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Kara Beil

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Notes

FUNERAL PROTEST BANS: DO THEY KILL SPEECH OR RESURRECT RESPECT FOR THE DEAD?

I. INTRODUCTION

In funerals across the country, protestors often fill the solemn air with lyrics like the following:

*First to fight for the fags
Now you're coming home in bags
And the Army goes marching to hell
Proud of all of your sin
No more battles you will win
And the Army goes marching to hell*

Chorus:

*Then it's I.E.D.s
The Army's on its knees
Count off the body parts all gone (Two! Three!)
And where e'er they go
The dying soldiers show [(or) The crippled soldiers show]
That the Army keeps marching to hell!
Crimes you praise in your ranks
Getting blown up in your tanks
And the Army goes marching to hell
Hating God; coward's hearts
Ziploc bags for body parts
And the Army goes marching to hell*

(Chorus)

*Serve a rag, God's hate grows
See the tags on all your toes?
And the Army goes marching to hell
For a tyrant you fight
God destroys you with His might
And the Army goes marching to hell¹*

¹ Westboro Baptist Church, http://www.godhatesfags.com/writings/patriotic_songs.pdf (last visited Sept. 19, 2007) (identifying the lyrics of the song titled "The Army Goes

Members of the Westboro Baptist Church (“WBC”), led by Fred Phelps, use songs like this one, along with placards, and flyers when they protest at veterans’ funerals.² Although the WBC’s message, that God is punishing America for tolerating homosexuality, is not welcomed by most Americans, it is their practice of choosing funerals to deliver this message that has outraged the public at large and led government at all levels across the country to respond with funeral protest bans.³ Since 2005, more than half the states proposed or passed funeral protest bans, and even more are likely to draft similar legislation in the future.⁴ The federal government responded as well, on Memorial Day 2006, when President Bush signed the “Respect for Fallen Heroes Act,” setting time and distance restrictions on protestors and demonstrations at military funerals held in national cemeteries.⁵

Marching to Hell”). Similar songs have lyrics tailored for Marines, Navy members, and homosexuals. *Id.*

² Westboro Baptist Church, <http://www.godhatesfags.com> [hereinafter Westboro] (last visited Sept. 19, 2007) (providing information, photos, video, audio, sermons, fliers, songs, and picketing schedules for their organization and demonstrations).

³ Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL L. REV. 271, 272 (1999) (picketing in areas that typically are not used for protests can draw more attention); David L. Hudson Jr., *Overview Funeral Protests*, Oct. 2006, http://www.firstamendmentcenter.org/assembly/topic.aspx?topic=funeral_protests [hereinafter Hudson] (last visited Oct. 1, 2007). According to the National Conference of State Legislatures, thirty-four states have introduced similar bills and twenty-seven of those have passed them following in Kansas’ footsteps, including: Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. *Id.*; see also The Associated Press, *Congress Votes to Restrict Protests at National Cemeteries*, May 25, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16933> [hereinafter Associated Press 16933] (last visited Sept. 4, 2006) (noting that more than two dozen states are considering restricting protests at non-federal cemeteries); Ronald K.L. Collins, *A funeral for free speech?*, LEGAL TIMES, Apr. 17, 2006, <http://www.firstamendmentcenter.org/analysis.aspx?id=16775> [hereinafter Collins] (last visited Sept. 4, 2006) (stating that thirty-two states have passed or are considering similar laws).

⁴ Hudson, *supra* note 3. Federal Heroes Act calls states to act in Section Four: “It is the sense of Congress that each State should enact legislation to restrict demonstrations near any military funeral.” Respect for America’s Fallen Heroes Act, H.R. 5037, 109th Cong. (2006); 38 U.S.C. § 2413 (2006); S. 421, 2006 sess. (Kan. 2006), available at <http://www.kslegislature.org/bills/2006/421.pdf>; MO. REV. STAT. § 578.501 (West 2006) (Kansas changed its statute after its first funeral protest ban failed in a court challenge by WBC, and Missouri also passed two different versions of a ban).

⁵ 38 U.S.C. § 2413 (prohibiting demonstrations or picketing within 300 feet of a national cemetery for one hour prior to and one hour after a funeral, memorial service, or ceremony with penalties that include a fine or prison up to one year or both); Associated Press 16933, *supra* note 3 (explaining that the House Bill was first sponsored by Representative Mike Rogers after he attended a protested military funeral in March of 2006); 10 KWTX, *Bush*

Despite different political or religious views about the WBC, the Iraq War, or homosexuality, the majority of Americans, as well as our courts, have recognized that respect is owed to the dead, their burial places, and to the privacy of their families.⁶ Although most Americans sympathize with the families who have to endure WBC protests while trying to mourn the loss of their loved ones, funeral protest bans raise serious First Amendment concerns.⁷ As a result of the clash of constitutional rights between protestors and mourners occurring at funerals across the country, state legislatures are attempting to address and constitutionally reconcile these newly passed bans.⁸

Signs Funeral Protest Ban, May 29, 2006, <http://www.kwtx.com/home/headlines/2890486.html> [hereinafter 10 KWTX] (last visited Oct. 1, 2006).

⁶ Phelps, *supra* note 3, at 286 (describing how many states have laws that ban disruptions of religious services, such as funerals); Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487 (2005) (explaining how the law has recognized respect for the dead and sanctity of land associated with death and burial, providing examples of property law exceptions for places associated with death, and pointing to government creations of cemeteries and memorials throughout history from the Civil War and Pearl Harbor Memorial to the Arlington National Cemetery and now the World Trade Center sites). Clark, a professor at American University Washington, has stated, “[e]very humane instinct urges that the last resting place of the dead should be preserved from profanation, and the desecration of such place should make a strong appeal to the conscience of the court.” Clark, *supra*, at 497. Places of worship, like churches, have also been interpreted as sacred spaces in America. *Id.* at 497 n.16.

⁷ See Hudson, *supra* note 3. Robert D. Richards, director of the Pennsylvania Center for the First Amendment, stated that “[t]he rationale behind these laws is to stop an offensive type of expression . . . but that’s the very type of expression the First Amendment continues to protect.” *Id.* As First Amendment scholar Ronald K.L. Collins said, “[i]t is a simple truth: The highest respect we can pay to our fallen war dead is to respect the principles for which they made the supreme sacrifice. We honor them by honoring those principles of freedom – even when a callous few vainly attempt to demean the dignity rightfully due them.” *Id.*; see also The Associated Press, *Anti-Gay Church Says It Won’t Violate New Funeral-Protest Laws*, Mar. 9, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16614> [hereinafter Associated Press 16614] (last visited Oct. 1, 2007). WBC member Shirley Phelps-Roper stated, “[w]e’re waiting until all the legislatures’ [sessions] are over to see what tattered shreds they’ve left the Constitution in.” Associated Press 16614, *supra*. But see The Associated Press, *Officials Push for Illinois Law to Curb Protests Outside Funerals*, Jan. 1, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16301> [hereinafter Associated Press 16301] (last visited Sept. 4, 2007). As Army Staff Sgt. Jeremy Doyle’s stepmother, Sandy Doyle, said, “[t]hey have a right to protest. That’s what our son died for, but not at arm’s length . . . The families need to have some sense of security.” *Id.* Lt. Governor Pat Quinn stated, “[a] hate group cannot use its right to speak hateful words to cancel out and heckle and harass others who are seeking to exercise their First Amendment rights to practice their religion, to assemble, and to speak in memory of someone very near to them.” *Id.*

⁸ Hill v. Colorado, 530 U.S. 703, 716 (2000) (noting a privacy interest in avoiding unwanted communication that changes in varying contexts); see also *infra* Part II.C

Part II of this Note discusses the WBC as the leading impetus behind the legislation, examines recently drafted state funeral protest bans, provides an overview of the First Amendment issues, and considers similar protest bans in other contexts.⁹ Building on this background, Part III analyzes the constitutional strengths and weaknesses in the drafting of these recent bans.¹⁰ Part IV proposes a model statute, based on arguments from the analysis, as to how a funeral protest ban can be constitutionally drafted to benefit states that pass a ban in the future or those states that may need to alter their current legislation if it fails in any future court challenges.¹¹ Finally, Part V concludes that funeral protest bans are rooted in the general public's support for maintaining the privacy and solemnity of funerals and mourners, as well as respect for the dead, and that these bans, if carefully drafted, will likely survive despite their constitutional challenges and provide the best remedy to the clash of rights in this conflict.¹²

II. BACKGROUND

The main legal issue in this Note centers around whether recent funeral protest bans violate the First Amendment.¹³ Part II.A provides an overview of WBC and its tactics, as the WBC largely provided the impetus for the legislation at issue.¹⁴ Part II.B examines current and proposed state funeral protest bans.¹⁵ Part II.C provides the analytical framework and precedent for First Amendment analysis.¹⁶ Finally, since no court has ruled on the newly passed bans, Part II.D examines similar speech restrictions in the abortion context, as well as older church related cases, to examine how they fared in the court system and to provide

(providing a First Amendment overview of this issue) and Part III.A (analyzing the constitutionality of the statutes).

⁹ See *infra* Parts II.A-D (providing background information about WBC, funeral protest bans, and First Amendment analysis dealing with restrictions on speech).

¹⁰ See *infra* Part III (hypothesizing that most of the statutes are likely constitutional, based on the analysis section of this Note).

¹¹ See *infra* Part IV (providing a model statute that is content-neutral on its face, contains clearly defined terms, is not vague or overbroad, sets reasonable distance and time requirements, and is equally enforceable against all groups in violation).

¹² See *infra* Part V (concluding that carefully drafted bans are the best remedy to this issue).

¹³ U.S. CONST. amend I. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

¹⁴ See *infra* Part II.A (generally discussing WBC).

¹⁵ See *infra* Part II.B (discussing recently passed state funeral protest laws).

¹⁶ See *infra* Part II.C (providing the First Amendment framework for analysis).

guidance as to how to draft a constitutional speech restriction.¹⁷ However, since neither the WBC nor mourning families will willingly compromise their rights in this conflict, a constitutionally drafted ban is the best way to resolve this conflict that the WBC began when it protested its first funeral.¹⁸

A. *Fred Phelps and the Westboro Baptist Church*

Fred Phelps, the leader of the WBC, an independent Christian group based out of Topeka, Kansas, is the primary impetus to the recent legislation.¹⁹ The WBC has about one hundred members, most of whom are related to Phelps either by blood or through marriage.²⁰ Their main belief and often-repeated message is that God is punishing the United States for tolerating homosexuality.²¹ They use picketing and protest demonstrations to voice this message.²² Although military funeral protesting has gained them the most attention, WBC has also picketed at

¹⁷ See *infra* Part II.D (discussing similar restrictions in other contexts).

¹⁸ See *infra* Part V (concluding that a constitutionally drafted ban is the best remedy in this conflict of rights); see also Associated Press 16933. Senate Majority Leader Bill Frist stated, “[i]t’s a sad but necessary measure to protect what should be recognized by all reasonable people as a solemn, private and deeply sacred occasion.” Associated Press 16933; see also Adriana Colindres, *Bill Would Limit Protests at Military Funerals*, SPRINGFIELD STATE JOURNAL-REGISTRAR, Jan. 11, 2006, available at 2006 WL 666465 (quoting Lt. Gov. Pat Quinn of Illinois, who said, “[n]o grieving military family should be subjected to vile epithets and signs at the funeral service of their loved one who has made the ultimate sacrifice for our country.”).

¹⁹ Westboro, *supra* note 2. Phelps has had a long history of political involvement, trying to advocate his anti-homosexual message. *Id.* He gained national attention as the leader of this controversial group in 1998 when WBC picketed the funeral of Matthew Shepard, a homosexual hate crime victim. *Id.* His family, many of whom are lawyers like Phelps, makes up a large portion of WBC members and takes an active role in demonstrations. *Id.* Phelps was disbarred in 1979 in Kansas and has been arrested and charged with several crimes. *Id.*

²⁰ See generally Westboro, *supra* notes 2, 19.

²¹ Westboro, *supra* note 2. According to WBC’s beliefs, events and deaths caused by 9/11, the Iraq War, and Hurricane Katrina are punishments from God because the U.S. tolerates homosexuality. *Id.*

²² Westboro, *supra* note 2. Past pickets have included gay pride gatherings, political events, Starbucks openings, memorials for 9/11 and Sage Mine victims, and funerals of homosexuals and veterans. *Id.* WBC posts a weekly picket schedule. See www.godhatesfags.com/fliers/Picket_Information.html (last visited Sept. 19, 2007). WBC also provides several other websites where information about their beliefs and photos of past demonstrations can be seen. Westboro, *supra* note 2 (referencing www.godhatesamerica.com, www.hatemongers.com, and www.thesignsofthetimes.net); see also Judy Keen, *Funeral Protestors Say Laws Can’t Silence Them[.] Their Belief: Troops Dying Because USA Tolerates Gays*, USA TODAY, Sept. 14, 2006, available at 2006 WL 15933998 [hereinafter Keen] (discussing WBC picketing for over fifteen years at schools, churches, and funerals).

non-military funerals and even hospitals and hotels in order to spread its message and beliefs.²³

WBC's songs, messages on placards, and choices of places to protest homosexuality have brought it media attention, criticism, and, now, restrictive legislation.²⁴ Since their first military funeral protest in June of 2005, WBC members have protested 162 funerals.²⁵ Although their tactics are controversial and the source of inspiration for funeral protest laws, WBC members argue that their speech is protected and that the bans are content-based violations of the First Amendment.²⁶ Despite

²³ Bob Von Sternberg, *Funeral Protest Causes Furor Among Legislators*, STARTRIBUNE, Feb. 24, 2006, <http://www.startribune.com/587/v-print/story/269563.html> [hereinafter STARTRIBUNE] (last visited Sept. 4, 2006) (describing how WBC's focus has changed from protesting funerals of AIDS victims to funerals of soldiers); Collins, *supra* note 3 (noting how WBC is expanding its picketing policy to hospitals of wounded soldiers); The Associated Press, *Lawmakers in 2 States Target Funeral Protests*, Jan. 25, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16354> (last visited Oct. 1, 2006) [hereinafter Associated Press 16354] (stating that WBC would protest the funerals of West Virginia coal miners); Keen, *supra* note 22 (describing how WBC targeted a hotel that had a rainbow flag in Kansas). University of Kansas law professor Steve McAllister believes that this legislation may benefit WBC by giving their message attention and possible legal fees if they are successful in any constitutional challenges of these laws. *Id.*

²⁴ See generally Westboro, *supra* note 2. The WBC pledge of allegiance states: "We pledge allegiance only to God / And pray he destroys America / And all the people in the land / More dead soldiers/ More lost limbs / Taking vengeance / On the disobedient / Bringing His justice to all." *Id.*; see also The Associated Press, *Kentucky, West Virginia Join States Trying to Bar Protesters From Funerals*, Feb. 2, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16414> [hereinafter Associated Press 16414] (last visited Sept. 4, 2006) (quoting Brandy Sacco, widow of a soldier, as saying "[t]hey choose to abuse these rights by harassment of a grieving wife and family. Such a lack of common decency should not be protected by law but punishable by the law The hardest thing I ever had to do in my life was to listen to their nonsense."); Molly McDonough, *Picket Fencing: Laws Blunting Church's Protests Worry First Amendment Experts*, 92 A.B.A. J. 16 (2006) [hereinafter McDonough] (stating that their tactics include chanting songs and holding signs that say "God Hates Fags" and that military funeral protesting since 2005 has given their message more attention); Associated Press 16614, *supra* note 7 (citing Phelps-Roper, who, when referring to states passing legislation restricting funeral protests, said, "[w]e're thanking them kindly. They drew a huge amount of attention to our message, and that's all we're doing is delivering a message."). See, e.g., *Snyder v. Phelps*, No. RDB-06-1389, 2006 WL 3081106 (D. Md. Oct. 30, 2006). In this case, Albert Snyder sued Phelps and WBC in the U.S. District Court of Maryland for defamation, civil conspiracy, intentional infliction of emotional distress, and invasion of privacy due to the signs and protests at his son's funeral and statements made on WBC's website. *Id.*

²⁵ Keen, *supra* note 22 (using a figure that reflects WBC activity from June 2005 through September 2006).

²⁶ Hudson, *supra* note 3 (stating how WBC argues that the bills are content and viewpoint based and violate First Amendment principles); The Associated Press, *Missouri Funeral-Protest Bill Sent to Governor*, Feb. 23, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16532> [hereinafter Associated Press 16532] (last visited Oct. 1, 2006). Shirley

new laws and unwelcoming communities, WBC members believe they have been successful in getting their message across.²⁷ The Patriot Guard Riders, a group of motorcyclists who oppose WBC picketers at funerals, and local public figures have taken matters into their own hands and have tried to address WBC's funeral protesting in their own ways.²⁸ In addition, other remedies to curb funeral protesting include using the tort system or enhancing already existing disturbing the peace statutes.²⁹ However, since WBC members feel strongly about their message and First Amendment rights to continue picketing, funeral

Phelps-Roper said, "[t]hey're going to give away rights that they claim these soldiers have died for? They're going to spit in their graves - for what? Some words?" Associated Press 16532, *supra*.

²⁷ See generally Keen, *supra* note 22. WBC pickets as many as three funerals a week and, since August of 2006, has targeted fifteen funerals in thirteen states. *Id.*

²⁸ Associated Press 16614, *supra* note 8. The Patriot Guard Riders are a group of motorcyclists who attempt to overshadow the anti-gay protestors with flags, patriotic messages, and chants. *Id.* See Keen, *supra* note 22 (noting that there are 53,000 Patriot Guard Riders nation-wide); Ryan Lenz, *Motorcyclists Roll to Soldier Funerals to Drown Out Protestors*, STARTRIBUNE, Feb. 21, 2006, <http://www.startribune.com/484/v-print/story/260171.html> (last visited Oct. 7, 2007). As Kentucky Patriot Guard Rider, Dan Woodrick, stated, "[w]hen a total stranger gets on a motorcycle in the middle of winter and drives 300 miles to hold a flag, that makes a powerful statement." Lenz, *supra*; see also Jacques Steinberg, *Air Time Instead of Funeral Protest*, N.Y. TIMES, Oct. 6, 2006, at A14. Talk-radio show host Mike Gallagher approached the matter somewhat differently – by giving WBC almost an hour of air time on October 5, 2006, for their written promise not to picket the funerals of five young girls killed that week in their Pennsylvania school by a gunman. Steinberg, *supra*. See also McDonough, *supra* note 24 (stating that legislation alone is unlikely to stop WBC protestors who are very cautious and notify law enforcement and the media in advance, follow directions, and agree on a time and location for their protest demonstrations). *But see* Associated Press 16614 (explaining that WBC cancelled funeral demonstrations in Indiana, Missouri, Oklahoma, and Wisconsin in March of 2006, all of which had new funeral protest legislation).

²⁹ See *Snyder*, 2006 WL 3081106 (discussing the Snyder lawsuit's claims of emotional distress due to WBC protesting). However, suits are time-consuming and costly. See *Funeral Protest: Court Asked For Repayment*, YORK DAILY RECORD, Aug. 30, 2006, http://www.ydr.com/portlet/article/html/fragments/print_article.jsp?article=425993 (last visited Sept. 4, 2006) (stating that it took Snyder more than twenty times to serve WBC with fees of almost \$6,000 and that he filed a motion to recover those fees in a federal defamation suit against WBC for protesting his son's March funeral); McDonough, *supra* note 24, at 16 (noting how, according to experts, if the bans enhance disturbing the peace statutes and are narrowly drafted they are more likely to be upheld). Although these options may be less intrusive on speech, funeral protest bans will be more effective and put the burden of bringing a lawsuit on the protestors like the WBC. *But see* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 90 (2003) [hereinafter Chen] ("Continuing First Amendment doctrine on its current path will inevitably lead to more superficially neutral attempts to target speech regulations.").

protest bans, if constitutionally drafted, are the most effective way to resolve this conflict of rights.³⁰

B. *Current State Funeral Protest Bans*

The funeral protest bans recently passed in many states, within a relatively short time, are the result of legislative concern about protecting the privacy of mourning families and preventing emotional distress at funerals caused by any protestors.³¹ Support for these bills crosses party lines, which allows them quick passage.³² Most of the protest bans include distance and time requirements surrounding funeral demonstrations, as well as serious punishments against violators that include hefty fines and even jail time.³³ To provide a sampling of legislation and different tactics states have used, the following key states are first generally discussed and then later compared: Kansas, Indiana,

³⁰ McDonough, *supra* note 24. Shirley Phelps-Roper has stated, “[i]f we were standing out there with signs that say, ‘God Bless America,’ we would not be having this conversation.” *Id.*; 10 KWTX, *supra* note 5. WBC members held signs that said “Thank God for Dead Soldiers” and “Bush killed them” three hundred feet away from Arlington National Cemetery on Memorial Day, 2006, when Bush signed the “Respect for America’s Fallen Heroes Act.” 10 KWTX, *supra* note 5.

³¹ See The Associated Press, *Indiana Enacts Funeral-Protest Law*, Mar. 3, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16584> (last visited Oct. 1, 2007) (quoting Indiana Senator Brent Steele, who said “I have heard from thousands of Hoosiers on this issue and they almost unanimously feel this is the right thing to do for the families of our fallen heroes and the funerals of all Hoosiers.”); The Associated Press, *South Dakota Governor Signs Bill Restricting Funeral Protests*, Feb. 14, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16475> [hereinafter Associated Press 16475] (last visited Oct. 1, 2006) (citing South Dakota’s House Speaker Matthew Michels’ reference to mourning family members: “We are free because these people have fought and died for us. . . . Everybody’s entitled to protest, but you are not entitled to cause grief upon grief.”). See generally Hudson, *supra* note 3.

³² 38 U.S.C. § 2413. The Act was introduced in the House on March 29, 2006; considered and passed on May 9, 2006; considered in the Senate and presented to the President on May 25, 2006; and signed on Memorial Day, 2006, with a total of 207 co-sponsors (99 Democrats and 108 Republicans). *Id.* See generally Part II.B (describing similar cross-party sponsorship and expediting of bills as seen in the states); The Associated Press, *Iowa Governor Signs Bill Restricting Funeral Protests*, Apr. 18, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16779> (last visited Sept. 4, 2006) (noting that the Iowa Governor enacted the law one day before a planned funeral picket by the Westboro Baptist Church); Associated Press 16532, *supra* note 26 (explaining that the Missouri bill took effect as soon as the Governor signed it); Associated Press 16301, *supra* note 7 (stating that no one testified against the funeral protest legislation in the Indiana committee hearing, and it was endorsed unanimously).

³³ See *infra* notes 35-53 and accompanying text.

Illinois, Wisconsin, Nebraska, Oklahoma, Maryland, Ohio, Florida, South Dakota, Missouri, and Kentucky.³⁴

Kansas, WBC's home state, is one example of a state that already had a law banning funeral demonstrations, but it was ultimately found unconstitutionally vague.³⁵ The newly enacted bill, passed almost a decade later, bans picketing and protest marches within 300 feet of a funeral service, except for public places within the buffer zone, for one hour before and two hours after the funeral service, and violations are a misdemeanor.³⁶ Similar distance and time restrictions were enacted in other states.³⁷

³⁴ See *infra* notes 35-53 and accompanying text.

³⁵ Associated Press 16354, *supra* note 23; The Associated Press, *Legislators Propose Bills Barring Protests at Funerals*, Nov. 14, 2005, <http://www.firstamendmentcenter.org/news.aspx?id=16064> [hereinafter Associated Press 16064] (last visited Sept. 4, 2006). In Kansas, a 1995 law prohibiting similar protesting outside of funerals was found to be too vague. Associated Press 16064, *supra*. However, by later including time restrictions, a similar law was enacted. *Id.*; see also Hudson, *supra* note 3 (referring to the same law and stating that Phelps challenged a Kansas Picketing Act in the 1990s that later was ruled by a federal judge as unconstitutionally vague because of its terms "before" and "after" a funeral instead of specific time restrictions).

³⁶ Associated Press 16532, *supra* note 32; Kan. S. 421. The bill, as of October 7, 2006, read:

(1) "Funeral" means any ceremony, procession or memorial service in connection with the death of a person.

(2) "Picketing" means protest activities engaged in by a person or persons stationed before or about a cemetery, mortuary, church or other location where a funeral is held or conducted within one hour prior to, during and two hours following the commencement of a funeral.

(e) It is unlawful for any person to:

(1) engage in picketing or a directed protest march at any public location within 300 yards of any entrance to any cemetery, church, mortuary or other location where a funeral is held or conducted within one hour prior to, during and two hours following the commencement of a funeral; or

(2) obstruct or prevent the intended uses of a public street, public sidewalk or other public space while engaged in picketing or a directed protest, as described in subsection (1).

Kan. S. 421 (emphasis in original). Punishment for violators may include a Class B misdemeanor and assessment of damages and attorney fees. *Id.*

³⁷ See *supra* note 3 and accompanying text; see also, e.g., H.R. 1382, 2006 Leg. (Colo. 2006), available at http://www.leg.state.co.us/clics2006a/csl.nsf/fsbillcont3/CDF6B09F14AF6C658725713300592865?open&file=1382_enr.pdf (stating that Colorado sets 100 foot restriction); S. 1833, 169th Leg. (N.C. 2006), available at <http://www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S1833v4.html> (explaining how North Carolina sets a 300 foot restriction one hour before, during, and one hour after); H.R. A2870, 212th Gen. Assem., Reg. Sess. (N.J. 2006), available at http://www.njleg.state.nj.us/2006/Bills/PL06/93_PDF (establishing that New Jersey has a 500 foot restriction immediately prior to, during, and after a funeral service); H.R. 97, 79th Leg. (Tex. 2006), available at

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For example, on March 2, 2006, the Indiana legislature enhanced its disorderly conduct statute to make picketing within 500 feet of a cemetery or burial a Class D felony.³⁸ Similarly, Illinois prohibits protests, even visual images conveying fighting words, within 300 feet of any facility used for funeral services.³⁹ In Wisconsin, as of February 20,

<http://www.capitol.state.tx.us/tlodocs/793/billtext/pdf/HB00097F.pdf> (noting how, similarly, Texas has a 500 foot restriction from one hour before to one hour after a service).

³⁸ Hudson, *supra* note 3; Associated Press 16584 (stating that it is disorderly conduct to protest within 500 feet of a funeral, procession, burial, or viewing, punishable as a felony offense with six months to three years in prison and a \$10,000 fine); *see also* IND. CODE § 35-45-1-3 (2006), available at <http://www.in.gov/legislative/bills/2006/SE/SE0005.1.html>. The statute states:

- (a) A person who recklessly, knowingly, or intentionally:
 - (1) engages in fighting or in tumultuous conduct;
 - (2) makes unreasonable noise and continues to do so after being asked to stop; or
 - (3) disrupts a lawful assembly of persons; commits disorderly conduct, a Class B misdemeanor
-
- (c) The offense described in subsection (a) is a Class D felony if it:
 - (1) is committed within five hundred (500) feet of:
 - (A) the location where a burial is being performed;
 - (B) a funeral procession, if the person described in subsection (a) knows that the funeral procession is taking place; or
 - (C) a building in which:
 - (i) a funeral or memorial service; or
 - (ii) the viewing of a deceased person; is being conducted; and
 - (2) adversely affects the funeral, burial, viewing, funeral procession, or memorial service.

IND. CODE § 35-45-1-3 (2006).

³⁹ Hudson, *supra* note 3; Associated Press 16301, *supra* note 7 (describing the Illinois Governor's signature of the statute "Let Them Rest in Peace Act," which bars demonstrations within 200 feet of funerals shortly before, during, and after services); *see also* H.R. 0772, 94th Gen. Assem., Reg. Sess. (Ill. 2006), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=094-0772>. The Act states:

- (b) For purposes of this Section:
 - (1) "Funeral" means the ceremonies, rituals, processions, and memorial services held at a funeral site in connection with the burial, cremation, or memorial of a deceased person.
 - (2) "Funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place at which a funeral is conducted or is scheduled to be conducted within the next 30 minutes or has been conducted within the last 30 minutes.
- (c) A person commits the offense of disorderly conduct at a funeral or memorial service when he or she:
 - (1) engages, with knowledge of the existence of a funeral site, in any loud singing, playing of music, chanting, whistling, yelling,

2006, individuals are prohibited from loud protests or displaying visual images that convey fighting words within 500 feet of a funeral from one hour before to one hour after a funeral.⁴⁰ Nebraska introduced an amendment expanding its state's anti-picketing law to include any picketing within 100 feet of any funeral being conducted.⁴¹ Similarly, an Oklahoma act signed into law on March 6, 2006, prohibits protests within one hour prior and two hours after funerals.⁴² In Maryland,

or noisemaking with, or without, noise amplification including, but not limited to, bullhorns, auto horns, and microphones within 200 feet of any ingress or egress of that funeral site, where the volume of such singing, music, chanting, whistling, yelling, or noisemaking is likely to be audible at and disturbing to the funeral site;

(2) displays with knowledge of the existence of a funeral site and within 200 feet of any ingress or egress of that funeral site, any visual images that convey fighting words or actual or veiled threats against any other person; or

(3) with knowledge of the existence of a funeral site, knowingly obstructs, hinders, impedes, or blocks another person's entry to or exit from that funeral site or a facility containing that funeral site, except that the owner or occupant of property may take lawful actions to exclude others from that property.

Ill. Pub. Act 094-0772 (Ill. 2006). A violation of the statute results in a Class C misdemeanor. *Id.*

⁴⁰ Hudson, *supra* note 3; S. 525, 2005 Leg. (Wis. 2005), available at <http://www.legis.state.wi.us/2005/data/acts/05Act114.pdf>. The Wisconsin bill states:

947.011 Disrupting a funeral or memorial service.

(1) In this section:

(a) "Facility" includes a cemetery in which a funeral or memorial service takes place.

(b) "Funeral or memorial service" includes a wake or a burial, as defined in s. 157.061 (1), but does not include a service that is not intended to honor or commemorate one or more specific decedents.

(2) . . .

(a) No person may do any of the following during a funeral or memorial service, during the 60 minutes immediately preceding the scheduled starting time of a funeral or memorial service if a starting time has been scheduled, or during the 60 minutes immediately following a funeral or memorial service:

1. Engage in conduct that is prohibited . . . within 500 feet of any entrance to a facility being used for the service with the intent to disrupt the service.

2. Intentionally block access to a facility being used for the service.

S. 525, 2005 Leg. (Wis. 2005).

⁴¹ Hudson, *supra* note 3.

⁴² *Id.*; see also S. 1020, 50th Leg., 2d Sess. (Okla. 2006), available at http://webserver1.lsb.state.ok.us/2005-06SB/SB1020_int.rtf. Oklahoma's law states, in part:

B. The purposes of this section are to:

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House Bill 850 would ban funeral protests within an hour prior to the funeral, making it a crime to obstruct mourners from funerals or burials, and making violations a misdemeanor.⁴³ Finally, Ohio bans picketing or any other protest activity within 300 feet of a funeral for one hour before and after a funeral.⁴⁴ The aforementioned states exemplify the current trend in legislation.

Some state legislation, however, has caused more controversy.⁴⁵ For example, Florida uses more general language and punishes anyone who

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1. Protect the privacy of grieving families within one hour prior to, during and two (2) hours following the commencement of funerals; and
 2. Preserve the peaceful character of cemeteries, mortuaries and churches within one hour prior to, during and two (2) hours following the commencement of funerals.

C. As used in this section:

1. "Funeral" means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead; and
2. "Picketing" means protest activities engaged in by a person or persons within five hundred (500) feet of a cemetery, mortuary or church within one hour prior to, during and two (2) hours following the commencement of a funeral.

S. 1020, 50th Leg., 2d Sess. (Okla. 2006). Violations may carry a fine up to \$500 dollars, jail up to thirty days, or both. *Id.*

⁴³ Associated Press 16532, *supra* note 26; *see also* H. R. 850, 2006 Leg., Reg. Sess. (Md. 2006), available at <http://mlis.state.md.us/2006rs/bills/hb/hb0850f.pdf>. The Maryland law provides:

(A) A person may not, for 60 minutes immediately preceding a funeral, burial, memorial service, or funeral procession that has a scheduled starting time, or during the 60 minutes immediately following a funeral or memorial service:

- (1) Knowingly obstruct, hinder, impede, or block another person's entry to or exit from the funeral, burial, memorial service, or funeral procession; or
- (2) Display a visual image that conveys fighting words against another person within 500 feet of:
 - (i) An entrance to a funeral, burial or memorial service; or
 - (ii) A funeral procession.

(B) A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 90 days or a fine not exceeding \$1,000 or both.

H. R. 850, 2006 Leg., Reg. Sess. (Md. 2006).

⁴⁴ H.R. 484, 126th Gen. Assem., Reg. Sess. (Ohio 2005), available at http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_484_RS. The bill specifies:

[N]o person shall picket or engage in other protest activities, nor shall any association or corporation cause ~~to be picketed~~ picketing or other protest activities to occur, within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before ~~and during~~ or one hour after the

“willfully interrupts or disturbs” a military funeral with a misdemeanor charge.⁴⁶ On February 13, 2006, South Dakota signed a bill prohibiting picketing likely to cause emotional distress to a grieving family within 1,000 feet, one hour before to one hour after a funeral service.⁴⁷ South Dakota’s distance requirement is one of the most extreme.⁴⁸ Similarly, in

conducting of an actual funeral or burial service at ~~such that~~ place. No person shall picket or engage in other protest activities, nor shall any association or corporation cause ~~to be picketed~~ picketing or other protest activities to occur, within three hundred feet of any funeral procession. As used in this section, “other protest activities” means any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service or a funeral procession.

Id. (underlining and striking as it appears in the bill to reflect the final version passed).

⁴⁵ See *infra* notes 46-50 and accompanying text.

⁴⁶ H.R. 7127, 2006 Leg., Reg. Sess. (Fla. 2006), available at [http://www.myflorida.house.gov/Sections/Documents/loaddoc.aspx?FileName=PCB%20MVA%2006-01.pdf&DocumentType=Proposed%20Committee%20Bills%20\(PCBs\)&Session=2006&CommitteeId=2257](http://www.myflorida.house.gov/Sections/Documents/loaddoc.aspx?FileName=PCB%20MVA%2006-01.pdf&DocumentType=Proposed%20Committee%20Bills%20(PCBs)&Session=2006&CommitteeId=2257).

The Florida bill states:

(2) Whoever willfully interrupts or disturbs any assembly of people met for the purpose of acknowledging the death of an individual with a military funeral honors detail pursuant to 10 U.S.C. s. 1491 commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Id.

⁴⁷ S. 156, 81st Leg., Reg. Sess. (S.D. 2006), available at <http://legis.state.sd.us/sessions/2006/bills/SB156HST.pdf>. It provides:

Section 1. No person may engage in any act of picketing at any funeral service during the period from one hour before the scheduled commencement of the funeral services until one hour after the actual completion of the funeral services. Any violation of this section is a Class 2 misdemeanor. Each day on which a person violates this section constitutes a separate offense.

Section 2. Notwithstanding the criminal penalties provided in section 1 of this Act, the circuit court may enjoin conduct proscribed by section 1 of this Act and may in any such proceeding award damages, including attorney fees, or other appropriate relief against any person who is repeatedly found guilty under this Act.

Section 3. For the purpose of this Act, the term, picketing, means protest activities engaged in by any person stationed within one thousand feet of a funeral service within one hour prior to, during, and one hour following the commencement of any funeral service.

Section 4. For the purposes of this Act, funeral services are any ceremony, procession, or memorial held in connection with the burial or cremation of a deceased person.

Id.; see also Associated Press 16475, *supra* note 31. The South Dakota legislature passed the law in only a couple of hours and included language that made it effective upon the Governor’s signature in order to cover upcoming funerals that week. Associated Press 16475, *supra* note 31.

⁴⁸ S.D. S. 156 (setting South Dakota’s distance restriction at 1,000 feet).

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Missouri, the governor signed the state's first protest ban in February 2006, but later signed a second law, as a preventative measure, to get around any potential future lawsuits since the first ban did not specify a certain distance, making it susceptible to a possible vagueness challenge.⁴⁹ Finally, Kentucky signed a law on March 27, 2006, that bans protestors within 300 feet of funerals, burial services, and memorial services.⁵⁰

To summarize the preceding sampling of legislation, distance requirements ranged from 100 feet in Nebraska, to 300 feet in Kansas,

⁴⁹ Associated Press 16532, *supra* note 32. The newer ban expands the definition of a funeral to cover them no matter where they are held and sets a distance limit of 300 feet from funeral proceedings. *Id.* Otherwise, it is similar to the previous ban and has the same time limit of sixty minutes before and after a funeral. *Id.*; see MO. REV. STAT. § 578.501 (West 2006).

1. This section shall be known as 'Spc. Edward Lee Myers' Law.'
2. 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
3. For the purposes of this section, "funeral" means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.

MO. REV. STAT. § 578.501; see also *infra* note 68 and accompanying text (likening the Missouri statute to those of Wisconsin, Ohio, and South Dakota).

⁵⁰ H.R. 333, 2006 Leg., Reg. Sess. (Ky. 2006), available at <http://www.lrc.ky.gov/record/06rs/hb333.htm>. The statute, as of October 10, 2006, provided:

- (1) A person is guilty of interference with a funeral when he or she at any time on any day:
 - (a) Blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted;
 - (b) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property that is within three hundred (300) feet of an event specified in paragraph (a) of this subsection; or
 - (c) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:
 1. Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment, or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or
 2. Distributes literature or any other item.

Id. Violation is a Class B misdemeanor. *Id.*; see Hudson, *supra* note 3; Associated Press 16414, *supra* note 24 (remarking on how Kentucky senators expedited the bill).

Illinois, Ohio, Missouri, and Kentucky, to 500 feet in Indiana and Wisconsin; and even to 1,000 feet in South Dakota.⁵¹ There were differences in time restrictions as well.⁵² For example, Kansas and Oklahoma restricted protesting one hour before and two hours after a funeral service, while Wisconsin, Ohio, South Dakota, and Missouri only restrict for one hour before and after.⁵³ Unlike the common time restrictions in most states, Kentucky's is an example of a ban with a vague time restriction, stating "at any time on any day."⁵⁴ Penalties range from violations constituting a misdemeanor, in Kansas, Maryland, and Kentucky, to a Class D felony in Indiana.⁵⁵

Beyond differences among the states, some states even differ from the Federal Heroes Act.⁵⁶ Although the Federal Heroes Act is limited to military funerals because of jurisdiction issues, it can still serve as sample legislation for states that ban protests at all funerals.⁵⁷ The Heroes Act distance requirement bans protestors 300 feet from a national cemetery or 150 feet from a route of ingress or egress to the cemetery.⁵⁸ Its time restriction is one hour before to one hour after a funeral, memorial service, or ceremony.⁵⁹ The penalty can be up to one year in prison, a fine, or both.⁶⁰ Having compared and contrasted the bans, it is obvious that the states and their legislation are not uniform and that many even differ from the federal bill.⁶¹

The lack of uniformity among state bans may be attributed to legislatures acting too quickly and it foreshadows the need for a model statute.⁶² One commentator stated, "[b]ut to see a news article one day and have a law enacted shortly thereafter makes it look as though little

⁵¹ See *supra* notes 34-44 and accompanying text.

⁵² See *supra* notes 34-50 and accompanying text.

⁵³ See *supra* notes 34, 36, 40, 42, 44, 47, and 49 and accompanying text.

⁵⁴ See *supra* note 50. The author believes this is a drafting weakness.

⁵⁵ Compare *supra* notes 33, 36, 42, 43, and 46-48 and accompanying text, with *supra* note 38 and accompanying text (noting, for instance, that Oklahoma has a \$500 fine or 30 days in jail and Maryland sets a \$1,000 fine and 90 days in jail).

⁵⁶ See *supra* note 6 and accompanying text.

⁵⁷ Associated Press 16933, *supra* note 3.

⁵⁸ 38 U.S.C. § 2413.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *supra* notes 31-60 and accompanying text.

⁶² Dean Mundy, *Funeral Protest Law is Misguided*, MILWAUKEE J. SENTINEL, Mar. 19, 2005, <http://www.jsonline.com/story/index.aspx?id=408970> (last visited Sept. 4, 2006) (arguing that legislators should wait before quickly enacting a law to see how big of a problem they are actually addressing).

thought or study are being done.”⁶³ The constitutional issues that these laws raise may be taking a back seat to public policy concerns, but such issues will eventually rise to the surface through court challenges.⁶⁴ Both WBC and the American Civil Liberties Union (“ACLU”) plan to challenge these laws.⁶⁵

In fact, Kentucky and Missouri are the first states to face constitutional challenges to their statutes in court.⁶⁶ As previously stated, both states have distance requirements of 300 feet.⁶⁷ Missouri restricts protesting for one hour before and after a funeral.⁶⁸ However, Kentucky’s restriction is vaguer, stipulating “at any time on any day.”⁶⁹ In addition, Kentucky has a very broad and encompassing definition of

⁶³ *Id.*

⁶⁴ Collins, *supra* note 3 (arguing that whether funeral protest bans violate the First Amendment is being overlooked in the recent trend of federal and state laws); STAR TRIBUNE, *supra* note 23. Chuck Samuelson, executive director of the Minnesota American Civil Liberties Union stated, “[w]e generally don’t like these things and part of me says leave [him] alone and he’ll go away. But this is not a constitutional issue, it’s a public policy issue.” STAR TRIBUNE, *supra* note 23; *see also* Worldwide Religious News, *Judge Temporarily Suspends Funeral Protest Ban*, Sept. 27, 2006, <http://www.wwrn.org/article.php?idd=22859&con=4&sec=36> (last visited Oct. 1, 2007) (describing how U.S. District Judge Karen Caldwell temporarily suspended Kentucky’s funeral protest ban, reasoning: “[t]he zone is large enough that it would restrict communications intended for the general public on a matter completely unrelated to the funeral as well as messages targeted at funeral participants.”).

⁶⁵ McDonough, *supra* note 24.

⁶⁶ The Associated Press, *ACLU Lawsuit Challenges Kentucky Funeral-Protest Law*, May 2, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16841> (last visited Oct. 1, 2007). On May 1, 2006, the ACLU filed a federal lawsuit in the U.S. District Court in Frankfort, Kentucky, challenging the new state law that prohibits protestors within 300 feet of funerals, memorial services, wakes, and burials, as well as preventing the use of bullhorns; punishable as disorderly conduct and up to a year in jail. *Id.*; *see* Phelps-Roper v. Nixon, No. 06-4156-CV-C-FJG, 2007 WL 273437, at *3 (W.D. Mo. Jan. 26, 2007) (involving a complaint against Missouri statute sections 578.501-502, of which section 578.502 is a backup that is to become effective if subsection 501 would be held unconstitutional, even though its only difference from the former version is that it changes “in front of or about” language to “three hundred feet”). Phelps-Roper is claiming that the statutes infringe on individual speech, religious liberty, and assembly rights, arguing that they are unconstitutional, and is seeking preliminary and permanent injunctions prohibiting enforcement of the statutes, citing a “lack of clarity about what speech is criminal” and complaining that the WBC is “chilled in their efforts to engage in protected speech activities inspired by their religious beliefs.” Complaint at 2, Phelps-Roper v. Nixon, No. 06-4156-CV-C-NKL, 2007 WL 2515872 (W.D. Mo. July 21, 2006).

⁶⁷ Ky. H.R. 333, 2006 Leg., Reg. Sess. (Ky. 2006); MO. REV. STAT. § 578.501; *see also supra* note 51 and accompanying text (noting that other states that have 300 foot distance requirements include Kansas, Illinois, and Ohio).

⁶⁸ MO. REV. STAT. § 578.501; *see also supra* note 52 (noting other states that have time restrictions of one hour before and after, including Wisconsin, Ohio, and South Dakota).

⁶⁹ Ky. H.R. 333, 2006 Leg., Reg. Sess. (Ky. 2006).

picketing and protest activity.⁷⁰ A court may find both of these vague sections within the Kentucky statute problematic.⁷¹ Although Missouri's statute shares common threads with many other states, its legislature did anticipate problems, leading to the passage of its most recent statute with the 300 foot distance requirement as "backup" legislation in case the previous language of "in front of or about" would be held unconstitutionally vague.⁷² These constitutional challenges and legislative concerns require an overview of First Amendment doctrine.

C. *First Amendment Overview*

Funeral protest bans implicate the First Amendment by restricting speech.⁷³ Although WBC and its tactics do not garner much public support, they may find all the support they need in the First Amendment.⁷⁴ First Amendment analysis is always wary of the "slippery slope" when restricting speech.⁷⁵ As Tony Rothert, an ACLU member stated, "[t]oday it's a group we don't like. Tomorrow it could be us that [sic] are silenced."⁷⁶

The First Amendment protects offensive and repugnant speech.⁷⁷ However, the First Amendment does not provide an absolute right to speech.⁷⁸ First Amendment challenges can address whether a speech

⁷⁰ *Id.*; see also *infra* note 168 (providing similar Texas code definitions).

⁷¹ *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999) (holding a vague and overbroad anti-picketing ordinance unconstitutional). See generally *infra* Part III.A.3 (providing analysis of overbreadth and vagueness doctrine).

⁷² See *supra* note 66 (discussing Missouri's backup legislation); *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273437, at *1, *4 (W.D. Mo. Jan. 26, 2007) (noting plaintiff's allegations that Missouri statute sections 578.501 and 578.502 infringe on speech, religious liberty, and assembly rights are targeted at WBC's message, are vague, are not narrowly tailored, and convey information about time and routes that are not posted in a manner that allows for compliance).

⁷³ See generally *supra* notes 8 and 13 and accompanying text (providing constitutional arguments as well as the text of the First Amendment).

⁷⁴ *STARTRIBUNE*, *supra* note 23 (reporting on how the general public and hosts of a Minnesota radio show publicly condemned a recent WBC protest for hours on end); *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (stating: "The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection.").

⁷⁵ See generally Keen, *supra* note 22.

⁷⁶ *Id.*

⁷⁷ *Cohen v. California*, 403 U.S. 15 (1971) (holding that wearing a jacket that said "Fuck the Draft" in a courthouse to protest the Vietnam War was constitutional because offensive words are protected by the First Amendment).

⁷⁸ *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961) (declaring that the freedom of speech and association are not "absolutes"); *Collins*, *supra* note 3 (holding that

restrictive law targets a certain group or content, argue that a restriction is not a reasonable time, place, and manner restriction, facially challenge vague or overbroad terms, or try to characterize the forum.⁷⁹

Determining whether a speech restrictive law is content-based or content-neutral on its face sets the standard for analyzing the law.⁸⁰ If a law is content-based, meaning the subject matter, message, or particular idea is restricted, it must satisfy strict scrutiny to survive a First Amendment challenge.⁸¹ Strict scrutiny requires a compelling government interest and narrowly tailored means.⁸² Strict scrutiny is a heavy burden to satisfy and typically requires that the regulation is necessary to achieve a compelling interest that cannot be achieved through any less intrusive means.⁸³

If a law is content-neutral, however, the government only has to meet intermediate scrutiny, which is a lesser burden and merely requires an important government interest and means that are no broader than necessary.⁸⁴ Under intermediate scrutiny, the regulations must be narrowly tailored to serve a significant interest.⁸⁵ Further, if a law is

government can regulate noise, obstruction, disorderly conduct, trespassing, crowd size, threats, and fighting words, even in the funeral context).

⁷⁹ See *infra* notes 80-93 and accompanying text; see also Part III.A (analyzing the constitutional strengths and weaknesses in current statutory and regulatory drafting).

⁸⁰ *Boos v. Barry*, 485 U.S. 312 (1988) (holding that if a restriction on speech is content-based, it must meet strict scrutiny with a compelling government interest and narrowly tailored means); *Hudson*, *supra* note 3 (quoting Robert D. Richards's statement: "Given that the expression at issue, 'funeral protest,' could easily be interpreted as a content-based restriction, the government will likely have a tough time defending the restriction.").

⁸¹ *Turner Broad. v. FCC*, 512 U.S. 622, 642 (1994); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1054 (2d ed. 2005).

⁸² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Barry*, 485 U.S. at 312.

⁸³ *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 274 (1986) (it would be unlikely that the funeral protest bans, if content-based, would survive strict scrutiny). *But see Freeman v. Burson*, 504 U.S. 191, 198 (1992) (upholding a content-based distance restriction around polling places because protecting the right to vote satisfied strict scrutiny).

⁸⁴ *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."); CHEMERINSKY, *supra* note 81, at 1054. Intermediate scrutiny requires an important government interest. CHEMERINSKY, *supra* note 81, at 1054. In order to be content-neutral, a speech regulation must be viewpoint neutral and subject matter neutral. *Id.* at 1058.

⁸⁵ *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535-36 (1980) (stating that the level of scrutiny for time, place, and manner restrictions requires that alternative channels of communication are also left open).

content-neutral, government can limit speech with reasonable time, place, and manner restrictions, which would allow the government to regulate speech even in a public forum, such as the sidewalks and streets around a funeral or cemetery.⁸⁶

In addition, laws can be facially challenged because of their vagueness or substantial over-breadth.⁸⁷ A law is unconstitutionally vague if it is ambiguous and a reasonable person cannot tell what speech is allowed or prohibited.⁸⁸ Similarly, a law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows and is unconstitutional when applied to others.⁸⁹ If facial challenges such as these are successful, the entire law is invalidated.⁹⁰

Finally, since the type of forum where the speech takes place affects the level of scrutiny, it is necessary to examine the places where laws are trying to regulate speech.⁹¹ Public forums, such as sidewalks and parks,

⁸⁶ *Hill v. Colorado*, 530 U.S. 703 (2000) (holding that a statute regulating speech within one hundred feet of the entrance to any health care facility is a valid time, place, and manner regulation that is content-neutral, narrowly tailored, and leaves open alternative channels of communication); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (holding that protestors could not sleep in the park); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Consol. Edison Co.*, 447 U.S. at 535-36; *see also Grayned v. Rockford*, 408 U.S. 104 (1972) (restricting noise and disruptions around schools in session); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (restricting sound devices on trucks); CHEMERINSKY, *supra* note 81, at 1356-57 (citing *Hill*, 530 U.S. 703, in which the Court upheld various regulations creating buffer zones around abortion clinics as reasonable time, place, and manner restrictions). *But see United States v. Grace*, 461 U.S. 171 (1983). In that case, the Court declared a speech restriction on the public sidewalks around the Supreme Court building unconstitutional because a total ban on speech was unnecessary to further the goal of preventing disruption of court proceedings. *Id.*

⁸⁷ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (finding that an ordinance was overbroad because it prohibited all forms of live entertainment); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (holding that a particular ordinance was vague because there was an unascertainable standard and broad because it punished protected conduct and speech, making it facially invalid).

⁸⁸ *Coates*, 402 U.S. at 611; CHEMERINSKY, *supra* note 81, at 1085.

⁸⁹ CHEMERINSKY, *supra* note 81, at 1087.

⁹⁰ *Id.* at 1084.

⁹¹ *Perry Educ. Ass'n*, 460 U.S. at 44 (1983); *Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) (holding that government regulation of speech in public places must be content-neutral or else it has to meet strict scrutiny); CHEMERINSKY, *supra* note 81, at 1342 (“[T]here generally is no right to use private property for speech purposes . . . there is no state action, and the Constitution does not apply”); Phelps, *supra* note 3 (stating that courts first look at the location of the protestors); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 584 (2006) (referring to free speech, buffer, and protest zones used around abortion clinics, political conventions, campuses, and funerals). “Governments have learned to manipulate geography in a manner that now seriously threatens basic First Amendment principles.” Zick, *supra*.

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are government property that the government must make available for speech.⁹² However, the government can still regulate speech in a public forum, as long as the regulation is content-neutral and is a reasonable time, place, and manner restriction.⁹³

D. *Similar Speech Restrictions in Other Contexts*

Reasonable time, place, and manner restrictions, like the recent funeral protest bans, have been challenged in court in other contexts and thus are helpful to examine, since a court has yet to rule on the constitutionality of a funeral protest ban.⁹⁴ Several Supreme Court abortion cases regarding buffer zones and restrictions around clinics provide helpful insight into how a court may analyze the constitutionality of funeral protest laws.⁹⁵ These cases provide helpful tools to construct a model statute, by providing language, distance, and time restrictions that have been upheld and the Supreme Court reasoning behind its decisions.⁹⁶

In *Hill v. Colorado*,⁹⁷ a 1993 Colorado law required protestors who were within one hundred feet of an abortion clinic to stay eight feet away from any person who was entering or exiting the clinic.⁹⁸ The Court found that the statute was a content-neutral place regulation and upheld the law as constitutional.⁹⁹ Similarly, in *Madsen v. Women's Health Center*,¹⁰⁰ the Court found that a thirty-six foot buffer zone in front of a clinic that prohibited any protest or demonstration was constitutional.¹⁰¹ However, in *Schenck v. Pro-Choice Network of W.N.Y.*,¹⁰² the Court held that a fifteen foot "floating" buffer zone around any vehicle or person entering or leaving a clinic was unconstitutional.¹⁰³ The Court reasoned

⁹² *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (stating that public streets and sidewalks are traditional public forums).

⁹³ See *infra* Part II.D (discussing similar speech restrictions in other contexts).

⁹⁴ See *infra* notes 95-110 and accompanying text.

⁹⁵ See, e.g., *Hill*, 530 U.S. at 703; *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994); *Frisby*, 487 U.S. 474.

⁹⁶ See *infra* Part IV (offering a model statute based on Part III's analysis).

⁹⁷ *Hill*, 530 U.S. at 703.

⁹⁸ *Id.* (reasoning that the law was a valid time, place, and manner restriction and that it was narrowly tailored and allowed enough alternative channels of communication).

⁹⁹ *Id.* (reasoning that the right to access a health facility was an important interest).

¹⁰⁰ *Madsen*, 512 U.S. at 753.

¹⁰¹ *Id.*

¹⁰² *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 357 (1997).

¹⁰³ 519 U.S. 357, 377 (1997). "We uphold the provisions imposing 'fixed bubble' or 'fixed buffer zone' limitations, as hereinafter described, but hold that the provisions imposing 'floating bubble' or 'floating buffer zone' limitations violate the First Amendment." *Id.* at 361.

that this was overbroad since it could apply to protestors on public sidewalks and curbs and would be very hard to enforce.¹⁰⁴

One final abortion case revolves around residential picketing.¹⁰⁵ In *Frisby v. Schultz*, anti-abortion protestors targeted a doctor's home and wanted to picket on the public street outside of his house.¹⁰⁶ The Court held that the city ordinance restricting residential picketing was constitutional, despite lower courts' holding and a strong dissent by several Justices.¹⁰⁷ The Court relied heavily on the privacy of the home and the fact that the residents are "captive audiences" in their homes.¹⁰⁸

Although not as persuasive as the Supreme Court reasoning in the abortion context, two lower court cases from the 1990's regarding picketing outside of churches are helpful for analyzing the recent funeral protest bans.¹⁰⁹ In *St. David's Episcopal Church v. Westboro Baptist Church*, a church filed a petition to stop WBC from picketing around its property before, during, and after religious events.¹¹⁰ The Kansas Court of Appeals affirmed a thirty-six foot buffer zone around the church to the east, west, and north and 215 feet to the south from thirty minutes before to thirty minutes after an event, reasoning that protecting a person's place of worship is a legitimate government interest.¹¹¹

¹⁰⁴ *Id.* at 379 ("[W]e conclude that the floating buffer zones burden more speech than necessary to serve the relevant governmental interests.").

¹⁰⁵ *Frisby v. Schultz*, 487 U.S. 474 (1988).

¹⁰⁶ 487 U.S. 474, 476 (1988). The ordinance stated: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *Id.* at 477.

¹⁰⁷ *Id.* at 488. The lower courts found that the ordinance was not narrowly tailored. *Id.* at 478. However, the Supreme Court more narrowly interpreted the ordinance to only include a single house and not a whole residential area and also to only include those listeners who could not avoid the speech. *Id.* at 482-88. *But see id.* at 494 (Brennan, J. dissenting) (arguing that the ordinance was not narrowly tailored and the city could go back and change the ordinance to only regulate the "number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket").

¹⁰⁸ *Id.* at 487 (majority opinion). "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.* at 488.

¹⁰⁹ *See infra* notes 110-11 and accompanying text. Since there has yet to be precedent directly on point drawing inferences, even from state and lower federal courts, provides some helpful information as to how courts may look at the recent funeral protest bans.

¹¹⁰ *St. David's Episcopal Church v. Westboro Baptist Church*, 22 Kan. App. 2d 537 (1996).

¹¹¹ *Id.* at 551-52. *St. David's* sued to stop picketing within thirty-six feet of the church to the east, west, and north and 215 feet to the south for thirty minutes before to thirty minutes after religious events like services, weddings, and funerals. *Id.* at 540. According to the Kansas Appellate Court, "the right of free exercise would be a hollow one if the

In contrast, in *Olmer v. City of Lincoln*,¹¹² the Eighth Circuit held that a city ordinance restricting picketing outside religious places, with the same thirty-minute time restrictions as in *St. David's*, was unconstitutional because it was not narrowly tailored.¹¹³ The court found that the ordinance banned speech directed at adults and not just children (who were the city's main interest when making the regulation) and prohibited more speech than just that speech that damaged children.¹¹⁴

The different stances and reasoning of the Supreme Court on similar restrictions in the abortion context, as well as lower court reasoning in the religious context, leave legislatures unsure of how to draft valid legislation and whether or not their laws will withstand constitutional

government could not step in to safeguard that right from unreasonable interference from another private party." *Id.* at 549.

¹¹² *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999).

¹¹³ *Id.* Here, anti-abortion picketers targeted an abortion doctor's church, where he was a deacon, to protest his practices. *Id.* The city argued that their ordinance was a valid time, place, and manner restriction and relied on the interests of protecting children at church who were exposed to the picketing, preserving the right of citizens to practice their religion, and maintaining public safety. *Id.* at 1180. The ordinance defined picketing as:

[T]he act of one or more persons stationing herself, himself or themselves outside religious premises on the exterior grounds, or on the sidewalks, streets or other part of the right of way in the immediate vicinity of religious premises, or moving in a repeated manner past or around religious premises, while displaying a banner, placard, sign or other demonstrative material as part of their expressive conduct.

Id. at 1179 (quoting LINCOLN, NE. MUNI. CODE tit. 9, ch. 20, § 090(a)(3) (Sept. 21, 1998) (repealed)). The ordinance further stated:

It shall be deemed an unlawful disturbance of the peace for any person intentionally or knowingly to engage in focused picketing of a scheduled religious activity at any time within the period from one-half hour before to one-half hour after the scheduled activity, at any place:

- (1) on the religious organization's exterior premises, including its parking lots; or
- (2) on the portion of the right of way including any sidewalk on the same side of the street and adjoining the boundary of the religious premises, including its parking lots; or
- (3) on the portion of the right of way adjoining the boundary of the religious premises which is a street or roadway including any median within such street or roadway.

Id. (quoting LINCOLN, NE. MUNI. CODE tit. 9, ch. 20, § 090(a)(3) (Sept. 21, 1998) (repealed)).

¹¹⁴ *Id.* at 1180 ("The ordinance purports to make the carrying of signs at the indicated times and places unlawful, no matter what the signs say or depict, and this prohibition is much broader than necessary . . .").

challenges, thus demonstrating the need for a model statute.¹¹⁵ State funeral protest bans are designed to balance the competing rights between protestors and mourners.¹¹⁶ The First Amendment protects speech, and precedent in other contexts sheds light on how such legislation should be drafted in order to survive future court challenges.¹¹⁷ The strengths and weaknesses in the drafting of current bans are analyzed below.¹¹⁸

III. ANALYSIS

Part III applies the background information to determine whether the state funeral protest bans violate the First Amendment rights of protestors and what the proper balance of rights should be in current and future legislation.¹¹⁹ First, this Part analyzes the constitutionality of the bans by discussing content-neutrality, reasonable time, place, and manner restrictions, vagueness and overbreadth, and forum.¹²⁰ Then, it exposes the strengths and weaknesses of the funeral protest bans by drawing on similar restrictions in other contexts.¹²¹

A. *Are State Funeral Protest Bans Constitutional?*

Recently passed state funeral protest bans implicate several constitutional concerns, including: content-neutrality, vagueness and overbreadth, and the scope of reasonable time, place, and manner restrictions. Although the bans have similar features, components, and drafting (each include items such as distance buffer zones, time restrictions, and penalties), the lack of uniformity among those features

¹¹⁵ See *supra* Part II.D. Compare *Hill* (530 U.S. 703), and *Madsen* (512 U.S. 753) (upholding the constitutionality of protest restrictions at one hundred feet, thirty-six feet, and an eight foot buffer zone), with *Schenck* (519 U.S. at 377, 379), and *Olmer* (192 F.3d at 1180) (declaring a fifteen-foot floating buffer zone unconstitutional and holding a restriction too broad since it regulated all forms of speech). See *infra* Part III.B (comparing state bans to the speech-restrictive bans from other contexts).

¹¹⁶ See *supra* Part II.B (providing a discussion of state bans and the reasons behind their enactments).

¹¹⁷ See *supra* Parts II.C and II.D (discussing First Amendment analysis and case law in other precedents).

¹¹⁸ See *infra* Part III (analyzing the constitutionality of state funeral protest bans).

¹¹⁹ See *infra* Parts III and IV (analyzing the constitutionality of the laws and providing a model statute).

¹²⁰ See *infra* Part III.A (discussing the constitutionality of the bans by analyzing whether the bans are content-neutral, set reasonable time, place, and manner restrictions, and are not over-broad or vague).

¹²¹ See *infra* Part III.B (comparing the drafting in state bans to the speech-restrictive bans from other contexts).

and components may be problematic.¹²² Since the legislation passed, roughly at the same time in many states and with little court precedent to guide the legislatures, the lack of uniformity may cause some states that exhibited poor drafting or more extreme measures to worry more about their statute's constitutionality.¹²³ As precedent in other contexts has highlighted, when restrictions are not carefully drafted or are too extreme, they often are found unconstitutional.¹²⁴

1. State Funeral Protest Bans Must Be Content-Neutral

In order for state funeral protest bans to survive constitutional challenges, they must be content-neutral.¹²⁵ A content-neutral regulation does not discriminate against or target specific speech and is viewpoint and subject matter neutral.¹²⁶ Despite generally having to meet a less stringent standard, it is important for a state funeral protest ban to be content-neutral since it would be unlikely for a court to find that such a ban satisfied strict scrutiny if it was content-based.¹²⁷

Paying some attention to the legislative intent behind these funeral protest bans is helpful to the analysis as well.¹²⁸ In particular, it is necessary to determine whether the bans were created and directed toward WBC and its message, or rather to protect funerals in general from all protestors and demonstrations.¹²⁹ The intent may impact

¹²² See generally *supra* Part II.B (discussing current state funeral protest bans); see also Hudson, *supra* note 3 (noting that the following states have passed legislation: Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia and Wisconsin).

¹²³ See *supra* notes 45-50 and 62-66 and accompanying text.

¹²⁴ See *supra* notes 34 and 40-43 and accompanying text; see also Part II.D (discussing similar speech restrictions in other protest contexts).

¹²⁵ See *supra* Part II.C; see also *supra* notes 73-93 (laying the foundation for a First Amendment analysis).

¹²⁶ See *supra* notes 80-86 and accompanying text. See generally Part II.C (providing a First Amendment overview).

¹²⁷ See *supra* note 121 and accompanying text. See generally Part II.C (First Amendment analysis framework).

¹²⁸ See *supra* note 116 and accompanying text. See generally Part II.C (setting a First Amendment analysis framework).

¹²⁹ See *supra* note 8; Associated Press 16414, *supra* note 24. WBC leader Fred Phelps told the Kansas Senate Federal and State Affairs Committee, "[w]e can't be lawfully moved out of sight of our target audience. . . . You have no legitimate public interest here." Associated Press 16414, *supra* note 24.

whether courts view the legislation as content-based.¹³⁰ For example, Governor Tom Vilsack of Iowa plainly stated, in regard to WBC, “[t]hese protestors don’t reflect Iowa values, and their actions have no place in our state.”¹³¹ Similarly, Kentucky stated in its statute that disrupting military funerals was disgraceful and even warranted a declaration of emergency.¹³² Despite arguments that the recent legislation targets the WBC and its message, certain members of the U.S. Supreme Court have stated that legislative intent is not determinative of whether a law is content-neutral on its face.¹³³ Although some of the bans were passed unusually quickly in anticipation of an upcoming WBC protest, making it easy to question the legislative intent, they have all been facially content-neutral.¹³⁴ Content-neutrality is key to any model statute, as it allows for a reasonable time, place, and manner restriction.¹³⁵

Although the impetus behind much, if not all, of the legislation has been caused by WBC’s conduct of protesting funerals, and many legislators and citizens have opposed WBC’s acts and message, courts

¹³⁰ David L. Hudson, Jr., *Pastor’s Anti-Gay Actions Test Society’s Commitment to First Amendment*, Oct. 16, 1998, <http://www.firstamendmentcenter.org/news.aspx?id=9482> [hereinafter Hudson II] (last visited Sept. 4, 2006) (describing how Tom McCoy, Vanderbilt law professor, stated at the time that WBC should have the right to express their message and that it was a form of political speech, despite general public feeling that a funeral is not an appropriate place). *But see* Hill v. Colorado, 530 U.S. 703, 715 (2000) (noting that the law was found content-neutral regardless of the triggering event). “Whether or not those interests justify the particular regulation at issue, they are unquestionably legitimate.” *Id.*

¹³¹ Associated Press, *supra* note 32; *see* STARTRIBUNE, *supra* note 23 (stating that Minnesota representative Seifert said that the WBC demonstrations were against Minnesota values).

¹³² Ky. H.R. 333. “Whereas there is a disgraceful nationwide campaign to disrupt military funerals, and whereas this campaign may enter Kentucky at any time, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.” *Id.* at § 6.

¹³³ Edwards v. Aguillard, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting) (“To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.”) (emphasis in original); *see also* Chen, *supra* note 29 (“[T]he Court has repeatedly rejected direct judicial inquiries into legislative motive, even where there is substantial evidence that a facially neutral law might have been adopted for speech-restrictive reasons.”). *But see* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (noting that, because the object of these ordinances was to suppress only one religion, the laws were struck down by the Court despite their neutrality); Collins, *supra* note 3 (stating that it is viewpoint-discrimination if the stated or actual purpose of the laws is to prohibit groups like the Westboro Baptist Church, but not Patriot Guard Riders); Associated Press 16301, *supra* note 7 (citing Geoffrey Stone from University of Chicago Law School as saying the Illinois law is unconstitutional because it is directed at the content of the speech and singles out certain protests).

¹³⁴ *See* Mundy, *supra* note 62 and accompanying text (discussing the speed with which many of these bans were enacted).

¹³⁵ *See infra* Part IV (providing a model statute).

generally look only to the statutory text to determine content-neutrality.¹³⁶ Since most of the statutes prohibit all protesting and demonstrations, creating a general ban, they will likely be determined to be content-neutral.¹³⁷ Nevertheless, the content-neutrality of these funeral protest bans is still being questioned.¹³⁸ In addition, any state that allows some forms of demonstrations (like those of the Patriot Guard Riders), but not others (like WBC demonstrations), will have a hard time convincing a court that its regulation is content-neutral and an even harder time convincing that same court that its statute meets strict scrutiny.¹³⁹

The majority of the funeral protest bans are content-neutral.¹⁴⁰ Beginning with the Respect for Fallen Heroes Act, their terms do not distinguish among different types of demonstrations and apply to all protestors no matter what their message may be.¹⁴¹ However, even the Fallen Heroes Act has a drafting weakness regarding content-neutrality.¹⁴² It states that no demonstrations can be carried out according to the various regulations “unless the demonstration has been approved,” and yet presents no guidelines on approval.¹⁴³ This may lead to some content-based decisions in the future and is a drafting weakness that should be avoided by the states.¹⁴⁴ Not taking after the weaknesses in the federal Act, all of the states sampled in this Note used content-

¹³⁶ See *supra* Part II.A (discussing the WBC and its tactics); see also *supra* Part II.C (providing the framework for content-neutral regulations); *supra* note 123 and accompanying text.

¹³⁷ Phelps, *supra* note 3, at 290.

¹³⁸ Hill v. Colorado, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting) (“By confining the law’s application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination.”); see also Hudson, *supra* note 3 (noting Richards’ statement, “[t]he other question I would have is what would happen if people who loved the deceased held up signs outside the church or funeral home saying, ‘We love you. We’ll miss you’ . . . Would those folks face criminal charges? If not, there’s a viewpoint-based discrimination issue.”).

¹³⁹ See Hudson, *supra* note 3 (stating that protection for a “grieving family” is not a compelling government interest). But see Phelps, *supra* note 3, at 290 (stating that protecting the right to worship is an important government interest). See generally *supra* Part II.C.

¹⁴⁰ See *supra* Part II.B (providing a sampling of current state funeral protest bans).

¹⁴¹ See *supra* notes 5-8 and accompanying text.

¹⁴² See *infra* notes 144-45 (showing drafting weaknesses in the Fallen Heroes Act).

¹⁴³ See 38 U.S.C. § 2413 (“No person may carry out – (1) a demonstration on the property of a cemetery under the control of the National Cemetery Administration . . . unless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located.”).

¹⁴⁴ See *infra* Part IV (providing a model statute based on analyzing strengths and weaknesses in drafting).

neutral language like “any person” or “any demonstration.”¹⁴⁵ Content-neutrality is the first requirement in surviving a constitutional challenge, and it seems as if most states have taken that first step correctly so as not to cause a drafting weakness.¹⁴⁶

2. Bans Must Be Reasonable Time, Place, and Manner Restrictions

Crafting a content-neutral funeral protest ban that is a reasonable time, place, and manner restriction is the best way to survive constitutional scrutiny.¹⁴⁷ A reasonable time, place, and manner restriction must be content-neutral, advance a substantial government interest, be narrowly tailored, and leave open alternative channels of communication.¹⁴⁸ A reasonable time, place, and manner status is important, as courts overwhelmingly uphold such restrictions.¹⁴⁹

State funeral protest bans can still be challenged under reasonable time, place, and manner restriction analysis.¹⁵⁰ For example, a statute that is not narrowly tailored may fail this analysis.¹⁵¹ States like South Dakota, with extreme distance requirements like 1,000 feet, or Kentucky, which arguably regulates too much conduct, such as distributing literature, may fail a narrowly tailored analysis because of these drafting weaknesses.¹⁵² In addition, if a protest ban is not effective (either because privacy rights are compromised or more speech than necessary is restricted), it can be argued that its means do not meet its goals and,

¹⁴⁵ See *supra* Part II.B (listing relevant state legislation).

¹⁴⁶ See *supra* Part II.B (noting that Florida, Illinois, Kentucky, Nebraska, Maryland, Missouri and Ohio are examples of states using content-neutral language like “no person,” “no demonstration,” and “no protest”); Wis. S. 525 (“No person . . .”); Ohio H.R. 484 (“[N]o person shall picket or engage in protest activities . . .”). However, some statutes focus more on the intent to disrupt. See, e.g., N.J. A2870 and N.C. S. 1833 (allowing an argument that non-disruptive supportive demonstrations would be excluded from the bans). See Chen, *supra* note 29, at 46-47 (“If lawmakers wish to regulate a particular type of constitutionally protected speech or speech-related conduct, they cannot openly identify the object of their concern in the statute’s language.”).

¹⁴⁷ See *supra* notes 64-65 and accompanying text; see also *supra* Part II.C; *supra* note 83.

¹⁴⁸ See *supra* note 83 and accompanying text.

¹⁴⁹ See generally *supra* Part II.C (discussing First Amendment analysis about content-neutrality). But see Collins, *supra* note 134 (holding that reasonable time, place, and manner restrictions cannot be used because these restrictions discriminate on the content of the message, and there is viewpoint-discrimination if the stated or actual purpose of the laws is to prohibit groups like Westboro Baptist Church but not others like the Patriot Guard Riders).

¹⁵⁰ See *supra* Parts II.D-III.B (looking at how courts have judged reasonable time, place, and manner restrictions in other contexts).

¹⁵¹ See *supra* notes 84-86 and accompanying text.

¹⁵² See *supra* notes 47, 50 (highlighting South Dakota and Kentucky statutes).

therefore, that it does not constitute a reasonable time, place, and manner restriction.¹⁵³ It will be important to courts in the future whether or not a ban has been successful at eliminating the harm caused by WBC's funeral protests or, rather, if the ban inhibited WBC's speech with no benefits coming from the regulation.¹⁵⁴ Finally, if a protest ban does not leave open alternative channels of communication, it cannot be considered a reasonable time, place, and manner restriction.¹⁵⁵ Therefore, the statutes that encompass more activities under their definitions of protest or picketing are more at risk, since they allow fewer alternatives and may even run the risk of being considered overbroad.¹⁵⁶ All of these examples highlight the importance of careful drafting that is required to create a constitutional funeral protest ban.¹⁵⁷

3. Bans Cannot Be Overbroad or Vague

A speech regulation that is overbroad or vague can be challenged on its face; if such a challenge is successful, the entire law is invalid.¹⁵⁸ Thus, a state funeral protest ban must be narrow in scope and must contain clear definitions and language so as not to be ruled unconstitutionally vague.¹⁵⁹ Unfortunately, balancing overbreadth and content-neutrality when drafting legislation is very difficult.¹⁶⁰

Since most of the protest bans prohibit any kind of speech or demonstration at funerals, even positive forms of each, it can be argued that the laws are too broad to survive constitutional scrutiny.¹⁶¹ For example, demonstrations by the Patriot Guard Riders are not disruptive and do not cause harm to grieving families, but they are still prohibited

¹⁵³ See *supra* notes 84-86 and accompanying text.

¹⁵⁴ Associated Press 16779, *supra* note 32 (noting that a member of WBC told the Des Moines Register that they would still come to Iowa, despite the law, but would honor the distance requirements).

¹⁵⁵ See *supra* notes 85-86 and accompanying text.

¹⁵⁶ See Ky. H.R. 333, *supra* note 50; see also *infra* notes 160-69; *infra* Part III.A.3 (discussing overbreadth and vagueness weaknesses).

¹⁵⁷ See *infra* Part IV (proposing a model statute based on drafting strengths and weaknesses discussed).

¹⁵⁸ See *supra* Part II.C (laying the foundation for a First Amendment analysis).

¹⁵⁹ See *supra* Part III.A.3 (discussing vagueness weaknesses in drafting).

¹⁶⁰ Chen, *supra* note 29, at 65.

¹⁶¹ Associated Press 16064, *supra* note 35 (explaining why Ronald K.L. Collins, a First Amendment Center scholar in Virginia, believes it will be hard to apply a law in a content-neutral way without restricting those who want to show respect for the dead); Collins, *supra* note 3 (stating that now you cannot be angry at or protest any dead person, even people like Lee Harvey Oswald or John Wilkes Booth). This author suggests that perhaps the decedents' families be allowed to invite whomever they want.

by the statutes.¹⁶² This example illustrates the problem of crafting a protest ban that makes clear what types of protests are unlawful and the side effects of prohibiting typically welcomed speech due to its breadth.¹⁶³ However, to attain content-neutrality, a level of broadness is necessary.¹⁶⁴ The statute's constitutionality will ultimately depend on how a court draws that line between content-neutrality and over-breadth.

Several state funeral protest bans have shown constitutional weakness in the context of vagueness or over-breadth problems.¹⁶⁵ For example, Kansas' original statute was deemed unconstitutionally vague because of its time restrictions "before or after," but recently the Kansas legislature changed its statute to specify a time period from one hour before to two hours after.¹⁶⁶ Similarly, Missouri passed a second funeral protest ban that changed the language "in front of or about" to 300 feet, in fear of having its statute declared unconstitutionally vague.¹⁶⁷ Kentucky's vague time restriction prohibiting protests "at any time of the day" and its far-reaching definition of protest activity may cause vagueness and over-breadth problems in any upcoming lawsuits.¹⁶⁸ Finally, South Dakota's 1,000 foot distance restriction is in danger of being held unconstitutionally overbroad, because it encompasses such a large area and may regulate more speech than the Constitution allows.¹⁶⁹ States with clear time restrictions will likely avoid this vagueness problem.¹⁷⁰

In contrast, Florida's ban is brief and vague, including language such as "interrupts."¹⁷¹ Florida is unique in that most of the other statutes

¹⁶² See *supra* note 28 and accompanying text (discussing Patriot Guard Riders). See generally notes 34-55 and accompanying text (revealing how various states' laws prohibit both friends and foes).

¹⁶³ Collins, *supra* note 134 (statutes need to make clear what types of messages are considered unlawful protest).

¹⁶⁴ See *supra* Part III.B.3 (explaining how content-neutral regulations can be broad and vague).

¹⁶⁵ Kan. S. 421; MO. REV. STAT. § 578.501; see also *supra* notes 110-11.

¹⁶⁶ Kan. S. 421.

¹⁶⁷ See *supra* notes 66-68 and 72.

¹⁶⁸ See *supra* notes 69-70 and accompanying text.

¹⁶⁹ McDonough, *supra* note 24, at 16 (commenting on how UCLA law professor Eugene Volokh believes that principles underlying bans on picketing private residences could be applied to funerals, but excessive distance requirements, which he believes regulate more than 100 feet, would probably be unconstitutional); S.D. S. 156.

¹⁷⁰ See *supra* notes 34-55 (providing examples of various state time restrictions).

¹⁷¹ Fla. H.R. 7127, *supra* note 46 and accompanying text (showing the bill's vague distance language).

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have clearly defined terms and distance and time requirements.¹⁷² For example, Texas' statute successfully avoids vagueness by clearly defining every term.¹⁷³ A model statute should define every term succinctly and avoid vague language like that in Florida's statute.¹⁷⁴

Definitions are easy targets for findings of vague or overbroad language because funeral protest bans differ in their definitions and often have unique clauses.¹⁷⁵ For instance, various definitions of the word "funeral" exist.¹⁷⁶ Kansas defines a "funeral" as any "ceremony, procession or memorial service in connection with the death of a person."¹⁷⁷ Indiana restricts protests for a funeral, procession, burial, or viewing.¹⁷⁸ Illinois includes any facility used for funeral services.¹⁷⁹ Missouri extends the restriction to any place in which a funeral is held.¹⁸⁰

¹⁷² See *supra* Part II.B (providing a sampling of current state legislation).

¹⁷³ H.R. 97, 2006 Leg. (Tex. 2006), <http://www.capitol.state.tx.us/tlodocs/793/billtext/pdf/HB00097F.pdf>. The definitions include:

(1) "Facility" means a building at which any portion of a funeral service takes place, including a funeral parlor, mortuary, private home, or established place of worship.

(2) "Funeral service" means a ceremony, procession, or memorial service, including a wake or viewing, held in connection with the burial or cremation of the dead.

(3) "Picketing" means:

(A) standing, sitting, or repeated walking, riding, driving, or other similar action by a person displaying or carrying a banner, placard, or sign;

(B) engaging in loud singing, chanting, whistling, or yelling, with or without noise amplification through a device such as a bullhorn or microphone; or

(C) blocking access to a facility or cemetery being used for a funeral service.

(b) A person commits an offense if, during the period beginning one hour before the service begins and ending one hour after the service is completed, the person engages in picketing within 500 feet of a facility or cemetery being used for a funeral service.

Id.

¹⁷⁴ See *supra* Part IV (providing a model statute).

¹⁷⁵ See *supra* notes 34-72, 160-68 and accompanying text.

¹⁷⁶ See *supra* notes 34-72, 160-68 and accompanying text.

¹⁷⁷ Kan. S. 421.

¹⁷⁸ See IND. CODE § 35-45-1-3.

¹⁷⁹ See Ill. Pub. Act 094-0772; see also Wis. S. 525 (defining funeral or memorial service as a wake or burial, but excluding services that are "not intended to honor or commemorate one or more specific decedents").

¹⁸⁰ See MO. REV. STAT. § 578.501 (defining funeral as the "ceremonies, processions and memorial services held in connection with the burial or cremation of the dead").

“Protest” or “picketing” are also defined differently by the states.¹⁸¹ For example, Kansas defines picketing as “protest activities engaged in by a person or persons stationed before or about a cemetery, mortuary, church, or other location where a funeral is held or conducted.”¹⁸² Ohio defines protest activities as “any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service or a funeral procession.”¹⁸³ Kentucky restricted even more activities, such as singing, distributing literature, and interfering with access to a funeral.¹⁸⁴ As these examples illustrate, some statutes are more detailed than others, have stricter restrictions than others, and ultimately may present more constitutional concerns than others.¹⁸⁵ A model statute needs to clearly define its terms and avoid vague or overbroad language when providing definitions.

4. Public vs. Private Forums

Sidewalks and streets have traditionally been held to be public forums.¹⁸⁶ Although most funerals take place on private property, protestors who have used public sidewalks and streets to voice their messages are now being regulated in those public places.¹⁸⁷ In effect, state funeral protest bans have regulated speech on public property.¹⁸⁸ This raises a constitutional concern, since:

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.¹⁸⁹

¹⁸¹ See *supra* notes 165, 167-68 and accompanying text.

¹⁸² Kan. S. 421.

¹⁸³ Ohio H.R. 484.

¹⁸⁴ Ky. H.R. 333.

¹⁸⁵ Compare Fla. H.R. 7127, with other statutes in Part II.B, *supra*.

¹⁸⁶ *Hill v. Colorado*, 530 U.S. 703, 715 (2000). Said the Court, “[T]he public sidewalks, streets, and ways affected by the statute are ‘quintessential’ public forums for free speech.” *Id.*

¹⁸⁷ See generally *supra* Part II.A; Hudson, *supra* note 3 (arguing that sidewalks and streets around funeral homes and churches are public and restricting speech on public space must have a compelling interest that is lacking here).

¹⁸⁸ See generally *supra* Part II.B (sampling current state legislation).

¹⁸⁹ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

Even so, government can still regulate speech in public forums, provided the regulation is content-neutral and a reasonable time, place, and manner restriction.¹⁹⁰ Furthermore, recent case precedent suggests that most government-owned properties will be considered non-public forums.¹⁹¹ Government can regulate or even prohibit all speech in non-public forums as long as the regulation is viewpoint neutral and reasonable.¹⁹² Therefore, it is possible to regulate speech activities in any of the areas that the funeral bans encompass, whether or not they are characterized as public forums or non-public forums, so long as the bans are carefully and constitutionally crafted.¹⁹³

As previously mentioned, a ban must be content-neutral, be a reasonable time, place, and manner restriction, and not be vague or overbroad.¹⁹⁴ A state funeral protest ban that meets all of these requirements has the best chance of surviving First Amendment challenges.¹⁹⁵ In order to illustrate the importance of these requirements in drafting, the Note will next analyze similar speech restrictions in other protest contexts.¹⁹⁶

B. How Do These Funeral Protest Bans Compare To Similar Protest Restrictions in Other Contexts?

Constitutional challenges to funeral protest bans are in their earliest stages; thus, comparing these bans to similar protest restrictions in other contexts will be helpful to this analysis and to predicting constitutionality.¹⁹⁷ As previously mentioned, several abortion,

¹⁹⁰ See *supra* notes 80-86 and accompanying text.

¹⁹¹ CHEMERINSKY, *supra* note 81, at 1375 (“Unfortunately, especially as applied in recent cases like *Kokinda*, *Lee*, and *Forbes*, it will be very difficult to find that any government property is a public or limited public forum.”). *But see* Zick, *supra* note 91, at 581 (arguing that recent First Amendment analysis concentrates on the speech that is being regulated and often pays little or no attention to the place, allowing place to become a “powerful weapon of social and political control”).

¹⁹² See CHEMERINSKY, *supra* note 81, at 1361.

¹⁹³ Compare *supra* notes 174-75 and accompanying text, with *Phelps*, *supra* note 3 (explaining how restricting public areas near churches may raise concerns about the separation of church and state).

¹⁹⁴ See *supra* Parts III.A.1-3 and accompanying text.

¹⁹⁵ See *infra* Part IV (offering a model statute).

¹⁹⁶ See *infra* Part III.B (discussing court reasoning from speech restrictions in other contexts).

¹⁹⁷ See *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273473 (W.D. Mo. Jan. 26, 2007); *supra* notes 66, 72 (involving a complaint alleging that Missouri statute sections 578.501 and 578.502 infringe on individual speech, religious liberty, and assembly rights); *Snyder v. Phelps*, No. RDB-06-1389, 2006 WL 3081106 (D. Md. Oct. 30, 2006); *supra* notes 24, 29; Brian Goodman, *Funeral Picketers Sued By Marine's Dad*, CBS News, July 28, 2006,

residential picketing, and church-related cases dealing with time, place, and manner restrictions on speech in public forums shed light on what a court looks for, what restrictions it has declared unconstitutional, and why.¹⁹⁸ Unfortunately, determining whether a regulation is reasonable is very contextual.¹⁹⁹ Therefore, looking at the results and reasoning of similar cases may help in crafting a constitutional funeral protest ban.²⁰⁰

In *Hill v. Colorado*, the Supreme Court upheld a statute regulating speech within one hundred feet of an abortion clinic, as well as an eight-foot buffer zone surrounding individuals entering and leaving the clinic as a valid time, place, and manner restriction.²⁰¹ In its reasoning, the Court found the regulation to be content-neutral and stressed that the statute placed no limitations on the number of speakers, the noise level, or the number, size, or text of images on the placards used by the protestors.²⁰² In addition, the Court acknowledged that the statute required protestors to approach someone knowingly in order for a violation to be upheld.²⁰³ However, it can be argued that funeral protest laws are different from the sort of buffer zones created in *Hill* because the former do not involve a right to access to health services and there is no constitutional right to have a public funeral without protests.²⁰⁴ Additionally, the distance requirements were much lower in *Hill* than in many state funeral protest bans.²⁰⁵ Despite that argument, *Hill* provides an excellent roadmap for drafting a constitutional time, place, and manner speech restriction.²⁰⁶

<http://www.cbsnews.com/stories/2006/07/27/national/printable1843396.shtml> (last visited Oct. 7, 2006) (explaining that Albert Snyder filed a lawsuit that claims WBC violated his privacy, defamed him, and intentionally inflicted emotional distress when it targeted his marine son's funeral).

¹⁹⁸ See *supra* Part II.D (discussing similar protest restrictions in other contexts).

¹⁹⁹ CHEMERINSKY, *supra* note 81, at 1357 ("Looked at together, all of these cases indicate that the determination of whether a regulation is a reasonable time, place, and manner restriction is entirely contextual.").

²⁰⁰ See *supra* Part IV (laying out a model statute).

²⁰¹ *Hill v. Colorado*, 530 U.S. 703, 719-20 (2000); *supra* notes 97-98 and accompanying text.

²⁰² *Hill*, 530 U.S. at 726-27. The Court acknowledged that the statute applied to "all" forms of protesting, counseling, and demonstrators whether or not they concerned abortion or supported a certain stance. *Id.* at 726.

²⁰³ *Id.* at 720.

²⁰⁴ *Id.*

²⁰⁵ Collins, *supra* note 3. However, shorter distances also pose problems because privacy is an important countervailing liberty interest to First Amendment freedoms. *Id.*

²⁰⁶ See *supra* Part IV (setting forth a model statute based in part on the reasoning in *Hill*).

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Other reasoning used in the cases previously examined may also be distinguished.²⁰⁷ For instance, laws banning residential picketing are arguably not applicable because the home is not involved in funeral protest bans.²⁰⁸ Based on that sort of reasoning, it will be difficult to use *Frisby's* "captive audience" approach for support in defending a funeral ban court challenge.²⁰⁹ In addition, it may be hard to apply the secondary effects doctrine to state funeral protest bans as the Eighth Circuit court did with the *Olmer* ordinance.²¹⁰

The remaining cases previously discussed also shed light on how to craft a model statute.²¹¹ *Madsen* and *Schenck* both serve as examples that buffer zones will likely be upheld if they are a reasonable distance, such as less than one hundred feet, and they are not floating.²¹² These cases shed light on the issue by allowing us to see how the Court has analyzed such content-neutral time, place, and manner restrictions against protestors.²¹³

Finally, *St. David's* and *Olmer* prove to be valuable examples concerning churches and protestors.²¹⁴ In *St. David's*, a court upheld a buffer zone against protestors around the church for thirty minutes before and after services because the court recognized that citizens have an interest in practicing their faith without interruptions.²¹⁵ In *Olmer*, on the other hand, the court struck down a very similar ordinance because it prohibited more speech than was necessary in achieving its goal of protecting children.²¹⁶ Both of these examples show that a model statute needs to make sure to convey the state's interests clearly and be narrowly tailored and crafted so as not to prohibit more speech than

²⁰⁷ See *supra* Part II.D (noting similar restrictions in other protest contexts).

²⁰⁸ *Collins*, *supra* note 3 (stating also that even absolute bans involving the home are sometimes not upheld).

²⁰⁹ See *supra* notes 81-83, 161 and accompanying text; *cf.* *Phelps*, *supra* note 3, at 300-01 (describing how it may be possible to apply the *Frisby* "captive audience" test to churches, because another court could find enough similarities, including that both are services taking place at specific times and days requiring people to be there); *Frisby v. Schultz*, 487 U.S. 474 (1988); *supra* notes 102-05 and accompanying text.

²¹⁰ *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999); *supra* notes 109-10 and accompanying text; *supra* Part II.D; see also *Phelps*, *supra* note 3, at 307.

²¹¹ See *supra* Part II.D (providing an overview of speech restrictive bans in other protest contexts).

²¹² See *supra* notes 95, 99-101 and accompanying text; *cf.* *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding an eight-foot floating buffer zone).

²¹³ See *infra* Part IV (using this analysis in creating a model statute).

²¹⁴ See *supra* notes 107-10 and accompanying text.

²¹⁵ See *supra* notes 107-08 and accompanying text.

²¹⁶ See *supra* notes 109-10 and accompanying text.

necessary when regulating funeral protests.²¹⁷ The foregoing analysis of restrictions in other contexts sheds light on how to best craft a constitutional funeral protest ban.²¹⁸

IV. CONTRIBUTION

Despite the importance of First Amendment political speech rights, state bans have been favoring the privacy rights of the deceased and their families in the context of funeral settings.²¹⁹ As these funeral bans continue to differ and are eventually challenged in court, the sensitivity attached to First Amendment speech rights will require a careful crafting of such restrictions and bans if they are to stand up to constitutional challenges.²²⁰ This Part will address whether striking a certain balance of rights or certain phrasing in a model statute can make legislation more likely to withstand future court challenges. In order to test constitutional challenges, a model statute based off of comparing current legislation

²¹⁷ See *infra* Part IV (providing a model statute).

²¹⁸ See *supra* Parts II.B, III.D; see also Carrie L. Johnson, Comment, *Unwanted Speech and the State's Interest in Protecting Religious Free Exercise: Drawing First Amendment Lines in Olmer v. City of Lincoln*, 34 CREIGHTON L. REV. 423, 471 (2001). Johnson states:

To follow *Hill*, the Lincoln City Council would draft its ordinance to make it unlawful for one individual to approach within eight feet of another individual without their consent for purposes of oral protest, education, counseling, or leaflet passing when within one hundred feet of a building used for religious purposes. To make the ordinance more narrowly tailored to its interest, the Lincoln City Council could follow its previous model and ban such activities only during "scheduled religious activities."

Johnson, *supra*; see also Phelps, *supra* note 3, at 310-12 (1999) (arguing that to construct a valid ban on church picketing, the best interests are protecting children, as in *Olmer*, or protecting religious privacy, as long as it does not violate the Establishment Clause, that ample alternative communication channels should not be a problem; that narrow tailoring is the hardest requirement to meet, and that, as said by the dissent in *Frisby*, coercive aspects of picketing bans should be eliminated, including regulations on group numbers, noise levels, and hours as opposed to the government being inactive or overbroad).

²¹⁹ See *supra* Part II.B (discussing current state funeral protest bans); see also Phelps, *supra* note 3, at 288-89 ("The Court is troubled by the notion that a person may be subjected to focused picketing at their place of worship. Indeed, the right to engage in quiet and reflective prayer without being subjected to unwarranted intrusion is an essential component to freedom of religion."); *Hill v. Colorado*, 530 U.S. 703, 715-16 ("It is also important when conducting this interest analysis to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication.").

²²⁰ Hudson II, *supra* note 125 (citing McCoy, who believes that reasonable time, place and manner restrictions to protect privacy rights, if applied neutrally, would likely survive constitutional challenges and who also stated, "[t]he true test of free speech is whether we tolerate political ideas which we all consider offensive. I mean, the ideas which we agree on do not need protection.").

and protesting precedents from other contexts needs to be addressed and laid out. The model statute consists of compiling strongly drafted sections of current state legislation (those sections that are likely to survive a court challenge), and then further enhances those sections to create a constitutional funeral protest ban.

A. *Components of a Model Statute*

A model funeral protest ban must be content-neutral, a reasonable time, place, and manner restriction, neither vague nor overbroad in its terms or what activity it encompasses, limited to public places, leave open alternative channels of communication, and draw upon the rulings of the courts in the abortion, residential picketing, and prior church-related rulings. The model statute cannot target the WBC or any other similar group on its face. If it did specifically enumerate groups, the statute would be subject to heightened scrutiny and would likely fail strict scrutiny. Similarly, if not equally enforced among all those who disturb a funeral, whether it is the WBC or Patriot Guard Riders, challengers may argue that the legislative purpose is in fact discriminatory. To be a reasonable time, place, and manner restriction, the model statute must not only be content-neutral but also have clear time and distance restrictions. The more extreme time and distance restrictions are, the less constitutional they will be.²²¹

Finally, if terms are unclear or the statute is crafted too broadly, it will likely fail a court challenge. A model statute should keep its distance requirements to 300 feet or less, its time restrictions as closely related to the time of the service as possible, and clearly provide timeframes quantitatively, while prohibiting only as much speech as necessary to preserve the privacy and sanctity of the service. As the Kentucky and Missouri statutes face court challenges already, it is clear that using language describing the time restrictions as “any time” instead of setting a concrete amount or having backup legislation in anticipation of a constitutional violation will place a target on a state’s funeral protest ban.²²²

²²¹ See S.D. S. 156, at § 3 (describing South Dakota’s 1,000 foot restriction); Fla. H.R. 7127 (providing only vague language about distance); Collins, *supra* note 3 (arguing that a greater distance lessens the effectiveness of protests).

²²² See Ky. H.R. 333.

B. Model Statute

The Model Statute will borrow from only the most strongly drafted sections of legislation previously discussed and will further amend and enhance them. To start, the Model Statute would benefit from a very clear and concise purpose statement, much like the one in Oklahoma's statute. Next, the conduct prohibited at funerals needs to be clearly defined and given a time restriction. Kentucky's statute does a thorough job of this and is the best model. Also, clear distance and time restrictions need to be set. Illinois sets a distance requirement of 200 feet and is overtly clear about which and from where services are protected within this buffer zone, making its statute an appropriate model. Finally, penalties for violating such a statute need to be given. The proposed Model Statute is as follows:²²³

(a) It is generally recognized that families have a substantial interest in organizing and attending funerals, *which also includes wakes, memorial services, or burials* for deceased relatives.²²⁴

(b) A person is guilty of interference with a funeral, *which also includes a wake, memorial service, or burial* when he or she, ~~at any time on any day~~ *from one hour prior to, during, and one hour after:*

- (1) Blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted;
- (2) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property; or
- (3) ~~Without authorization from the family of the deceased or person conducting the service,~~ during a funeral, wake, memorial service, or

²²³ The proposed statute is composed of sections from various state funeral protest bans and this compilation is the contribution of the author.

²²⁴ Okla. S. 1020. The proposed additions to the section are italicized and are the contribution of the author.

burial: Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment, or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial.²²⁵

(c) Such conduct is prohibited within 200 feet of any ingress or egress of that funeral, *which also includes a wake, memorial service, or burial site*. For purposes of this Section:

(1) "Funeral" means the ceremonies, rituals, processions, and memorial services held at a funeral site in connection with the burial, cremation, or memorial of a deceased person.

(2) "Funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place at which a funeral is conducted or is scheduled to be conducted within the next ~~30~~ 60 minutes or has been conducted within the last ~~30~~ 60 minutes.²²⁶

(d) "A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 90 days or a fine not exceeding \$1,000 or both. *In addition, subsequent violations may lead to more severe fines not exceeding \$5,000 or imprisonment not exceeding 120 days.*"²²⁷

C. Commentary on the Proposed Model Statute

The proposed Model Statute incorporates parts from various, already ratified funeral protest bans. In each section, the drafting was enhanced to cover different types of services connected with death, as well as to include specific timeframes everywhere in the statute. The compilation utilized aspects from various statutes with strong drafting likely to withstand a First Amendment challenge. Most statutes are already similar to this model and seem likely to be upheld. The key

²²⁵ See Ky. H.R. 333. The proposed amendments and additions are italicized or stricken with a line and are the contribution of the author.

²²⁶ See Ill. Pub. Act 094-0772. The proposed amendments and additions are italicized and are the contribution of the author.

²²⁷ See Md. H.R. 850. The proposed additions to the section are italicized and are the contribution of the author.

components and constitutional weaknesses of most laws of this type, however, lie in extreme distance and time restrictions, vague language, and content-based language. If a funeral protest ban can pass those elements, it is likely to remain on the books. If funeral protest bans follow this pattern, courts will likely find them to be a constitutional way to protect the privacy of grieving families.

V. CONCLUSION

The WBC and its controversial funeral protests have sparked a complex constitutional dispute nation-wide. Protecting speech is crucial, as is providing grieving families with privacy and honoring the dead, especially those that have died while serving our country. Regardless of a person's stance on homosexuality, war, funerals, or the appropriate reach of the First Amendment, the recently proposed and passed state funeral protest bans will continue to be passed in states and eventually challenged in court. The proposed model statute seeks to strike the appropriate balance of rights and highlight drafting techniques to benefit states that have yet to propose such a bill as well as legislatures that may be forced to redraft their current statutes in the near future.

Although most state protest bans will likely withstand constitutional scrutiny, a funeral protest ban will be most successful if it is content-neutral, a reasonable time, place, and manner restriction, contains clearly defined terms, is not vague or overbroad, sets reasonable distance and time requirements and punishments, and is equally enforced among all groups. All of these components are necessary, as previous constitutional analysis and similar restrictions in other contexts discussed herein illustrate. Despite other options, such as using the tort system, with the right clarity, reasonableness, and drafting, funeral protest bans can be crafted constitutionally and provide the best answer to any conflict of constitutional rights. Furthermore, strong public support for their passage thus far makes it even more likely that, despite future court challenges and possible redrafting, legislatures will work hard to keep these statutes on the books.

This issue presents a patriotic paradox: WBC spreading its message through its right to protest, legislatures following the will of the public and passing statutes with constitutional concerns, and, finally, soldiers who died protecting the freedoms of this country, among them the First Amendment. Although the Free Speech clause can be viewed as promoting tolerance and necessary to the exchange of ideas, it raises emotional responses when put into a funeral context that may

overshadow free speech rights if not drafted carefully. We must remember the warning from *Texas v. Johnson*:

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong

....

We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns... We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.²²⁸

For those who are grieving a loved one at a funeral and are disrupted by the WBC and its protests, placards, and lyrics that began this Note, it will no doubt be difficult to remember the First Amendment, respect the speech rights of the protestors, favor the ideals that your loved one died for over privacy at his or her funeral, and understand the constitutional concerns that surround the situation. State funeral protest bans, if drafted carefully, can successfully balance the competing rights in this patriotic paradox.

Kara Beil²²⁹

²²⁸ *Texas v. Johnson*, 491 U.S. 397, 419-20 (1989).

²²⁹ Kara Beil graduated magna cum laude from DePauw University in Greencastle, Indiana, 2005. She is a JD candidate in May 2008, from Valparaiso University School of Law in Valparaiso, Indiana. "I would like to thank Professor Rosalie Levinson for acting not only as a great advisor for my Note, but for continuing to serve as one of the best professors of law at Valparaiso University. Most importantly, I would like to thank my family, friends, and fiancé for their continued support in my education and for providing much happiness and inspiration in my life."