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Note

***523 THE RESPECT FOR AMERICA'S FALLEN HEROES ACT: CONFLICTING INTERESTS
RAISE HELL WITH THE FIRST AMENDMENT**

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I. Introduction

A mother should not have to bury her son. Such a loss would be devastating. But, on a Tuesday morning at Arlington National Cemetery in Washington, D.C., [FN1] a mother does. Military families know the risks of war, yet mothers and fathers selflessly send their sons and daughters off to protect America's freedoms. Not all of them make it back alive.

Her twenty-two-year-old son was an Army corporal who had the career he had always dreamed about. He enlisted in the military after graduating from high school and was proud to serve his country. During his second deployment to Iraq, he died when a roadside bomb exploded near his convoy in Baghdad. His body was flown back to the United States for a proper military funeral.

A military funeral should be a solemn occasion, a private gathering for mourning a loss, for honoring a life that was cut short, for remembering the love of a son, a brother, a friend, a hero. [FN2] Unfortunately, not everyone appreciates the dignity of a final farewell. While a mother, family, and friends mourn the death of a loved one, a small but vocal band of picketers, just past the perimeter of the cemetery grounds, celebrates his death.

The picketers are members of Westboro Baptist Church from Topeka, Kansas, who protest at the funerals of fallen soldiers to promote their belief that God is punishing America as divine retribution for the nation's tolerance of homosexuality. [FN3] Church members shake brightly colored placards bearing hateful messages, such as "Thank God for Dead Soldiers" and "God Hates Fags," and scream to grieving parents that their children are rotting in hell. [FN4] The members do not believe the soldiers are going to hell for being homosexual, but simply for fighting for a country that allows homosexuality. [FN5]

***524** Their message has been an unpopular one. Nevertheless, church members say they are exercising a constitutional right under the First Amendment to communicate their message, even if people do not like hearing it. [FN6]

The picketing, seen as disgraceful and unacceptable [FN7] in the eyes of many Americans, has ignited a widespread public outrage and sent lawmakers, both federal and state, to the drawing board to draft legislation to restrict demonstrations at funerals and cemeteries. [FN8] But how can the legislature ban the very freedoms that American soldiers are dying to protect?

Congress passed the Respect for America's Fallen Heroes Act, which was signed into law on May 29, 2006. [FN9] The legislation applies to cemeteries on federal property and was drafted to ban demonstrations one hour before and one hour after a funeral and to restrict demonstrations within 150 feet of any road, pathway, or other route to and from the cemetery and within 300 feet of property that impedes access to or exit from the cemetery. [FN10] Many states have followed suit, passing laws that impose similar restrictions for other cemeteries, though some, including Missouri and Kentucky, are facing constitutional challenges. [FN11]

Such legislation has sparked heated debate, and many expect First Amendment challenges litigated in courtrooms across the country. [FN12] On one side, the picketers are exercising freedom of speech, one of the most fundamental and cherished rights of American citizens, often equated with a democratic society. [FN13] On the other side, the families of dead soldiers should have the right to bury their loved ones with privacy and dignity in their time of grief. [FN14] What should be the outcome when freedom of speech collides head-on with the right to a private funeral? Do Americans have a constitutional right to a private funeral? Are the restrictions broader than necessary to achieve the purpose? Who will prevail when the legislation is finally challenged in court?

This Note focuses on the constitutionality of the Respect for America's Fallen Heroes Act and how the statute will measure up when challenged as a violation of freedom of speech. Part II provides background information about *525 Reverend Fred Phelps, Westboro Baptist Church, and the controversial beliefs that led to the anti-gay picketing at military funerals. Part III discusses the legislative intent and specific language of the Respect for America's Fallen Heroes Act as well as state statutes, including those of Missouri and Kentucky, which are currently being challenged as unconstitutional. Part IV provides a four-section constitutional analysis of the Respect for America's Fallen Heroes Act. Section A considers the existence of a constitutional right to privacy at military funerals. Section B addresses the restriction on speech if a picketing violation occurs on cemetery grounds regarded as a non-public forum. Section C discusses time, place, and manner restrictions in a public forum, focusing on the restrictions on the time of demonstrations, the restriction on demonstrations along a road, path, or route, and the restriction on demonstrations at the cemetery. Section D considers whether the anti-gay picketing could be defined as fighting words. Part V provides a final synopsis of the constitutionality of the Respect for America's Fallen Heroes Act.

II. Background

The Westboro Baptist Church, led by Reverend Fred Phelps, is a tiny fundamentalist group located in Topeka, Kansas, that consists almost entirely of Phelps's relatives, including his wife, nine of his thirteen children, fifty-four grandchildren, and five great-grandchildren. [FN15] Only one other family in Topeka belongs to the church. [FN16]

Phelps was ordained as a Southern Baptist minister on September 8, 1947, but describes himself as a Primitive Baptist preacher in the old-school style. [FN17] His church embraces a strict translation of the Bible, aligned with the teachings of Calvinism, preaching that any language contained in the scriptures should be followed without question. [FN18]

Phelps and his devoted church members openly express their belief in a hateful god who smites the wicked, with gays and lesbians at the forefront of the church's campaign against evil. [FN19] He believes the Bible teaches that homosexuals who engage in sodomy should receive the death penalty. [FN20] Phelps sees America as the modern-day equivalent to the biblical cities of Sodom and *526 Gomorrah, where God killed the sinners on a massive scale when he destroyed the city by fire and brimstone. [FN21] Phelps is making a life's work out of spreading his righteous message, and military funerals are simply his latest public platform. [FN22]

The gay-bashing crusade began in 1991 at Gage Park in Topeka, Kansas. [FN23] Phelps claimed the park was "a hotbed of homosexuals," and when city officials and the news media ignored his complaints about open homosexual activity, church members began picketing the presence of gays in the park. [FN24] Relentlessly, for a total of nearly 800 consecutive weeks, the church has held "protests against public sodomy" in Gage Park. [FN25]

The church first gained national notoriety in 1998 when it picketed the funeral of Matthew Shepard, a gay college student in Laramie, Wyoming, who was ruthlessly beaten to death because he was gay. [FN26] From there, church members began picketing the funerals of AIDS victims. [FN27] They have picketed the funerals of the

miners who died in the Sago Mine disaster, Sonny Bono, Frank Sinatra, Coretta Scott King, Barry Goldwater, and Mister Rogers. [FN28]

The church members believe that God is exacting his vengeance on America at every turn, including the World Trade Center terrorist attack on September 11, 2001; Hurricane Katrina, which ravaged New Orleans in 2005; and AIDS, [FN29] which has caused more than 529,000 deaths in the United States since 1981. [FN30]

But the hate does not stop at the U.S. border. Church members believe God hates Canada for passing hate crime legislation, popularly known as the Fred Phelps Law, that includes sexual orientation as a protected group. [FN31] They also denounce Sweden for arresting Pastor Ake Green for hate speech against *527 homosexuals under Swedish hate crime legislation. [FN32] They claim the deaths of 2,000 Swedes in the Asian tsunami disaster in December 2004 were God's wrath on Sweden for tolerating homosexuality. [FN33]

In all, the Westboro Baptist Church claims to have conducted more than 22,000 protests since 1991. [FN34] That number continues to rise.

Phelps and the church members seem to welcome confrontations on the picket line or in a courtroom. "Phelps has a law degree, as do eleven of his thirteen children and four in-laws." [FN35] Nine of the children are still loyal to Phelps and work for Phelps Chartered, the family law firm. [FN36]

After graduating from Washburn University School of Law in 1964, Phelps practiced as an attorney in the state of Kansas. [FN37] He had a tough, savvy presence in the courtroom, but a pattern of ethical problems that started early in his career finally ended it completely in 1989. [FN38]

In 1969, the State Board of Law Examiners instituted disbarment proceedings against Phelps for professional misconduct, [FN39] and Phelps received a two-year suspension from practicing law in Kansas. [FN40] In 1977, the state again filed a disbarment action against Phelps for knowingly making false statements, disregarding his oath, and violating the Code of Professional Responsibility and Kansas law. [FN41] Phelps was permanently disbarred from practicing law in the state of Kansas. [FN42]

In 1985, nine U.S. District Court judges in Kansas filed disciplinary actions against seven of the Phelps family members for accusing the judges of racism, religious prejudice, and conspiracy. [FN43] Phelps agreed to surrender his license to practice law in federal court so long as the others could retain their licenses. [FN44] As *528 a result, the Phelps family is still able to practice law in the state and federal courts. [FN45]

The Phelps family is well known for its extreme litigiousness. They have sued, personally and as counsel for Westboro Baptist Church, hundreds of times. [FN46] Numerous court cases filed by the Phelps family have been ruled frivolous or pursued in bad faith. [FN47] An apparent desire for conflict, attention, and recovery of attorney's fees as an income-generating mechanism seem to fuel the family's steady stream of litigation. [FN48]

As defendants, Phelps and his family have faced dozens of legal actions in both civil and criminal courts, but only four cases have resulted in criminal convictions. [FN49]

In June 2006, a soldier's father filed a lawsuit against Westboro Baptist Church, claiming defamation, invasion of privacy, and intentional infliction of emotional distress from the March 10, 2006, picketing of his son's military funeral. [FN50] The lawsuit is the first of its kind filed by the family of a fallen soldier. [FN51] The church plans to counter-sue "for conspiracy to violate civil rights and violation of civil rights." [FN52]

Anti-picketing legislation at the state and federal levels is a legal battle that Phelps and his church members are eager to fight. Kansas previously encountered such a battle when it enacted the Kansas Funeral Picketing Act in 1993. [FN53] The church challenged the constitutionality of the law, claiming that the statutory language restricting protests "before" and "after" a funeral was too indefinite. [FN54] The U.S. District Court for the District of Kansas agreed, holding that the statute was unconstitutionally vague. [FN55] In 1995, state legislators amended the language to "one hour prior to, during and two hours following the commencement of a funeral." [FN56]

***529** Currently, the American Civil Liberties Union (ACLU) is challenging the constitutionality of military funeral laws in Missouri and Kentucky on behalf of members of Westboro Baptist Church. [FN57] The cooperation between the ACLU and the church makes for strange bedfellows because the ACLU strongly favors the rights of gays and lesbians. [FN58] Nevertheless, from the beginning, church members have warned that they would challenge any legislation that they believe violates their First Amendment right to communicate their anti-gay message. [FN59] They are holding true to their word.

III. Legislation

A. Federal

Many legislators were determined to pass laws to restrict picketing at funerals, either after first-hand experiences with Westboro Baptist Church, or upon hearing stories of the hateful, abusive treatment of military families during funeral services in their home states. [FN60] Representatives Mike Rogers of Michigan, Silvestre Reyes of Texas, and Jeff Miller of Florida sponsored the Respect for America's Fallen Heroes Act, along with 172 co-sponsors of the bill, to preserve the sanctity of military funerals at all 122 national cemeteries and to protect the privacy of mourning families as they bury loved ones who died for their country. [FN61]

In a bipartisan effort, the bill was approved by an overwhelming 408 to 3 vote in the House of Representatives on May 9, 2006. [FN62] The House bill, an amendment to titles 18 and 38 of the United States Code, provided a 500-foot restriction for demonstrations for a period of one hour before, during, and one hour after a funeral. [FN63]

At the urging of Senator Larry Craig of Idaho, the Senate amended the distance restrictions of the bill. [FN64] Senator Craig reasoned that because national cemeteries are often located in residential neighborhoods, the 500-foot restriction would likely extend to private residences and "may not be sufficiently narrow to pass constitutional muster." [FN65] Further, funeral ceremonies are held at committal shelters on national cemetery grounds, which are a minimum of 300 feet from the perimeter of the cemetery, making it unlikely that demonstrators could cause a ***530** disruption anywhere other than an access point during the funeral procession. [FN66] Therefore, with constitutional considerations in mind, he suggested a more narrowly tailored amendment to the bill that would prohibit demonstrations within 150 feet of an entrance to or exit from the cemetery and 300 feet from cemetery property that impedes access to or exit from the cemetery. [FN67] That way, a funeral procession can peaceably make its way to the cemetery gates, yet the greater distance restrictions are only in place as the funeral procession moves closer to the cemetery property. [FN68]

Concurring with Senator Craig's amendment, both the House and Senate passed the bill on May 24, 2006, by a unanimous vote. [FN69] Just days later, on Memorial Day, President George W. Bush signed the bill into law as a prelude to the annual memorial ceremonies at Arlington National Cemetery. [FN70]

The Respect for America's Fallen Heroes Act applies only to federal property, including national cemeteries under the control of the National Cemetery Administration and Arlington National Cemetery, which is controlled by the U.S. Army. The cemetery superintendent or director of the property has the authority to approve demonstrations on cemetery grounds. [FN71]

The Act prohibits a demonstration at national cemeteries and Arlington National Cemetery, unless demonstrators have received prior approval. [FN72] A demonstration is defined as picketing; orating, speechmaking, or using amplification equipment; displaying any placard, banner, or flag; or distributing any handbill, pamphlet, or leaflet, any of which is not part of a funeral or ceremony. [FN73] In addition, a demonstration includes any person willfully making noise that disturbs the peace or order of a funeral or ceremony. [FN74]

The Act prohibits demonstrations that occur "within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery property" and "is within 300 feet of such cemetery and impedes the access to or egress from such cemetery." [FN75] Criminal penalties may be imposed for violation of the demonstration restrictions. [FN76] Under title 18, a violation qualifies as a Class A misdemeanor, punishable by fine or imprisonment of not more than one year or both. [FN77]

***531** B. State

States have indeed followed Congress's lead in enacting legislation. Twenty-five states have passed laws to prohibit picketing at military funerals, and proposed legislation is pending in ten other states. [FN78]

Currently, Missouri and Kentucky are facing constitutional challenges to their state statutes [FN79] and, understandably, some states may be holding off on pending legislation to see what direction these court challenges may take.

Missouri's statute, also known as the Specialist Edward Lee Myers' Law, was signed into law by Governor Matt Blunt on February 23, 2006. [FN80] Army Specialist Edward Lee Myers died while serving in Iraq and was buried in St. Joseph, Missouri, in August 2005, amid a raucous of picketing and vile screaming at the soldier's family. [FN81] The ugly display at the cemetery instigated lawmakers to create the funeral picketing legislation. [FN82]

The statute prohibits picketing "in front of or about any church, cemetery, or funeral establishment" one hour before and until one hour after a funeral. [FN83] Violation is a Class B misdemeanor for a first offense and a Class A misdemeanor for any subsequent offense. [FN84]

The ACLU of Eastern Missouri, on behalf of Shirley Phelps-Roper, is challenging the constitutionality of the "in front of or about" language, claiming the statute is so vague that law enforcement agents were unable to consistently interpret its language. [FN85] The ACLU is asking the court to issue an injunction to keep the law from being enforced so the church can continue to picket in Missouri. [FN86]

However, in May 2006, legislators approved a "backup law" that provides a clearly understood 300-foot buffer zone, and Governor Blunt signed the bill on July 6, 2006. [FN87] The backup law is designed to take effect only in the event that existing legislation is struck down. [FN88]

Kentucky is in much the same situation as the state of Missouri, but may be on less stable constitutional ground. The Kentucky statute was approved by the state senate by a 34 to 0 vote [FN89] and signed into law on March 27, 2006, by Governor Ernie Fletcher as an emergency measure to stop the disruptive protests *532 by Westboro Baptist Church members. [FN90] The statute prohibits picketing within 300 feet of a funeral service and makes it illegal to sing, chant, whistle, shout, yell, or use a bullhorn "within earshot" of a funeral, without prior approval from the family. [FN91] The language of the statute enumerates many other ways to disrupt or interfere with a funeral service. [FN92] Anyone who violates the statute may be guilty of disorderly conduct, which is punishable by up to one year in prison. [FN93]

Constitutional experts fear that Kentucky's statute may be so overly broad that a person whistling while walking down the street or friends chatting on a public sidewalk could be in violation of the law. [FN94] The ACLU agrees. On May 1, 2006, the organization filed a complaint on behalf of Bart McQueary, a Kentucky resident who protested alongside Westboro Baptist Church members on three separate occasions, challenging that the Kentucky statute is an "overbroad criminalization of speech." [FN95] The ACLU has asked the judge to grant a preliminary injunction to allow the funeral protests to continue without fear of prosecution in the state of Kentucky. [FN96]

With the Respect for America's Fallen Heroes Act in full effect and the large number of states having passed similar statutes, the lawsuits in Missouri and Kentucky may be far from the last of the constitutional challenges to the funeral picketing legislation.

IV. Constitutional Issues

Freedom of speech in America is a right that goes straight to the heart of the U.S. Constitution. Americans cherish the right to communicate a message, and to air their views, regardless of popularity or offense to others. Yet, the right to a private military funeral has also been a freedom that Americans embrace, with that freedom rarely being disputed in the United States. The government established all national cemeteries to be "considered national shrines as a tribute to our gallant dead." [FN97] Most Americans understand what behavior is expected of them on or near national cemetery grounds and act accordingly. [FN98] Westboro Baptist Church members have been the rare exception to the rule, and now, the right to a private funeral and freedom of speech are greatly at odds.

***533 A. Existence of a Constitutional Right to Privacy at Military Funerals**

The Supreme Court has never ruled on a case that specifically addressed a private funeral as a fundamental right under the Constitution, though case law does provide indications that the Court would acknowledge a private funeral as a right guaranteed to every American under the Fourteenth Amendment.

In *Griswold v. Connecticut*, the opinion discussed how the Court "has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name." [FN99] Instead, the named constitutional freedoms have penumbras that emanate from them to create "zones of privacy." [FN100] To determine whether the people have a right, the Court looks to the "traditions and [collective] conscience" to decide what is so deeply rooted as to be fundamental. [FN101] The Due Process Clause protects those freedoms. [FN102]

In *National Archives and Records Administration v. Favish*, the Court agreed that the right to privacy for the family of a deceased loved one has deep roots in the common law. [FN103] Burial rites "have been respected in almost all civilizations from time immemorial" and "are a sign of the respect a society shows for the deceased and for the surviving family members." [FN104] In *National Archives*, in a unanimous opinion, Justice Kennedy wrote that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." [FN105] The statements show a strong inclination toward the right to a family's privacy when mourning the loss of a loved one.

Even as early as 1895, the New York Court of Appeals held that the right to privacy may be "violated by improperly interfering with the character or memory of a deceased relative" and that "a privilege may be given the surviving relatives of a deceased person to protect his memory . . . and to prevent a violation of their own rights in the character and memory of the deceased." [FN106]

The limited case law regarding the right to a private funeral indicates how seldom in our nation's history the issue has arisen, until now.

B. Restriction on Speech in a Non-public Forum

The Respect for America's Fallen Heroes Act prohibits disruptive demonstrations at national cemeteries and Arlington National Cemetery, but the question is whether the Act has done so without violating constitutional *534 limitations on freedom of speech. The government may not prohibit the expression of an idea because that idea itself is unpopular or offensive to society. [FN107] Yet, government may put certain limits on the expression of an idea, [FN108] and the courts have instigated many tests to determine whether the government is justified in its restrictions.

The level of scrutiny applied to a restriction on speech depends on whether the speech occurs in a location that is a traditional public forum, a designated public forum, or a non-public forum. [FN109] A traditional public forum is limited to public streets, parks, and sidewalks that "by long tradition or by government fiat have been devoted to assembly and debate." [FN110] A designated public forum is "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." [FN111] Such a location, including a university student center [FN112] or state fairground, [FN113] is open to expressive activity, but exclusions are allowed. [FN114] A non-public forum is a public area that has been "dedicated for use for either communicative or non-communicative purposes but has never been designated for indiscriminate expressive activity by the general public," [FN115] such as a military base [FN116] or airport terminal. [FN117]

A national cemetery may be either a non-public forum or traditional public forum, depending on where the picketing violation occurs. This distinction can be quite relevant to a First Amendment analysis. [FN118]

If a picketing violation occurred on the cemetery grounds, the forum would be non-public. In *Griffin v. Secretary of Veterans Affairs*, the court determined that national cemetery grounds are a non-public forum, and a free speech challenge would be subject only to low scrutiny. [FN119] Under low scrutiny, the government can

regulate the content of the speech to preserve the cemetery property for its dedicated purpose. [FN120] The restriction must simply be reasonable and cannot be viewpoint discriminatory. [FN121] The Respect for America's Fallen Heroes Act would pass the reasonableness test because it would be reasonable to allow a soldier's family the dignity of mourning in a private ceremony without the disruption of picketers. After all, the government established national *535 cemeteries "as a final tribute of a grateful Nation to honor the memory and service of those who served in the Armed Forces." [FN122] Therefore, "maintaining an atmosphere of tranquility and respect is necessarily central to the purpose of the forum." [FN123]

By statute, national cemeteries are under the discretion of a cemetery superintendent or director, and all demonstrations must be approved at the discretion of the superintendent or director. [FN124] But permission to demonstrate cannot be left to the "unbridled discretion" of a governmental official because such control could lead to viewpoint discrimination in violation of freedom of speech. [FN125] However, in *Griffin*, the Federal Circuit Court of Appeals upheld the discretion given to the cemetery's superintendent as reasonable to preserve the nature and function of the national cemeteries. [FN126]

All in all, in a non-public forum, the Respect for America's Fallen Heroes Act would be constitutional to serve its intended purpose.

C. Time, Place and Manner Restrictions in a Public Forum

If a picketing violation occurred on a public sidewalk or street nearby the cemetery grounds, the forum would be a traditional public forum. [FN127] Streets, sidewalks, and parks are historically open to the public for assembly, expression of thoughts, and discussion of public concerns. [FN128] However, the right to freedom of speech does not allow citizens to speak in any public place, at any time. [FN129] Even in a traditional public forum, the government can impose restrictions on the time, place, and manner of the speech, if the restrictions are content neutral, provide alternative channels to convey the message, and are "narrowly tailored to serve a significant governmental interest." [FN130]

A government restriction is content-neutral when "justified without reference to the content of the regulated speech." [FN131] In the Respect for America's Fallen Heroes Act, the language makes no mention of the content or subject matter of the demonstration. [FN132] A demonstration is prohibited under the restriction regardless of the message of the speaker. [FN133]

However, the legislative history does make references to precisely the kind of message that the legislation is attempting to prohibit. Supporters of the bill took turns telling horror stories about what they and their constituents witnessed *536 at funerals in their home states, and conveyed specific messages they found disruptive, such as "Thank God for IEDs" [FN134] and "Thank God for Dead Soldiers." [FN135] The legislative history makes it obvious what expression Congress was attempting to restrict. But, a statute is not content-based merely because it was enacted in response to the actions of a particular group or individual. [FN136] For example, in *Frisby v. Schultz*, the anti-picketing ordinance was enacted because anti-abortion demonstrators wanted to picket outside a doctor's private residence; [FN137] yet, the Supreme Court held that the statute was content neutral. [FN138]

Thus, even though Congress was motivated by the demonstrations of Westboro Baptist Church members when it enacted the legislation, the Respect for America's Fallen Heroes Act does not contain any content-based language that would render a respectful message to the family as legal and the anti-gay message as illegal. [FN139] Therefore, the Act is content neutral because it limits speech altogether.

The Respect for America's Fallen Heroes Act must also provide alternative channels to convey the speaker's message. [FN140] Westboro Baptist Church members claim that the time restriction hinders their ability to reach the grieving military families during the funeral, which is "the only place where their religious message can be delivered in a timely and relevant manner." [FN141] Church members want to express their message at the funeral because that is a time when family members "have thoughts of mortality, heaven, hell, [and] eternity . . . on their minds." [FN142] However, supporters of the Respect for America's Fallen Heroes Act disagree, claiming that the anti-gay message is not truly directed at the families of the dead soldiers. [FN143] Instead, they believe the primary target is the media and the widespread television and print coverage that is generated when Westboro Baptist Church members picket at the military funerals. [FN144]

Supporters of the Act may be right. Church members would have a difficult time showing that military families and the American people in general are not hearing the anti-gay message, even following the enactment of the federal *537 and state legislation. Westboro Baptist Church's website at www.godhatesfags.com counts more than 5.4 million hits on its homepage [FN145] and a Google search of "Westboro Baptist Church" brings up more than 390,000 hits. [FN146] Considering those numbers and the huge effect that the small congregation of Westboro Baptist Church has had on the media, legislatures, and families from coast to coast, the Respect for America's Fallen Heroes Act has allowed for alternative channels for the speaker to communicate the anti-gay message to the masses.

Whether the time, place, and manner restrictions are "narrowly tailored to serve a significant governmental interest" [FN147] is the constitutional hurdle for the Respect for America's Fallen Heroes Act. Most Americans likely agree that a private military funeral is a significant government interest, but the question remains whether the statute is narrowly tailored enough to pass a constitutional test.

A statute is considered narrowly tailored when it "burden[s] no more speech than necessary to serve a significant government interest." [FN148] Senator Craig had this in mind when he amended the House Bill, changing the restrictions from 500 feet to 300 feet. [FN149] However, case law does not firmly support the Bill's entire time, place, and manner restrictions as narrowly tailored.

The Respect for America's Fallen Heroes Act restricts the time, place, and manner of a demonstration in three ways. A demonstration is prohibited during the period one hour before and one hour after a funeral; within 150 feet of a "road, pathway, or other route" going to and from the cemetery; and within 300 feet of the cemetery when it impedes entrance or exit from the cemetery. [FN150]

1. Restrictions on Time of Demonstrations

The time restrictions are supported by existing case law. In *Grayned v. City of Rockford*, the Court upheld a noise ordinance that punished conduct which "disrupts or is about to disrupt normal school activities." [FN151] The Court acknowledged, though speech may be protected at other times, it can be prohibited during class session. [FN152] Like the peaceful, quiet atmosphere required at the school during school hours, a military funeral requires peace and quiet to maintain the dignified atmosphere of a proper burial. However, unlike the restrictions applicable before and after funerals under the Respect for America's Fallen Heroes Act, the noise ordinance in *Grayned* did not impose any restriction *538 on speech before or after class session as students and faculty entered and exited the school. [FN153]

In *Madsen v. Women's Health Center, Inc.*, an ordinance prohibiting demonstrations at abortion clinics had several references to time restrictions, making it illegal to demonstrate "[a]t all times on all days . . . within [36] feet of the property line of the Clinic" and "[d]uring the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods." [FN154] The Court upheld both provisions of the ordinance as constitutional, though the opinion did not specifically comment on the time restrictions. [FN155]

Like the school setting in *Grayned* and the clinic setting in *Madsen*, a national cemetery during a funeral would have a need for quiet and tranquility during the service. Nothing in the Constitution states that the government cannot pass laws to protect citizens from disturbing conduct that threatens "the tranquility of spots selected by the people either for homes . . . or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals." [FN156] A national cemetery during a funeral could easily fall within that list of protected places where Americans should expect peace and quiet.

Along those same lines, in *Frisby*, where anti-abortion protesters picketed a doctor's private residence, the Court upheld an ordinance that banned picketing "before or about the residence or dwelling of any individual." [FN157] The ordinance provided a complete ban, and a 24-hour restriction on demonstrations at a person's home residence. [FN158] The Court reasoned that residential privacy protects "unwilling listeners" from undesirable intrusions in the home, where they cannot avoid expression that they do not want to hear. [FN159] "Because the picketing prohibited . . . is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it." [FN160] Like the privacy protection afforded in *Frisby*, grieving families as unwilling listeners may have a special right to privacy during a funeral, and the government may protect that right.

[FN161]

Therefore, the time restrictions of one hour before, during, and one hour after a funeral would probably pass a constitutional test as narrowly tailored to allow for a respectful funeral service and a peaceful funeral procession as the attendees make their way to and from the cemetery grounds. If, however, a shorter time period could satisfy the same purpose, a shorter time period would be a more desirable restriction.

***539 2. Restriction on Demonstrations Along a Road, Pathway, or Route**

The second of the time, place, and manner restrictions is the prohibition of demonstrations "within 150 feet of a road, pathway, or other route" going to and from the cemetery. [FN162] This restriction is designed to keep picketers at a distance as the funeral procession makes its way to the cemetery grounds. Because each family may choose its own funeral home or church as the point of departure for the drive to the cemetery, [FN163] the route is not constant from family to family, making the restriction a "floating buffer zone." Based on prior case law, a 150-foot floating buffer zone would be unconstitutional. [FN164]

In *Schenck v. Pro-Choice Network of Western New York*, petitioners challenged the constitutionality of an injunction against demonstrators at abortion clinics in upstate New York that prohibited "demonstrating . . . within fifteen feet of any person or vehicle seeking access to or leaving such facilities." [FN165] The Supreme Court struck down the provision as a floating buffer zone because the prohibited demonstration area moved as the person or vehicle moved. [FN166] In contrast, within that same ordinance, the Court allowed a provision for "demonstrating within fifteen feet from . . . doorways or doorway entrances, parking lot entrances, driveways and driveway entrances" as a "fixed buffer zone" because the prohibited area remained constant. [FN167] Thus, the court held that a fifteen-foot fixed buffer zone was constitutional, but a fifteen-foot floating buffer zone was not. [FN168]

However, in *Hill v. Colorado*, the Court upheld a floating buffer zone of eight feet. [FN169] The Court concluded that an eight-foot floating buffer zone would protect speech, while a fifteen-foot floating buffer zone, as in *Schenck*, would keep demonstrators from "expressing their views from a normal conversational distance." [FN170]

But, the need to communicate from a "normal conversational distance" might not apply to funeral picketing along the processional route because the demonstrators are not attempting to communicate one-on-one with a family member. [FN171] Instead, the demonstrators are shaking placards and shouting anti-gay slurs at the passing vehicles of the funeral procession as a means of generating media attention for their message. [FN172] Thus, a broader floating buffer ***540** zone than the eight feet upheld in *Hill* could exist for the Respect for America's Fallen Heroes Act.

However, because the Court in *Schenck* held that fifteen feet was overly broad and the 150-foot floating buffer zone in the Respect for America's Fallen Heroes Act is ten times greater than that, the restriction would burden more speech than necessary. Therefore, it would likely be found unconstitutional.

In addition, in *Cameron v. Johnson*, an "ingress to or egress from" clause was upheld by the Court [FN173] and, later, was even praised by Justice Marshall in *Grayned* for its preciseness. [FN174] The language of the Mississippi statute prohibited "picketing . . . in such manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises or property owned by the State of Mississippi." [FN175] Unlike *Cameron*, the language of the Respect for America's Fallen Heroes Act does not expressly address keeping the entrances and exits clear from congestion or obstruction. [FN176] Rather, the Act more broadly focuses on the distance restriction as a barrier to keep the demonstrators away from the funeral procession. Thus, the restriction appears to be an unacceptable floating buffer zone and would likely be found to burden more speech than is necessary.

3. Restriction on Demonstrations at the Cemetery

The third of the time, place, and manner restrictions prohibits a demonstration within 300 feet of the cemetery when it impedes entrance or exit from the cemetery. [FN177] The 300-foot restriction is too broad to be held constitutional, though a distance restriction less than 300 feet but as much as 100 feet would be narrowly tailored.

In the legislative history, members of the House of Representatives were reassured that the time, place, and

manner restriction was supported by the 500-foot restriction upheld in *Boos v. Barry*. [FN178] However, in *Boos*, the Supreme Court struck down the restriction that made it illegal to display any sign that brought a foreign government into "public odium" or "public disrepute" within 500 feet of a foreign embassy. [FN179] The Court upheld a 500-foot restriction for congregating only, which only applies to foreign embassies. [FN180] Thus, the 500-foot restriction in *Boos* does not support the Respect for America's Fallen Heroes Act, which prohibits picketing, oration, speech, use of sound devices, displays of placards *541 and banners, and the distribution of any handbill or pamphlet, and other forms of speech to a restriction of 300 feet. [FN181]

In *Madsen*, the Supreme Court struck down a "300-foot no-approach zone" around the clinic and a 300-foot buffer area around the neighboring residences as "sweep[ing] more broadly than necessary to accomplish the permissible goals of the injunction." [FN182] The Court did however uphold a 36-foot buffer zone around the clinic entrances and driveway because it "burden[ed] no more speech than necessary to eliminate the unlawful conduct." [FN183] No case law expressly supports a buffer zone of 300 feet or more.

However, in *Bursen v. Freeman*, the Supreme Court upheld a Tennessee code that prohibited the solicitation of votes and distribution or exhibit of campaign materials within 100 feet of the entrance of voting polls. [FN184] "A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right." [FN185] Like *Bursen*, where the constitutional right to vote was weighed against a demonstrator's right to freedom of speech, [FN186] the Respect for America's Fallen Heroes Act must balance the constitutional conflict between the right to a private funeral and freedom of speech.

The decision in *Hill* confirms the Supreme Court's acceptance of a 100-foot restriction. In *Hill*, the eight-foot floating buffer zone was allowed within 100 feet of the entrance to any health care facility. [FN187] Like *Bursen*, the *Hill* Court reasoned that the conflict between two competing constitutional rights "demand[s] delicate balancing." [FN188]

Based on both *Bursen* and *Hill*, a 100-foot restriction at the cemetery would pass a constitutional test as "narrowly tailored to serve a significant governmental interest." But, under *Madsen*, the 300-foot restriction as set out in the Respect for America's Fallen Heroes Act is a violation of freedom of speech.

D. Fighting Words

Critics of the anti-gay message of Westboro Baptist Church suggest that the taunts of "Thank God for Dead Soldiers" and "God Hates Fags" are fighting words, which would not be protected as free speech under the First Amendment. [FN189] Fighting words are epithets directed at the immediate listener that are likely to provoke immediate violence and have no role in the communication of an idea. [FN190] The anti-gay message spewed at families during *542 military funerals does include the repeated epithet of "fag" and does tend to provoke violence and breach of the peace. [FN191] Yet, simply because speech arouses anger in some people is not enough to constitute fighting words. [FN192] Free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." [FN193]

In addition, the epithet is not actually directed at the immediate listener or even the deceased soldier because church members do not necessarily believe that the soldiers are homosexual. [FN194] Rather, they believe that God is punishing America as divine retribution for the nation's tolerance of homosexuality. [FN195] Therefore, Westboro Baptist Church members are not using fighting words, and the message - no matter how offensive - is protected as free speech under the First Amendment.

V. Conclusion

A mother deserves the right to a private and dignified military funeral for her son, a soldier who bravely gave his life for his country. And the right to a private military funeral may exist. However, Americans also have the right to openly communicate their views, regardless of whether those views are unpopular or offensive. The Respect for America's Fallen Heroes Act seeks to balance the right to a private funeral with freedom of speech.

When challenged in court, the Respect for America's Fallen Heroes Act must pass established constitutional tests to justify any restrictions on speech. If a violation should occur on cemetery grounds, as a non-public forum, the Respect for America's Fallen Heroes Act would pass the reasonableness test, allowing the government to

regulate the content of the speech to preserve the cemetery for its intended use. The Act would be held constitutional, and a mother could bury her son with privacy and dignity.

But, if a violation should occur outside of the cemetery grounds on a sidewalk or street, as a traditional public forum, the Respect for America's Fallen Heroes Act would not pass a constitutional test for time, place, and manner restrictions. The Act would pass as content neutral and would provide alternative channels to convey the message, but would not be narrowly tailored to serve a significant government interest. The time restriction would be adequate, though the distance restrictions of 150 feet from the road, path, or route and within 300 feet of the cemetery would be broader than necessary to achieve the purpose. Thus, if challenged in court as a public forum, the Respect for America's Fallen Heroes Act would be held unconstitutional. A mother would have to tolerate the *543 hateful taunting of picketers as she buries her son, but she could still feel proud. Freedom of speech is one of the very freedoms her son gave his life to protect.

[FN1]. J.D. Candidate, December 2007, University of Missouri-Kansas City School of Law; Bachelor of Journalism, 1983, University of Missouri-Columbia.

[FN1]. Arlington National Cemetery is the nation's premier military cemetery for the brave men and women of the Armed Forces. The cemetery performs over 100 funerals each week, including funerals similar to the fictional scenario depicted here. Arlington National Cemetery, www.arlingtoncemetery.org/visitor_information/index.htm.

[FN2]. See 152 Cong. Rec. H2199 (daily ed. May 9, 2006).

[FN3]. 152 Cong. Rec. S5129 (daily ed. May 24, 2006) (statement of Sen. Craig).

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[FN5]. Kari Lydersen, 5 States Consider Bans on Protests at Funerals; Proposals Aimed at Anti-gay Demonstrations, Wash. Post, Jan. 30, 2006, at A9.

[FN6]. A Message from Westboro Baptist Church (WBC) to Lawmakers on Legislation Regarding her Counter-Demonstrations at Funerals of Dead Soldiers (Dec. 12, 2005), at 4-5, www.godhatesfags.com/writings/20051212_legislation-message.pdf.

[FN7]. 109 Cong. Rec. H2199 (daily ed. May 9, 2006) (statement of Rep. Gil Gutknecht).

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[FN19]. Alvarez, *supra* note 8.

[FN20]. "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them." *Leviticus 20:13* (King James); Joe Taschler & Steve Fry, *The Gospel According to Fred*, *Topeka Cap.-J.*, Aug. 3, 1994, at 2; www.godhatesfags.com.

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[FN23]. Joe Taschler & Steve Fry, *Faxes, Pickets, Politics Carry Phelps' Message*, *Topeka Cap.-J.*, Aug. 3, 1994, at 5.

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[FN25]. News Release, *Week 787 of the Great Gage Park Decency Drive* (July 20, 2006), www.godhatesfags.com/fliers/jul2006/20060720_week-787.pdf.

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[FN101]. Id. at 493.

[FN102]. Id. at 487.

[FN103]. 541 U.S. 157, 168 (2004) (holding that a family's privacy interest outweighs the public interest in disclosure of photograph of deceased).

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[FN150]. 38 U.S.C. § 2413 (2006).

[FN151]. *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972).

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[FN157]. *Frisby v. Schultz*, 487 U.S. 474, 476-77 (1988).

[FN158]. *Id.* at 485.

[FN159]. See *id.* at 475.

[FN160]. *Id.* at 488.

[FN161]. See *id.* at 485.

[FN162]. 38 U.S.C. § 2413 (2006).

[FN163]. 152 Cong. Rec. S5129 (daily ed. May 24, 2006) (statement of Sen. Craig) ("the closer the procession is to the gates of the cemetery, the tighter the restrictions . . ."); Baker, *supra* note 11.

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[FN167]. *Id.* at 367.

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[FN184]. *Bursen v. Freeman*, 504 U.S. 191, 211 (1992).

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[FN192]. *Cannon*, 998 F.2d at 873.

[FN193]. *Id.* (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

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