No. 081244

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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a court of appeals disregard "abuse of discretion" review for a district court's denial of a preliminary injunction request by re-weighing the factors and disposing of three of the four factors in two conclusory sentences?

2. Does a bright-line, First Amendment rule differentiate between laws that address intrusive protests at a home and those that address protests in all other locations, permitting states to adequately protect vulnerable captive audiences at home but denying such protection at funerals?

PARTIES TO THE PROCEEDING

Petitioner Jeremiah W. ("Jay") Nixon is the Governor of the State of Missouri. He is substituted in his official capacity in place of former Governor Matt Blunt. Petitioner Chris Koster is the Attorney General of the State of Missouri. He is substituted in his official capacity in place of former Attorney General Jeremiah W. (Jay) Nixon.

Respondent Shirley L. Phelps-Roper is a resident of the State of Kansas and desires to protest at funerals of United States soldiers in the State of Missouri. She brought a complaint for declaratory and injunctive relief to prevent enforcement of Missouri Revised Statute § 578.501 ("Spc. Edward Lee Myers' Law"), which places limits on picketing at funerals.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri denying a preliminary injunction is reported at 504 F. Supp.2d 691, and is reproduced in the appendix at A27-A38. The opinion of the U.S. Court of Appeals for the Eighth Circuit reversing the district court and granting a preliminary injunction is reported at 509 F.3d 480 (8th Cir. 2007), and reproduced in the appendix at A15-A26. The Eighth Circuit panel granted rehearing; the revised opinion is reported at 545 F.3d 685 (8th Cir. 2008), and is reproduced in the appendix at A1-A14.

The January 7, 2009 order of the court of appeals denying rehearing and rehearing en banc, with five judges voting to grant rehearing en banc, is unpublished but is reproduced in the appendix at A39-A40.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2008. App. A1. The court of appeals denied rehearing and rehearing en banc on January 7, 2009. App. A39-A40. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> 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.

Mo. Rev. Stat. § 578.501 (2006 Cum. Supp.) provides:

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. Each day on which a violation occurs shall constitute a separate offense. Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor.
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.

STATEMENT OF THE CASE

Shirley Phelps-Roper is a member of the Westboro Baptist Church of Topeka, Kansas (WBC). App. A43. Phelps-Roper alleges that her religious beliefs dictate that homosexuality is "the worst of all sins and indicative of the final reprobation of an individual." App. A44-A45. Accordingly, Phelps-Roper and the WBC believe that "God is punishing America for the sin of homosexuality by killing Americans, including soldiers." App. A45. WBC members regularly picket outside of public buildings, churches, parks, and funerals, including the funerals of individuals who have died while serving the United States in Iraq.

Phelps-Roper claims that the purpose of picketing and protesting near funerals is to use an available public platform to publish the church members' 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. App. A45; *see also Phelps v. Hamilton*, 122 F.3d 1309, 1310 (10th Cir. 1997) (noting that Phelps-Roper's church has conveyed messages at funerals such as "God Hates Fags"; "No Fags in Heaven"; "Fags are Worthy of Death, Rom. 1:32"; "Turn or Burn"; "Fag Church"; "God's Hate is Great"; and "Hate is a Bible Value"). According to Phelps-Roper, funerals are the only place where her religious message can be delivered in a timely and relevant manner. App. A46.

In response to protests and threats of additional protests by the WBC, the Missouri General Assembly enacted a law limiting "Funeral Protests." Mo. Rev. Stat. § 578.501 (2006 Cum. Supp.). Phelps-Roper challenged the constitutionality of § 578.501 in the United States District Court for the Western District of Missouri. App. A43-A60. She sought preliminary and permanent injunctions preventing Missouri from

implementing the statute, which was intended to ensure Missouri citizens safe, secure, and dignified funerals. The district court determined that a preliminary injunction should not be granted because Phelps-Roper had failed to demonstrate a likelihood of success on the merits and irreparable harm, and "the balance of harms among the parties and the public interest" weigh in favor of the state of Missouri and the public. App. A34-A35.

The district court also noted the "significant government interest" in protecting the rights of Missouri citizens to be "free from interference by other citizens while they mourn the death of friends or family." App. A32. The district court found that Phelps-Roper had not demonstrated a likelihood of success in arguing that defendants do not have a significant government interest, nor in arguing that the State's means of protecting that interest is not narrowly tailored. App. A32-A34. Thus the district court denied Phelps-Roper's request for a preliminary injunction. App. A36. Phelps-Roper appealed.

On December 6, 2007, the Eighth Circuit reversed the district court. App. A15-A26. Defendants sought rehearing or rehearing en banc.[1] On October 31, 2008, the Eighth Circuit panel issued its decision on rehearing, and the Defendants again asked for rehearing en banc. App. A1. The second petition for rehearing en banc was denied; five of the eleven active judges indicated that they would grant the petition. App. A39-A40.

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[1] Following receipt of the rehearing request, the Eighth Circuit issued a letter stating that the "petition for rehearing will be held pending a decision by the en banc court in *Planned Parenthood v. Rounds*, No. 05-3093." App. A42. The Eighth Circuit's June 27, 2008, decision in *Rounds* is reported at 530 F.3d 724.

REASONS FOR GRANTING THE PETITION

Though the case below arose in a very specific context, the Eighth Circuit's holdings present broader First Amendment issues. Some arise whenever there is an appeal from a district court decision on a preliminary injunction request. Others arise whenever a legislature, law enforcement officer, or a court considers steps to protect individuals from disruptive and demeaning protests at times and in places that interfere with events of intense personal interest, held of necessity in a public place. In both respects, the holdings of the Eighth Circuit depart in particularly problematic ways from established practice or rules in this Court and in other courts of appeals.

I. The court of appeals' departure from controlling standards of appellate review in preliminary injunction cases undermines the established deference to trial courts and renders the court of appeals a court of general jurisdiction.

The four-part test for deciding whether to issue a preliminary injunction and the standard of review for a decision whether to issue such an injunction were well-established – until the Eighth Circuit's decision here. The Eighth Circuit essentially read out of the test two of its parts, and eschewed the universally accepted abuse of discretion standard for review of the denial of a preliminary injunction, in favor of a new standard in which the court may re-weigh the factors and simply "come to a contrary conclusion." App. A5. The Eighth Circuit's approach, if allowed to stand here and adopted elsewhere, would both skew the injunction analysis and distort the limitations of its review on

appeal. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975).

A. Contrary to this Court's instructions, the Eighth Circuit has elevated one factor in the test for a preliminary injunction – likelihood of success on the merits – to the point that it has largely, if not completely, erased the other factors.

It is well-established that a district court considers four factors in deciding whether to issue a preliminary injunction. This court most recently stated those factors in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008):

> A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Though wording may vary slightly, every circuit but one has endorsed that four-factor approach,[2] and the

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[2] *Naser Jewelers, Inc. v. City of Concord, N.H.*, 513 F.3d 27, 32 (1st Cir. 2008); *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 356-57 (3d Cir. 2007); *Equity in Athletics, Inc. v. United States Dept. of Educ.*, 291 Fed. Appx. 517, 519 (4th Cir. 2008); *Avmed Inc. v. BrownGreer PLC*, 300 Fed. Appx. 261, 264 (5th Cir. 2008); *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 447 (6th Cir. 2009); *United Air Lines, Inc. v. International Ass'n of Machinists*, 243 F.3d 349, 360-61 (7th Cir. 2001); *Overstreet v. United Bhd. of Carpenters and Joiners*, 409 F.3d 1199, 1207 (9th Cir. 2005); *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008); *Estate of Coll-Monge v. Inner Peace Movement*, 524 F.3d 1341,

difference in the remaining circuit may be merely semantic.[3]

Here, though the Eighth Circuit cited the long-accepted test, the court then ignored this Court's recent instructions and abridged the standard for relief. The Eighth Circuit based its decision on a single factor: likelihood of success on the merits. It dismissed the remaining three factors in – literally – two conclusory sentences: "we find she will suffer irreparable injury if the preliminary injunction is not issued. The injunction will not cause substantial harm to others, and the public is served by the preservation of constitutional rights." App. A14.

That two-sentence dismissal of three preliminary injunction factors is the very type of cursory analysis this Court rejected in *Winter v. Natural Resources Defense Council*, 129 S. Ct. at 378: "Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion. The court's entire discussion of these factors consisted of one (albeit lengthy) sentence . . . ." The one sentence this Court rejected in *Winter* was much more detailed than the two short sentences in this case. The Court should instruct the Eighth Circuit, as it instructed the district court in *Winter*, that such summary dismissal of preliminary injunction factors is not permissible.

1349 (D.C. Cir. 2008); *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 847 (Fed. Cir. 2008).

[3] *In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 98 (2d Cir. 2006) (stating the factors as "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor").

B. The Eighth Circuit also eliminated deference to the trail court by replacing the established abuse of discretion standard with a *de novo* standard of review for the denial of a preliminary injunction, departing from this Court's mandate.

The abuse of discretion standard for appellate review of the grant or denial of preliminary injunctions has long been a fixture of the American judicial system. Nearly 80 years ago, in *Alabama v. United States*, 279 U.S. 229 (1929), this Court found that it was already "well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Id.* at 230-31 (citing *Meccano, Ltd., v. John Wanamaker*, 253 U.S. 136, 141 (1920); 2 HIGH ON INJUNCTIONS (4th Ed.) § 1696).

In reviewing a preliminary injunction decision, the duty of an appellate court "is not to decide the merits, but simply to determine whether the discretion of the court below has been abused." *Alabama*, 279 U.S. at 231 (citing *United States v. Balt. & Ohio R. R. Co.*, 225 U.S. 306, 325 (1912)); *see also Doran v. Salem Inn, Inc.*, 422 U.S. at 931-32 (holding that the "standard of appellate review is simply whether the issuance of the injunction . . . constituted an abuse of discretion"); *Buffington v. Harvey*, 95 U.S. 99, 100 (1877) (holding that the "granting or dissolution of a temporary injunction stands on the same footing" – "in the sound discretion of the court").

"The basic idea that discretion conveys is choice." Maurice Rosenberg, *Appellate Review of Trial Court*

Discretion, 79 F.R.D. 173, 175 (1978). An "abuse of discretion" standard of review, therefore, permits a trial court to exercise that choice within a range of possible choices even when the appellate court may view the decision as incorrect or one it would not have made. Thus, Professor Rosenberg wrote that a trial court "acting in discretion is granted a limited right to be wrong, by appellate court standards, without being reversed." *Id.* at 176.

> [T]he fact that the higher court does not hold the same view as the trial judge is an insufficient basis for reversing an exercise of discretion, if by that term we mean an area of trial court choice that is shielded from the kind of searching review that is given to a ruling on a question of law.

Id. at 179. *Seven-Up Co. v. O-So Grape Co.*, 179 F. Supp. 167, 172 (S.D. Ill. 1959) ("[L]ikelihood of successfully urging an abuse of discretion in an appellate court is comparable to the chance which an ice cube would have of retaining its obese proportions while floating in a pot of boiling water.").

Several reasons have been advanced to support the deference afforded a trial court in an abuse of discretion standard. *See id.* at 181-83 (noting reasons, including "bad reasons," such as appellate workload and demoralizing trial judges, as well as "good reasons," such as the impossibility of devising a rule of law to cover all situations, and the "you are there" reason). Regardless of the varying reasons and the different circumstances that may arise for the exercise of discretion, however, it is clear that when an abuse of discretion standard applies, a reviewing court should not ignore the standard and simply substitute its discretion for that of the trial court. This is particularly true for preliminary injunction decisions.

For more than a century this Court has consistently deferred to the "sound discretion of the court" in deciding preliminary or temporary injunctions. *Buffington v. Harvey*, 95 U.S. 99, 100 (1877). For example, in *Doran v. Salem Inn, Inc.*, this Court applied the standard in reviewing a preliminary injunction decision. Although the Court viewed "the question [there to be] a close one," the district court's decision was not an abuse of discretion. 422 U.S. at 932.

An abuse of discretion standard is particularly appropriate for preliminary injunction decisions because the four factors identified above require balancing, *e.g.*, determining whether "the balance of equities tips in ... favor" of the plaintiff. *Winter*, 129 S. Ct. at 374. "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* at 376 (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)). Balancing such factors is inherently discretionary.

Deferential review of the trial court under an abuse of discretion standard is also appropriate because a "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter* , 129 S. Ct. at 376. *See also Yakus v. United States*, 321 U.S. 414, 440 (1944) ("The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff."). Indeed, since "the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent," it is all the more important that a deferential abuse of discretion standard is applied by the court of appeals. *Doran v. Salem Inn, Inc.*, 422 U.S. at 931-32.

Here, the Eighth Circuit refused to give the lower court proper deference. The court of appeals stated the appropriate standard of review, but then departed from the standard in its analysis. According to the court of appeals, "[t]he district court weighed these considerations [the preliminary injunction factors] and concluded Phelps-Roper was not entitled to a preliminary injunction. We have weighed these same considerations and come to a contrary conclusion." App. A5.

As a further demonstration of the improper reassessment conducted by the court of appeals, the court concluded that "there is *enough* likelihood Phelps-Roper will be able to prove section 578.501 is not narrowly tailored or is facially overbroad to the point she is likely to prevail on the merits of her claim." App. A12 (emphasis added). This is hardly a finding of an abuse of discretion.

The court of appeals disregarded the standard of review requiring an abuse of discretion; its significant departure from controlling law merits review by this Court.

II. The Eighth Circuit's new bright-line rule, which severely limits the ability of states to protect vulnerable captive audiences from unwelcome, intrusive speech, conflicts with *Hill v. Colorado* and from court of appeals precedent.

The second reason for review is perhaps more important, for it goes to a constitutional rule that will be applied at least to all cases addressing statutory limitations on the time and place of protests that interfere with what are acknowledged to be particularly sensitive, private events. The court of appeals has created a new bright-line rule regarding

state regulation of speech: that outside the home, no one can be considered a vulnerable captive audience deserving of protection from intrusive, confrontational, and unwelcome protests. That rule conflicts with this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), another protest case. And it conflicts with the decision of a court of appeals decision in a nearly identical funeral protest case, *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

A. The Eighth Circuit's rule is based on its own decision that preceded and is incompatible with *Hill v. Colorado*.

The Eighth Circuit's analysis is tied back to *Frisby v. Schultz*, 487 U.S. 474 (1988), where this Court examined the constitutionality of a statute that restricted picketing and protests targeting a specific home. The court recognized that protests in a public forum, such as a street or sidewalk, can interfere with the right to privacy, particularly where the privacy is sought in the home.

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, ... *the home is different.* "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech ... does not mean we must be captives everywhere."

Frisby, 487 U.S. at 484 (1988) (citations omitted; emphasis added).

The Eighth Circuit has elevated the phrase, "the home is different," to dispositive constitutional status. In the Eighth Circuit's view, outside the home the concern for a captive audience can never outweigh free speech. The court first expressed that view nearly a

decade ago in *Olmer v. Lincoln*, 192 F.3d 1176, 1178 (8th Cir. 1999):

> As the Supreme Court said in *Frisby*, "the home is different," and, in our view, unique. Allowing other locations, even churches, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication. We recognize that lines have to be drawn, and we choose to draw the line in such a way as to give the maximum possible protection to speech, which is protected by the express words of the Constitution.

Olmer, 192 F.3d at 1182.

But after the Eighth Circuit decided *Olmer*, this Court considered whether protection of captive audiences was limited to residences. In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court dealt with statutory restrictions on protesters at clinics where abortions were performed. Instead of using the bright-line approach that the Eighth Circuit adopted in *Olmer*, this Court accepted that captive audiences may be protected outside the home in circumstances where the audience is particularly vulnerable and unable, due to circumstances, to avoid the message of the speaker:

> *The right to avoid unwelcome speech* has special force in the privacy of the home, ... and its immediate surroundings, ... but *can also be protected in confrontational settings.*
>
> ****
>
> [W]e have continued to maintain that "no one has a right to press even 'good' ideas on an unwilling recipient."... None of our decisions has minimized the enduring importance of "a right to be free" from persistent "importunity, following and dogging" after an offer to communicate has been declined. While the

> freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."

Hill, 530 U.S. at 717-718 (citations omitted; emphasis added). Thus, this Court expressly rejected the approach adopted by the Eighth Circuit in *Olmer* and applied here. This Court should grant the petition and require that the Eighth Circuit revise its precedent to conform to *Hill*.

B. The Eighth Circuit's ruling regarding Missouri's funeral protest law conflicts directly with the Sixth Circuit's decision upholding a similar Ohio law.

Although litigation over the constitutionality of funeral protest laws has been initiated in various locations,[4] to date just one other court of appeals has decided the question. The Sixth Circuit upheld such a statute, applying a test that is incompatible with the Eighth Circuit's bright-line approach. *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008).

Like the Eighth Circuit (*see* App. A7), the Sixth Circuit held that the appropriate test was intermediate scrutiny. 539 F.3d at 361; s*ee Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Under this test, the government may impose reasonable content-neutral restrictions on the time, place, or manner of protected speech, provided the restrictions:

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[4] *See, e.g., McQueary v. Stumbo*, 453 F. Supp.2d 975 (E.D. Ky. 2006); *State v. Sebelius*, 179 P.3d 366 (Kan. 2008); *Hood v. Perdue*, 540 F. Supp.2d 1350 (N.D. Ga. 2008).

> (1) Serve a significant governmental interest;
>
> (2) are narrowly tailored; and
>
> (3) leave open ample alternative channels for communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781 (1989). The Eighth and Sixth Circuits' analysis diverged not just as to the ultimate conclusion, but at each step along the way.

1. Governmental interest. The Sixth Circuit observed that this Court has already recognized the importance of protecting the mourners from public intrusions:

> Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

Phelps-Roper v. Strickland, 539 F.3d at 365 (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 at 168 (2004); internal quotation marks omitted). The Sixth Circuit found that mourners cannot avoid a message that targets funerals without forgoing their right to partake in funeral or burial services, and so are appropriately viewed as a captive audience. The court then concluded that the circumstances in *Hill* and in funerals were comparable, so the state did have a significant interest in protecting mourners:

> And just as "[p]ersons who [ ] attempt[ ] to enter health care facilities ... are often in particularly vulnerable physical and emotional conditions," *Hill*, 530 U.S. at 729, 120 S.Ct. 2480, it goes without saying that funeral attendees are also emotionally vulnerable.
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> ****

> Nor can funeral attendees simply "avert their eyes" to avoid exposure to disruptive speech at a funeral or burial service. The mere presence of a protestor is sufficient to inflict the harm. See *Frisby*, 487 U.S. at 478, 108 S.Ct. 2495 (noting that "the 'evil' of targeted residential picketing" is "the very *presence* of an unwelcome visitor at the home") (emphasis added [by the court]).

Phelps-Roper v. Strickland, 539 F.3d at 366.

Here, the district court noted similar concerns, concluding that Phelps-Roper was not likely to succeed in arguing that Missouri lacked a significant interest. App. A32-A33. But the Eighth Circuit, feeling bound by its decision in *Olmer*, refused to find a sufficient state interest in protecting persons from disruption at any location but their homes, giving little or no weight to the fact that the WBC protests occur and are aimed at a very personal and private event, albeit one that is held, of necessity, in a more public location. App. A9-A10.

2. Tailoring. The Sixth Circuit found the limitations on funeral protests to be comparable to those upheld by this Court in *Frisby*. 539 F.3d at 367-68. The court observed that "properly read, the Funeral Protest Provision restricts only the time and place of speech directed at a funeral or burial service." *Id.* at 368. The court noted that in *Frisby*, this Court "upheld as constitutional an ordinance that completely prohibited focused residential picketing 'before and about' a residence." *Id.* (quoting *Frisby*, 487 U.S. at 483).

Again, the Eighth Circuit took a very different approach that was in large part a natural result of its determination to comply with *Olmer* and restrict protection to homes. But the Eighth Circuit also found that the Missouri statute could be distinguished from the Ohio statute because the Ohio statute included a

definition of "other protest activities," which Missouri's statute lacks. App. A12. In doing so, the Eighth Circuit ignored a fundamental rule of statutory construction and this Court's endorsement and application of that rule.

Missouri law requires that if reasonably possible, statutes must be read in a manner that is consistent with the Constitution. *Simpson v. Kilcher*, 749 S.W.2d 386, 391 (Mo. 1988) ("[T]his Court is required to construe this statute in a manner that renders it constitutionally valid if reasonably possible to do so."). Thus, if a reasonable interpretation of this undefined phrase would rescue it from the perceived infirmity, a court is required to adopt that interpretation. This Court dealt with a similar issue in *Osborne v. Ohio*, 495 U.S. 103 (1990). There, this Court looked favorably on the fact that the Ohio Supreme Court read a scienter requirement into the statute at issue. 495 U.S. at 1693 ("[T]he statute's failure, on its face, to provide a *mens rea* requirement is cured by the [Ohio Supreme] court's conclusion that the State must establish scienter under the Ohio default statute specifying that recklessness applies absent a statutory intent provision.").

Like Ohio, Missouri has a default *mens rea* or scienter provision applicable to misdemeanors. *See* Mo. Rev. Stat. §§ 562.016, 562.021.3, and 562.026. As a result, a person could only violate section 578.501 if the person purposely or knowingly engaged in picketing or other protest activities in front of or about any location at which a funeral is held. So, contrary to the Eighth Circuit's conclusion, the statute does, indeed, limit its coverage to activity that targets or disrupts a funeral or burial service.

The Eighth Circuit was also troubled by the use of what it saw as a floating buffer zone, referring to the inclusion of processions in the definition of "funeral."

See Mo. Rev. Stat. 578.501.3 (2006 Cum. Supp.) But the Eighth Circuit again ignored the import of Missouri's scienter requirement – and thus departed from this Court's analysis in *Hill v. Colorado*. There, this Court upheld the use of a floating buffer, relying on the state's scienter requirement to prevent speakers from being forced to get out of the way of a person going to the clinic. *Hill*, 530 U.S. at 713 ("[U]nlike the floating buffer zone in *Schenck*, which would require a protester either to stop talking or to get off the sidewalk whenever a patient came within 15 feet, the "knowingly approaches" requirement in the Colorado statute allows a protester to stand still while a person moving toward or away from a health care facility walks past her."). While the Eighth Circuit may have been concerned about whether Missouri's restriction on protests along funeral processions provided guidance to citizens, it was required to recognize that provision, like the one at issue in *Hill*, must be interpreted in a way that would allow the application of the statute to processions to be upheld.

3. Available alternatives. Finally, the Eighth and Sixth Circuits diverged regarding the available alternatives to protesting at funerals.

Here, the district court concluded that Phelps-Roper may still protest outside of the times and places prohibited by the statute. As the district court noted: "Missouri's funeral protest law does not create a barrier to delivering to the public, by other means, plaintiff's intended message concerning the evils of homosexuality." App. A34. The statute does not prevent protests at public political rallies and other events that would provide ample opportunity to send Phelps-Roper's message. Indeed, such political functions would seem to be a far better venue, since attendees gather for the purpose of considering the future course of state and federal policies. But these

political events are not the only public gatherings where a protester could deliver a message. Communities have festivals where booths can be rented. Parade permits can be obtained. A host of other methods exist for the dissemination of Phelps-Roper's message.

The Sixth Circuit, too, concluded that the WBC has readily available alternatives to protesting at funerals. *See Phelps-Roper v. Strickland*, 539 F.3d at 372.

The Eighth Circuit concluded otherwise, relying on another of its own precedents, *Kirkeby v. Furness*, 92 F.3d 65 (8th Cir. 1996). But that case is readily distinguished. In *Kirkeby*, the statute restricted protesters in targeting the residence of a particular person whose behavior they wished to influence. *Kirkeby*, 92 F.3d at 662. At a funeral, the protesters cannot influence the deceased.

In fact, the WBC apparently does not wish to draw attention even to a particular individual at or connected with the funeral. And mourners are not particularly open to persuasion; they are, in fact, likely to be more closed than the general public to receiving a message other than one that provides comfort in a time of loss. Thus, the setting is used only to deliver a message, not to target a particular audience that cannot be reached by alternative means. *See Phelps-Roper v. Strickland*, 539 F.3d at 372 ("Moreover, mourners at a funeral are not her primary audience, as she openly admits in her brief that a 'funeral is the occasion of her speech, not its audience.'") Because that message is equally valid or invalid regardless of the time or location where it is delivered, Phelps-Roper could deliver it at alternative times and places. It appears that she chooses funerals not because of some functionality related to this location (other locations are equally functional), but for the very reason that it intrudes on the solace of the mourners.

Regardless of whether a protester intrudes in order to force a message upon mourners or for the purpose of gaining public notoriety, the method and the effect are the same: The protester does, in fact, intrude and disrupt the quiet reflection of those in mourning. The Sixth Circuit upheld Ohio's efforts to protect those mourners. The Eighth Circuit's contrary conclusion that Phelps-Roper or other protesters cannot adequately deliver the same message at other times or places without intruding on this captive and vulnerable audience, led that court to create a conflict that merits this Court's attention.[5]

C. In light of the enactment of funeral protest laws in nearly all the states and of the rule's application to other types of laws, the Eighth Circuit's rule has broad implications.

The conflict is pertinent, of course, not just to Ohio and Missouri, nor just to states in the Sixth and Eighth Circuits. Whether there is, in fact, a bright-line test as the Eighth Circuit has held is also critically important to other states and to the federal government. Congress and the legislatures of more than forty states have adopted funeral protest laws similar to the one at issue here.[6] The Missouri and Ohio statutes are

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[5] Like the Eighth and Sixth Circuits, scholars have reached divergent conclusions regarding the constitutionality of funeral protest statutes and the standard to be applied to determine their constitutionality. *See, e.g.*, Christine E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151 (2008); Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 KAN. L. REV. 101 (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 (2007).

[6] See 38 U.S.C. § 2413 (2006); 18 U.S.C. § 1388 (2006); Ala. Code

representative of those laws. All of those laws are at risk – or perhaps even presumptively invalid – if the Eighth Circuit's test is the right one.

There is no question that disputes over those statutes will continue to arise, and the conflict between the Sixth and Eighth Circuits will persist. WBC claims to "have picketed 40,214 times - preaching on the mean streets of 661 Cities – including in all 50 States (plus Canada and Iraq) –commanding all men to fear God, and give glory to Him, for the hour of His judgment is

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§ 13A-11-17 (LexisNexis Supp. 2007); Ark. Code Ann. § 5-71-230 (2007); Colo. Rev. Stat. § 13-21-126 (2007); Del. Code Ann. tit. 11, § 1303 (2007); Fla. Stat. § 871.01 (2007); Ga. Code Ann. § 16-11-34.2 (2007); Idaho Code Ann. § 18-6409 (Supp. 2008); 720 Ill. Comp. Stat. Ann. 5/26-6 (West Supp. 2008); Ind. Code Ann. § 35-45-1-3 (LexisNexis Supp. 2008); Iowa Code Ann. § 723.5 (West Supp. 2008); Kan. Stat. Ann. § 21-4015 (2007); Ky. Rev. Stat. Ann. §§ 525.055, .145, .155 (LexisNexis Supp. 2007); La. Rev. Stat. Ann. § 14:103 (Supp. 2008); Me. Rev. Stat. Ann. tit. 17A, § 501-A (Supp. 2007); Md. Code Ann. Crim. Law § 10-205 (LexisNexis Supp. 2007); Mass. Ann. Laws ch. 272, § 42A (2007); Mich. Comp. Laws Ann. §§ 123.1112-13 (West 2007); Minn. Stat. Ann. § 609.501 (West Supp. 2008); Miss. Code Ann. § 97-35-18 (West Supp. 2007); Mont. Code Ann. § 45-8-116 (2007); Neb. Rev. Stat. §§ 28-1320-01-1320.03 (2007); N.H. Rev. Stat. Ann. § 644:2-b (LexisNexis Supp. 2007); N.J. Stat. Ann. § 2C:33-8.1 (West Supp. 2008); N.M. Stat Ann. § 30-20B-1-5 (West Supp. 2007); N.Y. Penal Law § 240.21 (McKinney 2000); N.C. Gen. Stat. § 14-288.4 (2007); N.D. Cent. Code § 12.1-31-01.1 (Supp. 2007); Ohio Rev. Code Ann. § 3767.30 (LexisNexis 2005 & Supp. 2008); Okla. Stat. tit. 21, § 1380 (2007); 18 Pa. Cons. Stat. Ann. § 7517 (West Supp. 2008); S.C. Code Ann. § 16-17-525 (Supp. 2007); S.D. Codified Laws §§ 22-13-17- 22-13-20 (2007); Tenn. Code Ann. § 39-17-317 (2007); Tex. Penal Code Ann. §§ 42.055, 42.04 (Vernon Supp. 2008); Utah Code Ann. § 76-9-108 (Supp. 2007); Vt. Stat. Ann. tit. 13, § 3771 (Supp. 2007); Va. Code Ann. § 18.2-415 (Supp. 2008); Wash. Rev. Code Ann. § 9A.84.030 (West Supp. 2008); Wis. Stat. Ann. §§ 947.01, 947.011 (West 2005 & Supp. 2007); Wyo. Stat. Ann. § 6-6-105 (2007).

come!"[7] And presumably the door to disruption having been opened by the WBC, others will decide to use it.

Moreover, the Eighth Circuit's new rule is not limited to funeral protests. It also affects statues and ordinances dealing with protests affecting other places and other events. Most notable among them are protests near abortion clinics – the very type of protest that led to *Hill v. Colorado*. Rather than wait until such a case arises (and rather than require Phelps-Roper, the WBC, and the states to litigate the issues again and again in funeral protest cases), the Court should take up the question of that rule's legitimacy.

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[7] http://www.godhatesfags.com/picketlocations.html (last visited April 6, 2009)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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