Funeral Protests: Selected Federal Laws and Constitutional Issues

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Summary

The Westboro Baptist Church (WBC or Church) has been protesting military funerals for a number of years. The Church has gained national attention as a result. Its primary message is that God hates the United States and is punishing the country for its tolerance of homosexuality. The Church chooses to protest the funerals of fallen soldiers to make the point that in their opinion soldiers are dying as part of God's retribution for this country's sins. Though it began protesting military funerals, it has since branched out to funerals of fire fighters, police officers, and other public servants. It has protested events beyond funerals as well.

These protests have incited anger across the country. State and local regulations have been passed banning the protest of funerals within a certain distance of the services, creating so-called "buffer zones." The federal government passed similar bans on protests at military funerals in federally controlled cemeteries as well as wherever they might occur throughout the country.

Individuals whose loved ones' funerals have been protested by the Church have sued the Church as well. Recently, the Supreme Court decided a case involving whether the Church could be held liable for intentional infliction of emotional distress and intrusion upon seclusion by the family of a soldier, Matthew Snyder, whose funeral the Church protested. The Supreme Court held that, at least in the case of Matthew Snyder's funeral, the speech of the WBC was fully protected by the First Amendment.

There are two lines of cases, those analyzing the constitutionality of buffer zones and those analyzing tort liability. They present distinct, but related and significant First Amendment questions. This report will discuss the Supreme Court's recent decision in *Snyder vs. Phelps*, which deals with the question of the WBC's tort liability. It will then analyze the constitutional issues facing federal laws that create funeral protest buffer zones. Finally, it will discuss some legislative options for amending the federal laws restricting funeral protests, including the recently introduced H.R. 961.

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Introduction

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Snyder v. Phelps

In 2006, Marine Lance Corporal Matthew Snyder was killed in combat. His body was returned to his hometown of Westminster, Maryland, where his family chose to bury him.[1] They held services at a local Catholic Church and a local cemetery, which were noticed publicly in local newspapers. The WBC chose to protest Matthew Snyder's funeral to express their message that his death was God's retribution for the sinful ways of the United States. It contacted local law enforcement and, with the guidance of law enforcement, set up its protest on the day of the funeral on public land that was a distance of about 1000 feet from the church where the funeral was held, though the funeral procession passed within 200 to 300 feet of the protest.

Matthew Snyder's father testified that, as he passed by, he only saw the tops of the WBC's signs. However, he was exposed to the signs and to the Church's message when he saw the protest covered by the evening news. Its message distressed him greatly and caused emotional and

[1] Snyder v. Phelps 562 U.S. ___, 131 S. Ct. 1207, 2011 U.S. LEXIS 1903 at *9 (2011).

psychological harm. Snyder's father sued the WBC for intentional infliction of emotional distress and intrusion upon seclusion. The federal jury awarded him $2.9 million dollars in compensatory damages and $8 million dollars in punitive damages. The U.S. District Court for the District of Maryland reduced the punitive damages award to $2.1 million dollars.[2] The WBC appealed arguing that the First Amendment protected their speech and barred Snyder's damage award. The Fourth Circuit Court of Appeals agreed and reversed the jury verdict.[3] The Supreme Court granted certiorari, and, in an 8-1 opinion, with Justice Alito as the lone dissenter, affirmed the Court of Appeals ruling.

The majority, in an opinion written by Chief Justice Roberts, found that the case turned primarily on whether the WBC's speech was on matters of a public or private concern.[4] Speech on a matter of public concern is accorded the highest level of First Amendment protection. Whereas, speech on a matter of private concern is subject to a "less rigorous" First Amendment standard.

"Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"[5] However, in the case before the Court, one of the main questions was whether the speech of the WBC was directed at matters of public concern, or at the Snyder family personally. To determine if the speech was on a matter of public concern, the Court looked to the "content, form, and context" of the speech, "as revealed by the whole record."[6] Furthermore, the Court made clear that the particular outrageousness or offensiveness of the speech at issue has no bearing on whether the speech is on a matter of public concern.

Turning to the protest itself, the Court determined that the content of the message conveyed by the WBC was unquestionably on a matter of public concern. The Church is expressing its belief that the United States is bringing doom upon itself for its tolerance of homosexuality, as well as other evils that the Church has identified. "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."[7] Furthermore, the Court determined that the context of the speech should also be fairly characterized as speech on a matter of public concern. The fact that the speech was delivered in connection with Snyder's funeral was not enough to overcome this characterization and transform the speech into speech on a matter of private concern. The Court noted that the protest occurred on public land adjacent to a public street. The Church members worked with law enforcement to engage in the protest, and were 1,000 feet away from the church where the services were held. The protest was peaceful and not unruly. These facts, taken together, convinced the Court that the protest's mere connection with a military funeral was on a matter of public concern. In this case, there was not enough evidence to overcome the First Amendment protection of the speech and allow the Snyders' recovery.

[2] Snyder v. Phelps, 533 F. Supp. 2d 567, 571 (D. Md. 2008).

[3] Snyder v. Phelps, 580 F. 3d 206 (4th Cir. 2009).

[4] *Snyder*, 2011 U.S. LEXIS 1903 at *15.

[5] *Id.* at *18.

[6] *Id.*

[7] *Id.* at*19.

In relation to the intrusion upon seclusion claim, the Court declined to consider the Snyder family or other funeral attendees to be a "captive audience" in this circumstance.[8] The Court cited the distance from the funeral services the WBC kept and the fact that there was no evidence that the protest interfered with the funeral services in any way. This leaves open the possibility, which will be discussed below, that in a different context those attending a funeral may be considered a "captive audience," though they were not in this case.

The majority also repeatedly noted that their decision was very narrow. The Court examined only the facts of the case in this circumstance and whether this particular protest was protected by the First Amendment. The majority did not offer an opinion on other protests the WBC might have engaged in, though the Court did offer guidance for analyzing whether the speech in future cases could be fairly characterized as relating to a matter of public concern which would bar recovery for tort suits. As a result, it may be possible, with different factual circumstances, for families who have been aggrieved by the WBC protests to recover for torts like intentional infliction of emotional distress in the future. The Court also took pains to point out that laws regulating targeted picketing, for example setting up buffer zones, were not at issue in this case and raised "very different questions."[9]

Constitutionality of the Federal Funeral Protest Laws

Currently, there are two principle prohibitions on protesting at military funerals contained in federal law. Both make such protests a federal crime if held within a certain distance of a military funeral and within a certain time of the funeral services. The first, 38 U.S.C. § 2413, creates a buffer zone around all funeral services that occur in cemeteries under the control of the National Cemetery Administration and in Arlington National Cemetery.[10] There is prohibition on a demonstration that "disturbs or tends to disturb the peace or good order" of the funeral within 150 feet of the entrance to the cemetery, beginning one hour before and extending to one hour after any funeral service. There is also a prohibition on impeding the access to or egress from the cemetery within 300 feet of the cemetery's entrance. The second federal statute, 18 U.S.C. § 1388, creates very similar protest restrictions for military funerals wherever they are held throughout the country, if they are not held at a federally controlled cemetery.[11] The constitutional analysis below discusses § 1388, but due to the similarity between § 1388 and 38 U.S.C. § 2413 the same analysis could be applied to both.[12]

The more general funeral protest statute, which applies to funerals held outside of federally controlled cemeteries, contains two distinct, but related prohibitions. First, 18 U.S.C. § 1388 (a)(1) prohibits persons from willfully engaging in activities that tend to disrupt or otherwise

[8] *Id.* at *28.

[9] *Id.* at *242.

[10] Violations of this prohibition are punishable by fine or up to one year in prison, or both. 13 U.S.C. § 1382.

[11] Violations of this prohibition are punishable by a fine, up to one year in prison, or both. 18 U.S.C. § 1388 (b).

[12] The wording of 38 U.S.C. § 2413 appears more broad than the wording of 18 U.S.C. § 1388. Section 2413, for example, does not appear to require that the protests that it prohibits be intended to disrupt the funeral, only that it causes such disruption. Nonetheless, the constitutional analysis would likely be substantially similar to the analysis below.

disturb the peace of military funerals with the intent of causing such disturbance. The statute limits these activities within 150 feet of the boundary of the funeral and the road leading up to the location of the funeral for one hour prior and extending to one hour after the funeral service. This restriction is similar to other buffer zone laws that have been enacted by the states. Second, 18 U.S.C. § 1388 (a)(2) prohibits activities within 300 feet of a funeral that willfully impede the access to or egress from the funeral beginning one hour before and extending to one our after any military funeral.

Prohibition on Intentional Disturbance of a Military Funeral

There is no uniform distance or design for laws that would create speech buffer zones. The "size of the buffer zone is context-sensitive."[13] Any analysis of statutory buffer zones is necessarily specific to the particular statute at issue. The subsection in question, 18 U.S.C. § 1388 (a)(1), has never been challenged in court, and it does not appear that it has ever been enforced. As a result it is difficult to say whether the law is constitutional. However, the Supreme Court has decided a number of cases analyzing buffer zones in different contexts, which may inform the analysis of this statute. Furthermore, lower federal courts have reviewed state funeral protest restrictions that may provide assistance to the analysis as well.

In general, funeral protest laws, as well as laws that establish other types of speech buffer zones, have been analyzed as content-neutral, time, place, and manner restrictions on speech.[14] Content-neutral, time, place, and manner restrictions receive a more lenient standard of scrutiny than content-based restrictions on speech.[15] To be constitutional, a time, place, and manner speech restriction must (1) be content-neutral, (2) serve a significant government interest, (3) be narrowly tailored to achieve that interest, and (4) leave open ample alternative channels for communication of the information.[16] A court examining the constitutionality of the 18 U.S.C. § 1388 would likely apply this test as well, using Supreme Court precedent and circuit court analysis of state funeral protest buffer zones as a guide.

Content-Neutrality

Laws restricting speech are considered to be content-neutral if they are justified without reference to their content.[17] This is so regardless of the legislature's motivation in passing the legislation. "The plain meaning of the text controls."[18] The federal statute prohibits the willful "making or assisting in the making of any noise or diversion that is not part of [a military] funeral or tends to

[13] Phlelps-Roper v. Strickland, 539 F.3d 356, 368 (6th Cir. 2008).

[14] Prior to considering whether a content-neutral, time, place, and manner analysis is the proper course, the court would likely consider what type of forum the statute regulates: public, designated public, or private forum. Speech in public fora receives the highest degree of First Amendment protection, unless the regulation is a content-neutral, time, place and manner restriction. CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Kathleen Ann Ruane. 18 U.S.C. § 1388 regulates the public streets outside of funeral locations. Public streets are the quintessential public fora; therefore, the federal statute would likely be found to regulate a public forum. *See* Boos v. Barry 485 U.S. 312, 318 (1988); Phelps-Roper v. Nixon, 545 F.3d 685, 691 (8th Cir. 2008).

[15] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[16] *Id.* at 791 (quotations omitted).

[17] *Id.*

[18] Phelps-Roper v. Nixon, 545 F.3d 685, 691 (8th Cir. 2008), cert. denied by 129 S.Ct. 2865 (2009).

disturb the peace or good order of [a military] funeral with the intent" of disturbing the funeral.[19] It is likely that a reviewing court would find this language to be content-neutral, despite the fact that it likely was enacted to target specifically the protests of the kind staged by the Westboro Baptist Church, which were discussed, at length, above.

The Supreme Court has previously held laws restricting protests outside of residences and medical facilities to be content-neutral, despite the fact that they were primarily enacted to restrict abortion protesting.[20] The laws in these cases applied to speech that carried the acute danger of disruption of persons in vulnerable situations, regardless of the content of the speech. The Sixth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have also held that state laws restricting funeral protests were content-neutral for similar reasons.[21] The federal law is analogous in that it seeks to prevent the disruption of a military funeral to protect the attendees, who are, no doubt, vulnerable. The content of the prohibited speech is irrelevant. The relevant questions for violations of the statute are whether persons are creating a diversion that tends to disrupt the funeral, and whether such disruption was intended. As a result, it is likely that a court would find 18 U.S.C. § 1388 (a) to be content-neutral.

Significant Interest

The next question a reviewing court would address is whether the government has a substantial interest in enacting the restriction. In the case of restrictions at issue here, the interest the government would likely advance is the protection of the dignity of military funerals and the privacy and emotional well-being of the family and friends in attendance.[22] However, a ruling court would likely weigh the significance of this interest against the First Amendment interests of speakers in conveying their message. The Supreme Court has never squarely addressed this question, but previous case law may be informative.

The general First Amendment rule is that the burden is on the listener to avoid speech that she does not wish to hear.[23] The Supreme Court has recognized exceptions to this rule for "captive audiences." The Court initially announced its recognition of the government's interest in protecting "captive audiences" in *Frisby v. Schultz*.[24] The restriction at issue in that case prohibited focused picketing before or about an individual residence. The Court said, "[although] in many locations we expect individuals simply to avoid speech they do not want to hear, the home is different."[25] The Court was concerned that persons within their homes are particularly vulnerable, and that protests directly outside a home, regardless of the size of the protest, could inflict a great deal of stress on the home's occupants and fundamentally alter the character of the home itself, which is traditionally one's last refuge from the day's onslaught.

[19] 18 U.S.C. § 1388(a)(1)(B).

[20] *See* Frisby v. Schultz, 487 U.S. 474 (1988)(upholding restrictions on protesting before or about a specific residence), Madsen v. Women's Health Center, 512 U.S. 753 (1994)(upholding a 36 foot protest free zone surrounding health clinics and hospitals), Hill v. Colorado, 530 U.S. 703 (2000)(upholding a prohibition on approaching within 8 feet of anyone entering a medical facility for the purpose of "sidewalk counseling" without the consent of the person).

[21] *See* Phelps-Roper v. Strickland, 539 F.3d 356, 362 (6th Cir. 2008); *Phelps-Roper v. Nixon*, 545 F.3d at 691.

[22] *See* Phelps-Roper v. Strickland, 539 F.3d at 362; *Phelps-Roper v. Nixon*, 545 F.3d at 691.

[23] *See* Cohen v. California 403 U.S. 15 (1971).

[24] 487 U.S. at 484.

[25] *Id.*

Since *Frisby*, the Court has sparingly extended its captive audience analysis beyond the home.[26] The other instance in which the Court expressly found that individuals outside of their homes are similarly situated to those within their homes is in the medical privacy context. In *Madsen v. Women's Health Center*, which partially upheld an injunction against abortion protesters in Florida, the Court found that the government's strong interest in residential privacy applies by analogy in the medical context.[27] Those entering medical facilities as patients are often in fragile physical, emotional, and mental states. The Court found that the targeted picketing of a home threatens the emotional and psychological well being of its occupants in the same way that the picketing of medical facilities could threaten the physical and mental well being of patients attempting to exit or enter the facilities. Patients were "captive" by medical circumstance, in the Court's eyes.[28]

It is unclear, however, whether funeral attendees would be considered "captive." Analogies exist. Funeral attendees must be in a given place for a particular period of time in order to attend the funeral. They have also just experienced the loss of a loved one, who may have perished in the course of military service. It could be argued that protests of military funerals threaten the emotional and psychological well-being of funeral attendees in the same way that such protests threaten medical patients and those who are within their homes. It could also be argued that funeral attendees are just as powerless to avoid unwanted speech during the funeral service as patients entering medical facilities and those within their homes.

In *Hill v. Colorado*, the Court recognized an unwilling listener's "right to be let alone," which has special force in the home and immediate surroundings but may also be applied in "confrontational settings."[29] In recognizing this application, the Court was analyzing a law that restricted approaching within eight feet those entering medical facilities for the purpose of engaging in protests or leafleting without consent. This law more clearly applied to one on one confrontation. The federal law at issue seems to apply to more generalized speech, but it may be argued that, due to the acutely personal nature of funerals, any protest of a funeral might be characterized as sufficiently confrontational to satisfy the constitutional standard.

The Court has recognized the cultural significance of burial rights in other contexts as well. In recognizing the privacy right of the family to control the release of "death images" of the deceased by the government, the Court said "[family] 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 rights and respect they seek to accord to the deceased person who was once their own."[30] This reasoning also could be extended to the government's interest in protecting families from exposure to unwanted protests at the funerals of their loved ones.

On the other hand, the Supreme Court has recently held, in *Snyder*, that the speech at a military funeral protest was fully protected by the Constitution.[31] The speakers' interest in these cases is

[26] *See Snyder*, 2011 U.S. LEXIS 1903 at *28 – 29 ("As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech.").

[27] *Madsen*, 512 U.S. at 768.

[28] *Id. See also*, *Hill*, 530 U.S. at 716.

[29] *Hill*, 530 U.S. 716 – 717.

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

[31] *Snyder*, 2011 U.S. LEXIS 1903 at *27.

beyond dispute.[32] It may be difficult to prove that the government's interest in protecting the funeral attendees outweighs the speakers' constitutional right to engage in fully protected speech in a public forum.

The Eighth Circuit, in granting a preliminary injunction against the enforcement of a Missouri funeral protest statute, declined to extend the captive audience doctrine to cover funeral attendees, at least preliminarily.[33] The panel found it likely that the Westboro Baptist Church's First Amendment interests would outweigh those of the government in protecting funeral attendees' privacy. Citing a previous Eighth Circuit case, the panel said "[allowing] other locations, even churches, to claim the same level of constitutionally protected privacy [as the home] would, we think, permit government to prohibit too much speech and other communication."[34] As a result the court determined that the Westboro Baptist Church was likely to prove that any interest in protecting mourners was outweighed by the First Amendment and the language of the Constitution itself.

The Sixth Circuit, however, when analyzing a similar restriction on funeral protests in Ohio, reached the opposite conclusion.[35] After analyzing Supreme Court precedent in *Frisby*, *Madsen*, and *Hill*, the panel concluded that "[individuals] mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility."[36] Mourners, in the Sixth Circuit's view, cannot easily avoid the unwanted speech, beyond choosing not to go to the funeral services, nor can they simply "avert their eyes." The court found that the mere presence of picketers was sufficient to inflict harm, and that the government had a significant interest in protecting mourners from such harm.

There appears, therefore, to be a circuit split regarding whether the government has an interest in protecting mourners from unwanted protests sufficient to overcome the First Amendment interests of those who would wish to protest funerals. As noted above, the Supreme Court did not analyze a buffer zone in the *Snyder* case.[37] Rather the Court analyzed whether the family could recover damages for intentional infliction of emotional distress and intrusion upon seclusion or the First Amendment barred such recovery. In finding that the First Amendment barred recovery for intrusion upon seclusion, the Court declined to extend its "captive audience" doctrine in this case, because "Westboro stayed well away from the memorial service" and "Snyder could see no more than the tops of the signs."[38] This reasoning seems to apply solely in this circumstance and may not extend to an analysis of a law that would apply to all funeral protests, which seeks to ensure that the protesters remain "well away" from the mourners.

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[32] *See Hill*, 530 U.S. at 715 ("The First Amendment interests of [protesters] are clear and undisputed.").

[33] *Phelps-Roper v. Nixon*, 545 F.3d at 692. A number of district courts within the Eight Circuit's jurisdiction have followed this reasoning in recent cases, and other statutes and regulations have been invalidated as a result. *See* Phelps-Roper v. City of Machester, 2010 U.S. Dist. LEXIS 93187 (E.D. Mo. 2010), Phelps-Roper v. Koster, 2010 U.S. Dist. LEXIS 83518 (W.D. Mo. 2010).

[34] *Id.*

[35] *Phelps-Roper v. Strickland*, 539 F.3d at 366. *See also*, McQueary v. Stumbo, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006)(assuming without deciding that the government had a significant interest in restricting funeral protests).

[36] *Phelps-Roper v. Strickland*, 539 F.3d at 364. *See* Phelps-Roper v. Heineman, 720 F. Supp. 2d 1090 (D. Neb. 2010)(finding that the government had a significant interest in protecting the privacy of grieving family members akin to the interest in protecting the privacy of the home).

[37] *Snyder*, 2011 U.S. LEXIS 1903 at *9.

[38] *Id.* at *29.

Given the seemingly powerful government interests at stake in protecting mourners, and the analogy to previous cases in which the privacy interests in enforcing buffer zones were found to be significant, it remains possible that the Supreme Court could find that the government has a significant interest in protecting the privacy of mourners, despite its recent holding in *Snyder vs. Phelps*.

Narrow Tailoring

Assuming that the government has a significant interest in protecting the privacy of mourners at military funerals, a reviewing court would then analyze whether the law is narrowly tailored to achieve that interest. The narrow tailoring requirement "is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[39] In determining whether a buffer zone is narrowly tailored, the Court has never suggested that there was a fixed distance past which the restriction would be unconstitutional. Rather the Court has painstakingly inquired into the facts of a particular situation. In each of its cases examining buffer zones, the Court has looked for a balance between the preservation of the free speech rights of those subject to the restriction and the interest that the government seeks to advance. A reviewing court would likely do the same when reviewing 18 U.S.C. § 1388 (a)(1).

Currently, the federal law prohibits protesting that is directed at a military funeral within 150 feet of the funeral from one hour before the funeral until one hour after the service ends. The Supreme Court upheld a targeted picketing statute in *Frisby*, which did not contain a numerical footage limit.[40] However, the Court read that statute narrowly to prohibit only picketing that was focused on a particular home and noted that the restriction at issue would not have prohibited general marching through residential neighborhoods or even picketing an entire block of houses.[41] Those who support the funeral protest law might argue that, as in *Frisby*, the federal law bans only protests focused on a military funeral at the particular location and time of that funeral and would not ban general marching through the streets. Those who oppose the law, such as the Westboro Baptist Church, might argue that their speech is targeted more broadly than a particular funeral and the statute encompasses too much speech as a result.[42]

In *Madsen*, the Court upheld a 36-foot protest free zone on the public streets in front of a particular health clinic in Florida, but struck down a restriction banning protesting within 300 feet of the residences of clinic staff.[43] The Court found that a 36-foot buffer zone at the clinic to be a properly tailored distance that would prevent the blocking of entrance and exit from the clinic while simultaneously allowing the protesters to be seen and heard by those seeking the clinic's services.[44] The 300-foot zone, in the Court's opinion, banned exactly the type of speech in residential neighborhoods that the statute in *Frisby* did not: marching through a residential

[39] *Ward*, 491 U.S. at 798.

[40] 487 U.S. at 487 – 488.

[41] *Id.* at 486.

[42] The Westboro Baptist Church did advance this argument in the Sixth Circuit case, but the court rejected the argument citing *Frisby*. *Phelps-Roper v. Strickland*, 539 F.3d at 370 (citing *Frisby*, 487 U.S. at 486 ("Even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy.").

[43] *Madsen*, 512 U.S. at 768.

[44] *Id.* at 769 – 771.

neighborhood, or walking a route in front of a block of houses.[45] As a result, that 300-foot buffer zone was found to be unconstitutional.

However, it should be noted that the *Madsen* case arose in the context of an injunction. The Court placed a higher standard on the tailoring of an injunction, requiring that the injunction burden no more speech than necessary to achieve its interest.[46] As a result, it could be argued that a 150-foot buffer zone for funeral protests may survive the less stringent tailoring review for general laws imposing time, place, and manner restrictions, which asks merely whether the government's interest would be achieved less effectively absent the regulation.[47] Absent the buffer zone, there may be no law preventing protesters from disrupting a military funeral and invading the privacy of those in attendance. Opponents of the buffer zone might argue that the buffer zone is too large, and would apply to many different areas throughout the country, creating uncertainty regarding where protests are permissible.

A law creating a 300-foot buffer zone from one hour before until one hour after funerals was found to be narrowly tailored by the Sixth Circuit because it prohibited only protesting that was directed at a funeral, and restricted only the time and place of the speech.[48] The protesters were free to protest the funeral outside of the designated range, or outside of the designated time period. Furthermore, a buffer zone as large as 300 feet seemed appropriate to the court considering that "numerous mourners usually attend a funeral or burial service" and the size could be seen as necessary to "protect the privacy of an entire funeral gathering."[49]

The federal law creates a buffer zone half the size of the zone created by the statute before the Sixth Circuit and would likely be upheld by that court. The Eighth Circuit declined to do a rigorous analysis of the tailoring of an Ohio statute creating a 300-foot funeral protest buffer zone.[50] However, that statute was fundamentally different in its scope than the federal statute analyzed here because the law also restricted protests of the funeral procession.[51] The Supreme Court appears to particularly disapprove of "floating buffer zones," which require protesters to stay a certain distance a way from an uncertainly moving target.[52] The federal law does not appear to create a "floating buffer zone" and would not suffer from that potentially fatal tailoring problem.

It could be argued successfully, therefore, that the 150-foot buffer zone and one hour time restrictions before and after the ceremony are narrowly tailored to achieve the government's interests. At least one federal circuit court of appeals appears likely to uphold such a statute, and Supreme Court precedent can be read to reasonably support such a result.

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[45] *Id.* at 774 – 775.

[46] *Id.* at 765.

[47] *Ward*, 491 U.S. at 798.

[48] *Phelps-Roper v. Strickland*, 539 F.3d at 372.

[49] *Id.* at 371.

[50] *Phelps-Roper v. Nixon*, 545 F.3d at 692 – 693.

[51] *Id. See also*, Phelps-Roper v. Taft, 523 F. Supp. 2d 612, 620 (N.D. Ohio 2007)(holding that a provision of the Ohio funeral protest statute that prohibited protesting funeral processions created a "floating buffer zone" that was unconstitutionally overbroad).

[52] Schenk v. Pro-Choice Network of Western N.Y., 519 U.S. 357 (1997)(striking down a 15 foot "floating buffer zone" that would have required protesters to stay 15 feet away from persons who had not consented to their approach regardless of the movements of the unconsenting individuals).

Ample Alternative Speech Opportunities

The last question is whether the statute provides speakers with ample alternative channels of communications. When examining whether ample speech alternatives were left open in *Frisby*, the Supreme Court noted that "protesters have not been barred from the residential neighborhoods. They may enter such neighborhoods alone or in groups, even marching. They may go door to door... They may distribute literature... They may contact residents by telephone, short of harassment."[53] Though protesters are barred from protesting within a certain distance of the funeral, they remain free to protest the funeral outside of that distance. Furthermore, given the time limitations on the prohibition, it seems likely that ample alternative speech opportunities would be considered to be preserved. Those wishing to protest also could take to the Internet, as the Westboro Baptist Church does, hand out fliers, go door to door, or choose any other means of communication of their message outside the time and place limitations of the federal restriction.

It is unclear whether the Supreme Court would uphold 18 U.S.C. §1388(a)(1) as a constitutional time, place, and manner restriction on speech. However, reasonable arguments can be made in favor of the current statute's constitutionality, based upon Supreme Court precedent and lower court opinions related to similar state laws.

Prohibition on Impeding Access to or Egress from Funeral Location

The second subsection of the federal law to be analyzed, 18 U.S.C. §1388(a)(2), prohibits willfully impeding the access to or egress from any military funeral location with the intent to impede such access or egress within 300 feet of the entrance and within one hour before and extending to one hour after the funeral. This subsection may restrict expressive activity if some protesters wish to express their message by blocking the entrance to a military funeral. Nonetheless, the restriction of such activity would likely be found to be consonant with the First Amendment by a reviewing court. This subsection likely would be considered an incidental restriction on speech, in that its primary purpose would be to preserve the free and unimpeded access to the locations of military funeral services though it may have the ancillary effect of limiting expression.

The Supreme Court has said that an incidental restriction on speech is constitutional if it is not "greater than necessary to further a substantial governmental interest."[54] However, the Court has made clear that an incidental restriction, unlike a content-based restriction, "need not be the least restrictive or least intrusive means" of furthering a governmental interest. Rather, the restriction must be "narrowly tailored," and "the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.'"[55] The standard is very similar, in fact, to the standard for time, place, and manner restrictions discussed above. In that light, the federal restriction on impeding access to military funeral sites could be viewed as a restriction on conduct that incidentally affects speech.

[53] *Frisby*, 487 U.S. at 483 – 484.

[54] San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 537 (1987). This is known as the "*O'Brien* test," which was first formulated in the case United States v. O'Brien, 391 U.S. 367, 382 (1968).

[55] Ward v. Rock Against Racism, 491 U.S. 781, 798-799 (1989). This case makes clear that, although both "strict scrutiny" and the *O'Brien* test for incidental restrictions require "narrow tailoring," "the same degree of tailoring is not required" under the two; under the *O'Brien* test, "least-restrictive-alternative analysis is wholly out of place." *Id.* at 798-799 n.6.

It is likely that a reviewing court would find that this subsection is no greater than necessary to further a substantial government interest. The government interest in enacting this statute would appear to be the preservation of unimpeded access and egress from military funeral services wherever they are held. A court would likely find this interest to be substantial. The Supreme Court has noted that "men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege."[56] While the First Amendment balancing of interests may be more delicate in determining restrictions on protesting at military funerals in general, a restriction on actively impeding the rights of others to enter and exit a military funeral would likely present less of a close case. The primary question, therefore, would be whether the restriction is narrowly tailored. In this case the restriction applies only to the intentional impediment of access to a military funeral. It would not apply to road crews, other authorized roadblocks, or activities that are not directed at the military funeral. The prohibition further is limited in duration and in scope to within one hour of the funeral and within 300 feet of the entrances. It is possible that a court would find that this restriction would advance the government's interest in preserving unimpeded access to military funerals and that the government's interests would be achieved less effectively absent the regulation.

Legislative Options and Proposals

Members of Congress, following the Court's decision in *Snyder*, may have an interest in legislative options at their disposal for increasing the protections of military funeral attendees under federal law. Below are three options. The first option is to expand the buffer zone, which has been proposed in some form by H.R. 961. The other two options attempt to address the issue that the federal laws currently on the books have never been enforced. One possible solution would be to grant states the authority to enforce the federal buffer zone law when protests occur within their state. Another option might be to grant those attending protested funerals a private right of action if the buffer zone is violated by the protesters.

Expanding the Buffer Zone

H.R. 961, The Safe Haven for Heroes Act of 2011

H.R. 961 proposes to amend 18 U.S.C. § 1388(a)(1) to extend the time period during which protests would be prohibited from one hour before extending to one our after the funeral to a period beginning five hours before the funeral and extending until five hours after the funeral. The funeral protest buffer zone would remain 150 feet.

Assuming that H.R. 961 is adopted, however, it is unclear whether the extension of the picketing ban to five hours before and extending five hours after any services would be considered to be constitutional. The Supreme Court in these cases pays particular attention to the precision of the tailoring of these restrictions. It seems more difficult to argue that the Court would support a ban on protesting that would cover nearly the entire day of a funeral when the people whose privacy the government seeks to protect would only be in the vicinity of the service location for a fraction of that time period. Furthermore, the Sixth Circuit cited the limited time of the prohibition on

[56] American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184, 201 (1921).

protesting approvingly in its analysis of the Ohio buffer zone law.[57] The panel noted that this was not a complete ban on protesting in a particular location at all hours on all days, as was the case in *Frisby*.[58] Instead it allowed protesters to protest on the day they wished to do so, but balanced their rights against the rights of the family to bury their dead in peace. It seems difficult to argue that increasing the time frame during which protests would be forbidden to encompass almost the entire day on which the protesters wish to deliver their message would be upheld. At the very least, the argument supporting the constitutionality of the federal ban including H.R. 961's amendments would be more difficult to sustain than the arguments for the constitutionality of the federal ban as it currently stands. The Supreme Court has already noted that the speech of the Westboro Baptist Church is fully protected and increasing the time restraint on its speech, as H.R. 961 proposes to do may burden its constitutional rights too heavily to survive constitutional review. As a result, broadening the statute, as H.R. 961 proposes to do may, critically impair the constitutional viability of 18 U.S.C. § 1388(a)(1).

H.R. 961 also proposes to amend 18 U.S.C. § 1388 (a)(2) to extend the time period during which impeding access to the funeral location would be prohibited from one hour before extending to one hour after the funeral to a period beginning five hours before the funeral and extending until five hours after the funeral. It further proposes to increase the size of the prohibition's area from 300 feet to 2500 feet, a distance of nearly half of a mile.

While the speech prohibited by 18 U.S.C. § 1388(a)(2) would still be a narrower class of speech than that prohibited by (a)(1), the extension of the boundary to nearly half a mile from the funeral location and the extension of the time during which the activity would be prohibited to include most of the day may sweep too broadly to withstand constitutional scrutiny. A half mile radius could encompass large amounts of some small towns leaving little area in the town, if any, where the prohibition would not apply. It may be difficult to argue that a prohibition so broad is narrowly tailored.

State Laws

Some state laws have adopted funeral protest buffer zones as large as 300 feet.[59] As noted above, the Sixth Circuit Court of Appeals has upheld the constitutionality a buffer zone that size. It is possible that such a buffer zone law would survive review at the Supreme Court level as well, given the above analysis. However, the smaller buffer zone may more easily withstand scrutiny considering the requirement that the restriction be narrowly tailored.

Broadening the buffer zone to 300 feet might have the added effect of providing more protection for military funerals in some states. For example, Maryland's buffer zone law requires a 100-foot buffer zone around all funerals.[60] If the federal law requires a 300-foot buffer zone for military funerals, then military funerals would be afforded greater protection in Maryland as a result of the federal law.

[57] *Phelps-Roper v. Strickland*, 539 F.3d at 369 – 370.

[58] *Id.*

[59] *See, e.g.*, Neb. Rev. Stat. §§ 28-1320.03 – 28-1320.03; Ohio Revised Code § 3767.30.

[60] Md. CRIMINAL LAW Code Ann. § 10-205.

State Enforcement

The federal laws discussed in this report do not appear to have been enforced. There could be any number of reasons for this lack of enforcement. For example, it could be because no one has ever broken the laws. It might also be because the federal government may not have the resources to enforce them. One potential suggestion to increase the rate of enforcement of the laws may be to empower the states to enforce these buffer zones.

The issue with enacting these reforms, however, may be that both of these statutes, 38 U.S.C. § 2413 and 18 U.S.C. § 1388, are criminal statutes. Historically, federal courts have exclusive jurisdiction to hear and the Department of Justice has the exclusive jurisdiction to prosecute federal criminal violations.[61] As a result, to allow states to enforce the prohibitions it may be necessary to enact a separate provision making this a civil offense.

Private Right of Action

Another suggestion to rectify the lack of enforcement may be to allow those aggrieved by the protests to sue for civil damages under federal law in federal or state court if the federal buffer zone is breached by protesters. This proposal has the same issue attached to it as the proposal to allow the states to enforce the law. It may be necessary, therefore, to make violations of the buffer zone a civil as well as a criminal offense in order for this option to be viable. Furthermore, if the government wishes citizens to have a private right of action under the law, the right of action should be explicit in the statute.[62]

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[61] 28 U.S.C. § 516 ("Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General). 28 U.S.C. § 547 (stating that is the duty of the United States Attorneys to prosecute all federal crimes within their districts, except as otherwise provided by law). *See* Donald H. Zeigler, *Twins Separated At Birth: A Comparative History of the Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 19 Vt. L. Rev. 673 (1995).

[62] Courts rarely imply a private right of action where one has not been explicitly granted by federal statute, absent "affirmative evidence of Congressional intent to allow one." Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 Notre Dame L. Rev. 861, 873 (1996). As a result, the best way to ensure the existence of a private right of action would be to explicitly include it in the statute.