

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

SHIRLEY L. PHELPS-ROPER,)
)
Plaintiff,)
)
v.) No. 06-4156-cv-c-NKL
)
JEREMIAH W. NIXON, in his official)
capacity as Attorney General for the)
State of Missouri,)
)
MARK GOODWIN, in his official capacity)
as Prosecuting Attorney for Carroll County,)
)
JIM HUGHES, in his official capacity)
as Chief of Kirksville Police Department,)
)
and)
)
MATT BLUNT, in his official capacity as)
Governor for the State of Missouri,)
)
Defendants.)
)

**SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION TO
PREVENT DEFENDANT GOODWIN FROM ENFORCING § 578.501 IN AN
UNCONSTITUTIONALLY OVERBROAD MANNER**

Plaintiff, Shirley Phelps-Roper, seeks a preliminary injunction enjoining Mark Goodwin, in his official capacity as Prosecuting Attorney for Carroll County, from enforcing Mo. Rev. Stat. § 578.501 (2006) in an unconstitutional manner. Section 578.501 criminalizes non-disruptive, non-disorderly speech and visual displays by barring “picketing and other protest activities in front of or about” funeral processions, ceremonies, and memorial services related to the burial or cremation of the dead. Mo. Rev. Stat. § 578.501.2-3 (2006). Plaintiff seeks entry

of an injunction on the grounds that she has an overwhelming likelihood of success on the merits of her claims against Defendant Goodwin and because preliminary injunction is needed to prevent the irreparable harm that results from the suppression of free speech.

STATEMENT OF FACTS

Plaintiff is a member of the Westboro Baptist Church of Topeka, Kansas (WBC). Complaint, ¶ 1. The Church follows Primitive Baptist and Calvinist doctrines. Complaint, ¶ 7. Based on these doctrines, church members, including plaintiff, believe that homosexuality is a sin and abomination. *Id.* They believe homosexuality is the worst of all sins and indicative of the final reprobation of an individual; it follows, according to their beliefs, that acceptance of homosexuality by society prompts divine judgment. *Id.* They further believe that God is punishing America for the sin of homosexuality by killing Americans, including soldiers. *Id.* Because God is omnipotent to cause or prevent tragedy, they believe that when tragedy strikes it is indicative of God's wrath. *Id.*

Plaintiff and other church members have long expressed their religious views by engaging in picketing and protesting. Complaint, ¶ 8. They have protested at churches, theaters, parades, and demonstrations that they view as promoting homosexuality. *Id.* For many years, they have also picketed and protested near funerals of gay people, persons who died from AIDS, people whose lifestyles they believe to be sinful but are touted as heroic upon their death, and people whose actions while alive had supported homosexuality. *Id.* The purpose of picketing and protest near funerals is to use an available public platform to publish the timely religious message that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not. Complaint, ¶ 9. The funerals of soldiers, in plaintiff's view, have become an internationally-watched platform where the question

of whether God is cursing or blessing America is being discussed. *Id.* Plaintiff and her church believe the scriptures teach that an individual who dies on the battlefield for a nation that is at enmity with God cannot go to heaven and, despite the views of public figures, is not a hero. *Id.* For this reason, it is imperative to plaintiff's faith that this message from public figures be balanced with scriptural message at the time it is being uttered. *Id.* Further, death time is a time when the eyes, ears and hearts of mankind are attending to matters of eternity. *Id.* Plaintiff and her church believe it is too late for the dead, but not the living. *Id.* Also, plaintiff and her church believe one of the great sins of America is idolatry in the form of worshiping the human instead of God, and in America this has taken the form of intense worship of the dead, particularly soldiers. *Id.* For all these reasons, this public platform is the precise and only place where this religious message can and must be delivered in a timely and relevant manner to those attending the funeral and to those participating in the public events and displays outside the funeral. *Id.*

Recently, plaintiff and other church members have picketed and protested near funerals of American soldiers killed in Iraq and Afghanistan. Complaint, ¶ 16. On August 5, 2005, plaintiff and other church members they held a non-disruptive, non-disorderly picket and protest near the funeral of Spc. Edward Lee Myers in St. Joseph. Complaint, ¶ 17. In direct response to the protest and the content of the speech, Missouri Senate Majority Leader Charlie Shields introduced the law that, when enacted, became § 578.501. Complaint, ¶ 18. The law is known as "Spc. Edward Lee Myers' Law." Mo. Rev. Stat. § 578.501.1 (2006). The Governor did not hide that the target of the law was the content of the protestors' message, stating, "It is offensive that groups would attempt to spread a message of hate as families and friends grieve the loss of a loved one." Complaint, ¶ 20.

The current version of § 578.501 took effect on July 6, 2006, upon being signed by the Governor. It provides, *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. Mo. Rev. Stat. § 578.501.2 (2006).

The statute defines the term funeral as meaning “the ceremonies, processions[,] and memorial services held in connection with the burial or cremation of the dead.” Mo. Rev. Stat. § 578.501.3 (2006). The current § 578.501 is nearly identical to the former § 578.501, which became law upon being signed February 23, 2006, by the acting governor, Senator Michael Gibbons.¹

Plaintiff and other members of the church planned to protest in Carrollton, Missouri, on May 16, 2006. Complaint, ¶ 26-D. Because plaintiff supports non-violent and law abiding protests and did not want to be arrested herself and wanted to assist other church members in avoiding arrest, she contacted local law enforcement officials to determine how they would interpret the vague description “in front of or about” a location. Complaint, ¶ 23.

¹ The former § 578.501, which began as SB 578, was more narrow than the current version. SB 578 had banned protests and picketing “in front of or about any church, cemetery, or funeral establishment” while the current law prohibits protests and picketing “in front of or about any location at which a funeral is held.” In this respect, the law was altered in response to a protest conducted near a funeral held inside a high school.

As plaintiff made clear in her letters to law enforcement officials, including Defendant Goodwin, she and other church members did not desire to disrupt any funeral proceedings but rather to remain a respectful distance from the funeral while remaining in sight of their target audience. Complaint, ¶ 24. They also indicated they intended to continue their practice of remaining in public areas, such as sidewalks, and departing once a funeral begins. Complaint, ¶ 25. Plaintiff and other church members would also protest on private property onto which they were invited by the property owner. *Id.*

Chief Donald King of the Carrollton Police Department advised church members that they could conduct their picketing and protest during the 45 minutes preceding the beginning of a memorial service so long as they remained in a designated spot 100 feet from the church entrance. Complaint, ¶ 26-D. Plaintiff and other church members made arrangements to travel to Carrollton in reliance upon King's representations. *Id.* Later in the afternoon before the protest, Defendant Goodwin called church members to tell them that he would not honor Chief King's interpretation of § 578.501. *Id.* Goodwin told church members that he would call them by 4:30 p.m. to advise where the protest could be held, but he did not call as promised. *Id.* When church members called Goodwin, he told them that they could only protest "on the other side of town" and that if they conducted the picketing and protest as arranged with Chief King, church members would be arrested and their children taken into state custody. *Id.* Eventually, Goodwin faxed a letter to church members in which he interpreted the statute as barring *all* picketing and protests within one hour of the funeral and threatened anyone picketing or protesting with the one hour before the funeral with being arrested and held for 24 hours. *Id.*; *see also* Letter from Goodwin, attached hereto as Exhibit 1. He allowed that a protest could be held

in a specific location more than 400 feet away from the site of the funeral, so long as no one continued to protest within an hour of the funeral. *Id.*

As a result of Defendant Goodwin's overbroad interpretation of § 578.501's provisions, plaintiff and other church members reasonably determined they could not engage in non-disruptive, non-disorderly protest and picketing without facing arrest, confiscation of their children, or both. Complaint, ¶ 27.

ARGUMENT

Defendant Goodwin's interpretation of section 578.501 is a content-based, prior restraint on speech that fails both immediate scrutiny and strict scrutiny. It is also overbroad, prohibiting all protest and picketing within one hour of any funeral related service or procession. His interpretation is also overbroad in that it prohibits more speech than is necessary to prevent disruptions and blocks more speech than is necessary in an excessively large area, affecting any individual who may want to protest or picket anything in the vicinity of any funeral proceedings or processions.

PRELIMINARY INJUNCTION

The Eighth Circuit has consistently held that there are four factors in determining whether to issue a preliminary injunction:

"(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the interest of the public.

Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). A court must balance all of these factors in deciding whether to issue an injunction. While no one factor is necessarily determinative of whether an injunction should be granted, there must be a finding of irreparable harm. *Dataphase*, 640 F.2d at 114.

Plaintiff meets the criteria for issuance of a preliminary injunction. First, there is a substantial, if not overwhelming, probability of success on the merits. Second, plaintiff has suffered and will continue to suffer immediate and irreparable harm if an injunction is not issued. Third, enjoining the Defendant Goodwin from enforcing an unconstitutional interpretation of the law will not harm Carroll County and will benefit its citizens. Fourth, issuance of an injunction favors the public interest because protecting individuals' constitutional rights is always an interest of the public. *See G & V Lounge, Inc. v. Michigan Liquor Control Com'n.*, 23 F.3d 1071, 1079 (6th Cir. 1994).

I. PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

The First Amendment to the United States Constitution states “Congress shall make no law . . . abridging the freedom of speech. . . or the right of the people peaceably to assemble.” *U.S. Const, AM I.* The First Amendment applies to the states through the Fourteenth Amendment's due process clause. *See Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985).

Plaintiff seeks only to picket and protest in public *fora* or private property on which she is invited. In determining whether a governmental restriction on speech in a public forum is valid, the court must first determine whether the restriction is content-based or content-neutral. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Where a restriction is content-based, it is subject to “the most exacting scrutiny” and can be upheld only when necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 642 (1994). If a statute is content-neutral, it is subject to intermediate scrutiny and will survive if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication. *Turner*

Broadcasting System, 512 U.S. at 642; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). “[T]he ‘principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.’” *Turner Broadcasting System*, 512 U.S. at 642. A restriction is content-based if it is directed toward a specific person or group of persons. *Thorburn v. Johnson*, 231 F.3d 1114 (8th Cir. 2000).

A. Defendant Goodwin’s Interpretation of § 578.501 Impermissibly Prohibits Speech on Private Property

Private property owners have always had the right to bar individuals from entering or speaking on their property. *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976). This case does not implicate individuals’ rights to keep others from entering or speaking on their private property. Defendant Goodwin’s interpretation of § 578.501 goes further. It forbids protestors from congregating on or speaking from private property if their protest activity takes place within one hour of the funeral or within 400 feet of a funeral, even when the owner has consented to the protest.

In *City of Ladue v. Gilleo*, 512 U.S. 43, 45 (1994), the Supreme Court considered the validity of an ordinance prohibiting residents from displaying signs on their property with the exception of “for sale” signs, residence identification signs, and signs warning of dangers on the property. Gilleo placed a sign on her property protesting the Gulf War. *Id.*, 512 U.S. at 45. When the sign was knocked down, she asked the City of Ladue for permission to post another sign, but the city denied this request pursuant to the ordinance. *Id.*, 512 U.S. at 45. The Court assumed the ordinance was content-neutral and analyzed the ordinance accordingly. *Id.*, 512 U.S. at 56. “A special respect for individual liberty in the home has long been part of our

culture and our law[.] ... [T]hat principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *Id.* at 58 (emphasis in original) (citations omitted). The Court found that the ordinance did not "leave open ample alternative channels for communication." *Id.*, 512 U.S. at 55–56. (citations omitted). Residential signs provide information about the speaker and often include messages aimed at neighbors. *Id.*, 512 U.S. at 56–57. Hence, their location at the speaker's residence shapes the message; communicating the same message elsewhere is ineffective. *Id.*, 512 U.S. at 56. "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." *Id.*

Defendant Goodwin's interpretation of § 578.501 restricts the expressive rights of owners of private property not only near funeral homes, churches, and other common locations of funerals, wakes, memorial services, or burials, but also persons who own private property near any street that might be used for a funeral procession. His interpretation forbids private property owners from protesting or allowing protestors on their property during and one hour before and after ceremonies, processions, and memorial services held in connection with the burial or cremation of the dead.

As in *Ladue*, this restriction on the use of private property must survive at least intermediate scrutiny. But, as demonstrated, *infra*, the statute is not narrowly tailored, but instead is overbroad. In addition, as discussed, *infra*, the statute does not leave open ample alternatives for speech.

B. Defendant Goodwin's Application of Section 578.501 is Overbroad and Prohibits Valid Speech in a Public Forum

While the government may regulate a citizen's use of a city street or sidewalk for expressive purposes, the regulation may not be an abridgement or denial of the right to speak in disguise. *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939); *see also Dean v. Byerley*, 354 F.3d 540, 550 (6th Cir. 2004). Section 578.501, as applied by Defendant Goodwin, represents just such an abridgement of speech and is, therefore, unconstitutional.

Defendant Goodwin's interpretation is overbroad in terms of the expressive activity that it restricts. It prevents all picketing and protest within 400 feet of a funeral site at any time and anywhere, within one hour of the funeral. "[T]he statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Hill v. Colorado*, 530 U.S. 703, 731-732 (2000), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The vacillate, broad interpretation by Defendant Goodwin is even more likely to chill speech. In fact, it did chill the speech of Plaintiff and other church members.

Section 578.501, as applied by Defendant Goodwin, burdens a tremendous amount of expressive activity, such that it criminalizes the exercise of speech within 400 feet of a funeral site as well as any speech within an hour of the ceremony. This burden is unnecessary: the State already has other means for preventing disruptions at funerals, wakes, memorial services, and burials. *See* § III, *infra*. Because loud, offensive, or threatening speech that is truly disruptive is already illegal in Missouri, Defendant Goodwin's interpretation of § 578.501 serves no purpose other than to increase the scope of prohibited conduct beyond that which is disruptive. Accordingly, the overbreadth of § 578.501 is real and substantial.

II. PRELIMINARY INJUNCTION IS NECESSARY TO PROTECT PLAINTIFF FROM IRREPARABLE HARM

Defendant Goodwin's interpretation of § 578.501 constitutes a broad ban on protected speech that is neither disruptive nor disorderly. It deprives plaintiff and other members of her church of fundamental First Amendment freedoms. The Supreme Court and the Eighth Circuit have consistently held that violations of the First Amendment constitute irreparable harms. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *see also Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999) (finding irreparable harm when a state law placed overbroad restrictions on independent political spending); *Kirkeby v. Furness*, 52 F.3d 772 (8th Cir. 1995) (finding irreparable harm when a city ordinance placed overboard restrictions on the rights of antiabortion demonstrators to picket). In short, the violation of an individual's constitutional rights alone establishes irreparable harm.

Here, plaintiff offers concrete evidence of the harm. Without the preliminary injunction, plaintiff will be unable to express her beliefs in Carroll County in the manner she believes will be most effective for conveying the message inspired by her religious beliefs. She believes that the best way to share her message is by picketing in a non-disruptive way near funerals, wakes, memorial services, funeral processions, or burials. The harm to plaintiff is not speculative; Defendant Goodwin's broad interpretation of § 578.501 has already chilled protected speech by preventing her from protesting in Carrollton as planned on May 17, 2006. Unless this Court enters a preliminary injunction, plaintiff will continue to be forced to choose between engaging

in protected speech or facing her own arrest, the confiscation of her children, or both in Carroll County.

III. AN INJUNCTION WILL DO NO HARM TO DEFENDANT GOODWIN.

Unlike plaintiff, Defendant Goodwin would suffer no injury if this court were to issue preliminary injunction.

Were preliminary injunction granted, the Defendant Goodwin would still have ample resources to prosecute activities that truly were disruptive or disorderly.² Chapter 574 of the Missouri Revised Statutes provide a number of offenses against public order that would provide the state with the necessary means to punish actual disruptions of funerals, memorial services, wakes, and burials that overstep the bounds of peaceful protest. Included are the crimes of peace disturbance, unlawful assembly, and refusal to disperse.

The peace disturbance statute makes it a crime to unreasonably and knowingly disturb or alarm another person through loud noises, offensive language, or threats. Mo. Rev. Stat. § 574.010 (2006). The unlawful assembly law prohibits the knowing assembly of six or more persons with the intent to violate criminal laws. Mo. Rev. Stat. § 574.040 (2006). What is more, anyone who fails to comply with an officer's order to leave the scene of an unlawful assembly can be found guilty of refusal to disperse. Mo. Rev. Stat. § 574.060 (2006).

Prosecution for an offence against the public order is not meaningless. These offenses are class B and C misdemeanors, with a peace disturbance raising to a class A misdemeanor for repeat offenses. Mo. Rev. Stat. § 574.010-574.060 (2006). With these laws in place, Defendant Goodwin already has the ability to punish actual disruptions of funerals, memorial services, wakes, and burials that go beyond protected free expression. Defendant Goodwin's application

² Plaintiff and other members of her church have protested many events in Missouri without running afoul of laws that prohibit disruptive and disorderly speech.

of § 578.501 is simply an effort to extend the scope of these penalties to include peaceful protests, and this extension violates the First Amendment. Accordingly, Defendant Goodwin will suffer no harm if this court enters a preliminary injunction.

IV. AN INJUNCTION WILL SERVE THE PUBLIC INTEREST

The issuance of an injunction is in the public interest because “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc.*, 23 F.3d at 1079. The Eighth Circuit has held that the public interest is reflected in free expression on issues of publication, not the restriction of constitutionally-protected freedoms. *See Kirkeby v. Furnes*, 52 F.3d at 775. Plaintiff is not the only individual whose First Amendment rights are at stake in this case. If the Court fails issue a preliminary injunction, other members of plaintiff’s church and any other citizen would be proscribed from exercising certain First Amendment freedoms by the vague and broad language of § 578.501. No counterbalancing interest governs this aspect of the case, and the Court should therefore enter preliminary injunctive relief.

CONCLUSION

In dissent, Justice Holmes once wrote,

... I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless ... an immediate check is required to save the country. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Justice Holmes words ring true to this case. Doubtless a large number of Missourians would find plaintiff's message offensive. But the very purpose of the First Amendment is to protect unpopular messages like plaintiffs that are delivered in a non-disruptive, non-disorderly manner.

Plaintiff's message – or at least aspects of the message -- may be unpopular with the public. But courts have repeatedly held that regardless of the abrasive or unpopular theme of any individual or group's speech, it remains protected by the First Amendment. The majority or the government's disagreement with a message is an insufficient justification for restricting speech.

Plaintiff has a strong probability of success on the merits and is subject to irreparable harm if a preliminary injunction is not granted. The balance of the equities and the public interest also weigh in favor of a grant of preliminary injunction. For all these reasons, the court should grant plaintiff's motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was delivered to the following by placing a copy of the same in the United States Mail in a properly addressed envelope with first-class postage prepaid on the 21st day of July, 2006.

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³ Motion to appear *pro hac vice* pending.