Counting the Cost of Free Speech: Evaluating a nation’s Attempts to protect the honor of its troops

*by*

Nathan Eilert\*

**I. Introduction**

The freedom of speech is a cornerstone of American society. For centuries brave men and women have fought and died to protect this basic liberty. Despite the vast array of opinions shared throughout the United States, few citizens have stretched this freedom further than the members of a small church in Kansas. The Westboro Baptist Church (WBC) recently appalled the nation by picketing funerals of United States Servicemen killed in the Middle East.[[1]](#footnote-2) Members of the church shamelessly displayed signs stating “God Hates America,” “Semper Fi Fags,” “You’re Going to Hell,” and “Thank God for Dead Soldiers.”[[2]](#footnote-3) The resulting firestorm of public opinion led to personal injury suits, state laws, and even federal acts being levied toward the WBC for its inflammatory speech.[[3]](#footnote-4)

Despite the nearly unanimous support for laws restricting the speech of the WBC, these restrictions must be evaluated according to their effect on basic freedoms and not their repudiation of a despicable message. Although the Supreme Court of the United States has never confronted the issue of funeral picketing[[4]](#footnote-5), it has established a framework for evaluating laws burdening the freedom of speech.[[5]](#footnote-6) Analyzing the recent federal restrictions according to this time, place, and manner framework will show just how far the government may go to protect its troops.[[6]](#footnote-7)

This article will evaluate whether the recent Honoring America’s Veterans and Caring for Camp Lejeune Act (HAVA) is an unconstitutional restriction of free speech. Section II will discuss the history of the WBC and relevant judicial decisions leading to the enactment of the HAVA.[[7]](#footnote-8) Section III will apply the Supreme Court’s standard regarding time, place, and manner restrictions to the HAVA and will evaluate the policy implications of free speech regulation and any alternative methods for ensuring respect of America’s soldiers.[[8]](#footnote-9)

Considering both the protections and restrictions associated with the HAVA, this article will conclude that it is likely an unconstitutional restriction on free speech. The Act impermissibly restricts First Amendment freedoms while providing negligible protection to the families of fallen soldiers. The Act has received widespread support, however it likely fails the Supreme Court’s reasonable time, place, and manner test. In spite of the HAVA’s apparent illegality, this determination does not close every avenue for protecting the honor of America’s warriors. It is possible to protect the rights America’s soldiers died to defend through the implementation of less restrictive alternatives.

**II. Background**

The events leading to the enactment of the HAVA demonstrate why such drastic measures have been sought to restrain the Westboro Baptist Church. This section will first detail the history of the WBC. Next, it will evaluate the legislative efforts at both the state and national levels to protect mourners from the WBC’s offensive message. After analyzing the ineffectiveness of legislative restrictions, this section will detail each level of the failed *Snyder v. Phelps* civil suit, where the Supreme Court denied civil damages to the family of deceased Lance Corporal Matthew Snyder. Lastly, this section will detail the increased regulations imposed by the HAVA following the *Snyder* decision.

**A. History of the Westboro Baptist Church**

To better understand one of the most despised families in America, it is important to examine their progression from Midwestern church founders to incendiary activists. The Westboro Baptist Church, located in Topeka, Kansas, was founded in 1955.[[9]](#footnote-10) Fred Phelps has been the senior pastor of the WBC throughout its entire existence.[[10]](#footnote-11) The WBC adheres to a strict subset of Christianity called five-point Calvanism.[[11]](#footnote-12) The tenants of this subset include: (1) the total depravity of man, (2) the unconditional election of God’s saints, (3) limited atonement for sins, (4) irresistible grace for those called by God, and (5) the perseverance of the saints.[[12]](#footnote-13) Following these tenants, members of the WBC believe it is their duty to warn unbelieving members of society about God’s imminent judgment.[[13]](#footnote-14)

Due to its inflammatory rhetoric and uncompromising message, the WBC has attracted few members outside of the Phelps family in its nearly sixty-year history. The congregation is currently estimated at sixty to seventy active members, fifty of whom are members of the Phelps family.[[14]](#footnote-15) According to information posted on its website, the WBC began picketing in 1991 following a realization by Fred Phelps of the increasing threat of homosexuality in America.[[15]](#footnote-16) Since that time, the WBC has picketed an estimated 51,358 events.[[16]](#footnote-17) Using signs manufactured in their walled-off compound, picketers of all ages carry signs stating “God Hates Fags,” “Thank God for AIDS,” “Burn in Hell,” and “Thank God for Dead Soldiers.” [[17]](#footnote-18)

The WBC’s infamy grew as their tactics became increasingly controversial. While the WBC has picketed schools and even other churches since the 1980s, in 1991 it began focusing attention on funerals.[[18]](#footnote-19) This decision brought the WBC national disdain when members of the church picketed the funeral of openly gay teenager, Matthew Shepard.[[19]](#footnote-20) Unaffected by the universally negative response throughout the nation, members of the WBC took arguably their most controversial step in 2006 when they began protesting military funerals.[[20]](#footnote-21) Believing that the deaths of United States servicemen resulted from God’s judgment for homosexuality, the WBC travelled to Maryland in 2006 to picket the funeral of Lance Corporal Matthew Snyder after his death in Iraq.[[21]](#footnote-22) The insensitivity shocked the nation and immediate steps were taken throughout the country to stop the WBC from ever picketing military funerals again.[[22]](#footnote-23)

**B. Legislation Regarding Funeral Picketing**

Kansas developed the first anti-funeral picketing law in 1992.[[23]](#footnote-24) Few other states followed suit until the national attention garnered by the military funeral protests in 2006.[[24]](#footnote-25) After the shocking display by the WBC, national support for funeral protection was so universal that by the end of 2006 nearly 40 states had created some form of ordinance regulating the ability to protest military funerals.[[25]](#footnote-26) As explained by Professor Stephen McCallister in his 2007 Kansas Law Review article, these ordinances prohibit funeral picketing in three separate ways.[[26]](#footnote-27) The first method of restriction is the creation of a buffer zone.[[27]](#footnote-28) These buffers restrict all demonstrations within an area 100 to 1,000 feet from the location of the funeral.[[28]](#footnote-29) Currently, nineteen states choose a 500 foot buffer while thirteen support 300 feet buffers.[[29]](#footnote-30) The second approach is to prohibit loud or distracting activities by the picketers by labeling it a disruption of the peace or disorderly conduct.[[30]](#footnote-31) The third and most popular method among states is to combine both the buffer zone and disruption of the peace into a single bill.[[31]](#footnote-32) Widespread support for state laws regulating funeral protests also led to bicameral support for national regulation.

In December of 2006, the United States Congress unanimously passed the Respect for America’s Fallen Heroes Act.[[32]](#footnote-33) Similar to state laws, the Act established a buffer zone of 150 feet from any roadway along the funeral route or 300 feet from the cemetery during the sixty minutes before or the sixty minutes after a service.[[33]](#footnote-34) Additionally, the Act prohibited chanting, yelling, and other distracting actions by protesters.[[34]](#footnote-35) The state and national statutory protections are extensive, but they have not deterred the WBC. Fred Phelps was trained as an attorney, and several of WBC’s members are currently practicing attorneys.[[35]](#footnote-36) Their intimate knowledge of legal processes allows the WBC to carefully adhere to pertinent state and federal restrictions regarding the right to protest.

**C. Tort Law Restriction of WBC Picketing at Military Funerals**

Following the shocking actions of the WBC at Lance Corporal Snyder’s funeral, his father brought suit against the WBC for intrusion, intentional infliction of emotional distress, and conspiracy.[[36]](#footnote-37) Despite the fact that Maryland had an anti-funeral protest law in effect on the day of the funeral, the WBC was well within the restrictions of the ordinance during the funeral of Lance Corporal Snyder.[[37]](#footnote-38) Prior to the funeral, the Phelps family had coordinated with local police and established a fenced area for picketing 1,000 feet from Lance Corporal Snyder’s funeral.[[38]](#footnote-39) The Phelps family peacefully displayed their signs without openly confronting any funeral attendees.[[39]](#footnote-40) Members of the WBC picketed for a period of about 30 minutes before the funeral started and chose not to follow the procession to the cemetery.[[40]](#footnote-41)

Without any violation of Maryland funeral statutes, Snyder brought a tort action against Fred Phelps based solely on the harm caused to himself and his family.[[41]](#footnote-42) Although Snyder admitted that he had only seen the tops of the signs on the day of the funeral[[42]](#footnote-43), his main claim revolved around the emotional pain he sustained when he saw images of the protest on the news and when he read an “epic” written by members of the WBC and posted on the official church website.[[43]](#footnote-44) The “epic” asserted Lance Corporal Snyder’s fate in hell for idolatry and adultery[[44]](#footnote-45)

**1.Snyder v. Phelps Trial Court Decision**

The key issue at trial regarded whether Snyder could be considered a public or private citizen.[[45]](#footnote-46) As established in *Hustler Magazine v. Falwell*, the First Amendment prohibits recovering tort damages for emotional distress when the target of offensive speech is a public figure.[[46]](#footnote-47) The trial court rejected Phelps’s assertion that Mr. Snyder had become a public figure and instead utilized the rule established in *Gertz v. Robert Welch* that, “a publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the *New York Times* protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest.”[[47]](#footnote-48) Applying *Gertz,* the jury found that the WBC had defamed Lance Corporal Snyder through both their signs and the “epic” posted on their website.[[48]](#footnote-49) The jury awarded Snyder $2.9 million in compensatory damages and $8 million in punitive damages for the pain and suffering caused by the WBC.[[49]](#footnote-50) The judge later reduced the punitive award to $2.1 million.[[50]](#footnote-51) Phelps appealed.[[51]](#footnote-52)

**2.** **Snyder v. Phelps Appellate Court Decision**

On Appeal, the 4th Circuit reversed the trial court’s decision.[[52]](#footnote-53) The Court referred to the maxim established in the *New York Times* case that the First Amendment must have room to breathe.[[53]](#footnote-54) Instead of relying on *Gertz*, the 4th Circuit referenced the Supreme Court’s *Milkovich* case saying that the issue revolved around whether the destructive statements on the signs and within the “epic” could be interpreted as provable facts or simply opinion.[[54]](#footnote-55) The Appellate Court’s analysis differed completely from the public or private question raised at the trial level.[[55]](#footnote-56) Because the statements about Lance Corporal Snyder were opinions absent facts and mere hyperbole, First Amendment protection extended to the WBC.[[56]](#footnote-57) Importantly, the 4th Circuit indicated that despite the denial of Snyder’s claim, the government may institute valid time, place, and manner restrictions to prevent similar offenses in the future.[[57]](#footnote-58)

**3.** **Snyder v. Phelps Supreme Court Decision**

The Supreme Court granted certiorari to *Snyder v. Phelps* in 2010.[[58]](#footnote-59) Affirming the 4th Circuit, the Court quoted its holding in *Boos v. Barry* and said that “in a public debate we must tolerate insulting, even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”[[59]](#footnote-60) Though reaching the same conclusion as the 4th Circuit, the Supreme Court employed a slightly different analysis than the previous courts.[[60]](#footnote-61)

Instead of focusing on whether the speech was conducted by a private citizen or merely the opinion of the speaker, the Court based its decision on the fact that the speech was an area of public concern.[[61]](#footnote-62) In the opinion of the Court, “speech concerning public affairs is more than self-expression; it is the essence of self government.”[[62]](#footnote-63) Accordingly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.”[[63]](#footnote-64) In the majority’s opinion the fact that the speech was inappropriate or controversial in character was irrelevant to the question of whether it is a matter of public concern.[[64]](#footnote-65) The test employed by the Court to determine whether the speech was a matter of public concern looks at the content, form, and context of the speech.[[65]](#footnote-66) According to the Court, the content of the WBC messages concerning 9/11, the moral conduct of our nation, the fate of our nation, and homosexuality in the military, “plainly relate[d] to the broad interests of society at large, rather than matters purely of private concern.[[66]](#footnote-67)

In rejecting Snyder’s appeal, the Court focused entirely on the tort liability for the messages displayed at the funeral.[[67]](#footnote-68) The Court declined to analyze whether the “epic,” written entirely about Lance Corporal Snyder, would fail the content, form, and context analysis.[[68]](#footnote-69) The “epic” was a key factor in the trial and appellate decisions;[[69]](#footnote-70) however, Snyder failed to raise the issue in his petition for certiorari.[[70]](#footnote-71)

Acknowledging that the WBC had acted in accordance with First Amendment privilege, the Court refused to create a categorical exception for funerals in the area of free speech.[[71]](#footnote-72) Picketing a funeral was distinct from the obscenity exception in *Roth*, fighting words in *Chaplinsky,* and captive audiences in *Frisby*.[[72]](#footnote-73) The Court held that no tort damages would be awarded because the picket was conducted peacefully, on matters of public concern, and on a public space.[[73]](#footnote-74) After the Supreme Court’s ruling, national lawmakers took immediate steps to implement the reasonable time, place, and manner restrictions alluded to in the appellate decision.

**D. Honoring America’s Veterans and Caring for Camp Lejeune Families Act**

Following the decision in *Snyder v. Phelps*, the Honoring America’s Veterans and Caring for Camp Lejeune Families Act was signed into law on August 28, 2012.[[74]](#footnote-75) Title VI of this Act increases the federal restrictions on picketing military funerals.[[75]](#footnote-76) The restrictions prohibit protests of military funerals within cemeteries outside the control of the National Cemetery Administration.[[76]](#footnote-77) This prohibitions extend two hours before and two hours after a ceremony and restrict activities which: (1) take place within 300 feet of an intersection between the boundary of the funeral location or a road of ingress/egress;[[77]](#footnote-78) (2) include the making of noise or a diversion that tends to disrupt the peace or good order of the funeral;[[78]](#footnote-79) (3) take place within 500 feet of the actual location of the funeral and tend to impede the ingress/egress from that location;[[79]](#footnote-80) (4) is on or near the boundary of any surviving member of the deceased’s immediate family and tends to disrupt the peace or good order of the funeral.[[80]](#footnote-81)

The stated purpose of the Act is to provide the necessary and proper support for the recruitment and retention of the armed forces by protecting the dignity of the service members.[[81]](#footnote-82) The Act also furthers this purpose by protecting the privacy of service members’ immediate family members and other attendees during funeral services.[[82]](#footnote-83) The penalty for violating the HAVA includes both criminal and civil remedies. The criminal remedies may involve a fine of up to $50,000 and up to a year in prison. However, civil remedies may only be sought through suit for personal injuries received.[[83]](#footnote-84)

The Act specifically applies to cemeteries outside the control of the National Cemetery Administration and increases the boundaries established in the Respect for America’s Fallen Heroes Act from 150 and 300 feet to 300 and 500 feet from roads of ingress/egress and the location of the funeral.[[84]](#footnote-85) The new Act also increases the prohibited time of picketing from sixty minutes before and after the service to 120 minutes before and after the service.[[85]](#footnote-86)

**III. Analysis**

The recent Honoring America’s Veterans Act significantly increases funeral picketing restrictions established in the Respect for America’s Fallen Heroes Act of 2006.[[86]](#footnote-87) Even though the HAVA passed through Congress with the support of the President, the legislation is still subject to judicial review.[[87]](#footnote-88) Section III.A. will discuss the public nature of the forum restricted by the HAVA.[[88]](#footnote-89) Then Section III.B. will discuss whether the HAVA neutrally restricts speech.[[89]](#footnote-90) Section III.C. will evaluate the HAVA according to the Supreme Court’s time, place, and manner analysis.[[90]](#footnote-91) Finally, Section III.D. will explore the policy implications of repealing the HAVA.[[91]](#footnote-92)

**A. Nature of the Forum**

The first step in evaluating the Constitutionality of the HAVA is determining which type of forum it affects.[[92]](#footnote-93) Ascertaining what limits may be placed on speech requires focusing on the “place” of that speech and considering the nature of the forum the speaker seeks to employ.[[93]](#footnote-94) Free speech concessions vary depending on whether the forum is classified as traditionally public, a public forum created by government designation, or non-public.[[94]](#footnote-95)

Speech may be regulated in non-public and public forums by designation while traditionally open forums retain the highest freedom of expression.[[95]](#footnote-96) In *Heffron*, the Supreme Court held that the government may regulate its property to ensure the purpose of that land is fulfilled.[[96]](#footnote-97) A cemetery or church would be a prime example of a non-public forum.[[97]](#footnote-98) However, the HAVA affects more than non-public fora.[[98]](#footnote-99) Because the HAVA contains no exceptions for sidewalks and public roads, its 300-500 foot restriction of free speech intrudes into traditionally public fora.[[99]](#footnote-100)

According to the Supreme Court*,* public streets are the archetype of public forums and they cannot lose that designation because of their relation to a private residence or other property.[[100]](#footnote-101) Insofar as the HAVA influences public streets surrounding a military funeral it is in effect a traditionally open forum.[[101]](#footnote-102) While restrictions on traditionally public fora are permissible in limited situations, these restrictions must never suppress expression because of the speaker’s viewpoint.[[102]](#footnote-103)

Restrictions on public fora require a high level of scrutiny from judicial review.[[103]](#footnote-104) If the restriction is content based it must be narrowly tailored to achieve a compelling state interest.[[104]](#footnote-105) Content neutral time, place, and manner restrictions receive a more intermediate level of scrutiny.[[105]](#footnote-106) Neutral restrictions must be, “narrowly tailored to achieve an important government interest while leaving open ample alternative methods.”[[106]](#footnote-107)

**B. Content Neutrality**

The HAVA likely passes the test of content neutrality on its face. The principle inquiry in a neutrality analysis is whether the government has adopted a regulation of speech without reference to the content of the regulated speech.[[107]](#footnote-108) The actual text of the HAVA makes no reference to the WBC or their controversial message.[[108]](#footnote-109) The statute simply restricts activity that, “distracts or tends to distract from the service.”[[109]](#footnote-110)

However, the issue of unconstitutionality arises when considering how the Act will be implemented. In *Snyder*, the WBC was not the only group “protesting”.[[110]](#footnote-111) A counter protest was in effect by the Patriot Guard, a military veteran organization dedicated to honoring fallen soldiers.[[111]](#footnote-112) The Guard essentially established a human wall to shield the funeral attendees from the visual onslaught of the WBC.[[112]](#footnote-113) According to a strict interpretation of the statute, a counter protest obstructing the WBC could distract from the service. If the counter-protesters are treated differently than the WBC, the discrepancy could be interpreted as a viewpoint-based discrimination.[[113]](#footnote-114) Because the Act is likely neutral on its face, any determination of unconstitutionality will have to be established through the practical effect of the HAVA.[[114]](#footnote-115)

In relation to uneven enforcement of a facially neutral statute, protest ordinances are invalid if it can be proven that they ban only negative opinions.[[115]](#footnote-116) In *Perry,* the Court investigated and decided that a particular opinion was the deciding factor in whether protesters could appear at a school rally.[[116]](#footnote-117) The Court held that the restrictions on protesting were content-based because the Act was intended to silence only negative comments.[[117]](#footnote-118) Likewise, in *Boos v. Barry*, the Supreme Court held that an ordinance banning picketing around a foreign embassy was a content-based restriction.[[118]](#footnote-119) The ordinance impermissibly banned only critical messages.[[119]](#footnote-120)

Although the first two sections of the HAVA remain neutral by restricting loud noises or paths of ingress/egress, the third section may be held to be an unlawful restriction because it bans activity that “disturbs the peace” of the listener.[[120]](#footnote-121) An argument may be made that only the presence of the WBC would “disturb” the funeral attendees. Unlike the previous Respect for Fallen Heroes Act, which banned only noise or diversion,[[121]](#footnote-122) the HAVA may be evaluated strictly due to unequal enforcement of its vague terms.

**C. Time, Place, and Manner Restrictions**

Despite the argument that the practical effect of the HAVA will unfairly restrict the WBC, the statute will likely be scrutinized according to its facial neutrality. Neutral time, place, and manner restrictions within the public forum are evaluated according to an intermediate level of scrutiny.[[122]](#footnote-123) This intermediate level of scrutiny requires that the restrictions serve an important government interest, are narrowly tailored to achieve that interest, and offer significant alternative means of communication.[[123]](#footnote-124)

**1. Important Government Interest**

The stated purpose of the HAVA is to “provide the necessary and proper support for the recruitment and retention of the Armed Forces by protecting their dignity and the dignity of their families during funeral services.”[[124]](#footnote-125) Congress justifies the Act under the Necessary and Proper exercise of powers in Article I, Section 8 of the Constitution.[[125]](#footnote-126) This section permits Congress to provide for the common defense, raise and support armies, and regulate of the nation’s military forces.[[126]](#footnote-127)

Although the United States has an interest in preserving the honor of its deceased military members, the HAVA is likely still an unconstitutional restriction on the First Amendment right to free speech. The government interest is insufficient when viewed in relation to the freedom it seeks to restrict. The Supreme Court has recognized that the First Amendment reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”[[127]](#footnote-128) Because of the crucial nature of free speech, any restrictions on public issue picketing will be scrutinized carefully.[[128]](#footnote-129) This scrutiny is placed on the Government because “all ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests.”[[129]](#footnote-130) According to the Supreme Court, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable.”[[130]](#footnote-131)

Due to the essential nature of the freedom of speech, “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”[[131]](#footnote-132) The right to expression of unpopular beliefs is illustrated by the *Cohen v. California* decision. In striking down a conviction for wearing the words “Fuck the draft” on a jacket in a courthouse, the Court explained that “the ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”[[132]](#footnote-133) The Government may not restrict speech solely because of the unpopular message, so any restrictions on speech must be based on a government interest independent of a particular message.

Although the Supreme Court has never addressed the issue of funeral picketing, it has addressed a variety of other laws which burden speech within traditionally public fora. The Supreme Court has recognized that the government has an interest in protecting individual privacy in the home[[133]](#footnote-134), maintaining national parks[[134]](#footnote-135), encouraging the proper functioning of health care facilities[[135]](#footnote-136), and controlling appropriate sound levels within parks[[136]](#footnote-137). In *Frisby*, the court recognized that the government has an important interest in preserving residential privacy.[[137]](#footnote-138) Likewise, in *Madsen*, the Court held that the government has an important interest in preserving the freedom of patients seeking medical help.[[138]](#footnote-139) The medical assistance idea was further advanced in *Hill*. The Court in *Hill* acknowledged a significant government interest, but reiterated that the purpose was not to avoid offensive speech, but rather “to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message by physically approaching an individual at close range.”[[139]](#footnote-140)

The stated purpose of the HAVA is to provide the proper protection for the dignity of soldiers and their families.[[140]](#footnote-141) This protection extends while they are engaging in funeral services outside the home. Protected areas include not only cemeteries but also the church administering the service and all paths of ingress and egress to the funeral.[[141]](#footnote-142) The public nature of a funeral distinguishes this issue from the rationale in *Frisby*.[[142]](#footnote-143) The holdings of both *Madsen* and *Hill* recognize interests for those moving outside the home, however the government interest in both of these cases deals directly with allowing individuals to receive physical and psychological care within a healthcare facility.[[143]](#footnote-144) Even then, the restriction on speech never extends further than 100 feet.[[144]](#footnote-145)

When considering the previous precedents regarding strong government interests, the situations raised for the HAVA are likely most closely related to those in *Cohen*. The Court in *Cohen* refused to acknowledge an ordinance prohibiting disturbing the peace.[[145]](#footnote-146) The Court explained that even a public courthouse cannot provide the same protections from unwanted speech as are present in one’s home.[[146]](#footnote-147) Even when the message infringes upon the privacy of the viewer, the Court refused to acknowledge a strong government interest in restricting free speech.[[147]](#footnote-148) Faced with an offensive message, the Court recommended that the audience merely avert their eyes.[[148]](#footnote-149)

Though the Supreme Court has never considered the issue of funeral picketing, the issue has been addressed on a limited basis within the lower courts. In *McQueary v. Stumbo,* a Kentucky district court struck down an ordinance restricting picketing within a 300 buffer around a funeral.[[149]](#footnote-150) The court found that the 300 foot buffer was not narrowly tailored to fulfill the important government interest.[[150]](#footnote-151) Despite the failure of the ordinance, the court interestingly held that the government had an important government interest in protecting the privacy of funeral-goers.[[151]](#footnote-152) The court held that the interest was important because like *Frisby*, funeral attendees were essentially captive to the message presented by picketers.[[152]](#footnote-153) The court compared the solemn, deeply personal nature of a funeral to that of the home and declared an important governmental interest.[[153]](#footnote-154)

The captivity concept was expanded by the 6th Circuit in the case *Phelps-Roper v. Strickland*. The 6th Circuit borrowed heavily from the analysis used in *McQueary* and held that the captivity of funeral-goers justified an important government interest in protecting their privacy.[[154]](#footnote-155) The court also expanded *McQueary* by holding that a fixed buffer around funeral services was sufficiently narrowly tailored to accomplish the government interest.[[155]](#footnote-156)

Despite the recent recognition of a government interest for protecting funeral services, the Supreme Court will still likely hold that the interest is insufficient. In the *Snyder* decision the Court refused to impose civil liability on Phelps on the basis of audience captivity.[[156]](#footnote-157) Admittedly, the Court was deciding a civil issue based on tort law, but the refusal to expand the captivity doctrine to cemeteries indicates that the *Frisby* analysis currently employed by lower courts is flawed. As mentioned above, previous Supreme Court precedent indicates the government’s interest will likely be held to be insufficient.

In the case of the HAVA, there is a serious restraint of a constitutionally protected right. The HAVA restricts all speech within a 300 foot zone which includes public roads, sidewalks, and even private residences.[[157]](#footnote-158) Considering previous precedent, the government does have an interest in preserving the privacy and dignity of its troops, but the Court makes clear that the freedom of speech requires a showing that these privacy interests are being invaded in an essentially intolerable manner.[[158]](#footnote-159) Given that individuals are generally expected to avert their eyes when exposed to objectionable speech outside the home,[[159]](#footnote-160) the interests established in the HAVA likely fail to reach this standard.

**2. Narrowly Tailored**

According to the United States Supreme Court a complete ban of free speech can be legal, but only if it targets and eliminates no more than the exact source of evil.[[160]](#footnote-161) As a result, the restriction must be couched in the narrowest terms that will accomplish its pinpoint objective.[[161]](#footnote-162) A content neutral statute, which the HAVA appears to be, only needs to pass an intermediate level of scrutiny.[[162]](#footnote-163) A less restrictive alternative is not fatal to the government ordinance, but the restriction must be significantly related to an important government end.[[163]](#footnote-164) The statute must be rejected if it burdens more speech than is necessary to accomplish the government interest.[[164]](#footnote-165)

The Supreme Court has yet to evaluate a funeral ordinance as a valid time, place, and manner restriction; however, the Court has established a framework for restricting speech in a non-public forum.[[165]](#footnote-166) Applying the Court’s analysis in *Madsen* and others, the HAVA likely fails the narrow tailoring test.[[166]](#footnote-167) Narrow tailoring is generally evaluated according to two criteria: (1) overbreadth and (2) vagueness.[[167]](#footnote-168) As discussed below, the HAVA likely fails in both analyses.

**i. Overbreadth**

The HAVA is overly broad in its restriction of speech because it affects an area much larger than is necessary to protect the privacy of funeral goers. Thereby making the restriction influence more than the exact source of evil. The Supreme Court has never approved a statutory buffer of more than 100 feet from a static building.[[168]](#footnote-169) In *Madsen,* the Court struck down a 300 foot buffer surrounding an abortion clinic while approving only a thirty-six foot buffer surrounding the immediate property of the clinic.[[169]](#footnote-170) The 300 foot buffer established in the HAVA is nearly ten times the approved distance in *Madsen* and three times the limit in *Hill.*[[170]](#footnote-171) The distance required in the HAVA has never been approved by the Supreme Court and is likely an overly broad buffer that burdens more speech than is necessary to protect the interest of military families.

In addition to physically displacing protesters, the HAVA effectively negates a protester’s right to confront his target audience. This makes the statute overly broad because it forces protesters to move outside of the area where they can be reasonably seen or heard. In *Madsen*, the approved thirty-six foot ordinance still allowed the protesters to convey their message visually or verbally to the intended recipient while prohibiting them from approaching the individual.[[171]](#footnote-172) In *Hill*, the protesters were allowed to approach no closer than eight feet of the intended recipient within a 100 foot buffer.[[172]](#footnote-173) The protesters in *Hill* could also present signs and speak directly with targeted individuals.[[173]](#footnote-174)

In this case, the buffer is so large that any visual message will likely be lost. Additionally, the HAVA bans even speaking to funeral attendees by forbidding “the making of noise or a diversion that tends to disrupt the peace or good order of the funeral”.[[174]](#footnote-175) In *Cohen,* where a protester wore an anti-military statement on his jacket, the Supreme Court indicated that those faced with a confrontational issue should simply avert their eyes.[[175]](#footnote-176) This new ordinance is overly broad because it removes the need to avert ones eyes by moving the protesters to a location beyond where the average observer may notice.

The restriction also fails the narrow tailoring analysis because it neglects to include an exception for private property.[[176]](#footnote-177) As the Act is written, the 300 foot buffer affects public property and private property alike. If a home or business were to fall within that significant area, the citizen could be restricted from her own beliefs within her own home. The Act would even permit posting signs within a private yard. *Madsen* addressed this very issue when it struck down the thirty-six foot buffer surrounding the building wherever it intersected with private property.[[177]](#footnote-178)

In addition to the excessively restrictive buffer, the four-hour duration of the ordinance may be construed to excessively burden the right to free speech. This increase in duration is nearly double the limit established in the Respect for America’s Fallen Heroes Act.[[178]](#footnote-179) The restriction is not narrowly drawn because it can be construed to restrict speech without positively influencing the path of ingress/egress of funeral attendees. Banning picketing an extra hour before a funeral will likely have little impact on the ability of funeral goers to reach the funeral in peace, however the right of speech to the general public will be completely affected. The benefit of the expanded timeframe is clearly excessive when weighed against the fact that protesters may be completely prohibited from sharing their message.

Applying this restriction to the recent *Snyder* case, the increased time restriction would have had no positive effect. In *Snyder*, there is no evidence that the family members would have been spared any anguish if the federal restriction had been two hours before the funeral instead of simply an hour. A two hour restriction on protesting before the funeral would not have had any positive impact on the ingress or egress of funeral attendees unless funeral-goers began arriving over an hour before the service, yet it would have completely hindered the protesters’ right to free speech. Thus, the restrictions placed by the Act are not narrowly tailored and are likely unconstitutional.

**ii. Vagueness**

The HAVA clearly defines the majority of its terms regarding regulation of speech,[[179]](#footnote-180) however the terms regarding “disruption” may be construed as an overly vague violation of narrow tailoring. A statute can be determined to be overly vague for two reasons: (1) when it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, and (2) if it authorizes or even encourages arbitrary and discriminatory enforcement.[[180]](#footnote-181) The HAVA uses specific terms regarding paths of ingress and making of noise,[[181]](#footnote-182) however the prohibition of “diversions tending to disturb the peace of funeral attendees”[[182]](#footnote-183) may be determined to be unreasonably vague.

The phrase, “diversions tending to disturb the peace,” poses a problem because it fails to provide a person of ordinary intelligence a reasonable opportunity to understand the prohibition. Disturbing the peace may be interpreted to mean loud statements or a whispered insult. In striking down a loitering ordinance against suspected gang members, the *Morales* court held that the law was unconstitutionally vague because it, “drew no distinction between innocent conduct and conduct calculated to do harm.”[[183]](#footnote-184)At an emotionally charged event, such as a funeral, attendees may be unstable to the point where an otherwise benign comment may cause significant distress. It is also unclear if disturbing the peace relates only to the statements by protesters or whether responses by funeral attendees can be considered as a disruption of the peace attributable to the protesters.

“Diversions tending to disturb the peace” may also encourage arbitrary and discriminatory enforcement of the law. First, the word “tending” may mean that speech is stifled before any actual disruption occurs. Allowing prosecution for an act that may not have even caused a legitimate harm fails the narrow tailoring test for being overly vague because if the “restricted” conduct is in fact harmless or innocent, the penalty is an “unjustified impairment of liberty”.[[184]](#footnote-185) Second, it is possible that only negative opinions toward the United States will be prosecuted while others creating a “disturbance” will be ignored. This is exactly the issue addressed in *The Police Department of the City of Chicago v. Mosely*.[[185]](#footnote-186) In *Mosely*, the Court struck down a restriction on protesting that allowed for a distinction regarding permissible speech based on subject matter.[[186]](#footnote-187) It is possible, and entirely probable that only negative opinions will disturb the funeral attendees. Indeed, this is the primary reason for protests. Allowing an ambiguous description of prohibited activity encourages abuse.

**3. Alternative Means of Communication**

The final step in the time, place, and manner analysis is whether the restriction provides alternative channels of communication.[[187]](#footnote-188) These alternative means of communication may be valid even if they reduce the potential audience.[[188]](#footnote-189) To be considered constitutionally valid, the remaining means of speech must simply be adequate for spreading the intended message.[[189]](#footnote-190)

The HAVA is unique to the alternative channels of communication analysis because the variety and degree of restrictions are so severe. The Supreme Court has upheld distance restrictions in the past in *Madsen* and *Hill*; however, the alternative forms of communication were sufficient because the protesters were still within view and capable of verbally communicating with the intended recipient.[[190]](#footnote-191) In the current case, the ordinance moves protesters 300 to 500 feet and restricts their ability to communicate by barring speech that “tends to disturb.”[[191]](#footnote-192) The effect of the ordinance will not simply reduce the intended potential audience, but likely eliminate it altogether. In *Clark*, the Court upheld an ordinance banning overnight camping in a state park, however the protesters were allowed to leave their signs overnight and protest during normal park hours.[[192]](#footnote-193) In essence, the ordinance had no effect on limiting access to the intended recipient because no visitors whatsoever were allowed in the park after dark. The HAVA, however, bars communication during the most effective timeframe. A four-hour prohibition of all speech within 300-500 feet of the funeral essentially silences the contrary opinion.

Modern technology adds an interesting twist to the “alternative forms of communication” debate. Connectivity within society has reached a degree unknown during the previously litigated cases. Other than *Snyder*, which refused to address the statutory issue, the majority of Supreme Court cases dealing with statutory restrictions on free speech were litigated before internet connectivity flourished in the 2000s. The advent of instant communication influences both sides of the debate.

Supporters of the HAVA may say that the expanded buffer still leaves media alternatives available for spreading an intended message. Indeed, in *Snyder*, the damage done to Mr. Snyder occurred after the funeral when he was watching news coverage later that evening.[[193]](#footnote-194) This argument is flawed for two reasons. First, there is no guarantee that the intended audience will see a specific news story. There is a much higher probability that the audience will see a physical protest though. Second, the WBC garners national fame through physically attending controversial events and eliciting negative responses from their intended audience. WBC’s infamy has grown in large part due to its willingness to thrust an offensive message onto an observer. It is probable that the WBC would receive far less media attention if they were moved even a block away.

The internet may be an immediate source of information, but it is vast. The Phelps family has gained their reputation through physical presence at sacred events, not through random traffic to its website. Requiring members of the WBC to stand 500 feet from a funeral at least two hours before an event decreases its impact and arguably affects the news coverage it will receive. While alternative communication can legally diminish an audience, it is likely that this alternative will be found insufficient.

**D. Policy Effects of Striking Down the HAVA**

The HAVA is likely an unconstitutional restriction of the WBC’s right to free speech, but this determination does not ensure a complete victory for the WBC. Striking down the HAVA would not only protect individual rights, but also aid in shielding the families of fallen soldiers. Repealing the HAVA takes the power out of the government’s hands and places it in the hands of private citizens. The first private solution to the WBC is the utilization of counter-protests. The presence of the Patriot Guard at Lance Corporal Snyder’s funeral demonstrated the efficacy of this solution. The Patriot Guard created a human wall of support to shield Lance Corporal Snyder’s family from the WBC’s hateful message.[[194]](#footnote-195) According to the record in *Snyder*, this method was successful. Mr. Snyder could only see the tops of the protest signs on the day of the funeral.[[195]](#footnote-196) While the WBC represents the darkest side of free speech, striking down the HAVA will enable private citizens to mobilize in support of America’s heroes. Using human walls and counter-protests embraces the freedoms our soldiers have died for.

A second solution, provided in the *Madsen* decision, is to simply avert one’s eyes.[[196]](#footnote-197) Although this recommendation may seem futile on a personal level, it gains significant power on a national scale. The WBC consists of only sixty members, yet its influence is compounded every time it receives media coverage. Members of the WBC have openly admitted to using the most controversial methods to gain media attention. Ignoring their presence will preserve their freedom of speech, but strip them of the power to influence a national or even global audience.

Withdrawal of media attention will allow the WBC to proclaim its hateful message only through on-site picketing and its official website. When considering the *Snyder* decision closely however, even the permissibility of “epics” posted to the official website is in doubt. The Supreme Court ruled in favor of the WBC without even considering the impact of the hate-filled “epic” on Snyder’s claim of emotional distress.[[197]](#footnote-198) In a dissenting opinion, Justice Alito indicated that the “epic” was a clear violation of the content standard for claims of emotional distress.[[198]](#footnote-199) Applying the content, form, and context test to an “epic” written specifically about an individual’s punishment in hell becomes much more difficult to defend than a picket sign about terrorist attacks on 9/11. The HAVA has no influence whatsoever on messages posted on the internet, however tort remedies for personal attacks on the internet may still significantly shield families of soldiers.[[199]](#footnote-200) The Supreme Court analysis of Snyder’s claim is significantly narrowed without consideration of the “epic”. The dissenting opinion by Justice Alito[[200]](#footnote-201) laments the court’s refusal to evaluate the “epic” and adds considerable weight to claims against specific attacks posted on the internet.

The Westboro Baptist Church has been spreading its message of hate for over fifty years.[[201]](#footnote-202) Its influence has grown not by increasing membership, but by amplifying its message. Unfortunately, despite its noble intentions, the HAVA is simply another vehicle for the WBC to garner attention. The Government adds notoriety to the Westboro message by trying to restrain it. From a policy standpoint the HAVA fails to achieve its main goal of protecting the families of deceased servicemen. Repealing the HAVA will do more for the preservation of honor than a restrictive measure ever could. The hateful speech should not be silenced, but rather drowned out by the gracious acts of private citizens seeking to honor the fallen.

**IV. Conclusion**

Despite the honorable intentions behind the HAVA, it is likely an unconstitutional restriction on the freedom of speech. The Act appears to be a neutral restriction on all picketers, but its effect on non-public forums exposes it to a substantial degree of scrutiny. When applying the Supreme Court’s time, place, and manner restrictions the Act must be narrowly tailored to protect an important government interest while leaving alternate means of communication. The HAVA does protect a governmental interest, but it is doubtful the Supreme Court would consider it sufficiently important. The HAVA also likely fails the narrow tailoring and alternate means tests.

Although private citizens appear to be without a judicial or statutory recourse to the WBC’s message, they do retain their own rights to free speech. Shielding funeral attendees from offensive messages and simply ignoring the WBC will significantly reduce their negative impact. A rejection of the HAVA is not a victory for the WBC, but rather a preservation of those liberties brave soldiers have died to defend.

1. \* Third year graduate student at the University of Kansas School of Law. Articles Editor for the University of Kansas Journal of Law and Public Policy.

   Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009), *aff'd,* 131 S. Ct. 1207 (2011). [↑](#footnote-ref-2)
2. *Id.* [↑](#footnote-ref-3)
3. *See generally id.*; Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. Kan. L. Rev. 575, 614 (2007); Respect for America’s Fallen Heroes Act, Pub. L. No. 109–228, 120 Stat. 387 (2006). [↑](#footnote-ref-4)
4. McAllister, *supra* note 3, at 599. [↑](#footnote-ref-5)
5. Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460, U.S. 37, 45 (1983)). [↑](#footnote-ref-6)
6. *Id.* [↑](#footnote-ref-7)
7. *See infra* pp. 3–12. [↑](#footnote-ref-8)
8. *See infra* pp. 12–31. [↑](#footnote-ref-9)
9. Westboro Baptist Church, *About Us*, God hates Fags, <http://www.godhatesfags.com/main/aboutwbc.html> (last visited Oct. 23, 2013). [↑](#footnote-ref-10)
10. *Id.*  [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *Id.* [↑](#footnote-ref-13)
13. *Id.* [↑](#footnote-ref-14)
14. Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009), aff'd, 131 S. Ct. 1207 (2011).* [↑](#footnote-ref-15)
15. *Westboro Baptist Church, About Us, GOD HATES FAGS, http://www.godhatesfags.com/main/aboutwbc.html (last visited Oct. 23, 2013).* [↑](#footnote-ref-16)
16. *Id.* [↑](#footnote-ref-17)
17. *Snyder*, 580 F.3d at 212. [↑](#footnote-ref-18)
18. *Westboro Baptist Church, About Us, GOD HATES FAGS, http://www.godhatesfags.com/main/aboutwbc.html (last visited Oct. 23, 2013).* [↑](#footnote-ref-19)
19. *Id.* [↑](#footnote-ref-20)
20. Joseph Russomanno, *"Freedom for the Thought That We Hate": Why Westboro Had to Win*, 17 Comm. L. & Pol'y 133, 137–38 (2012). [↑](#footnote-ref-21)
21. *See generally Snyder*, 580 F.3d at 211. [↑](#footnote-ref-22)
22. McAllister, *supra* note 3, at 579. [↑](#footnote-ref-23)
23. Cynthia Mosher, *What They Died to Defend: Freedom of Speech and Military Funeral Protests*, 112 Penn St. L. Rev. 587, 599 (2007). [↑](#footnote-ref-24)
24. *Id.* at 588-89. [↑](#footnote-ref-25)
25. *See supra* note 3, at 579. [↑](#footnote-ref-26)
26. *Id.* at 580. [↑](#footnote-ref-27)
27. *Id.* [↑](#footnote-ref-28)
28. *Id.* [↑](#footnote-ref-29)
29. *Id.* [↑](#footnote-ref-30)
30. *Id.* [↑](#footnote-ref-31)
31. *Id.* at 581. [↑](#footnote-ref-32)
32. Respect for America’s Fallen Heroes Act, Pub. L. No. 109–228, 120 Stat. 387 (2006). [↑](#footnote-ref-33)
33. *Id.* [↑](#footnote-ref-34)
34. *Id.* [↑](#footnote-ref-35)
35. McAllister, *supra* note 3, at 578. [↑](#footnote-ref-36)
36. Snyder v. Phelps, 131 S. Ct. 1207, 1210 (2011). [↑](#footnote-ref-37)
37. *Id.* [↑](#footnote-ref-38)
38. *Id.* [↑](#footnote-ref-39)
39. *Id.* [↑](#footnote-ref-40)
40. *Id.* [↑](#footnote-ref-41)
41. *See generally* Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). [↑](#footnote-ref-42)
42. *Id.* at 584. [↑](#footnote-ref-43)
43. *Id.* at 570. [↑](#footnote-ref-44)
44. Snyder v. Phelps, 131 S. Ct. 1207, 1210 (2011) (quoting *The Burden of Lance Cpl. Matthew Snyder*, “God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD – PERIOD! You did JUST THE OPPOSITE – you raised him for the devil...Albert and Julie RIPPED that body apart and taught Matthew to defy his creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave to the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.”). [↑](#footnote-ref-45)
45. *Snyder,* 533 F. Supp. 2d at 576–77. [↑](#footnote-ref-46)
46. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988). [↑](#footnote-ref-47)
47. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). [↑](#footnote-ref-48)
48. *Snyder*, 533 F. Supp. 2d at 567, 569–70. [↑](#footnote-ref-49)
49. *Id.* at 570–71. [↑](#footnote-ref-50)
50. *Id.* at 571. [↑](#footnote-ref-51)
51. Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009*)*, *aff'd,* 131 S. Ct. 1207 (2011). [↑](#footnote-ref-52)
52. *Id.* at 226. [↑](#footnote-ref-53)
53. *Id.* at 226 (citing New York Times Co. v. Sullivan, 84 S. Ct. 710, 721 (1964)). [↑](#footnote-ref-54)
54. *Id.* at 218–19 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 16 (1990)). [↑](#footnote-ref-55)
55. *Id.* [↑](#footnote-ref-56)
56. *Id.* at 221–22. [↑](#footnote-ref-57)
57. *Id.* at 272. [↑](#footnote-ref-58)
58. Snyder v. Phelps, 130 S. Ct. 1737 (2010). [↑](#footnote-ref-59)
59. Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (citing Boos v. Barry, 485 U.S. 312, 322 (1988)). [↑](#footnote-ref-60)
60. *Id.* at 1214–15. [↑](#footnote-ref-61)
61. *Id.* at 1211. [↑](#footnote-ref-62)
62. *Id.* at 1215 (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)). [↑](#footnote-ref-63)
63. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)). [↑](#footnote-ref-64)
64. *Id.* at 1211 (quoting Rankin v. McPherson, 483 U.S. 378, 387 (1987)). [↑](#footnote-ref-65)
65. Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985). [↑](#footnote-ref-66)
66. *Id.* at 1216–17 (quoting *Dun & Bradstreet*, 472 U.S. at 759). [↑](#footnote-ref-67)
67. *Id.* at 1210–12. [↑](#footnote-ref-68)
68. *Id.* [↑](#footnote-ref-69)
69. Snyder v. Phelps, 533 F. Supp. 2d 567, 569–70 (D. Md. 2008); Snyder v. Phelps, 580 F. 3d 206, 221–22 (2009). [↑](#footnote-ref-70)
70. *See generally* Snyder v. Phelps, 2009 WL 5115222 (U.S.). [↑](#footnote-ref-71)
71. Snyder v. Phelps, 580 F. 3d 206, 218 n.12 (2009). [↑](#footnote-ref-72)
72. *Id*. [↑](#footnote-ref-73)
73. *Snyder*, 131 S. Ct. at 1218 (quoting United States v. Grace, 461 U.S. 171, 180 (1983)). [↑](#footnote-ref-74)
74. Press Release, The White House Office of Communications, Statement by the Press Secretary on H.R. 1627 (August 6, 2012). [↑](#footnote-ref-75)
75. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112–54, tit. VI, § 601, 126 Stat. 1165, 1195–99. [↑](#footnote-ref-76)
76. *Id.* at 1196. [↑](#footnote-ref-77)
77. *Id.* [↑](#footnote-ref-78)
78. *Id.* [↑](#footnote-ref-79)
79. *Id.* [↑](#footnote-ref-80)
80. *Id.* [↑](#footnote-ref-81)
81. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112–54, tit. VI, § 601(a), 126 Stat. 1165, 1195. [↑](#footnote-ref-82)
82. *Id.* [↑](#footnote-ref-83)
83. *Id.* at 1197. [↑](#footnote-ref-84)
84. *Id.*; Respect for America’s Fallen Heroes Act, Pub. L. No. 109–228, § 2, 120 Stat. 387 (2006). [↑](#footnote-ref-85)
85. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, 126 Stat. at 1196; Respect for America’s Fallen Heroes Act, 120 Stat. at 387. [↑](#footnote-ref-86)
86. *See supra* text accompanying notes 69–78. [↑](#footnote-ref-87)
87. U.S. Const. art. I, § 2, cl. 1. [↑](#footnote-ref-88)
88. *See infra* pp. 13–15. [↑](#footnote-ref-89)
89. *See infra* pp. 14–16. [↑](#footnote-ref-90)
90. *See infra* pp. 16–29. [↑](#footnote-ref-91)
91. *See infra* pp. 29–31. [↑](#footnote-ref-92)
92. Frisby v. Schultz, 487 U.S. 474, 479–80 (1988). [↑](#footnote-ref-93)
93. *Id.* at 479. [↑](#footnote-ref-94)
94. *Id.* at 479–80. [↑](#footnote-ref-95)
95. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648 n. 3 (1981). [↑](#footnote-ref-96)
96. *Id.* at 655–56. [↑](#footnote-ref-97)
97. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (explaining that traditionally public fora have, “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”). [↑](#footnote-ref-98)
98. *Heffron*, 452 U.S.at 654–55. [↑](#footnote-ref-99)
99. Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 761 (1994). [↑](#footnote-ref-100)
100. Frisby v. Schultz, 487 U.S. 474, 480 (1988). [↑](#footnote-ref-101)
101. *Id.* at 481 (“No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.”). [↑](#footnote-ref-102)
102. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983) (citing Widmar v. Vincent, 454 U.S. 263, 269–70 (1981)). [↑](#footnote-ref-103)
103. *Id.* at 45. [↑](#footnote-ref-104)
104. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)). [↑](#footnote-ref-105)
105. *Id.*; Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 754 (1994) (“In evaluating a content-neutral injunction, the government standard is whether the injunction’s challenged provisions burden no more speech than necessary to serve a significant government interest.”). [↑](#footnote-ref-106)
106. *Perry,* 460 U.S. at 45. [↑](#footnote-ref-107)
107. *Madsen*, 512 U.S. at 763. [↑](#footnote-ref-108)
108. *See generally* Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112–54, tit. VI, § 601, 126 Stat. 1165, 1191–95. [↑](#footnote-ref-109)
109. *Id.* at 1196. [↑](#footnote-ref-110)
110. *See* Gina Davis, *At Carroll Funeral, A National Protest*, The Baltimore Sun, Mar. 11, 2006, http://articles.baltimoresun.com/2006-03-11/news/bal-te.md.marine11mar11\_1\_military-funerals-westboro-baptist-church-shirley-phelps-roper. [↑](#footnote-ref-111)
111. *See* Patriot Guard Riders, Home, http://www.patriotguard.org/content.php (last visited Oct. 14, 2013). [↑](#footnote-ref-112)
112. *Id.* [↑](#footnote-ref-113)
113. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 54–55 (1983) (“In *Mosely* and *Carey*, we struck down prohibitions on peaceful picketing in a public forum…[I]n both cases, we found the distinction between classes of speech violative of the Equal Protection Clause.”). [↑](#footnote-ref-114)
114. *Id.* at 64–65 (“In this case… the intent to discriminate can be inferred from the effect of the policy, which is to deny an effective channel of communication to the respondents, and from other facts in the case.”). [↑](#footnote-ref-115)
115. *Id.* at 65. [↑](#footnote-ref-116)
116. *Id.* [↑](#footnote-ref-117)
117. *Id.* [↑](#footnote-ref-118)
118. Boos v. Barry, 485 U.S. 312, 318–19 (1988). [↑](#footnote-ref-119)
119. *Id.* [↑](#footnote-ref-120)
120. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112–54, tit. VI, § 601(b), 126 Stat. 1165, 1196. [↑](#footnote-ref-121)
121. Respect for America’s Fallen Heroes Act, Pub. L. No. 109–228, 120 Stat. 387 (2006). [↑](#footnote-ref-122)
122. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). [↑](#footnote-ref-123)
123. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). [↑](#footnote-ref-124)
124. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, 126 Stat. at 1195. [↑](#footnote-ref-125)
125. *Id.* (citing U.S. Const. art. I, § 8, paras. 1, 12, 13, 14, 16, 18). [↑](#footnote-ref-126)
126. U.S. Const. art. I, § 8, paras. 1, 12, 13, 14, 16, 18). [↑](#footnote-ref-127)
127. Boos v. Barry, 485 U.S. 312, 318 (1988). [↑](#footnote-ref-128)
128. *Id*. [↑](#footnote-ref-129)
129. Roth v. United States, 354 U.S. 476, 484 (1957). [↑](#footnote-ref-130)
130. Texas v. Johnson, 491 U.S. 397, 414 (1989). [↑](#footnote-ref-131)
131. Street v. New York, 394 U.S. 576, 592 (1969). [↑](#footnote-ref-132)
132. Cohen v. California, 403 U.S. 15, 21 (1971). [↑](#footnote-ref-133)
133. *See generally* Frisby v. Schultz, 487 U.S. 474 (1988). [↑](#footnote-ref-134)
134. *See generally* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984). [↑](#footnote-ref-135)
135. *See generally* Hill v. Colorado, 530 U.S. 703 (2000); *See also* Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753 (1994). [↑](#footnote-ref-136)
136. *See generally* Ward v. Rock Against Racism, 491 U.S. 781 (1989). [↑](#footnote-ref-137)
137. *Frisby*, 487 U.S. at 484. [↑](#footnote-ref-138)
138. *Madsen*, 512 U.S. at 767. [↑](#footnote-ref-139)
139. *Hill*, 530 U.S. at 718 n. 25. [↑](#footnote-ref-140)
140. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-54, tit. VI, § 601(a), 126 Stat. 1165, 1195. [↑](#footnote-ref-141)
141. *Id.* at 1196. [↑](#footnote-ref-142)
142. Frisby v. Schultz, 487 U.S. 474, 484 (1988). [↑](#footnote-ref-143)
143. *Hill*, 530 U.S. 703 U.S. at 728–29; *Madsen*, 512 U.S. at 758–59. [↑](#footnote-ref-144)
144. *Hill*, 530 U.S. at 707. [↑](#footnote-ref-145)
145. Cohen v. California, 403 U.S. 15, 26 (1971). [↑](#footnote-ref-146)
146. *Id.* at 21–22. [↑](#footnote-ref-147)
147. *Id.* at 26. [↑](#footnote-ref-148)
148. *Id.* at 21. [↑](#footnote-ref-149)
149. McQueary v. Stumbo, 453 F. Supp. 2d 975, 996–97 (E.D. Ky. 2006). [↑](#footnote-ref-150)
150. *Id.* [↑](#footnote-ref-151)
151. *Id.* at 992. [↑](#footnote-ref-152)
152. *Id.* [↑](#footnote-ref-153)
153. *Id.* [↑](#footnote-ref-154)
154. *See* Phelps-Roper v. Strickland, 539 F.3d 356, 366 (6th Cir. 2008). [↑](#footnote-ref-155)
155. *Id.* at 373. [↑](#footnote-ref-156)
156. Snyder v. Phelps, 131 S. Ct. 1207, 1219–20 (2012). [↑](#footnote-ref-157)
157. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-54, tit. VI, § 601(b), 126 Stat. 1165, 1196. [↑](#footnote-ref-158)
158. Cohen v. California, 403 U.S. 15, 21 (1971). [↑](#footnote-ref-159)
159. *Snyder*, 131 S. Ct. at 1220. [↑](#footnote-ref-160)
160. Frisby v. Schultz, 487 U.S. 474, 485 (1988). [↑](#footnote-ref-161)
161. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968). [↑](#footnote-ref-162)
162. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). [↑](#footnote-ref-163)
163. *Id.* [↑](#footnote-ref-164)
164. Ward v. Rock Against Racism, 491 U.S. 781, 805 (1989). [↑](#footnote-ref-165)
165. McAllister*, supra* note 3, at 599–600. [↑](#footnote-ref-166)
166. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (striking down the ordinance with regard to buffer zones around the clinic, the provisions relating to “images observable,” and the “no-approach” zone around the residences for sweeping more broadly than necessary to accomplish the goals of the injunction). [↑](#footnote-ref-167)
167. *Madsen*, 512 U.S. at 775. [↑](#footnote-ref-168)
168. Mosher, *supra* note 23, at 622. [↑](#footnote-ref-169)
169. *Madsen*, 512 U.S. at 776. [↑](#footnote-ref-170)
170. Hill v. Colorado, 530 U.S. 703, 730 (2000) (upholding a 100 foot area around a hospital in which picketers could approach no closer than eight feet from the intended recipient). [↑](#footnote-ref-171)
171. *Madsen*, 512 U.S. at 770. [↑](#footnote-ref-172)
172. *Hill*, 530 U.S. at 730. [↑](#footnote-ref-173)
173. *Id.* at 729–30. [↑](#footnote-ref-174)
174. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112–54, tit. VI, § 601(b), 126 Stat. 1165, 1196 (2012). [↑](#footnote-ref-175)
175. Cohen v. California, 403 U.S. 15, 21 (1971). [↑](#footnote-ref-176)
176. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, 126 Stat. at 1196. [↑](#footnote-ref-177)
177. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994). [↑](#footnote-ref-178)
178. Respect for America’s Fallen Heroes Act, Pub. L. No. 109–228, 120 Stat. 387 (2006). [↑](#footnote-ref-179)
179. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-54, tit. VI, § 601(b), 126 Stat. 1165, 1195**–**1198. [↑](#footnote-ref-180)
180. City of Chicago v. Morales, 527 U.S. 41, 56 (1999). [↑](#footnote-ref-181)
181. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, 126 Stat. at 1196. [↑](#footnote-ref-182)
182. *Id.* [↑](#footnote-ref-183)
183. *Morales*, 527 U.S. at 50–51. [↑](#footnote-ref-184)
184. *Id.* at 58. [↑](#footnote-ref-185)
185. *See* Police Dep’t. of Chicago v. Mosley, 408 U.S. 92 (1972). [↑](#footnote-ref-186)
186. *Id.* at 95. [↑](#footnote-ref-187)
187. Hill v. Colorado, 530 U.S. 703, 726 (2000). [↑](#footnote-ref-188)
188. *Hill*, 530 U.S. at 714 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989)). [↑](#footnote-ref-189)
189. *Ward*, 491 U.S. at 783. [↑](#footnote-ref-190)
190. *Hill*, 530 U.S. at 730 (“The restriction interferes far less with a speaker’s ability to communicate than did the total ban on picketing on the sidewalk outside of a residence.”); Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 770 (1994) (“Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots.”). [↑](#footnote-ref-191)
191. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-54, tit. VI, § 601(b), 126 Stat. 1165, 1196. [↑](#footnote-ref-192)
192. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 291–92 (1984). [↑](#footnote-ref-193)
193. Snyder v. Phelps, 131 S. Ct. 1207, 1213–14 (2011). [↑](#footnote-ref-194)
194. *See* Gina Davis, *At Carroll Funeral, A National Protest*, The Baltimore Sun (March 11, 2006), *available at* http://articles.baltimoresun.com/2006-03-11/news/bal-te.md.marine11mar11\_1\_military-funerals-westboro-baptist-church-shirley-phelps-roper. [↑](#footnote-ref-195)
195. *Snyder*, 131 S. Ct. at 1210. [↑](#footnote-ref-196)
196. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 770 (1994). [↑](#footnote-ref-197)
197. *Snyder*, 131 S. Ct. at 1215–1219. [↑](#footnote-ref-198)
198. *Id.* at 1226 (“[I]t is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member or the United States military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder’s purely private conduct does not.”). [↑](#footnote-ref-199)
199. Id. at 1227 (“The Court suggests that the wounds inflicted by vicious verbal assaults at funerals will be prevented or at least mitigated in the future by new laws that restrict picketing within a specified distance of a funeral. . . . It is apparent however, that the enactment of these laws is no substitute for the protection provided by the established IIED tort; according to the Court the verbal attacks that severely wounded petitioner in this case complied with the new Maryland law regulating funeral picketing.”). [↑](#footnote-ref-200)
200. *Id.* at 1222–29. [↑](#footnote-ref-201)
201. *About Westboro Baptist Church*, GodHatesFags, http://www.godhatesfags.com/wbcinfo/aboutwbc.html. [↑](#footnote-ref-202)