natural disasters, accidents, and shocking crimes. [By their own count](#), they have conducted 30,000 such pickets, in all 50 states, and in over 500 cities and towns.

They seek to convey the very unconventional, and to most, bizarre, message that God is punishing the United States for its tolerance of homosexuality, particularly in the military, and that, as a result, the dead soldiers and others whose funerals the church members protest are “in hell.”

They only called off their plans to conduct a similar protest at the funeral of a 9-year-old girl killed in a shooting spree in Tucson, Arizona (which also resulted in the death of a federal judge and shooting of a Congresswoman) when offered radio broadcast time in exchange for doing so.

The family members and friends of those being buried at those funerals, and most other members of the public, it is safe to say, have a problem with this conduct, based on the emotional harm it inflicts and the intrusion into the seclusion/privacy of those grieving for their lost loved ones.

This article briefly examines the facts and reasoning of the U.S. Supreme Court decision on this issue, which involved a civil lawsuit by the father of a dead soldier whose funeral was subjected to such picketing. It then examines the parameters of existing federal criminal statutes designed to create a “buffer zone” around military funerals, and the issues likely to arise concerning their enforceability.

The article then looks at a pair of conflicting federal appeals court decisions ruling on the enforceability of state statutes aimed at restricting such funeral protests, as well as at some existing and pending legislative proposals. At the end of the article, there is a listing of some useful resources and references on this topic.

### ❖ Supreme Court Ruling

The U.S. Supreme Court, in [Snyder v. Phelps](#), #09-751, 2011 U.S. Lexis 1903, addressed the issue of the [First Amendment](#) rights of members of a church, the [Westboro Baptist Church](#), who demonstrated near the funeral of a U.S. soldier killed in combat in Iraq.

The Court concluded that the church and its members had a protected First Amendment right to express their message that God was punishing the U.S. for tolerating homosexuality by the death of soldiers.

It ruled that the church’s message was on an issue of public concern, so that a jury verdict for the soldier’s father against the church of \$2.9 million in compensatory damages and \$8 million in punitive damages (reduced by the trial court to \$2.1 million in punitive damages) for intentional infliction of emotional distress and intrusion into seclusion was improper.

The case involved the funeral of [Marine Lance Corporal Matthew Shepherd](#), who died in Iraq in the line of duty. The funeral was held at a Catholic church in the family’s hometown of Westminster, Maryland, and the Westboro Baptist Church members announced their protest plans after learning of the funeral from a newspaper notice.

Pickers complied with police instructions by remaining on a 10 by 25 foot plot of public land adjacent to a public street, behind a temporary fence, located about 1,000 feet from where the funeral was held. They did not enter church property or go to the cemetery.

The funeral procession passed within 200 to 300 feet of the site of the picketing. The dead soldier's father saw the pickets while on his way to the service, but did not read their message until he saw the signs displayed on a TV news report of the event that evening.

In ruling that the father could not recover damages for emotional distress and intrusion into seclusion under Maryland state law, the U.S. Supreme Court mainly focused on its analysis that the picketers message was speech on matters of public, rather than private concern,

“While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic Church—are matters of public import.”

On the intrusion into seclusion claim, the Court rejected arguments that the bereaved family was a “captive” audience, forced to endure the picketers’ message, because of the distance of the funeral from the protest, and the lack of any evidence that the protest interfered with the funeral.

The Court emphasized that its decision was narrowly based on the facts in front of it, and that it was not addressing issues not raised in the case, such as laws creating buffer zones around military or other funerals. It did note, in passing, however, that a new Maryland “buffer zone” statute, enacted since the incident at issue in the case, only prohibits picketing within 100 feet of a funeral service or procession, so that the picketing at issue would have complied with this state law.

### ❖ **Federal Criminal Statutes**

There are several federal statutes that restrict protests aimed at military funerals.

[38 U.S.C. Sec. 2413](#) imposes a buffer zone around funeral services in cemeteries under the control of the National Cemetery Administration and in Arlington National Cemetery. Protests that disturb “or tends to disturb the peace or good order” within 150 feet of the entrance of the cemetery are unlawful from an hour before to an hour after the funeral. It is also illegal to impede access to or egress from the cemetery within 300 feet of the entrance.

[18 U.S.C. Sec. 1388](#) imposes similar restrictions on military funerals held outside of federally controlled property, including a prohibition on willfully doing anything that tends to disrupt or disturb the peace of military funerals within 150 feet of the site and of the road leading to the funeral for an hour before and after the funeral. Impeding access to or egress from the funeral within 300 feet during the same time period is also unlawful.

There are evidently no court cases interpreting these statutes. Such time, place, and manner restrictions on speech, however, and buffer zones in particular, have been upheld in a number of other contexts, such as residential picketing and demonstrations at abortion facilities. See [Frisby v. Schultz](#), #87-168, 487 U.S. 474 (1988), upholding restrictions on protests at a particular home, and [Madsen v. Women's Health Clinic](#), #93-880, 512 U.S. 753 (1994), upholding a buffer zone around health clinics and hospitals.

Such restrictions are generally constitutional if they are: 1) content neutral, 2) serve a significant government interest, 3) are narrowly tailored to serve that interest, and 4) leave open ample alternative channels for free speech expression. See [Ward v. Rock Against Racism](#), #88-226, 491 U.S. 781 (1989).

These are the legal tests that have been applied by lower federal courts in determining the enforceability of state statutes imposing buffer zones around military funerals.

### ❖ Federal Appeals Court Rulings

Two federal appeals court decisions reached conflicting results on the enforceability of state statutes designed to restrict picketing within a “buffer zone” around funeral services. Both cases involved members of the same church involved in the U.S. Supreme Court case. Both cases involve the enforceability of state criminal statutes, similar to the federal criminal statutes discussed in the last section of this article.

In [Phelps-Roper v. Nixon](#), #07-1295, 545 F.3d 685 (8<sup>th</sup> Cir. 2008), cert. denied, [Nixon v. Phelps-Roper](#), #07-1295, 129 S. Ct. 2865 (2009), motion denied by, injunction granted at Phelps-Roper v. Koster, #06-4156, 2009 U.S. Dist. Lexis 96717 (W.D. Mo., Oct. 16, 2009), a member of the church sought and was granted a preliminary injunction against enforcement of a Missouri statute.

The statute criminalizes picketing within 300 feet of a funeral location or procession from an hour before until an hour after the funeral, and was enacted in response to church members' protest at a military funeral.

While the court found that the statute's provisions were "content-neutral," applying regardless of the message or viewpoint being conveyed, it also found that the statute restricted expressive activity not only within or on the premises of a cemetery or a church, but also on traditional public forums, such as adjacent streets and sidewalks.

The appeals court ruled that the government has no compelling interest in protecting an individual from unwanted speech "outside of the residential context" (picketing targeted at an individual's home), implicitly rejecting the trial court's ruling that the state has 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."

While not engaging in detailed analysis of whether or not the statute in question was "narrowly tailored" or overbroad, the court was plainly also troubled by the application of the law to funeral processions, which travel, rather than taking place at a fixed location. The court suggested that there might be a problem about whether protesters could get adequate notice of where such a "floating" buffer zone might be, and where, therefore, picketing was a criminal act.

The statute was also found to improperly cover all protests near funerals or funeral processions, rather than limiting its ban to activity which targets, disrupts or is otherwise related to the funeral, memorial service, or procession.

The court also seemed to accept the argument that the statute did not leave open adequate alternative channels for the expression of the protesters' particular message, based on the plaintiff's statement that those who protest at or near military funerals wish to reach an audience that can only be addressed at that occasion.

Two trial courts in the Eighth Circuit followed this reasoning, and, in both cases, invalidated the laws and regulations at issue. *Phelps-Roper v. City of Manchester*, #4:09CV1298, 2010 U.S. Dist. Lexis 93187 (E.D. Mo. 2010), and *Phelps-Roper v. Koster*, #06-4156, 734 F. Supp. 2d 870 (W.D. Mo. 2010).

In contrast, in *Phelps-Roper v. Strickland*, #07-3600, 539 F.3d at 356. (6<sup>th</sup> Cir. 2008), another federal appeals court found a 300-foot buffer zone restriction on funeral picketing from one hour before to one hour after a funeral enforceable..

In that case, the court held that an Ohio state statute banning protests near funerals was a reasonable time, place, and manner restriction, as well as being content neutral. The court

found that the restrictions imposed by the Ohio statute protected the privacy interests of grieving funeral attendees, and was narrowly tailored to achieve the desired goal.

Two federal trial courts have reached similar results in examining other funeral picketing statutes. See *McQueary v. Stumbo*, #06-CV-24, 453 F. Supp. 2d 975 (E.D. Ky. 2006) (in which the court assumed, without deciding, that the government had a significant interest in restricting funeral protests) and *Phelps-Roper v. Heineman*, #4:09-CV-3268, 720 F. Supp. 2d 1090 (D. Neb. 2010) (government has a significant interest in protecting the privacy of grieving family members similar to the interest in protecting the privacy of the home).

Plainly, the two federal appeals courts in the Eighth and Sixth Circuits reached different results applying the same tests for reasonable time, place, and manner regulation of speech established by the U.S. Supreme Court. They appear to be disagreeing largely on the question of how strong the governmental interest in protecting the privacy of funeral attendees is and whether or not that interest is outbalanced by the free speech rights of funeral protesters.

It remains to be seen what other federal appeals courts will do on this issue, or whether the U.S. Supreme Court will ultimately resolve this conflict between the Circuits.

### ❖ Enacted and Proposed Legislation

As noted in the U.S. Supreme Court decision in *Snyder v. Phelps*, #09-751, 2011 U.S. Lexis 1903, Maryland now has a law imposing restrictions on funeral picketing, as do 43 other states and the federal government. Most of these appear to essentially establish a “buffer zone” of some type to protect funeral services or processions from picketing. Some target “disruptive” activity, and the space and time restrictions in them vary.

An [amicus brief](#) filed by the American Legion in the Snyder case lists the current state statutes.

A proposal pending in Congress, [H.R. 961](#) (The Safe Haven for Heroes Act of 2011) would amend existing federal law to extend the time during which such protests at military funerals would be unlawful from one hour before and after funerals to five hours before and after funerals. It is uncertain, however, whether courts would enforce a time restriction that long, which might essentially bar all picketing near a funeral site for the entire day of the funeral.

The Ohio statute upheld by the Sixth Circuit had a shorter one hour before and after time limit, and the court referred to that in finding the statute reasonable.

The proposed new law would also extend the time during which it is unlawful to impede access to a funeral location from one hour before and after to five hours before and after, and expand the area in which such activity is prohibited from 300 feet to 2500 feet, which might be too far in some courts' view.

### ❖ Some Suggestions

Given the frequency with which protests at military and other high-profile and emotionally charged funerals have occurred, it is reasonable to anticipate that most law enforcement agencies will be confronted, at some point, with the task of managing such events. The following are some suggestions to consider:

- ***Remember*** that the fact that protected First Amendment speech is involved ***does not*** alter the fact that the role of officers includes the enforcement of otherwise applicable traffic regulation. No separate or special legislation is required for them to take steps to prevent the impeding of access to and the flow of traffic towards, funeral services and church ceremonies.
- ***Normal laws and standards*** concerning the use of bullhorns, loudspeakers, and the volume of noise permissible are still in effect.
- ***Normal laws*** concerning trespass on private church and cemetery property are not suspended in any way by the fact that a First Amendment protest is occurring.
- Officers must take steps necessary ***to ensure the peace***, which often may require keeping groups of protestors and counter demonstrators apart, and talking with participants in such demonstrations, counter-demonstrations, and funerals, when necessary, to “cool” things down, and attempt to prevent disturbances and fights from occurring.
- The expression of First Amendment opinions is protected under the case law, ***but disorderly conduct, “fighting words,” invective or insults directed at particular individuals, or the actual physical disruption of a funeral or blocking of entrance and exit are a different matter***. The U.S. Supreme Court found no such disorder in the case before it, but officers should be prepared to act appropriately should such incidents occur.

- Officers, like all persons in the community, understandably may have strong personal reactions to the opinions being expressed in such demonstrations, but must ***avoid “taking sides,” and attempt to maintain a calm and professional demeanor.*** Prior discussion and planning of the operational response to such demonstrations, when possible, will be very helpful.
- While local law enforcement agencies may not currently play a role in enforcing the federal criminal statutes concerning buffer zones around military funerals, informing demonstrators of the existence of such federal laws may result in some degree of compliance.
- The U.S. Supreme Court decision explicitly states that it is not ruling on the legality of state and local buffer zone statutes and ordinances. Accordingly, unless a state or federal court in your jurisdiction has ruled such a law unconstitutional, ***you are on solid grounds in rigorously enforcing such restrictions.***

#### ❖ Resources

- [First Amendment](#). Summaries of cases reported in AELE publications.
- [Oral Arguments](#) in Snyder v. Phelps.
- [Privacy](#). Summaries of cases reported in AELE publications.
- [Snyder v. Phelps](#). Wikipedia article.
- [Snyder v. Phelps](#). Briefs and documents in the U.S. Supreme Court case.
- [Westboro Baptist Church](#). Wikipedia article.
- [Westboro Baptist Church](#). The church’s website, with the heading “God Hates Fags.”

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- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.

- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.

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