

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,)
)
 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 DEFENDANTS NIXON AND BLUNT FROM ENFORCING § 578.501**

Plaintiff, Shirley Phelps-Roper, seeks a preliminary injunction enjoining Jeremiah W. Nixon, in his official capacity as Attorney General of the State of Missouri, and Matt Blunt, in his official capacity as Governor of the State of Missouri, from enforcing Mo. Rev. Stat. § 578.501 (2006). 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 claim 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, 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

Recognizing that § 578.501 is unconstitutional and will inevitably be invalidated, the legislature enacted a contingent back-up provision to become effective “on the date the provisions of section 578.501 are finally declared void or unconstitutional by a court of competent jurisdiction.”² Complaint, ¶ 15.

In recent months, plaintiff and other members of her church have desired to conduct pickets and protests near funerals in several Missouri locations, including Anderson, Carrollton,

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.

² Because plaintiff at this stage seeks only preliminary injunction to enjoin enforcement of the statute, not a final declaration that § 578.501 is void or unconstitutional, it is not necessary to determine whether to enjoin § 578.502 because it is not in effect and issuance of preliminary injunction will not make it effective.

Eugene, Eureka, Jamestown, Kirksville, Liberty, Republic, St. Joseph, St. Louis and St. Robert. 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.

As plaintiff made clear in her letters to law enforcement officials, 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.*

The responses to plaintiff’s questions about enforcement of the state’s protest ban were inconsistent:

A. On May 2, 2006, W. Stephen Geeding, Prosecuting Attorney of McDonald County, advised that he would prosecute violations of the new law. He interpreted “in front of or about” as including “any place that is reasonably established as a parking area for funeral attendees” and “apply[ing] to processions to and from the cemetery.” Complaint, ¶ 26-A.

B. On April 13, 2006, George Kapke, attorney for the Liberty Police Chief, advised church members that there would be “a concerted and coordinated effort by law enforcement to enforce the law” but refused to elaborate on what would or would not be considered a violation. Kapke referred church members to the Clay County Prosecuting

Attorney. The prosecutor, Daniel White, refused to provide any guidance because church members are not licensed as attorneys in Missouri. Complaint, ¶ 26-B.

C. On April 20, 2006, Darrell Moore, prosecuting attorney in Greene County, would only advise church members that he intended to vigorously prosecute violations of the law. He did not reply to follow-up letters attempting to determine how “in front of or about” would be interpreted when deciding whether to prosecute with vigor. Complaint, ¶ 26-C.

D. On May 16, 2006, 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. Plaintiff and other church members made arrangements to travel to Carrollton in reliance upon King’s representations. Later in the afternoon May 16—the day before the protest—the Prosecuting Attorney for Carroll County, Mark Goodwin, called church members to tell them that he would not honor Chief King’s interpretation. 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. 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. 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 within the one hour before the funeral with being arrested and held for 24 hours. 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. Complaint, ¶ 26-D

E. On April 22, 2006, when members of plaintiff's church protested in Eugene, Missouri, law enforcement permitted those carrying flags, who demonstrated in favor of America, to fully surround and physically jostle and block WBC protestors. The local sheriff made it clear to WBC members and the media that he was only permitting the protest to occur at any location because the law – at that time – did not cover a funeral being held at a high school. Complaint, ¶ 26-E.

F. On May 16, 2006, when church members protested in Jamestown, Missouri, outside a high school, officials lined up school busses and semi-trucks from the door of the school to the end of the parking lot, blocking church members' signs from those who entered the lot and walked into the school. Complaint, ¶ 26-F.

G. On June 27, 2006, when church members were en route to picket in St. Louis, Missouri, one of the church members phoned the police chief, who was hostile and indicated he felt no need for the conversation about the protestors arriving. During the picket, one officer attempted to charge at the protestors as though to attack them, but another officer had to restrain him and hold him back. Complaint, ¶ 26-G.

H. On July 8, 2006, when church members were protesting in St. Joseph, Missouri, they were standing in a spot designated by local law enforcement, more than 300 feet from the church where the funeral was scheduled to occur. A line of police officers then came and lined up in front of the church members, including Plaintiff. Plaintiff inquired as to why the officers were blocking their signs and by whose authority this was being done. She was told by one of the officers that he was the police chief and it was being done on his authority. After some time passed and Plaintiff continued to inquire as to why this was being done, the chief approached Plaintiff and said "I just kept you from being arrested." When Plaintiff inquired as to

what this meant, the chief said he and his officers were blocking Plaintiff and other church members to keep them from view of the funeral procession. Plaintiff, who had seen no funeral procession, checked with other church members, and found that only one was even aware of a procession and it passed hundreds of yards away, never in the area. Complaint, ¶ 26-H.

I. On July 9, 2006, when church members protested in Kirksville, Missouri, WBC protestors were required to stay hundreds of feet from the middle school building where the funeral occurred. At the same time, hundreds of members of the Patriot Guard and other community members with signs and flags were permitted to be directly in front of the middle school building. When church members inquired about this difference in treatment, Chief Jim Hughes of the Kirksville Police Department advised that these demonstrators were “part of the ceremony” and were “waving flags as part of the memorial ceremony,” and thus were not subject to the terms of the law. One church member asked Chief Hughes for permission to go into the same physical area, with just a flag in his hand, which he desired to hold upside down, but Chief Hughes declined to give him any response. Complaint, ¶ 26-I.

As a result of the varying interpretations 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 on several occasions. Complaint, ¶ 27. Specifically, plaintiff and other church members did not conduct protests and pickets as they had desired at the following places and times:

A. March 4, 2006, Ozark Funeral Home, 100 Spring Street, Anderson, Missouri, from 12:15 to 1:00 p.m.;

B. April 14, 2006, Pleasant Valley Baptist Church, 1600 N. 291 HWY, Liberty, Missouri, from 9:45 to 10:30 a.m.;

C. April 21, 2006, Calvary Baptist Church, 804 US HWY 60 West, Republic, Missouri, from 9:15 to 10:00 a.m.; and

D. May 17, 2006, First Baptist Church, 124 N. Folger Street, Carrollton, Missouri, from 9:15 to 10:00 a.m. Complaint, ¶ 27 A-D.

Plaintiff or other church members were able to conduct peaceful, orderly protests—with varying geographic and temporal restrictions placed upon them—at the following locations:

A. April 22, 2006, Eugene High School, 14803 HWY 17, Eugene, Missouri, from 11:15 a.m. to noon;

B. May 10, 2006, Ft. Leonard Wood, Outside of Main Gate on Missouri Avenue, St. Robert, Missouri, from 10:15 to 11:00 a.m.;

C. May 16, 2006, Jamestown High School, 222 School Street, Jamestown, Missouri, from 4:00 to 5:00 p.m.;

D. June 27, 2006, Kutis Funeral Home, 5255 Lemay Ferry Road, St. Louis, Missouri, from 9:15 to 10:00 a.m.;

E. June 30, 2006, Sacred Heart Church, 350 East Fourth Street, Eureka, Missouri, from 9:15 to 10:00 a.m.;

F. July 8, 2006, Word of Life Church, 3902 N. Riverside Road, St. Joseph, Missouri, from 10:15 to 11:00 a.m.; and

G. July 9, 2006, Kirksville Middle School, 1515 S. Cottage Grove, Kirksville, Missouri, from 1:15 to 2:00 p.m. Complaint, ¶ 28 A-G.

The protests referred to in the preceding paragraph were held successfully only because local law enforcement officials were willing to share their interpretation of the vague provisions of § 578.501 prior to the protest and otherwise communicate their expectations about how the

law could be satisfied. Complaint, ¶ 29. Although the interpretations varied and were not imposed on other groups with opposing messages, plaintiff and other church members complied so as to avoid arrest. *Id.*

During each of the events referenced above, there was no posting of information or other indication of when the funeral ends. Complaint, ¶ 30. Thus, Plaintiff and other church members have no means of knowing what is “one hour following the cessation of any funeral,” making this an impossible provision with which to comply. *Id.*

Also during these events, there has been no visible posting of information or other indication of any funeral procession route. Complaint, ¶ 31. Thus, Plaintiff and other church members were not able to reasonably ascertain when and where they would be “in front of about” a funeral procession. *Id.*

ARGUMENT

Section 578.501 is a content-based, prior restraint on speech that fails both immediate scrutiny and strict scrutiny. It is overbroad and vague in terms of its geography and content, prohibiting all protest and picketing “in front of or about” any funeral related service or procession. It 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 State from enforcing an unconstitutional law will not harm the State 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. *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. Section 578.501 is a Content-Based Prior Restriction on Expression

Prior restraints on speech are viewed with disfavor. “Any system of prior restraints of expression ... bear[s] a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citing *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 70 (1963)). “The Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint.’” *New York Times Co.*, 403 U.S. at 714 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). The State cannot meet this heavy burden in this case.

Section 578.501 is a content-based restriction on speech. It was enacted for the purpose of preventing plaintiff and other members of her church from protesting and picketing near funerals. The law is named after a deceased soldier whose funeral was protested by church members. The original sponsor was clear that the law was directed at church members’ speech. The governor himself indicated that it was the content of protests—what he termed “a message

of hate”—that was the aim of the law. The Governor confirmed that the law is in response to the protest conducted by church members.

Section 578.501 is designed to prevent the expression of members of Westboro Baptist Church. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-5 (1993) (ordinance prohibiting animal sacrifice is not neutral where regulation is clearly aimed at specific religious group and intended to target and restrict the group’s activities); *Wallace*, 472 U.S. at 38 (Alabama statute permitting moment of silence for meditation or voluntary prayer is invalid when government’s actual purpose was to endorse or disapprove of religion).

In addition to being directed at a specific group, § 578.501 prohibits speech based upon its content. The language of the statute appears to allow demonstrations or displays that are *not* protests. For example, a group of soldiers could participate in an honor guard at or near a funeral or a group of citizens could hold signs supporting the war effort along the funeral procession without offending § 578.501 because these activities are not “protests.” It is the content of the message that determines whether it is a protest and only protests are restricted. Indeed, Defendant Hughes interprets and enforces the statute in exactly this way.

Because § 578.501 is a content-based restriction, strict scrutiny applies. The statute fails because, even if there were a compelling state interest, the statute is not narrowly tailored to achieve any compelling end. See §§ I.B.2.A. and B., *infra*. To the contrary, § 578.501 is an overbroad restriction on protected speech.

B. Even if Section 578.501 is Content-Neutral, It Fails Intermediate Scrutiny

1. Section 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. Section 578.501 goes further. It forbids protestors from congregating on or speaking from private property even with the owner's consent.

In *City of Ladue v. Gilleo*, 512 U.S. 43, 45 (1994), the 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.*

Section 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. The statute 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. Mo. Rev. Stat. § 578.501 (2006). It consequently forbids private property owners from doing anything that might appear to be a protest or displaying images that might be considered picketing. An individual standing in his private yard could violate § 578.501 if it was a sign of protest during a funeral or around the time of a funeral or funeral procession. Such activities would fall well within Defendant Goodwin’s interpretation of § 578.501.

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.

2. Section 578.501 Prohibits Valid Speech in a Public Forum

“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”

Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939). 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. *Id.*; *see also Dean v. Byerley*, 354 F.3d 540, 550 (6th Cir. 2004). Section 578.501 represents just such an abridgement of speech and is, therefore, unconstitutional.

a. Section 578.501 Creates an Unconstitutional Floating Buffer Zone

Section 578.501 prohibits people from protesting or picketing “in front of or about” any place a funeral is held. Mo. Rev. Stat. § 578.501.2 (2006). Funeral is defined broadly to include any ceremony, procession, or memorial service related to the burial or cremation of the dead. Mo. Rev. Stat. § 578.501.2 (2006). The provision creates a buffer zone of indeterminate size around funeral related activities.³ What is more, the buffer is a floating one, traveling wherever a funeral procession might venture.

The United States Supreme Court repeatedly has considered the constitutionality of buffer zones. *Frisby v. Schultz*, 487 U.S. 474 (1988), involved the constitutionality of a Brookfield, Wisconsin city ordinance prohibiting picketing in front of a specific residence. *Id.*, 487 U.S. at 476. The ordinance was passed in response to picketing at the residences of doctors who performed abortion procedures. *Id.*, 487 U.S. at 476. In *Frisby*, the Court held the content-neutral ordinance served a number of significant government interests, including preserving residential privacy. *Id.*, 487 U.S. at 484. In so doing, the Court stressed the government’s authority to protect the residential privacy of unwilling listeners. “[U]nwilling listeners may be protected when within their own homes.” *Id.*, 487 U.S. at 485. The Court reasoned that persons picketing the home of a specific doctor aimed their speech not at the general public, but at the resident. *Id.*, 487 U.S. at 485. “Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it.” *Id.*, 487 U.S. at 488. The Court further found the ordinance narrowly tailored to achieve this purpose because it banned picketing only in front

³ The size of the buffer zone is uncertain because there is no consensus on the meaning of “in front of or about any location at which a funeral is held.” It varies from town to town and within some towns from one law enforcement official to another. *See, e.g.*, Complaint ¶¶ xx. Presumably, the buffer zone is *at least* 300 feet since the contingent back-up statute, § 578.502, creates a protest-and-picket-free buffer of 300 feet and only goes into effect once § 578.501 is finally declared invalid. The opposite – a back-up provision impinging on a greater area— would make no sense.

of the target's residence. *Id.*, 487 U.S. at 486. Finally, the restriction left open ample opportunity for communication. *Id.*, 487 U.S. at 483.

Protestors 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 proselytizing their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone, short of harassment.”

Id., 487 U.S. at 484.

In contrast, the Supreme Court struck down a similar buffer zone on protests in *Madsen v. Women's Health Clinic*, 512 U.S. 753, 775 (1994), because the zone's geographic scope was much too broad. *Madsen* involved a state court injunction forbidding protestors from picketing or demonstrating within 300 feet of residences. *Id.*, 512 U.S. at 775. The 300-foot restriction would ban “[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.” *Id.* at 775 (quoting *Frisby*, 487 U.S. at 484). The court struck down the restriction as not narrowly tailored to the government's interest in protecting the home's tranquility and privacy. *Id.* at 775. “[I]t appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.” *Id.*

It is unclear how large a buffer zone § 578.501 creates. Given that the legislatures contingent back-up plan is a 300-foot buffer, it is not unreasonable to believe that § 578.501's buffer is more than 400 feet or “the other side of town,” as the Carroll County Prosecuting Attorney concluded. *See* Mo. Rev. Stat. § 578.501; Complaint ¶ X. Assuming, *arguendo*, that the Governor is correct that § 578.501's purpose is to prevent the “spread [of] a message of hate as families and friends grieve the loss of a loved one” and further assuming the unlikely premise this purpose is a significant government interest, the floating buffer of undefined size is not

narrowly tailored to achieving the statute’s purpose. Although the reach of the buffer zone is imprecise, it is reasonable to conclude that law enforcement officials—with their power to arrest adults and jail adults and confiscate their children—will determine it is large. Where funeral homes, churches, and funeral processions are located within residential areas, § 578.501 likely excludes protestors from “[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.” *Madsen*, 512 U.S. at 775 (quoting *Frisby*, 487 U.S. at 484). At the very least, the vague description of the protest ban’s geographic reach reasonably chills constitutionally protected protest and picketing.

In addition, the floating buffer zone is so large that it does not leave open ample opportunity for alternative channels of speech. Unlike in *Frisby*, the plaintiff and other members of her church aim their speech less at the mourners than at the general public. Their church’s message is that God is killing soldiers to punish America for tolerating homosexuality. The message is aimed at Americans. Protesting near funerals merely emphasizes their belief that the death of Americans is in punishment for America’s acceptance of homosexuality. The message’s impact will be greatly diluted if plaintiff and other church members cannot enter within a large buffer around any location where a funeral or burial is held or where a funeral process might travel.

b. Section 578.501 Restricts More Speech Than is Necessary to Prevent Disruption

In addition to its geographic overbreadth, § 578.501 is also overbroad in terms of the expressive activity it seeks to restrict. It prevents all picketing and protest in front of or about any location where a funeral is held or any funeral procession, one hour before, one hour after,

and for the entire duration of any ceremony, procession, or burial. Mo. Rev. Stat. § 578.501.2, 3 (2006).

[T]he overbreadth doctrine enables litigants “to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the 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).

In *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), the Court considered a New Orleans ordinance that made it unlawful for a person to “wantonly curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.” *Id.*, 415 U.S. at 132. Lewis challenged her conviction under the ordinance. *Id.*, 415 U.S. at 132. The Court rejected the Louisiana Supreme Court’s effort to limit the statutory ban to “fighting words,” finding that the ordinance “plainly has a broader sweep than the constitutional definition of ‘fighting words.’” *Id.*, 415 U.S. at 132. The ordinance’s broad scope was thus likely to chill speech: “[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” *Id.*, 415 U.S. at 134. “Since [the ordinance] is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid.” *Id.*, 415 U.S. at 134.

A statute is overbroad if it overreaches in terms of the behavior it regulates, but “the overbreadth of [the] statute must . . . be real, [and] substantial as well, judged in relation to the statute’s plain legitimate sweep.” *Broadrick*, 413 U.S. at 615.

Section 578.501 unquestionably prohibits conduct that is related to speech. Specifically, it prohibits protesting and picketing within a large geographic and temporal zone. The space and

time buffers created by § 578.501 are simply far more than are needed to prevent actual disruptions at funerals.

Even if the scope were more limited, the risk of disruption to a funeral, burial, or funeral procession from an otherwise lawful picket or protest⁴ is minimal at best. As written, the statute applies to people who happen to be picketing or protesting on the public sidewalk adjacent to funeral homes and churches whenever a funeral, wake, or memorial service is going on inside or when a funeral procession passes. For instance, the statute would apply to labor pickets at businesses “in front of or about any location” holding a funeral or home to a funeral procession.

Section 578.501 burdens a tremendous amount of expressive activity, such that it criminalizes the exercise of speech near funeral homes, churches, cemeteries, other common locations of funeral and memorial services, and on any street a funeral procession happens upon. Nor is this burden necessary: 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, § 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.

c. Section 578.501 is Unduly Vague

i. “Before and About” Language Leaves Open to Broad Interpretation

A law is unconstitutionally vague when it is subject to varied interpretations and enforcements by law enforcement or prosecutors. The facts before the Court reflect that this is precisely what is happening with regard to § 578.501. Some officials view the law as prohibiting

⁴ It was already unlawful in Missouri to disturb the peace, unlawfully assemble, or refuse to disperse from an unlawful assembly. *See* § III, *infra*.

any kind of protesting in any location at any time, or have simply refused to offer any limits, making it clear that plaintiff and other church members proceed at their peril.

**ii. “Following Cessation” of Funeral is Too Vague
Without a Posting Requirement**

Without any requirement in the statute that the ending time of the funeral be published or announced in some manner, there is no foreseeable way to comply with this portion of § 578.501.

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

Section 578.501 is 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 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; the existence of the broad and vague § 578.501 has already chilled protected speech. 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.

III. AN INJUNCTION WILL DO NO HARM TO THE STATE OF MISSOURI

Unlike plaintiff, the State of Missouri would suffer no injury if this court were to issue preliminary injunction.

Were preliminary injunction granted, the government would still have ample resources to prosecute activities that truly were disruptive or disorderly.⁵ 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

⁵ Plaintiff and other members of her church have protested many events in Missouri without running afoul of laws that prohibit disruptive and disorderly speech.

repeat offenses. Mo. Rev. Stat. § 574.010-574.060 (2006). With these laws in place, the state already has the ability to punish actual disruptions of funerals, memorial services, wakes, and burials that go beyond protected free expression and intrude on the safety or privacy of the family. Section 578.501 is simply an effort to extend the scope of these penalties to include peaceful protests, and this extension violates the First Amendment. The State 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. v. Michigan Liquor Control Com’n.*, 23 F.3d 1071, 1079 (6th Cir. 1994). 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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⁶ Motion to appear *pro hac vice* pending.