No. 08-1244

IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, Governor of the State of Missouri, and CHRIS KOSTER, Attorney General of the State of Missouri,

Petitioners,

—v.—

SHIRLEY L. PHELPS-ROPER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals properly apply the abuse-of-discretion standard for reviewing the denial of a preliminary injunction by determining whether the district court's decision was guided by errors of law?

2. Did the court of appeals err in holding Respondent was entitled to a preliminary injunction against a Missouri statute prohibiting all pickets and protest activities, including non-disruptive and peaceful activities on public sidewalks, within a floating buffer zone of at least 300 feet of any funeral- or memorial-service-related activity, including a procession, while reserving judgment on the ultimate constitutional question?

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Respondent Shirley L. Phelps-Roper submits this brief in opposition to the petition for writ of certiorari filed by Jeremiah W. Nixon, Governor of the State of Missouri, and Chris Koster, Attorney General of the State of Missouri.

STATEMENT OF THE CASE

This case arises from Respondent's request for a preliminary injunction while the district court considers the merits of her challenge to Missouri's statutes related to funeral protests. Respondent is a member of Westboro Baptist Church and, based on her religious beliefs, thinks that God is punishing America for what Respondent's faith dictates is the sin of homosexuality. Pet. App. A44-45. In Respondent's view, one method of punishment that God has chosen is allowing Americans to be killed. *Id.* As part of her religious duties, Respondent believes she must protest and picket near certain public events, including certain funerals, to publish her church's religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not obey him. Pet. App. A45.

The statute at issue in these preliminary injunction proceedings, R.S.Mo. § 578.501, bans "picketing and other protest activities in front of or about" any place where memorial-service- or funeral-related activities, including processions, are held.[1]

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[1] Missouri has a back-up statute that prohibits picketing and protest activity within 300 feet of memorial-service- and funeral-related activities. R.S.Mo. § 578.502. Section 578.502 is "effective only on the date the provisions of section 578.501 are

Pet. 2. Violations are misdemeanor offenses for which incarceration is an available sanction.[2] Pet. App. A48. Petitioners admit that the statute targets protests conducted by Respondent and other members of her church. Pet. 3.

Respondent conducts peaceful, non-disruptive protests in public *fora*.[3] Uncertain about the scope of § 578.501 because of its undefined terms, Respondent sought guidance from local law enforcement officials in advance of planned protests throughout the state. Pet. App. A49-A50. Some officials refused to respond. When officials did respond, their interpretations of § 578.501 varied—at times even within a single

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finally declared void or unconstitutional." R.S.Mo. § 578.503. Because this interlocutory appeal involves only the propriety of a preliminary injunction, not a determination of the ultimate validity or constitutionality of § 578.501, the fall-back statute is not implicated at this stage of the case.

[2] The Missouri Attorney General has previously argued with success that he cannot be preliminarily enjoined from enforcing a misdemeanor statute because he cannot independently initiate prosecution of a misdemeanor offense. *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139 (8th Cir. 2005). The issue was not raised in this case until a still-pending motion to dismiss filed in the district court on May 21, 2009. In any event, the issue is not a ground for certiorari since it represents a disputed issue of state law.

[3] Contrary to the assertions dispersed throughout the petition, Missouri's proscription of speech is not limited to speech that disrupts or intrudes into a funeral. Neither is there any evidence in the record of any protest conducted by Respondent disrupting or intruding into a funeral, even though Petitioners note that Respondent's church has conducted more than 40,000 protests. Pet. 21.

jurisdiction. For instance, in advance of a protest planned in Carrollton, Missouri, in May 2006, the police chief advised church members that they could conduct their picketing and protest during the forty-five minutes preceding the commencement of a memorial service so long as they remained in a designated spot 100 feet from the entrance of the church where the service was held. Pet. App. A50. Later that day, the prosecuting attorney called church members to tell them that he would not honor the police chief's interpretation of § 578.501. *Id.* The prosecutor eventually advised that church members could only protest "on the other side of town," and that if they conducted the protest as arranged with the police chief, church members would be arrested and their children taken into state custody. *Id.* The prosecutor then faxed a letter to the church members in which he interpreted the statute as barring all picketing and protest within one hour of a funeral. *Id.* He allowed that a protest could be held at a specific location more than 400 feet away from the site of the funeral, so long as no one continued to protest within one hour of the funeral. *Id.* As a result of the inconsistent and ever-changing interpretations of the statute by law enforcement officials in Carroll County, Respondent and other church members feared they would be unable to avoid arrest and, as a consequence, canceled their protest. Pet. App. A52.

Because of the varying interpretations of § 578.501's provisions by local law enforcement officials and the statute's broad and vague terms, Respondent determined that she could not engage in

peaceful picketing and protest in Missouri without risking arrest. Her suit for declaratory and injunctive relief followed.

Respondent sought a preliminary injunction. The district court denied her request. Pet. App. A27-38. Based on its interpretation of relevant precedent, the district court did not believe that Respondent demonstrated that she is likely to prevail on the merits. Pet. App. A35. Following from its conclusion that Respondent was not likely to succeed, the court further determined that Respondent had not demonstrated irreparable harm. *Id.* In similar fashion, the court determined that the balance of harms and public interest did not favor entry of a preliminary injunction because the court had found that Respondent had not shown a violation of her constitutional rights. Pet. App. A36. Respondent filed a notice of interlocutory appeal.

The Eighth Circuit reversed. Pet. App. A15-26. The court employed the familiar four-part test for consideration of a preliminary injunction and reviewed the district court's decision under an abuse-of-discretion standard. Pet.App. A19. Applying its own and this Court's precedent, the Eighth Circuit first held, as a matter of law, that Respondent is likely to succeed on the merits of her challenge to § 578.501. Pet.App. A26. Having found that Respondent is likely to succeed on several of her First Amendment claims, the court then found that the probable loss of First Amendment freedoms constituted irreparable harm, the public interest favors the protection of constitutional rights, and the balance of equities favors constitutionally protected

freedom of expression.[4] Pet. App. A26. The court repeatedly stressed that it was not holding the challenged statute unconstitutional. Pet. App. A16 ("[W]e are only reviewing the propriety of a preliminary injunction, not determining the constitutionality of the statute."); Pet. App. A20 ("We do not determine the constitutionality of the Missouri statute at issue."); Pet. App. A24 ("[W]e do not decide the merits of Phelps-Roper['s] claim[.]"); Pet App. A26 ("We emphasize again we do not today determine the constitutionality of section 578.501.").

The court later granted Petitioners' request for panel rehearing. Pet. App. A41. The panel reconsidered its opinion in light of *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008), an intervening *en banc* decision requiring those seeking to preliminarily enjoin a state statute to satisfy a "more rigorous standard for demonstrating a likelihood of success on the merits." *Id.* at 732. Utilizing the more rigorous standard, the court again found that Respondent is likely to succeed on several of her First Amendment claims.[5] Pet. App. A10, A12, A13. Its analysis of the other preliminary injunction factors did not change on rehearing. The court again emphasized that it was not making a determination of § 578.501's constitutionality. Pet. App. A2, A11,

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[4] As discussed in greater detail, *infra.*, Petitioners' claim that the Eighth Circuit disposed of three of the four factors in two conclusory sentences is false.

[5] On rehearing, the Eighth Circuit also took note of the Sixth Circuit decision in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), which had been issued after the Eighth Circuit's initial decision. *See* pp. 11-12, *infra*.

A14.

Petitioners' second petitions for panel rehearing and rehearing en banc were denied. Pet. App. A39-40.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE TO ADDRESS THE QUESTIONS PRESENTED BY PETITIONERS

In its current posture, this case is not an appropriate vehicle to decide the First Amendment question presented for multiple reasons, which include: this is an interlocutory appeal from a decision granting a preliminary injunction, in which the lower courts expressly did not resolve the constitutionality of the statutes at issue; this Court is not the proper venue to address for the first time disputes about the meaning and scope of the challenged statutes; there is no meaningful conflict between the circuits; the Eighth Circuit followed well-established standards for appellate review of preliminary injunctions; and there exist more narrowly tailored state and federal statutes that would better frame the constitutional questions.

A. This Is An Interlocutory Appeal And The Eighth Circuit Expressly Did Not Resolve The Constitutionality Of The Challenged Statutes

Throughout its preliminary injunction decision, the Eighth Circuit stated repeatedly and

unequivocally that it was not ruling on the constitutionality of § 578.501. Pet. App. A2, 14, 16, 20, 24, 26. The district court also has not yet addressed the constitutional claims on the merits.[6] Nor has either lower court even begun to examine the constitutionality of § 578.502, the back-up statute.

A decision about the statutes' constitutional validity should first be made by a lower court. "This Court ... is one of final review, 'not of first view.'" *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (*quoting Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). *See also Montejo v. Louisiana,* No. 07-1529, 2009 WL 1443049 at *13 (U.S. May 26, 2009). For that reason, reviewing the constitutional issues before a final determination has been made on a complete record is premature This case presents "no reason to abandon [the Court's] usual procedures in a rush to judgment without a lower court opinion." *FCC,* 129 S.Ct. at 1819.

B. This Court Is Not The Proper Venue To Consider In The First Instance Disputes Over The Meaning And Scope of Missouri State Law

For the first time in their appellate brief (and then only in passing), more extensively in their second petition for rehearing, and now in their petition in this Court, Petitioners urge that—as a

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[6] This case remains pending in the district court, which has set a November 13, 2009, deadline for summary judgment motions and an April 12, 2010, trial date. Respondent intends to move for summary judgment soon.

matter of initial statutory construction— a culpable *mens rea* should be read into each element of the challenged statute. Pet. 17. Petitioners then suggest that § 578.501, once construed as requiring a specific intent as to each element, would be narrowly tailored and not overbroad. *Id.*

Because the issue of the statute's meaning and scope was not raised before the district court, the district court did not address it. Likewise the issue was not properly raised before the Court of Appeals until the second petition for rehearing, so it was not addressed by the reviewing court either. Under these circumstances, this Court should decline to consider the issue. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *see also Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (holding that where respondent raised arguments for the first time in a response to petitioner's motion for rehearing in the court of appeals it was untimely and precluded consideration). Declining to consider the issue initially in this Court is especially appropriate in this case because Petitioners still have a full opportunity to present their argument to the lower courts in the ongoing proceedings.

Disputes over the meaning of § 578.501, on its face and as applied, can and should be resolved at a hearing on the merits, which has not yet occurred. This is not a case, like *Osbourne v. Ohio*, 495 U.S. 103 (1990), on which Petitioners erroneously rely, where the state supreme court has adopted an

authoritative interpretation of the challenged statute. No court has interpreted the challenged statutes, definitively or otherwise. And in this case there is a real dispute about how the statutes should be construed: Missouri law provides that no culpable mental state is imputed to a misdemeanor statute that, like the statute challenged in this case, does not prescribe a culpable mental state if such an imputation is inconsistent with the purpose of the statute defining the offense or might lead to a result that is unjust. R.S.Mo. § 562.026. If, as Petitioners have contended below, § 578.501 is designed to shield funeral attendees from *any* protest or picketing whatsoever, without regard to content or viewpoint, then it is not apparent that imputation of a culpable mental state is consistent with the purpose of the statute. *See State v. Dennis*, 153 S.W.3d 910, 919-20 (Mo. Ct. App. 2005) (holding there is no culpable mental state for the offense of rape). Accordingly, no *mens rea* is required to violate the statute.

Although this case has been pending for nearly three years, Petitioners have never asked the district court to construe the statute or to either certify the question or to defer federal proceedings on the merits pursuant to *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), so that the determination of any unsettled question of state law can be made by the Missouri courts. This Court is not the appropriate place to address disputed contentions of state law in the first instance, particularly given the procedural posture of this case. Indeed, if Petitioners choose to present their limiting construction to the district court on the merits, it might simplify the resolution

of the constitutional issues.

Similarly, Petitioners have now filed a motion to dismiss in the district court on the ground that they are not the proper party defendants under state law. *See* n.2, *supra*. Respondent disagrees with that contention. However, the fact that the district court has yet to resolve this disputed question of state law affecting the only Petitioners before this Court further highlights the interlocutory nature of this petition and is yet another reason to deny certiorari.

C. There Is No Meaningful Conflict Between The Circuits

Contrary to Petitioners' claims, there is no significant conflict between the Eighth Circuit's decision and the Sixth Circuit opinion in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), that makes the decisions incompatible.[7] The government interest recognized by *Strickland* was limited to the avoidance of unwanted communications that "disrupt or disturb a funeral or burial service" within a fixed zone of defined size in front of a funeral service. *Strickland*, 539 F.3d at 358. As the Eighth Circuit recognized, § 578.501

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[7] Petitioners also overstate the degree of disagreement among scholars. While their views of the concept of funeral protest bans vary and their reasons differ, each of the law review articles cited by Petitioners recognizes that § 578.501 is likely unconstitutional. Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C.L.Rev. 151, 183, 233 (2008); Stephen R. McAllister, 55 Kan. L. Rev. 575, 601, 606 (2007); Robert F. McCarthy, *The Incompatibility of Free Speech and Funerals: a* Grayned-*Based Approach for Funeral Protest Statutes*, 68 Ohio St. L. Rev. 1469, 1497-98, 1508 (2007).

differs from the Ohio statute because it prohibits pickets and protests in front of or about a funeral or funeral procession without regard to whether the speech disrupts or disturbs, or is even targeted at, those attending a funeral or participating in a funeral procession.[8] Pet. App. A12. Petitioners' claim of a conflict is thus overstated because the statutes are easily distinguishable, as both the Sixth Circuit and the Eighth Circuit explained.[9] Until the Eighth Circuit rules on the merits, moreover, there is no ultimate conflict with the Sixth Circuit that requires immediate resolution by this Court.

D. The Court Of Appeals Did Not Adopt A New Standard For Appellate Review Of Preliminary Injunction

Petitioners' claims that the Eighth Circuit created a new standard for appellate review of

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[8] The scope of the challenged statute is especially broad when one considers that a funeral procession in Missouri might be as few as two cars (R.S.Mo. § 194.500.3) and the term "picketing," left undefined by the state, has been interpreted by Eighth Circuit precedent to include a wide range of activities, including prayer. *Veneklase v. City of Fargo*, 248 F.3d 738, 743 (8th Cir. 2001); *Douglas v. Brownell*, 88 F.3d 1511, 1521 (8th Cir. 1996).

[9] The portion of the Ohio statute related to funeral processions, which was less restrictive of speech than the comparable provision of § 578.501, was stricken as unconstitutional by the district court. *Phelps-Roper v. Taft*, 523 F.Supp.2d 612, 619-20 (N.D. Ohio 2007), aff'd *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008). This aspect of the district court's decision was not appealed by Ohio officials. On this point, therefore, the decisions of the Ohio and Missouri courts are in accord. Petitioners cite no precedent from this Court or any circuit that would support a holding that Respondent is not likely to succeed on her challenge to § 578.501's floating buffer zone.

preliminary injunctions and, in doing so, departed from this Court's precedents, are premised on a misrepresentation of the decision below and a miscomprehension of this Court's decisions.

The Eighth Circuit properly conducted its review of the district court's denial of a preliminary injunction in this case. Even Petitioners concede that the Eighth Circuit recited the correct standards. Pet. 7. While Petitioners attack the court for "eliminating" the abuse of discretion standard, it is Petitioners who distort the standard beyond recognition by arguing that it insulates the district court from any meaningful review. In *Winter v. Natural Res. Defense Council*, 129 S. Ct. 365 (2008), this Court recently reversed a preliminary injunction because the Court concluded that the lower courts had improperly weighed the factors for granting a preliminary injunction. *See id.* at 378 ("While we do not question the seriousness of [the interests advanced by Plaintiffs], we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy."). The Eighth Circuit engaged in the same process in this case. While Petitioners are dissatisfied with the result, the method employed is sound and review is not warranted merely to correct what Petitioners allege to be an erroneous conclusion.

The Eighth Circuit's review of the district court's conclusion that a preliminary injunction should be denied was especially appropriate in this case because the district court's decision was guided by its erroneous legal conclusion that Respondent is

not likely to succeed on the merits. "The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon v. United States*, 518 U.S. 81, 100 (1996). Here, the district court's denial of the preliminary injunction was based entirely on conclusions of law, not consideration of disputed factual questions, and the Eighth Circuit's review of that denial was entirely consistent with the standard employed by other circuits. *See, e.g., Newsom ex rel. Newsom v. Albermarle County School Bd.*, 354 F.3d 249, 254 (4th Cir. 2003) ("We review a district court's grant or denial of a preliminary injunction for abuse of discretion. We accept the district court's findings of fact absent clear error, but review its legal conclusions *de novo*." (citations omitted)); *See also United Air Lines Inc. v. Air Line Pilots Ass'n, Intern*, 563 F.3d 257, 269 (7th Cir. 2009); *Jean v. Mass. State Police*, 492 F.3d 24, 27 (1st Cir. 2007); *Cobell v. Norton*, 428 F.3d 1070, 1074 (D.C. Cir. 2005). The district court did not make findings of fact; indeed, while the motion for preliminary injunction was supported by references to facts averred under oath in Respondent's verified complaint, Petitioners presented no evidence in opposition. In reviewing whether the district court had abused its discretion in denying a preliminary injunction, the Eighth Circuit correctly considered whether the decision was directed by erroneous legal conclusions. The Eighth Circuit's application of the abuse-of-discretion standard did not depart from this Court's precedent.

Petitioners' contention that the Eighth Circuit paid insufficient attention to the public interest,

irreparable harm, and the balance of harms is also misplaced. At the outset, in their first question presented and throughout their petition in this Court, Petitioners falsely assert that the Eighth Circuit disposed "in two conclusory sentences" of three of the four factors considered to determine the propriety of a preliminary injunction. Petition at *i*, 7. Petitioners overlook the court's additional analysis:

> Peaceful picketing is an expressive activity protected by the First Amendment. *Olmer v. Lincoln,* 192 F.3d 1176, 1179 (8th Cir.1999). It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality). If Phelps-Roper can establish a sufficient likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation. *See Marcus v. Iowa Pub. Television,* 97 F.3d 1137, 1140-41 (8th Cir.1996); *Kirkeby,* 52 F.3d at 775. Likewise, the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights. *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (quotation omitted); *Kirkeby,* 52 F.3d at 775 (citing *Frisby v.*

> *Schultz,* 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). The balance of equities, too, generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue. *McQueary v. Stumbo,* 453 F. Supp.2d 975, 979 (E.D. Ky. 2006) (granting preliminary injunction to WBC precluding enforcement of Kentucky statute imposing time, place and manner restrictions on gatherings near funerals) (*citing Connection Distrib. Co.,* 154 F.3d at 288). Pet. App. A5-A6.

The Eighth Circuit's consideration of the additional factors was far more extensive than Petitioners suggest, and it bears no resemblance to the "one (albeit lengthy) sentence" devoid of citation to precedent that this Court found inadequate in *Winter.* In *Winter*, the district court determined that the public interest and balance of harms favored a preliminary injunction in true conclusory fashion: "'The Court is also satisfied that the balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur if prevented from using MFA sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period.'" *Winter*, 129 S. Ct. at 378 (*quoting Nat. Res, Def. Council, Inc. v. Winter*, No. 8:07-cv-

00335-FMC-FMOx, 2007 WL 2481037 at *10 (C.D.Cal.)).

While the Eighth Circuit gave greater consideration to factors beyond the likelihood of success on the merits than had the lower courts in *Winter*, this case is also distinguishable in that, unlike *Winter*, it involves a constitutional issue. In concluding that the absence of a preliminary injunction would constitute irreparable harm, that the public interest favors preliminary injunction, and that the balance of harms favors injunctive relief, the Eighth Circuit simply applied this Court's well-established jurisprudence. The loss of First Amendment freedoms constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). To the extent the state has an interest in preventing actual disruptions to funerals, that interest is adequately addressed by pre-existing statutes, at least when weighing the balance of harms at the preliminary injunction stage. *See, e.g.*, R.S.Mo. § 574.010 (peace disturbance), § 574.040 (unlawful assembly); § 574.060 (failure to disperse)

The reason the Eighth Circuit's analysis of the factors beyond likelihood of success on the merits stops where it does is because Petitioners offered no further evidence or argument for the court to consider. In the district court, Petitioners provided no evidence and cited not a single case in support of their position on the factors other than likelihood of success on the merits.[10] In the circuit court, they

[10] In this case, Petitioners merged their argument regarding

again pointed to no evidence, and the cases they cited were limited to the proper standard of review. The lack of evidence and case law put forth by Petitioners in this case stands in stark contrast to *Winter*, in which the Navy provided extensive evidence of harm to the Navy and the public interest. Notably, even the petition neglects to cite a single case to support a holding that Respondent is *not* likely to suffer irreparable harm in the absence of preliminary injunction, that the balance of equities does *not* tip in her favor, or that an injunction is *not* in the public interest, if she is likely to prevail on the merits in this case.

The Eighth Circuit faithfully applied controlling law from this Court both in utilizing the abuse-of-discretion standard of review and in balancing the appropriate factors in determining whether to issue a preliminary injunction. Review by this Court is not warranted.

E. The Existence Of Similar State And Federal Laws Allows This Court To Wait For A Better Vehicle To Address The Constitutional Issues

Petitioners suggest that the fact that the federal government and other states have enacted funeral protest laws is a reason to grant review in

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balance of harms and the public interest. In the related context of an application for a stay pending appeal, this Court recently recognized "[t]hese factors merge when the Government is the opposing party." *Nken v. Holder,* 129 S.Ct. 1749, 1762 (2009).

this case.[11] Just the opposite is true. With the existence of so many other laws on the same topic, this Court can wait for a case with a fully developed record where the scope of the challenged law is either uncontested or authoritatively construed and where the constitutionality of the law has been definitively resolved in a final judgment on the merits.

Section 578.501 is a poor choice for consideration because it is an outlier. Respondent is aware of no other funeral-protest law that criminalizes non-disruptive, peaceful protests on streets and sidewalks within a floating buffer of undefined size. Because of § 578.501's broad scope, consideration of the First Amendment issues in this case at this stage in the proceedings is unlikely to have any bearing on determinations of the constitutionality of more narrow statutes.

II. THE EIGHTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT RESPONDENT HAD ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

The Eighth Circuit did not abuse its discretion in concluding that Respondent is likely to succeed on the merits on four of her First Amendment claims: (1) any interest the state has in protecting mourners from speech outside of a funeral in a public forum is outweighed by the First Amendment right to speak; (2) the challenged statute is not narrowly tailored to any government interest that does exist; (3) the

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[11] *See* Pet. at 20 & n.6.

statute is facially overbroad; and (4) it fails to afford open, ample, and adequate alternative channels for dissemination of Respondent's particular message.[12] Respondent need succeed only on any one of her claims for § 578.501 to be unconstitutional. (Respondent has also challenged § 578.502, which goes into effect once § 578.501 is finally determined to be unconstitutional but which is not subject to this interlocutory appeal.)

In recognizing "the home is different," the Eighth Circuit in this case did no more than quote this Court's statement in *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). *Frisby*, in turn, simply recognized what this Court has frequently said: the home is different. *Id.* at 484-85. In the home, this Court has held, one may escape unwanted messages. *Frisby* repeatedly stressed the private residential location targeted by protests. *Id.* at 483. This case does not involve protests inside cemeteries, churches, or funeral homes or any person's ingress or egress; it involves protests on streets and sidewalks outside residential areas. The Eighth Circuit's determination that Respondent is likely to prevail in resisting Petitioners' efforts to expand *Frisby* beyond the home to peaceful, non-disruptive protests on

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[12] Respondent also asserted that § 578.501 is unconstitutional as a content-based restriction on speech and because it is vague. The Eighth Circuit concluded she is not likely to succeed on her claim that the statute is content-based. Although the issue was fully briefed by the parties, the court did not address her likelihood of success on her vagueness claim. Respondent intends to press the vagueness claim in the district court, which is another reason this case is not a proper vehicle for review of the ultimate constitutional question.

public sidewalks comports with this Court's own description of *Frisby*'s limitations.

Petitioners' reliance on *Hill v. Colorado*, is misplaced. *Hill* did not involve a ban on protests; the statute at issue did not restrict signs, silence any speaker, or have any effect on what a protestor could say while standing on a sidewalk. *Hill v. Colorado*, 530 U.S. 703, 729-30 (2000). In *Hill*, a protestor could stand still while a person going to or from a medical facility walked by her. *Id.* The statute approved in *Hill* only applied within 100 feet of a reproductive health care facility and, even then, only prevented a protestor from approaching within eight feet of someone entering or leaving the clinic. *Id.* at 730. The interest recognized in *Hill*, then, was in preventing "close physical approach" of a protestor making "unwanted communication" within a small, defined area near the entrance of a medical facility. *Id.* at 729. Section 578.501 is not limited to unwanted speech, to close physical approaches, or to protests within a small, well-defined geographic area. The Eighth Circuit properly declined to find that *Hill* prevented Respondent from demonstrating a probability of success on the merits.

This case is more like *Schenk v. Pro-Choice Network of Western New York*, 519 U.S. 357, 379 (1997), a case that does not earn mention in the petition. In *Schenk*, this Court found a 15-foot floating buffer around persons and vehicles was unconstitutional because it would burden more speech than was necessary to serve relevant governmental interests. *Id.* at 379. *Hill* distinguished *Schenk* on the basis that, unlike the

15-foot floating buffer zone, an 8-foot buffer zone "allows the speaker to communicate at a 'normal conversational distance.'" *Hill*, 530 U.S. at 726-27. Although no court has yet construed what distance constitutes "in front of or about" a location or procession in § 578.501, it must be *at least* 300 feet since that is the distance that will be put in effect after § 578.501 is found unconstitutional. *See* R.S.Mo. § 578.502. The change from "in front of or about" to 300 feet is the only change in the contingent statute. It would defy logic for the legislature to impose a larger floating buffer zone in the back-up statute that becomes effective only if the first statute is found unconstitutional. *See* R.S.Mo. § 578.503. The ban on speech at issue in this case cannot reasonably be construed as allowing communication at anything approaching a normal conversational distance, and Petitioners do not assert otherwise. The Eighth Circuit's determination that Respondent is likely to succeed on the merits is in accordance with *Schenk*.[13]

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[13] The petition also fails to mention *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994). While *Madsen* involved an injunction, which this Court concluded was subject to stricter scrutiny than a statute, it is noteworthy that this Court struck down a 300-foot, fixed buffer zone as overly broad. In this case, the buffer is at least 300 feet and floating. In addition, there is no evidence showing any interference with anyone's ingress to or egress from any location.

CONCLUSION

For the reasons stated herein, the writ should be denied.

Respectfully submitted,

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