NEW LIFE IN THE FIRST AMENDMENT: FUNERAL PROTEST STATUTES AFTER MCCULLEN V. COAKLEY

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Forty-six states and the U.S. Congress have passed funeral protest statutes to counter the notorious practices of the Westboro Baptist Church, but are the statutes constitutional? The recent Supreme Court case of McCullen v. Coakley *on the parallel issue of abortion clinic buffer zones suggests that they are not. First, the Court restored speech rights by reaffirming that the governmental interest of protecting people from unwanted communication while in traditional public fora is content based. Second, the Court struck down a statute as failing to be narrowly tailored, despite the Court's application of intermediate scrutiny. While lower courts have upheld broad funeral protest statutes, the Supreme Court now shows that even facially content-neutral statutes do not give legislatures carte blanche to substantially burden speech. The Sixth and Eighth Circuit courts have upheld broad funeral protest statutes, but* McCullen *shows a far more speech-protective Supreme Court. In light of this precedent, lower courts should rule that existing funeral protest statutes are unconstitutional. However, this article proposes a more moderate "line of sight" legislative solution that would preserve the protestors' First Amendment rights while protecting funeral attendees' interest in avoiding disruptive protests during funerals. This workable solution is narrowly tailored to serve the valid state interest of preventing funeral disruptions.*

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INTRODUCTION

"[A] function of free speech under our system of government is to invite dispute. It 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." – Justice Douglas[1]

The First Amendment protects the freedom to speak, but it serves its most vital role when it protects unpopular speech. Provocative speech on issues of public concern may cause the listener to reevaluate his or her position, or the offended listener may simply ignore the speech. Either way, our Constitution ensures that it is the *individual*, and not the government, who decides the value of the speech in the marketplace of ideas.[2]

The Westboro Baptist Church tests our nation's commitment to First Amendment principles. Sidewalks and public ways are "traditional public fora" that have long received heightened First Amendment protection due to their "historic role as sites for discussion and debate."[3] However, in the past decade, the U.S. Congress and state legislatures have attacked freedom of speech in this protected zone. Because of public outrage against the church, the U.S. Congress and forty-six states have passed statutes to address the Westboro Baptist Church's practice of picketing funerals.[4] Many statutory buffer zones carve out hundreds to thousands of feet around funerals to prevent the church's offensive expression.

While this church group deserves the widespread public condemnation it receives, courts should protect the constitutional rights of the most marginal minorities. However, the lower courts have universally interpreted Supreme Court precedent too broadly when upholding statutes restricting such speech.[5] First Amendment protections for all are sacrificed as a result. The Supreme Court shows the unconstitutional breadth of these statutes in its recent unanimous decision of *McCullen v. Coakley*, a case about anti-abortion protests. In *McCullen*, Massachusetts passed a law making it a crime to stand on the public way or sidewalk within thirty-five feet of an abortion clinic entrance in order to prevent sidewalk crowding, crime, and unwanted communication to women approaching the clinic.

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[1] Terminello v. Chicago, 337 U.S. 1 (1949).

[2] *See* Abrams v. United States, 250 U.S. 616 (1919). Justice Oliver Wendell Holmes in dissent argued, "The best test of truth is the power of the thought to get itself accepted in the competition of the market…" *Id*. at 630.

[3] McCullen v. Coakley, 134 U.S. 2518, 2529 (2014).

[4] *See* Kendra L. Suesz, America Hates the Westboro Baptist Church: The Battle to Preserve the Funerals of Fallen Soldiers 3 (Dec. 1, 2011), (unpublished M.A. thesis, University of Nebraska). Additionally, Missouri has since passed V.A.M.S. 574. 160 (2014).

[5] *See* Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008); Phelps-Roper v. City of Manchester, 697 F.3d 678 (8th Cir. 2012); Phelps-Roper v. Koster, 713 F.3d 942 (8th Cir. 2013); Phelps-Roper v. Heineman, 720 F.Supp.2d 1090 (D. Neb. 2010).

In part II of this article, I explain the reasoning behind both the First Circuit's upholding of the buffer zone statute and the Supreme Court's subsequent unanimous reversal. The First Circuit, citing *Hill v. Colorado*, upheld the state statute as constitutional. The Supreme Court held that the buffer zone outside of the abortion clinic was content neutral and was therefore only subject to intermediate scrutiny. However, the Court unanimously held that the statute violated the First Amendment, because it burdened more speech than was necessary to serve the governmental interest of safety and preventing sidewalk obstruction. The Court reasoned that Massachusetts had not "seriously undert[aken]" to accomplish its goal with the "less intrusive tools readily available…" With this scrutinizing analysis, *McCullen* constitutionally eroded *Hill* and undercut the lower courts' bases for upholding the funeral protest statutes.

The recent *McCullen* decision signals a far more speech-protective Supreme Court than was likely anticipated by the lower courts, which have upheld broad funeral protest statutes. By analogy, *McCullen* shows that the buffer zones around funeral services are unconstitutionally broad, as they burden far more speech than is necessary to achieve the government interests of protecting funerals from disruptions by protestors. Although the Supreme Court has not reviewed any funeral protest statutes to date, the *McCullen* decision shows that the state legislatures are not satisfying the burden of narrowly tailoring the statutes to their valid interests. *McCullen* also suggests that lower courts have interpreted *Hill v. Colorado* and other decisions too broadly, permitting the government to unconstitutionally burden speech in traditional public fora.

In part III of this article, I argue that the government lacks sufficient valid interests to support these broad buffer zones. The prevention of funeral disruption is a valid state interest, during the funeral and when the audience is truly captive. However, lower courts have interpreted precedent as creating privacy interests on the traditional public fora that could justify a buffer zone displacing protestors hundreds of feet, before and after a funeral. *McCullen* undercuts this by stating that avoidance of unwanted communication cannot be a valid content-neutral state interest on streets and sidewalks. Further, there has been no history of crime or obstruction of funeral entrances by the protestors, so the government lacks a reasonable basis for the broad statutes.

In part IV, I argue that the funeral protest statutes are not narrowly tailored to their one valid interest: preventing the disruption of funerals. The *McCullen* decision shines new light on the constitutional problems of the funeral picketing statutes. The unconstitutional buffer zones around abortion clinics in Massachusetts were only thirty-five feet each, whereas many funeral buffer zones extend several hundred feet. Further, unlike *McCullen*, there have been no successful prosecutions of funeral protestors for violating existing statutes, and there is no history of entrance

obstruction, so there are limited justifications for the buffer zone without regard for the content of the speech.

The state interest is further undercut by the effectiveness of less restrictive means. I propose a solution that would preserve funeral attendees' privacy as well as freedom of speech on traditional public fora. Legislatures should remove the buffer zones that are likely unconstitutional after *McCullen*. Instead, they could pass a "line of sight" statute that would forbid audible and visual disruptions to the funeral or burial service. This would ensure protestors their constitutionally protected opportunity to reach their intended audience on streets and sidewalks while respecting the funeral attendees' interest in having an undisrupted funeral service. Additionally, repealing these statutes would likely cut into the Westboro Baptist Church's funds, as the church ironically gains much of its funding for protests by recovering settlements for civil rights violations by states.

Though the Westboro Baptist Church is nearly universally hated, Circuits upholding these laws accomplish little good in exchange for restricting significant First Amendment protections. All evidence suggests that counter-speech has proven to be an effective force against the church. Throughout the country, counter-protests have arisen where the church plans to protest. A group called the "Patriot Guard Riders" attends funerals to peacefully insulate funeral attendees from the protestors.

Supreme Court decisions read broadly have been used to justify these buffer zones that eliminate speech. However, the unanimous *McCullen* decision has held that such a buffer zone must have a strong and demonstrable state interest to which the restriction is narrowly tailored. For these reasons, this article argues that the Sixth and Eighth Circuit courts, as well as many lower courts, have over-applied precedent and upheld funeral picketing statutes that the more speech-protective Supreme Court would not likely uphold. This article argues that many of the forty-six funeral protest statutes are thus facially unconstitutional and should be more narrowly tailored by their legislatures.

I. BACKGROUND

The Westboro Baptist Church has gained notoriety as a result of their picketing high-profile funeral services. As a result, statutes targeting the protestors gained in popularity.[6] After the Supreme Court in *Snyder v. Phelps* stated in dicta that the group could be subject to appropriate time,

[6] *See* Suesz, *supra* note 4, at 22.

place, and manner restrictions, new states adopted statutes and already written statues were extended.[7]

Though the general rule is that listeners must "avert[] their eyes" to unwanted communication,[8] the Sixth and Eighth Circuits have relied heavily on *Frisby v. Schultz* and *Hill v. Colorado* to expand the captive audience exception to the streets and sidewalks outside of funerals.[9] However, in June 2014 the Supreme Court in *McCullen v. Coakley* unanimously struck down a smaller thirty-five foot buffer zone for not being as narrowly tailored.[10]

A. HISTORY OF FUNERAL PROTESTS

1. Fred Phelps and the Westboro Baptist Church Funeral Protests

In 1955, Pastor Fred Phelps began the Westboro Baptist Church, a Calvinist, fundamentalist church that claims to teach the truth of the Bible, despite its own admission that this "truth" is "almost universally hated."[11] This small church survives as a fringe group based in Topeka, Kansas, and it consists primarily of members of the Phelps family.[12] It is unaffiliated with the Baptist World Alliance.[13] It stands in defiance to the popular belief that "God loves everyone," and it instead warns of the nation's impending destruction for its acceptance of sin.[14]

By its own proud admission, the church has engaged in 53,808 demonstrations since 1991 in which its members hold signs that say "GOD HATES F**S" and other offensive messages, often thanking God for the deaths of soldiers and homosexuals.[15] This includes over 400 demonstrations at military funerals.[16] The church protested the funeral of Matthew Shepard, who was beaten to death in Wyoming, possibly for

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[7] *Id*. at 23, 26.
[8] Cohen v. California, 403 U.S. 15, 21 (1971).
[9] *Strickland*, 539 F.3d 356, 362 (citing Frisby v. Schultz, 487 U.S. 474 (1988) and Hill v. Colorado, 530 U.S. 703 (2000)). *City of Manchester*, 697 F.3d 678, 692 (citing *Frisby*, at 485 and *Hill*, at 717).
[10] *McCullen*, 134 U.S. at 2518.
[11] *About Us*, GODHATESF**S, http://www.godhatesfags.com/wbcinfo/aboutwbc.html (last visited Jan. 25, 2015).
[12] *Louis Theroux: The Most Hated Family in America* (BBC 2011).
[13] *Baptists Denounce Latest Westboro Stunt*, CHRISTIAN TODAY, http://www.christiantoday.com.au/article/baptists.denounce.latest.westboro.stunt/5495.htm (last visited Jan. 25, 2015).
[14] *See* GODHATESF**S, *supra* note 11.
[15] *Id*.
[16] *Id*.

being homosexual.[17] The Phelps are drawn to high-profile funerals, where their protests draw the greatest amount of controversy and publicity.[18] The protestors are always careful to avoid breaking any laws, including noise ordinances.[19] Ironically, the Westboro Baptist Church receives funding for its protests from settlements flowing from violations of its members' civil rights and the government's failure to protect them from violence during protests.[20]

The church's messages are despicable on any occasion and are likely even more painful during a funeral service. But however offensive these messages may be, it is difficult to argue that the beliefs behind them are insincere.[21] The church perceives America's acceptance of homosexuality as a danger that will "expos[e] our nation to the wrath of God as in 1898 B.C. at Sodom and Gomorrah."[22] For the church, these "gospel message[s]" are "this world's last hope" to be saved from this threat.[23]

Believing itself to be one of the last churches preaching that uncomfortable truth of the Bible, opposition to the Westboro Baptist Church merely emboldens its members. Much of the free publicity enjoyed by the church comes from documentaries attacking the church. The church proudly links to these documentaries on their website.[24]

Still, the church is almost universally hated and appears by any standard to be losing decisively in the marketplace of ideas.[25] Some editorials have even contended that the church "has done a lot of good for [the gay] community" by causing Christian churches and groups to distance

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[17] *Id*. Whether his murderers were motivated by his homosexuality remains in dispute. *See* John Kruzel, *Matthew Shepard's Enduring Legacy*, SLATE, http://www.slate.com/blogs/outward/2013/10/03/even_if_matthew_shepard_s_murder_wasn_t_a_hate_crime_the_legislation_that.html (last visited Jan. 25, 2015).

[18] *See* Lindsey Deutsch, *Five Incendiary Westboro Baptist Church Protests*, USA TODAY, http://www.usatoday.com/story/news/nation-now/2014/03/21/westboro-baptist-church-pickets-funerals/6688951/ (last visited Jan. 25, 2015). In this way, the means of funeral protest is vital to the message of the Westboro Baptist Church.

[19] There have been no successful prosecutions of Westboro Baptist Church Members in relation to funeral protests.

[20] According to the Southern Poverty Law Center, the church does not accept outside donations, but relies on donations within the congregation and settlements from lawsuits to fund the travels. For example, the church sued the city of Topeka for failing to provide adequate protection. *Westboro Baptist Church*, SOUTHERN POVERTY LAW CENTER, http://www.splcenter.org/get-informed/intelligence-files/groups/westboro-baptist-church (last visited Nov. 27, 2014).

[21] The Supreme Court in *Snyder v. Phelps* stated that "there can be no serious claim that the picketing did not represent Westboro's honestly held beliefs on public issues." 131 U.S. 1207, 1211 (2011).

[22] *See* GODHATESF**S, *supra* note 11.

[23] *Id*.

[24] *Id*.

[25] Gauging support is difficult due to a lack of scientific opinion polling on the Westboro Baptist Church. Furthermore, the church does not accept donations from outside the congregation, but rather relies upon tithes and legal settlements for state civil rights violations.

themselves from the Westboro Baptist Church.[26] In this way, the church has created a unified front against such hate across the nation.

Often, the church's protests have drawn much larger counter-protests.[27] Military funeral protests have led to the creation of groups like the Patriot Guard Riders, a counter-protest group that insulates funeral attendees by forming a peaceful wall blocking out protestors.[28] At Matthew Shepard's funeral, counter-protestors dressed as angels formed a wall blocking attendees from the messages of the signs during the service.[29] Even Romaine Patterson, a lesbian and close friend of Matthew Shepard who was disgusted by the demonstration at his funeral, supported the Supreme Court's ruling in *Snyder v. Phelps*.[30] Calling the funeral protests "terrible," Patterson nonetheless stated that the "United States Constitution is blind in its devotion to free speech."[31] This exchange of ideas is the purpose of the First Amendment's protection of traditional public fora.[32]

In this way, even offensive and controversial messages serve to promote better messages in the marketplace of ideas. As Noah Michelson has stated, "[d]espite their best intentions, the church is actually pushing people to get on the right side of history."[33] In this way, these counter-protests have served a broader communicative purpose for a sharply divided country.

2. Funeral Protest Statutes and Their Expansion after *Snyder v. Phelps*

[26] Noah Michelson, *I Love Westboro Baptist Church and Here's Why You Should Too*, HUFFPOST GAY VOICES, http://www.huffingtonpost.com/noah-michelson/i-love-westboro-baptist-church_b_5790174.html (last visited Jan. 25, 2015). *See also* Paul Brandeis Raushenbush, *Thank You, Westboro Baptist Church!*, HUFFPOST RELIGION, http://www.huffingtonpost.com/paul-raushenbush/thank-you-westboro-baptist-church_b_2396991.html (last visited Jan. 25, 2015). Raushenbush points out the irony that "[t]he problem for literalists and homophobes everywhere is that everyone really, really hates the Westboro Baptist Church." *Id*.

[27] Karen Lee Ziner, *Protesters in Cranston, Providence Met by Bigger Crowds Supporting Same Sex Marriage*, PROVIDENCE JOURNAL, http://www.providencejournal.com/breaking-news/content/20130801-protesters-in-cranston-met-by-bigger-crowd-supporting-same-sex-marriage.ece (last visited Jan. 25, 2015).

[28] PATRIOT GUARD RIDERS, https://www.patriotguard.org/content.php?1-the-front-page&s=b4f174172cfc299a7042a2aba5e90197 (last visited Jan. 25, 2015).

[29] Romaine Patterson, *Let the Westboro Baptist have their hate speech. We'll smother it with peace*, THE WASHINGTON POST, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/04/AR2011030406330.html (last visited Jan. 25, 2015).

[30] *Id*. The Supreme Court in *Snyder v. Phelps* reversed a verdict against the Westboro Baptist Church for the tort of Intentional Infliction of Emotional Distress, holding that the First Amendment protects the church's speech. 131 U.S. 1207. *See infra* note 47.

[31] *Id*.

[32] *McCullen*, 134 U.S. at 2518, 2529.

[33] *See* Michelson, *supra* note 26.

In response to the Westboro Baptist Church's demonstrations at military funerals, forty-six states and the U.S. government passed funeral protest statutes that create buffer zones around funerals or burial services.[34] These statutes create buffer zones that vary in size from 100 to 1,500 feet that prevent either disruption or protesting, and some exclude all protests within a fixed time, usually from one hour before until one hour after a funeral or burial service.[35] These statutes have led to extensive debate and litigation over how to balance protestors' constitutional right to speak and funeral attendees' right to mourn in peace.

Following the Tucson shooting of 2011, Congress passed and President Obama signed into law the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012.[36] Title VI creates a 300-foot buffer zone around the funeral of any member of the Armed Forces that extends from two hours before until two hours after the funeral service.[37] Section 601(a) states that the purpose of the statute is to "protect[] the dignity of the service of the members" and the "privacy of the families." This law applies to

> any individual willfully making or assisting in the making of any noise or diversion— (i) that is not part of such funeral and that disturbs or tends to disturb the peace or good order of such funeral; and (ii) with the intent of disturbing the peace or good order of such funeral.

Violators of the Act face up to a year in prison as well as civil liability.[38]

The language varies among the several state statutes, but nearly all of them create a large buffer zone, and all of them include a window of time before and after the funeral.[39] California's statute makes it illegal "to engage in picketing targeted at a funeral,"[40] while New York's statute makes it illegal to "make[] unreasonable noise or disturbance… within three hundred feet" of a funeral service.[41] It is difficult to predict whether the Westboro Baptist Church, in their normal protest activity, could be convicted under all of the statutes. Does holding a sign within the buffer zone constitute a "diversion" in New York? If the signs are not visible by funeral attendees, is the protest "target[ing]" the funeral in California? In

[34] *See* Suesz, *supra* note 4.
[35] *See* Suesz, *supra* note 4, at 29.
[36] 18 U.S.C.S. § 1388 (2014).
[37] *Id*.
[38] *Id*.
[39] *See* Suesz, *supra* note 4, at 50-68.
[40] Cal. Pen. Code § 594.37.
[41] NY CLS Penal § 240.21.

City of Manchester, the Eighth Circuit agreed with the lower court, concluding that the Phelps were reasonable in their fear of prosecution under the Missouri statute.[42]

After the Supreme Court's dicta in *Snyder v. Phelps*, state legislatures were emboldened to pursue broader funeral protest statutes. In 2009, Marine Lance Corporal Matthew Snyder's father sued the Phelps-Ropers and the Westboro Baptist Church for intentional infliction of emotional distress after they protested his son's funeral in Maryland.[43] In the district court, a jury awarded Snyder over ten million dollars in compensatory and punitive damages based on a finding that the speech was "outrageous."[44] The jury also found the Phelps-Ropers liable for the state tort of "intrusion upon seclusion," because Snyder was a "captive audience" to the protests during the funeral.[45] The Fourth Circuit Court of Appeals reversed the ruling, holding that the Westboro Baptist Church's protest messages spoke on a matter of public concern and was therefore entitled to First Amendment protection.[46]

Acknowledging the pain caused by the protest, the Supreme Court nevertheless affirmed the Fourth Circuit, holding that the speech was constitutionally protected.[47] The Supreme Court pointed out that the church members had the right to protest on the sidewalk, and they did not make loud noises, commit violent acts, or break any applicable laws.[48]

On appeal to the Supreme Court, Snyder argued that even if First Amendment protection applied to the Westboro Baptist Church's speech, they are still liable for the "intrusion upon seclusion" tort because Snyder was a "captive audience."[49] However, the Court pointed out that the protestors remained over 1,000 feet from the funeral, and Snyder was unable to read the signs until he saw them on the news after the service.[50] Without stating how close the protestors may have to be in order to render the audience "captive," the court simply refused to extend the doctrine to Snyder.[51]

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[42] *City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012).
[43] Snyder v. Phelps, 131 U.S. 1207 (2011).
[44] *Snyder*, 131 U.S. at 1214, 1219. The district court remitted these damages to six million dollars in damages overall. *Id*.
[45] *Snyder*, 131 U.S. at 1212.
[46] *Id*. at 1216. Speech is a matter of public concern when it is "a subject of general interest and of value and concern to the public." *City of San Diego v. Roe*, 543 U.S. 77 (2004).
[47] *Snyder*, 131 U.S. at 1210. The Court effectively ruled that the church's protests could not be limited by the obscenity or fighting words doctrine. They stated that "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import" *Id*. at 1217.
[48] *Id*. at 1218. This occurred prior to Maryland's funeral protest statute.
[49] *Id*. at 1212.
[50] *Id*.
[51] *Id*.

Emphasizing the First Amendment's protection of streets and sidewalks as traditional public fora, moreover, the Supreme Court held that the Westboro Baptist Church was constitutionally immune to the tort claims.[52] The Court therefore dismissed the judgment against the church.[53]

However, the Supreme Court stated in dicta that "Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach – it is 'subject to reasonable time, place, or manner restrictions' that are consistent with the standards announced in this Court's precedents."[54] This statement has sparked several new funeral protest statutes as well as further restrictions on existing statutes.[55] While the Court mentioned the content-neutral restrictions in *Frisby* and *Madsen v. Women's Health Center, Inc*., it pointed out that "[t]he facts here are quite different, both with respect to the activity being regulated and the means of restricting those activities."[56] The Court also stated that the speech cannot be prohibited "simply because it is upsetting or arouses contempt."[57]

3. The *Ward v. Rock Against Racism* Test for Speech Restrictions in Traditional Public Fora

For speech restrictions on traditional public fora, courts apply a three-prong test from *Ward v. Rock Against Racism*.[58] First, the courts must decide if the statute is content neutral.[59] If it is not, then the statute is held to a heightened standard of scrutiny, meaning that it must be narrowly tailored to serve a *compelling* state interest.[60] On the other hand, if it is content neutral, then the statute must be narrowly tailored to serve a *significant* government interest.[61] Second, courts must determine whether

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[52] *Id*.
[53] *Id*. at 1241.
[54] *Id*. at 1218.
[55] "Many [funeral protest] laws existed prior to the Snyder decision, but a number of states have either amended earlier laws to make the laws more restrictive or enacted new statutes in the wake of the Snyder decision." *Constitutionality of state funeral-picketing statutes in the wake of the* Snyder v. Phelps *decision*, FIRST AMENDMENT CENTER 2 (Feb. 11, 2014), http://www.firstamendmentcenter.org/madison/wp-content/uploads/2014/02/Snyder-Phelps-Report-FINAL-FINAL-02-04-14.pdf.
[56] *Snyder*, 131 U.S. at 1218; Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).
[57] *Id*. at 1219.
[58] 491 U.S. 781 (1989).
[59] *Ward*, 491 U.S. at 781, 791. This is determined by "whether the statute distinguishes between prohibited and permitted speech based on the content." *Frisby*, 487 U.S. at 481.
[60] *See* FCC v. League of Women Voters, 468 U.S. 364 (1984), in which the Court held that § 399 of the Public Broadcasting Act was a content-based restriction, because it the statute required inquiry into the content of the message. *Id*. This section prohibited noncommercial educational radio and television stations that received government grants under this act from editorializing. *Id*. at 366. Under this heightened scrutiny, the statute was struck down.
[61] *McCullen*, 134 U.S. at 2524.

the statute is narrowly tailored to serve the state interest.[62] If a statute proscribes more speech than necessary to achieve its goal, courts will strike it down as overbroad.[63] Finally, even if a content-neutral statute is narrowly tailored to serve a significant governmental interest, it must also leave adequate alternative means of communication available to the speaker.[64]

B. THE SUPREME COURT HAS RECOGNIZED PRIVACY AS A VALID STATE INTEREST IN CAPTIVE AUDIENCE CASES

1. The Normal "Avert the Eyes" Rule of *Cohen v. California*

In 1968, Paul Cohen wore a jacket in a Los Angeles County courthouse which read "F*** the Draft."[65] He was tried and convicted for engaging in "offensive conduct" in violation of a California statute.[66] The Court of Appeal of California affirmed his conviction.

The Supreme Court, however, reversed it. The Court held that any restriction on the speech must pertain to the manner in which it is communicated, not on the content of the message.[67] Cohen's speech was entitled to constitutional protection, and this did not change simply because "some unwilling 'listeners' in a public building [were] briefly exposed to it…"[68] Instead of limiting the ability to speak, those listeners "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[69] This general rule that values the speaker's right to communicate above the listener's interest in avoiding unwanted communication has been applied in several subsequent cases.[70]

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[62] *Ward*, 491 U.S. at 789. *See* Schenck v. Pro-Choice Network, 519 U.S. 357 (1997), which struck down 15-foot floating buffer zones around individuals and vehicles approaching abortion clinics, because it proscribed more speech than necessary to achieve the government interest of public safety.

[63] The overbreadth doctrine allows statutes to be challenged based on the likelihood that it would prevent speakers from engaging in constitutionally protected speech. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[64] *Ward*, 491 U.S. at 791.

[65] *Cohen*, 403 U.S. at 15, 16.

[66] *Cohen*, 403 U.S. at 22.

[67] *Id*. at 18-19. The Court concluded that the speech did not constitute "fighting words," obscenity, or incitement to unlawful activity. *Id*. at 18-20.

[68] *Id*. at 21.

[69] *Id*.

[70] These include Erznoznik v. Jacksonville, 422 U.S. 205 (1975), Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (the rule was followed, but not cited), and Rabe v. Washington, 405 U.S. 313 (1972).

2. The Captive Audience Exception of *Frisby v. Schultz*

In 1988, the Supreme Court in *Frisby v. Schultz* upheld a local ordinance that prohibited protests targeted at private residences.[71] The ordinance was enacted due to the acts of the appellees, pro-life activists who would protest outside the home of an abortion doctor.[72] The primary purpose of the statute was to "protect[] and preserv[e]…the home" and prevent the "emotional disturbance and distress to the occupants" that results from the protests.[73]

The language of the ordinance did not create a fixed-area buffer zone, but instead prohibited "picketing before or about the residence or dwelling of any individual…"[74] From this language,[75] the Court interpreted the statute as only prohibiting protests which "focus[] on, and take place in front of, a particular residence…"[76]

This ordinance proscribed speech on public streets and sidewalks, the "archetype of traditional public fora," but it was held to be a narrowly tailored statute that served a legitimate governmental interest.[77] The Court concluded that the home is a unique setting that creates an exception to the normal rule which requires one to "avert[] their eyes."[78] The Court recognized that for the "unwilling listener," the home is different from other locations, because the occupant is a captive audience.[79]

Further, both the majority and the concurrence rejected the statutory interpretation urged by the protestors: that the statute prohibited all speech within residential neighborhoods.[80] As interpreted by the Court, the statute does not create a large zone barring protests, but instead it limits a particular expressive act that is so intrusive on the peace of the unwilling listener that he or she cannot escape it.

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[71] *Frisby*, 487 U.S. at 474.
[72] *Id*. at 476. The court found that the protests were "peaceful and orderly," and there were no noise or obstruction of traffic complaints. *Id*.
[73] *Id*. at 477.
[74] *Id*.
[75] *Id*. at 477. The singular forms of the words "residence" and "dwelling" led to this interpretation. Based on this, the Sixth Circuit Court of Appeals interpreted the Ohio funeral statute in *Phelps-Roper v. Strickland* differently from the natural reading of the statute. *See infra* note 228.
[76] In adopting this interpretation, the Court considered oral argument in which the State presented this interpretation. Also, the Court recognized the "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby*, 487 U.S. at 482.
[77] *Frisby*, 487 U.S. at 480.
[78] *Id*. at 484, *citing Cohen*, 403 U.S. at 21-22. The Court also cited *Gregory v. Chicago*, which recognized homes as "the last citadel of the tired, the weary, and the sick." *Id*.
[79] *Frisby*, 487 U.S. at 486. The Court stated that other "generally directed" protests cannot be completely banned. *Id*. at 487.
[80] Justice White's concurrence held that the statute is constitutional as interpreted by the majority, but the broader, more natural reading of the statute would forbid any protest "before or about" a residence, regardless of whether the protest group picketed a single residence. *Id*. at 488-490.

The narrow tailoring of this statute is further shown by the alternate means of communication that it leaves unburdened. The Court pointed out that protestors are still able to march through the neighborhood, solicit door-to-door, call, or send mail to their intended audience.[81] For these reasons, the Court held that the content-neutral statute was narrowly tailored to serve a significant governmental interest.[82]

3. The Apparent Expansion of the Captive Audience Doctrine in *Hill v. Colorado*

In 2000, the Supreme Court upheld a buffer zone around all health care facilities, which made it unlawful to "knowingly approach" within eight feet of another person to hand a leaflet to, show a sign to, protest, educate, or counsel the individual.[83] The statute prohibited such an approach within 100 feet of the clinic.[84] The statute did not exclude protestors from the buffer zone or require protestors to retreat when approached, and did not prohibit leafleting, protesting, or sign display to those approached.[85] The Court applied the test from *Ward*.[86]

The proffered governmental interest at issue was the "protect[ion] of the health and safety of… citizens," which included the "avoidance of potential trauma to patients associated with confrontational protests."[87] Citing *Frisby*, the majority extended the captive audience doctrine to women entering abortion clinics.[88] The Court controversially recognized the interest in avoiding unwanted communication in confrontational settings, even in traditional public fora, and held that these interests outweighed the First Amendment rights of those approaching the women.[89]

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[81] *Id*. at 483-84.
[82] *Id*. at 488. The Court acknowledged a possible exception where a residence may be used as a place of business or public meeting. However, because this was only a facial challenge, such a possibility did not render the statute overbroad. *Id*.
[83] Hill v. Colorado, 530 U.S. 703, 707 (2000). Though the statute did not specify, it was undisputedly enacted to address protests outside of abortion clinics.
[84] *Id*.
[85] *Id*. at 714. This statute differs from the statute in Schenck v. Pro-Choice Network of Western N.Y. in this respect. There are no floating buffer zones that prohibit all speech, and leafleting is still possible if approached. 519 U.S. 357 (1997).
[86] *Id*. at 719.
[87] *Id*. at 715.
[88] *Id*. at 716.
[89] *Id*. at 717. Justice Scalia in dissent stated that the majority recognized a right to avoid unwanted communication. The majority responded that this was not a "right" but rather a legitimate individual interest. Based on this, Jamin Raskin argued that "the state's interest in protecting the unwilling listener becomes an effective tool for government to reduce the speech rights of disfavored groups or individuals." Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test* 51 AM. U. L. REV. 179 (2001).

The Court held that the statute was narrowly tailored to this legitimate interest, because it did not prohibit sign holding, chanting, or leafleting those who approached the protestors.[90] Though the statute would likely prevent even harmless or even welcome approaches, the Court called this statute a "bright-line prophylactic rule" to protect women from the possibility of unwanted approaches.[91] Therefore, the Court upheld that the statute was content-neutral and narrowly tailored to a significant governmental interest.

To many, *Hill* was poorly decided in light of First Amendment precedents, because the governmental interest in preventing unwanted communication in a traditional public forum had never before justified speech restrictions outside of a residential setting.[92] Justice Scalia's dissent argued that, by applying *Frisby*'s privacy rights in *Hill*, "[t]he Court… elevate[d] the abortion clinic to the status of the home."[93] Further, there was no history of violence, obstruction of clinic entrances, harassment, or any other criminal activity.[94] Instead of addressing crime, this statute of general applicability specifically targeted speech based on presupposed listener reaction.[95] Of course, courts normally require those who encounter unwanted communication in traditional public fora to "avert[] their eyes."[96] The Sixth and Eighth Circuits cited this expansion of privacy rights to uphold funeral protest statutes that prohibited protests on streets and sidewalks. However, the Supreme Court would strongly erode those decisions fourteen years later in *McCullen v. Coakley*.

C. BASED ON THE CAPTIVE AUDIENCE DOCTRINE, LOWER COURTS HAVE UPHELD BROAD FUNERAL PROTEST BUFFER ZONES

1. Phelps-Roper v. Strickland

Several district and state courts had ruled on funeral protest buffer zones prior to the Sixth Circuit's decision in *Phelps-Roper v. Strickland* in 2008. In *Strickland*, the Court of Appeals considered a facial challenge to Ohio Rev. Code Ann. § 3767.30. This statute stated that "no person shall picket or engage in other protest activities… within three hundred feet of

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[90] *Hill*, 530 U.S. at 725.
[91] *Hill*, 530 U.S. at 730.
[92] Scalia points out in his *McCullen* dissent that there is an "abundance of scathing academic commentary describing how Hill stands in contradiction to our First Amendment jurisprudence." *McCullen*, 134 U.S. at 2545-46. *See* Michael W. McConnell, *RESPONSE: Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747 (2001); *See also* Raskin, *supra* note 89.
[93] *Hill*, 530 U.S. at 753.
[94] McConnell, *supra* note 92, at 748.
[95] Professor McConnell points out that *Hill v. Colorado* is the first case he can think of which rejects the listener's burden to avoid unwanted speech. *Id*.
[96] *Cohen*, 403 U.S. at 21.

any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service…"[97] The statute further requires that "[n]o person…picket or engage in other protest activities… within three hundred feet of any funeral procession."[98] As used in this section, "other protest activities" means any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service or a funeral procession.[99]

The district court struck down the funeral procession provision, holding it to be unconstitutionally overbroad.[100] However, the court held that the 300-foot buffer zone provision statute was a content-neutral time, place, and manner restriction, as Ohio had a "significant interest in protecting its citizens from disruption" during the funeral service.[101] The court held that the buffer zone was narrowly tailored to the legitimate state interest in question and upheld this provision of the statute as constitutional.[102]

Shirley Phelps-Roper appealed to the Sixth Circuit Court of Appeals, challenging the statute's fixed buffer zone.[103] She argued that this provision was unconstitutionally overbroad and violated her First Amendment right to protest.[104]

Phelps-Roper stipulated that the statute as written was a content-neutral time, place, and manner restriction, because the statute was justified without reference to the content of the message.[105] Applying intermediate scrutiny, the court then considered whether the statute was narrowly tailored to serve a significant state interest, and whether it left alternate channels of communication.[106]

The court expressed strong disfavor for the facial challenge in the interests of judicial restraint,[107] but it held that Ohio had a significant interest in protecting citizens from disruption during a funeral or burial service.[108] To justify this interest, the court cited *Frisby* and held that

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[97] Ohio Rev. Code Ann. § 3767.30.
[98] *Id*.
[99] *Id*. The statute was amended in 2006 to extend the time to include one hour before until one hour after the funeral service, establish a 300-foot buffer zone, and add a residual clause that barred "other protest activities." This statute was originally written in 1957 to prohibit picketing funerals and funeral processions, but the statute was amended in 1961 to add a time frame. *Id*.
[100] *Strickland*, 539 F.3d at 360.
[101] *Id*.
[102] *Id*. at 373.
[103] *Id*. at 358.
[104] *Id*.
[105] *Id*. at 361.
[106] *Id*. at 366-67, 372.
[107] *Id*. at 373.
[108] *Id*. at 362. The court balanced the attendees' interests in avoiding unwanted communication against the protestors' rights to speak. *Id*.

funeral attendees are a "captive audience" to the protests which are "so intrusive that [the] unwilling audience cannot avoid it."[109] As a captive audience, the court stated that the funeral attendees cannot "avert[] their eyes," because they are bound to attend the funeral services.[110] To justify this expansion of *Frisby*, the court pointed to the Supreme Court's decisions in *Hill* and *Madsen v. Women's Health Ctr.* to expand privacy rights to abortion clinics.[111]

The court then examined the fixed buffer zone and determined that it was narrowly tailored. Phelps-Roper argued that it was not narrowly tailored, because it barred all protests within 300 feet of a funeral service. The court rejected this interpretation of the statute. Instead, the court held that because the statute used the singular forms in naming the areas where speech is limited, the buffer zone only applied to protests directed at funerals.

Next, Phelps-Roper argued that the 300-foot buffer zone was too large for the state interest.[112] The court disagreed, stating that "*Frisby*, *Hill*, and *Madsen*, read together, establish that the size of the buffer zone is context sensitive..."[113] Though the *Madsen* Court struck down a 300-foot buffer zone, the Sixth Circuit reasoned that the limited time of the funeral protest ban caused it to be narrower.[114] The court determined that the same time difference also made the statute narrower than the one in *Hill*, although the funeral protest buffer zone was 200 feet larger.[115]

Finally, Phelps-Roper argued that the statute was not narrowly tailored because there were already laws in place that protected funeral attendees from physical violence by protestors.[116] Here, the court succinctly states the purpose of the statute: to protect funeral attendees from the "harmful psychological effects of unwanted communication when they are most captive and vulnerable."[117]

The court additionally pointed out that the 300-foot buffer zone helped solve the "logistical problems associated with moving large numbers of people from the site of a funeral to the burial site."[118]

The court then decided that alternate channels of communication remained open to Phelps-Roper. The court stated that Phelps-Roper had

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[109] *Id.*
[110] *Id.* at 366.
[111] *Id.* at 363.
[112] *Id.* at 367.
[113] *Id.* at 368.
[114] *Id.* at 370.
[115] The court did not address the fact that protestors in *Hill* could still target the clinic or its clients within the 100-foot buffer zone as long as they did not approach within eight feet. *Hill*, 530 U.S. at 707.
[116] *Strickland*, 539 F.3d at 371.
[117] *Id.* at 372.
[118] *Id.* at 371.

more alternate means of communication than the plaintiff in *Frisby*, because "targeted" protests at the funeral site were permitted outside of the statute's proscribed time.[119] The court concluded that the plaintiff was not "entitled to her best means of communication," pointing out the church's website and its radio and television appearances.[120]

2. *Phelps-Roper v. City of Manchester*

Four years after the Sixth Circuit's decision in *Strickland*, the Eighth Circuit followed suit and upheld a similar 300-foot buffer zone ordinance around funerals that extended from one hour before to one hour after the service.[121] In Missouri, the Phelps-Ropers sued eight municipalities with funeral protest ordinances, and every one repealed the ordinance except the City of Manchester.[122] The district court held that the statute was content-based and therefore "presumptively invalid," but even if the statute were content-neutral, it was not narrowly tailored.[123]

The Eighth Circuit affirmed the ruling in 2011, but it granted the City of Manchester a rehearing in light of the Supreme Court's indication in *Snyder* that the Westboro Baptist Church is subject to reasonable time, place, or manner restrictions.[124] The court reexamined the ordinance in light of *Snyder* and found it to be a content-neutral and narrowly tailored statute in light of the Sixth Circuit's interpretation of *Frisby* and *Hill*.[125] With similar reasoning as in *Strickland*, the Eighth Circuit concluded that the ordinance left open adequate alternate channels of communication, and the court upheld its constitutionality.[126]

II. THE SUPREME COURT IN *MCCULLEN V. COAKLEY* BRINGS NEW LIFE TO THE FIRST AMENDMENT BY PROTECTING SPEECH

A. *THE LOWER COURT UPHOLDS THE STATUTE AND CITES SIMILAR CAPTIVE AUDIENCE GROUNDS AS THE FUNERAL PROTEST CASES*

In 2007, the Massachusetts legislature amended Mass. Gen. Laws Ch. 266, § 120E 1/2(b),(c) to create a thirty-five foot buffer zone around any abortion clinic's entrance or driveway where "no person shall knowingly

[119] *Id*. at 372.
[120] *Id*.
[121] *City of Manchester*, 697 F.3d at 678.
[122] *Id*. at 684.
[123] *Id*.
[124] *Id*. at 684.
[125] *Id*. at 688.
[126] *Id*. at 695.

enter or remain."[127] However, the statute created an exception for persons entering or leaving, employees or agents of the clinic, emergency services, and people passing down the sidewalk. [128] The buffer zone applied at any time the clinic was open.[129] This legislation began a long line of constitutional "serial challenges" which were struck down by the district court and First Circuit Court of Appeals.[130] The Court of Appeals upheld the statute as a valid content-neutral time, place, and manner restriction on speech.[131]

McCullen and three other plaintiffs regularly engaged in "sidewalk counseling," in which women entering the abortion clinic would hear prayer, see pro-life signs, and receive literature if they approached.[132] The plaintiffs claimed to have had success in convincing women to forego abortions at the clinics, but that this was severely burdened by the Massachusetts statutory amendment.[133]

In 2013, the Court of Appeals once again upheld the statute and cited *Snyder*'s statement in dicta that "even traditional public fora are subject to reasonable time-place-manner regulations."[134] The plaintiffs argued that the employee exception unconstitutionally permitted speech by only one viewpoint.[135] The plaintiffs also argued that the statute was overbroad as applied to them.[136] Finally, the plaintiffs argued that the statute did not leave adequate alternate means of communication.[137]

To this final argument, the court showed that the plaintiffs were able to hold large signs, use their voices and sound amplification equipment, and wear "evocative garments."[138] Of course, standing outside of a buffer

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[127] McCullen v. Coakley, 708 F.3d 1 (1st Cir. 2013). The statute was amended because the alleged difficulty of enforcing the "no approach" statute modeled after the one in *Hill v. Colorado*. *McCullen*, 134 U.S. at 2518, 2526.
[128] Mass. Gen. Laws Ch. 266, § 120E 1/2(b).
[129] *McCullen*, 134 U.S. at 2526.
[130] McGuire v. Reilly (McGuire I), 260 F.3d 36 (1st Cir. 2001) (which rejected a facial challenge); McGuire v. Reilly (McGuire II), 386 F.3d 45 (1st Cir. 2004) (which rejected an as-applied challenge). McGuire v. Reilly, 544 U.S. 974 (2005) (which the Supreme Court denied cert).
[131] *McCullen*, 134 U.S. at 2525.
[132] *McCullen*, 708 F.3d. Massachusetts had a statute similar to the one in *Hill v. Colorado*, which prohibited approaching within 6 feet of women within 100 feet of an abortion clinic. *McCullen*, 134 U.S. at 2525.
[133] Plaintiff Zarrella claimed that she had not been able to convince a woman to opt out of an abortion since the 2007 amendment. *McCullen*, 708 F.3d at 5.
[134] *McCullen*, 708 F.3d at 1, 8.
[135] Plaintiffs alleged that "pro-choice advocates [] surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature." *McCullen*, 708 F.3d at 9.
[136] The court concluded that the comprehensive nature of the statute (that it establishes several buffer zones at several abortion clinics) does not show overbreadth, but instead shows that the government does not have a discriminatory motive. McCullen, 708 F.3d at 13. The Supreme Court majority agreed. *McCullen*, 134, U.S. at 2532.
[137] *McCullen*, 134 U.S. at 2518, 2535-36.
[138] *McCullen*, 708 F.3d at 8.

zone and shouting was not the plaintiffs' chosen means of conveying their message, but the appellate court held that "as long as a speaker has an opportunity to reach her intended audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication."[139] The court concluded that the plaintiffs are not guaranteed the attention of their audience or ability to speak closely.[140]

Finally, the court pointed out the Supreme Court's ruling in *Hill v. Colorado*, which "specifically recognized" abortion patients' interest in "avoiding unwanted communication."[141] Therefore, the Constitution does not ensure "the same quantum of communication that would exist in the total absence of regulation."[142] The lower court rejected all of the plaintiffs' arguments and upheld the amended statute as constitutional.[143]

B. THE SUPREME COURT REVERSES

The Supreme Court unanimously held that the amended statute violated the First Amendment.[144] Just as the Court had done in *Snyder*, it once again reaffirmed that the "government's ability to regulate speech [on traditional public fora] is 'very limited.'"[145] Despite the statute's sole application at abortion clinics and its disproportionate effect on pro-life protestors, the Court held that the statute was content-neutral, because it is "justified without reference to the content of the regulated speech."[146] To determine whether the buffer zone was justified, Massachusetts had to show a pattern of violations of existing laws which current laws were unable to address.[147] The Commonwealth already had a statute similar to that in *Hill,* that prevented any unconsented approach of a woman within eighteen feet of an entrance to an abortion clinic, but Attorney General Coakley claimed that this statute was "unenforceable" and that violations occurred "on a routine basis."[148] However, police testified that there were only a few arrests and no successful prosecutions.[149] On the other hand, the buffer zone was clearly marked in yellow paint and was easily enforced.[150]

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[139] *McCullen*, 708 F.3d at 13.
[140] *Id*.
[141] *Id*. at 14.
[142] *Id*.
[143] *Id*. at 15.
[144] *McCullen*, 134 U.S. at 2518.
[145] *Id*. (quoting United States v. Grace, 461 U.S. 171 (1983)).
[146] *Id*. at 2523.
[147] *Id*. at 2539.
[148] *Id*. at 2525-26.
[149] *Id*. at 2539.
[150] *McCullen*, 708 F.3d at 5; *Id*. at 2526.

Unlike the district court below, the Supreme Court gave significant weight to the plaintiffs' particular method of persuading patients.[151] Citing to the record, the Court showed that the success of the plaintiffs' efforts depended upon "maintain[ing] a caring demeanor, a calm tone of voice, and direct eye contact" with the women.[152] According to the plaintiffs, these efforts have resulted in "hundreds of women" choosing not to terminate their pregnancies.[153] However, with the imposition of these thirty-five foot buffer zones, the plaintiffs claimed that their success was greatly diminished.[154] On the other hand, clinic employees have an unlimited ability to speak within the zone, sometimes telling women to ignore the protestors and calling them "crazy."[155]

The plaintiffs argued that the statute was not content-neutral, because it specifically applied to abortion clinics and exempts employees, both of which discriminate against the pro-life viewpoint.[156] However, the Court stated that, despite the statute's sole application to abortion clinics, it would not infer an unconstitutional purpose to the statute.[157] Therefore, the Court held the law is "justified without reference to the content of the regulated speech."[158] Because the regulation was facially neutral, the Court held that it was not content-based and therefore not subject to strict scrutiny.[159]

1. Avoidance of Unwanted Communication Is Not a Valid State Interest in Traditional Public Fora

Faced with a governmental interest of ensuring public safety and preventing sidewalk congestion, the Court nonetheless explicitly denied the possibility of a privacy interest justification. The Court did not directly address the district court's citation of *Hill*'s sidewalk privacy rights, but the Court stated:

> To be clear, the Act would not be content-neutral if it were concerned with undesirable effects that arise from "the direct impact of speech on its audience" or "[l]isteners' reactions to speech." If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not

[151] *Id*. at 2527.
[152] *Id*.
[153] *Id*.
[154] *Id*. at 2528.
[155] *Id*. at 2528.
[156] *Id*. at 2523.
[157] *Id*. at 2523.
[158] *Id*. at 2523 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)) (internal quotes omitted).
[159] *Id*. at 2523.

give the Commonwealth a content-neutral justification to restrict the speech.[160]

Therefore, if Massachusetts's proffered interest were to protect women from unwanted communication as they entered the clinic, the statute would be classified as content-based and would be presumptively unconstitutional. However, Massachusetts showed a record of "crowding, obstruction, and even violence" near at least one abortion clinic.[161] It is undisputed that these concerns qualify as a content-neutral basis for a statute, but it was disputed that this proffered justification was sincere.[162]

In Justice Scalia's concurrence, he argued that the limited record of criminal activity at abortion clinics and sweeping nature of the buffer zones evinced that the statute's true purpose is to limit speech. However, the majority refused to infer discrimination from the scope of the statute, and instead considered this imbalance under a narrow tailoring analysis.

Justice Scalia also argued that the statute was content-based because it created a broad statute that applied to all abortion clinics despite a complete lack of evidence of public safety problems arising, except at one office and on one day.[163] He further argued that the issue truly before the Court, as evinced by the statute's breadth, structure, and origins in *Hill*, is whether the government may protect people on streets and sidewalks from unwanted speech.[164]

It is unclear why the majority failed to directly address the *Hill* decision.[165] Kevin Russell has opined that it is possible that the Court no longer held the five-vote majority necessary to uphold such buffer zones, and the Justices who joined the majority in *Hill* voted with the majority in *McCullen* to ensure that such statutes would still be held to be content neutral.[166] This theory explains why the Court would proceed through the content-neutrality analysis, despite ultimately holding that the statute did not satisfy even lowered scrutiny.[167] Justice Scalia found the content-based statute to be "unconstitutional root and branch," and therefore did not address whether it was narrowly tailored to the state's interest.[168]

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[160] *Id*. at 2532-33 (citation omitted).
[161] *Id*. at 2523.
[162] *Id*. at 2545-46.
[163] *Id*. at 2544.
[164] *McCullen*, 134 U.S. at 2545-46.
[165] Justice Scalia argues that the Court *sub silentio* overruled *Hill*. *Id*. at 2546.
[166] And thereby held to intermediate scrutiny. Kevin Russell, *What is left of Hill v. Colorado?*, SCOTUSBLOG (Jun. 26, 2014, 4:34 PM), http://www.scotusblog.com/2014/06/what-is-left-of-hill-v-colorado.
[167] Justice Scalia argued that this type of analysis is inconsistent with precedent. *Hill*, 530 U.S. at 2541-42.
[168] *McCullen*, 134 S. Ct. at 2549.

2. A Thirty-Five Foot Buffer Zone Is Not Narrowly Tailored

Even though the Supreme Court held that the Massachusetts statute was content-neutral, it concluded that it was not narrowly tailored to the state interest.[169] The Court first looked to the burden on the plaintiffs' speech.[170] Because the plaintiffs were excluded from the buffer zone, their ability to leaflet was severely burdened.[171] The Court stated that the Court of Appeals was "wrong to downplay these burdens on petitioners' speech."[172] Simply referring to the remaining ability to hold a sign and chant "misses the point."[173] The Court concluded that "[i]f all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled the petitioners' message."[174]

While the burdens on the plaintiffs' speech were substantial, the Court held that the state had failed to utilize less speech restrictive means to achieve its legitimate interest.[175] First, within the same statute, Massachusetts prohibited violence to or harassment of clinic employees and patients, but there had been no successful prosecutions in seventeen years.[176] Second, the state failed to utilize ordinances already in place to ensure access to the entrance of abortion clinics.[177] While the state is not required to adopt the least speech-restrictive means to accomplish its goals, it may not create a statute in which "a substantial portion of the burden on speech does not serve to advance its goals."[178] The Supreme Court unanimously held that the statute was not narrowly tailored to the state interest, and was therefore unconstitutional.[179]

III. MCCULLEN SHOWS THAT BROAD FUNERAL PROTEST STATUTES LACK SUFFICIENT GOVERNMENTAL INTERESTS

Considering the justifications for the captive audience doctrine in *Frisby v. Schultz*, the Supreme Court would likely hold that there is a valid

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[169] *Id*. at 2532-33.
[170] *Id*. at 2536.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] *Id*. at 2536-37.
[175] *Id*. at 2537-38.
[176] *Id*. at 2537-39.
[177] *Id*. at 2539. Also, the federal government had enacted the Freedom of Access to Clinic Entrances (FACE Act), which had also been adopted by several states. Massachusetts has not adopted the statute. *Id*. at 2537.
[178] *Id*. at 2535.
[179] *Id*.

governmental interest in preventing the disruption of funerals.[180] The dicta in *Snyder v. Phelps* supports this.[181] However, this interest is only valid to protecting attendees during the service, and only from disruptions that the state has reason to believe will occur.

A. PRIVACY INTEREST IN PREVENTING FUNERAL DISRUPTION IS A VALID STATE INTEREST BUT WILL ONLY SUPPORT NARROWER STATUTES

In one way, funerals require protection of privacy interests during their service more than an abortion clinic does, because funerals often take place outdoors. People inside abortion clinics do not experience the same captive audience concerns that funeral attendees do, because the building walls block the unwanted speech and signs. Women only face unwanted communication outside of an abortion clinic as they enter or exit. In this way, the location of funerals present a unique constitutional challenge, as attendees are potentially captive to disruptive speech throughout the entire funeral service. To this point, the Supreme Court recognized in *Snyder* that "Westboro's choice of where and when to conduct its picketing is 'subject to reasonable time, place, or manner restrictions.'"

On the other hand, *McCullen* and its progeny show that the Constitution disfavors buffer zones that encompass a traditional public forum, even when the restriction is content neutral. Faced with a legitimate interest in preventing captive funeral attendees from having unwanted communication forced upon them during the service, state legislatures have passed broad statutes that completely prevent the communication by moving protestors to outside the buffer zone.[182] However, a statute based on this state interest could withstand intermediate scrutiny, if that law were narrowly tailored.

B. THERE IS NO VALID GOVERNMENTAL INTEREST IN PREVENTING COMMUNICATION TO THOSE ENTERING OR LEAVING FUNERALS

The *Hill* Court classified an interest in avoiding confrontational communication as a legitimate governmental interest that overcame the protestors' First Amendment rights to approach and leaflet on streets and sidewalks.[183] This holding was subsequently used by lower courts to justify

[180] *Frisby*, 487 U.S. at 474.
[181] "Westboro's choice of where and when to conduct its picketing… is 'subject to reasonable time, place, or manner restrictions.'" *Snyder*, 131 U.S. at 1211.
[182] *See* Suesz, *supra* note 4.
[183] *Hill*, 530 U.S. at 703, 715.

buffer zones to prevent presumptively unwanted communication for funeral attendees approaching a service, even where there was no confrontational approach.[184]

The First Circuit Court of Appeals also cited this holding in *McCullen* in upholding the thirty-five foot buffer zone around abortion clinics.[185] Though the Massachusetts legislature's stated interest in *McCullen* was to preserve public safety, the court added that the *Hill* Court had previously recognized clinic patients' interest "in avoiding unwanted communication."[186] Therefore, the circuit court concluded that protestors are not entitled to the same ability to communicate that they would have without the statute, so long as "adequate alternative means of communication exist."[187]

McCullen now shows that privacy and avoidance of unwanted communication are not legitimate state interests in traditional public fora. Without reference to the First Circuit's mention of *Hill*, the Supreme Court in *McCullen* discarded the possibility of considering audience reaction as a valid content-neutral state interest.[188] The Court stated that "the Act would not be content-neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'"[189] However, because Massachusetts claimed that their interest was sidewalk safety and prevention of crowding, the Supreme Court held the interest to be legitimate and content-neutral.[190] By refusing to address the women's interest in avoiding unwanted communication, the Court has at least interpreted *Hill* narrowly. In Scalia's concurrence, he even argued that by making this statement and striking down the statute as insufficiently tailored, the Court has "*sub silentio* (and perhaps inadvertently) overruled *Hill*."[191]

Therefore, *McCullen* now shows that the Sixth and Eighth Circuits erroneously relied on the privacy interests of *Frisby* and *Hill* in upholding the funeral buffer zones. In *Frisby*, the Court recognized that the interest of peace and privacy within the home could justify an ordinance barring protests directed at a residence.[192] By a narrower vote, the Court held in *Hill* that privacy rights could justify a buffer zone that barred approaching

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[184] *See supra* note 111.
[185] *McCullen*, 708 F.3d at 14.
[186] *See supra* note 141.
[187] *McCullen*, 708 F.3d at 14.
[188] *See supra* note 160.
[189] *See supra* note 160. The Court cited Boos v. Barry, 485 U.S. 312, 321 (1988).
[190] *See supra* note 161.
[191] *See supra* note 165. Justice Scalia in his concurrence states that the reason the Court granted certiorari was to address whether *Hill* should be overruled, but the majority "avoid[ed] that question by declaring the Act content-neutral on other (entirely unpersuasive) grounds. *McCullen*, 134 U.S. at 2545.
[192] *See supra* note 79.

an unwilling audience.[193] The Sixth and Eighth Circuit Courts interpreted *Hill*'s ruling broadly, holding that the government has a legitimate interest in limiting speech "in confrontational settings" and where the speech "is so intrusive, the unwilling audience cannot avoid it," even where the audience is not approached.[194] *McCullen* shows that these privacy interests do not justify a thirty-five foot buffer zone outside of an abortion clinic, despite the possible confrontational nature of the message or the willingness of the audience.[195]

The Sixth and Eighth Circuits also found it "critical" to the governmental interest that the funeral protesting statutes only apply to funerals, because it shifts the burden off the captive viewer to avert his eyes.[196] Both courts stated that it would be unreasonable to require an attendee to avoid the funeral of a loved one in order to avoid offensive speech.

However, *McCullen* struck down a buffer zone surrounding an abortion clinic, which offers a constitutionally protected service. In that case, the Supreme Court never addressed the fact that women who choose to enter an abortion clinic have to forgo obtaining an abortion in order to avoid offensive speech. Instead of citing or distinguishing *Frisby* or *Hill*, the *McCullen* majority nearly avoided them entirely.[197] Furthermore, the Court never addressed the First Circuit's application of privacy rights within the public forum. Instead, the Court cited *Boos v. Barry*, stating that if the speech "caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech."[198]

As Justice Scalia's concurring opinion pointed out, the majority in *McCullen* rejected *Hill*'s balancing of interests.[199] Therefore privacy, treated by the Sixth and Eighth Circuit Courts as synonymous with "avoidance of unwanted communication," should not be classified as a legitimate state interest for those *entering* a funeral after *McCullen*. This holding undercuts the primary foundation upon which the Sixth and Eighth Circuits have upheld broad funeral protest statutes.[200]

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[193] *See supra* note 88.
[194] *Strickland*, 539 F.3d at 362.
[195] Though, as discussed *infra* note 231, if *Hill* is not overruled, states may pass "no approach" floating buffer zones around individuals.
[196] *See supra* note 69.
[197] The Court merely mentioned them in the structure of statute. *McCullen*, 134 U.S. at 2525.
[198] *McCullen*, 134 U.S. at 2532.
[199] In *Hill*, the interest in avoiding unwanted communication outweighed the speakers' rights, at least with regard to their ability to approach. *See supra* note 89.
[200] *See supra* note 108.

C. A CRIME PREVENTION GOVERNMENTAL INTEREST CANNOT JUSTIFY FUNERAL PROTEST STATUTES WITHOUT A FACTUAL BASIS FOR BELIEVING CRIME IS LIKELY TO OCCUR

Without the avoidance of unwanted communication as a valid state interest, there is little left to support these broad buffer zones on traditional public fora. In *McCullen*, the Court recognized a record of protestors who crowded streets and sidewalks, obstructed entrances, and sometimes committed acts of violence at one clinic.[201] Still, even that record did not justify a smaller buffer zone than any of those created by funeral protest statutes.

First, there have been no successful prosecutions of Westboro Baptist Church members related to funeral protests, despite more than 600 protests in twenty years.[202] In *Snyder*, the Supreme Court pointed out that the protestors alerted police to the protests in advance, complied with all police instructions, and violated no laws.[203] Even if the prevention of crime or violence by protestors were the stated governmental interests, the lack of prosecutions would necessarily make any statute fail the narrow tailoring analysis. There have been instances of violence, however, directed *against* the Westboro Baptist Church. To limit speech on this basis would constitute an unconstitutional "heckler's veto."[204] The government has a responsibility not only to avoid infringing upon First Amendment rights, but also to protect speakers from hostile audience reaction.

Second, unlike *Madsen* and other abortion cases, there has been no claim that protestors block the flow of traffic or obstruct access to funeral grounds.[205] If the Westboro Baptist Church did not conform to the law so strictly, a broader buffer zone could be upheld.

Therefore, without a record of crime or a valid interest in protecting approaching funeral attendees from unwanted speech, the broad statute is obviously directed against unpopular speech without any plausible content-neutral justification.

IV. MCCULLEN SHOWS THAT FUNERAL PROTEST STATUTES ARE NOT NARROWLY TAILORED

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[201] *McCullen*, 134 U.S. at 2523.

[202] Southern Poverty Law Center, http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2001/spring/a-city-held-hostage/fred-phelps-timel. There was, however, an arrest, for desecrating an American flag. *Snyder*, 131 U.S. at 1213.

[203] *See supra* note 108. *Snyder*, 131 U.S. at 1213.

[204] *See* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992).

[205] The governments in *Strickland* and *City of Manchester* did not make this argument.

Only three governmental interests could establish a valid content-neutral state interest for the funeral protest statutes. First, the state may place buffer zones to prevent violence, illegal noise disturbances, vandalism, and trespass. Second, the state may implement the buffer zone to ensure unobstructed entrance to the funeral. Finally, the state may act to prevent funeral disruption for a captive audience, an interest already accepted by the Sixth and Eighth Circuits. Of course, each of these interests would require the state to show a substantial enough problem to justify intruding upon recognized free speech in traditional public fora. As the circuit courts in *Strickland* and *City of Manchester* pointed out, under an intermediate scrutiny standard the government need not utilize the "least restrictive or least intrusive means of serving the statutory goal."[206] However, the restrictions on speech must be balanced against the amount of speech burdened. In *McCullen*, the Supreme Court declared that even under intermediate scrutiny, this standard does not give carte blanche to legislatures to excessively burden speech.

Perhaps in an attempt to save the constitutionality of the statute, the Sixth Circuit in *Strickland* construed the statute as similar to the residential protest statute in *Frisby* in that it does not displace protestors.[207] However, this is contrary to the language of the statute. The court held that the statute, "properly read… restricts only the time and place of speech *directed* at the funeral…" Under this interpretation, the court concluded that merely holding a sign within 300 feet of a funeral will not support a conviction. The protestor must somehow "direct" that protest toward the funeral. Nonetheless, the statute states "no person shall picket or engage in other protest activities…within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place."[208] The only place in which the "directed at" language appears is in reference to the residual clause.[209] The court reasoned that the Supreme Court in *Frisby* interpreted the ordinance's use of the singular form "residence" to show that the statute intended to cover only those protests directed at a residence. However, the language of this statute is easily distinguished. The ordinance in *Frisby* did not prescribe a buffer zone inside which all protests were explicitly barred.

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[206] *Strickland*, 539 F.3d at 367; *City of Manchester*, 697 F.3d at 695.
[207] *Strickland*, 539 F.3d at 368.
[208] ORC Ann. 3767.30. *See supra* note 97.
[209] This covers "other protest activities" and is defined as "any action that is disruptive or undertaken to disrupt a funeral or burial service." Even if the court applies this residual clause to the rest of the statute, it would give funeral attendees, the police, and jurors the ability to punish unpopular speech based on the content of a message. Mourners and police would likely not find counter protestors' messages disruptive to the funeral. *Hill* petitioners lost on this argument regarding the word "protest," but "disrupt" necessarily depends on which message an audience finds "disruptive." *Hill*, 530 U.S. at 709.

This left the scope of the statute open to interpretation by the courts. The plain language of ORC Ann. 3767.30 leaves no such room. The Eighth Circuit in *City of Manchester* followed a similar interpretation, citing *Strickland*.

However, even under this interpretation, the statutes burden far more speech than is necessary to prevent funeral disruptions. Those "directing" their protests at the funeral are still moved hundreds of feet away, regardless of whether the funeral is ongoing or whether they are visible or audible to attendees.

A. STATUTES THAT LIMIT SPEECH ON THE SIDEWALKS AND ROADS BURDEN TOO MUCH SPEECH IN RELATION TO THE STATE INTEREST

In order to satisfy the narrow tailoring requirement, the statutes must only address the captive audience concerns, and must not attempt to prevent the offensive communication from occurring in traditional public fora. The funeral protest statutes fail in this regard because they do not exclusively apply to the time and place where the funeral attendee becomes a captive audience, and his or her privacy interests outweigh the protestors' speech rights. The circuit courts in *Strickland* and *City of Manchester* failed to make this distinction as they upheld a buffer zone that extended 350 feet even one hour before the funeral service began.[210] If state legislatures intend to prevent the disruption of peace and privacy during a funeral service, then the restriction should only apply to those places and times where the service is actually disrupted.

In justifying the 300-foot buffer zone, the Sixth Circuit pointed to the 100-foot buffer zone in *Hill v. Colorado*. The court acknowledged that the buffer zone is 200 feet greater, but reasoned that "it serves a similar purpose… [to] protect[] a group of individuals who may arrive and depart from the funeral or burial service in a coordinated fashion." This reasoning fails in several ways. First, the buffer zone in *Hill* did not prevent protestors from standing or holding signs within the buffer zone. The majority in *Hill* even pointed to the fact that signs could still be seen within eight feet.[211] It only prevented the direct approach to and confrontation of unwilling listeners. Second, the Massachusetts statute in *McCullen* had a similar goal: to protect public safety and prevent sidewalk crowding. However, those privacy interests could not even justify a thirty-five foot buffer zone that displaced protestors.

Unfortunately, none of the funeral protest statutes are narrowly tailored, and all burden more speech than the buffer zone statute held

[210] *See supra* note 113, 125.
[211] *Hill*, 530 U.S. at 726.

unconstitutional in *McCullen*. The Court in *McCullen* held that "the government's ability to restrict speech [on sidewalks] is 'very limited.'" However, most funeral buffer zones extend 300 or more feet from the cemetery, and some statutes extend to 1,500 feet. Even the smallest of these buffer zones exceed the thirty-five foot buffer zone struck down in *McCullen*. These overbroad statutes push protestors far away, without providing an exception for those who are behind a wall or building and not visible from the funeral itself. Although the government has a legitimate interest in preventing funeral service disruptions by these offensive messages, these statutes go one step further by attempting to prevent the protestors' messages from ever being conveyed to their intended recipient, even when there is no funeral in progress to disrupt. To do so, the statute creates a buffer zone in which the funeral protest is so far removed that it ceases to be a funeral protest at all.

The funeral protest statutes go farther than *Hill*, *Frisby*, and *McCullen* by displacing protestors in a way that eliminates their ability to gain the attention of their audience. A statute that displaces protestors so far that their intended audience can never see nor hear them violates the First Amendment.[212]

The *Strickland* court opined that the funeral protest statute was narrower than the statute in *Hill*, because the time restriction in *Hill* was greater. This distinction is meaningless. The restriction in *Hill* applied to whenever the clinic was open, and the restriction in *Strickland* applied from one hour before, to one hour after, the funeral service.[213] Protestors at the clinics in *Hill* actually enjoyed a better opportunity to counsel, because they could approach women waiting for the clinic to open. Even if the period of time restricted by the statute in *Strickland* is shorter, by preventing speech anytime the intended audience is present, the statute effectively stifles the message just as effectively as the longer buffer zones in *Hill* and *McCullen*.[214]

The statutes are also far too broad with regard to the number of locations, as they forbid all protests within hundreds of feet of any funeral throughout the entire state, without showing a pattern of funeral disruptions. The *McCullen* Court held that, because only one abortion clinic had experienced the problems,[215] and only one day per week,

[212] *See* Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 655 (1981), quoting Kovacs v. Cooper 336 U.S. 77, 87 (1949) ("The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be an opportunity to win their attention.'").

[213] It is possible that a funeral service could even extend beyond the length of the clinic's open hours.

[214] This reasoning would support a statute that prohibited any protest occurring within an hour before and after any politician's speech. It is doubtful that any court would find that the limited time frame helped the constitutionality of the statute in any way.

[215] The problem was crowding, obstruction of entrances, and violence. 134 U.S. at 2523.

"creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution." The funeral protest statutes suffer from even less justification.[216] Therefore, removing the speakers hundreds of feet from funerals throughout the state is not a narrowly tailored solution.

While perhaps the strongest argument in favor of funeral buffer zone statutes is the ease of enforcement, this does not support the statutes' constitutionality. The existing buffer zones proscribe a large fixed area that can be clearly delineated where targeted protests may not occur. Admittedly, the "line of sight" restrictions would require police officer enforcement on an individual basis, as opposed to drawing a clear line 300 feet away from the funeral. *Phelps-Roper v. Strickland* used this convenience as one justification for the statute. Nevertheless, the *McCullen* Court held that narrow tailoring does not only serve to "guard against an impermissible desire to censor," but it also burdens speech for the purpose of convenience.[217] Police are fully capable of detecting and prosecuting illegal noise and trespass disruptions of funerals. Moreover, if the Westboro Baptist Church or any other protestor regularly violates the line of sight provision of the statute, an impartial court could issue a narrowly tailored injunction to address that violation.

B. THE FUNERAL BUFFER ZONES DO NOT LEAVE ADEQUATE ALTERNATIVE MEANS OF COMMUNICATION

Analogous to *McCullen*, the funeral protesting statutes do not leave the protestors adequate means to convey their message. In *McCullen*, the right to hold signs and chant outside the smaller buffer zone where they can still be seen was never in question. Of course, the petitioners wanted more: the ability to counsel through "personal, caring, and consensual conversations" and hand leaflets to those who approached them. They had a strong interest in avoiding shouting and sign waving. Still, the First Circuit held that the petitioners' First Amendment speech rights were not infringed by moving them outside of the buffer zone. That court recognized that the statute prevented the petitioners' preferred methods of speech,[218] but held that "the Constitution does not ensure that [a speaker] will [always] be able to employ her preferred method of communication."

Both the Sixth and Eighth Circuits upheld funeral protest statutes on similar grounds. Both courts held that the petitioners' First Amendment

[216] There have been no successful prosecutions with regard to the funeral protests.
[217] *McCullen*, 134 U.S. at 2534.
[218] "Gentle discussions with prospective patients at a conversational distance…" *McCullen*, 708 F.3d at 13.

rights were not violated, because several other means of communication remained open to the protestors, including the church's own website.[219] The Sixth Circuit reasoned, as had the First Circuit in the abortion clinic context of *McCullen*, that protestors were "not entitled to [their] best means of communication."[220]

However, when *McCullen* reached the Supreme Court, this argument did not persuade. The Court unanimously held that the means of the message is a vital part of the message itself. Because the buffer zone moved the protestors away from the drive entrance, those who approached would only "see and hear… vociferous opponents of abortion."[221] Consequently, if the buffer zones were upheld, they would have "effectively stifled the petitioners' message." [222]

On the other hand, the means vital to the Westboro Baptist Church's message is to protest with signs outside a funeral. The funeral setting is key to the message and media publicity, just as others have protested outside of the White House or Capitol Hill.[223] Therefore, the Eighth Circuit's proposal that the speech "may be freely expressed anywhere in the city except during a short period immediately surrounding a funeral service" does not provide alternate channels for communication of that same message or to the same effect. Just as the Supreme Court ruled that the Court of Appeals was "wrong to downplay" the burdens on the abortion protestors' speech in *McCullen*,[224] so have the Sixth and Eighth Circuits downplayed the burden on the funeral protestors' message by removing them from their chosen protest site in a traditional public forum. Permitting protestors to protest hundreds of feet away, or an hour after the funeral, just as "effectively stifle[s] the [protestors'] message."[225] Although the funeral protestors' speech may be purposely antagonistic and greatly offensive, the government may not effectively silence a message by leaving only ineffective means of conveying it.

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[219] The Sixth Circuit also pointed to all of the alternative means available to the protestors in *Frisby v. Schultz*, and claimed that they are available here. Of course, this stifles the message by ignoring its nature and intent. *Strickland*, 539 F.3d at 372.

[220] *Strickland*, 539 F.3d at 372.

[221] *See supra* note 174.

[222] *Id*.

[223] Some have argued that the Supreme Court building has its own buffer zone, but this zone does not limit speech on the sidewalks, but only within the building and grounds. SUPREME COURT OF THE UNITED STATES: BUILDING REGULATIONS, http://www.supremecourt.gov/publicinfo/buildingregulations.aspx#Reg7 (last visited Jan. 31, 2015).

[224] *McCullen*, 134 U.S. at 2536.

[225] Of course, there is no right to exploit funerals for media publicity, but this restriction cuts into a traditional public forum, where the "government's ability to restrict speech … is 'very limited.'" *Id*. at 2522.

C. A MODERATE SOLUTION: FAR LESS RESTRICTIVE MEANS ARE AVAILABLE TO PREVENT FUNERAL DISRUPTION

The Supreme Court held in *McCullen* that there was no right to avoid unwanted communication in traditional public fora, but other precedent shows that right to exist when the audience is captive to the message.[226] Though it may be tempting to pass a law that completely prevents offensive communication from ever reaching mourners, such laws cause greater harm to the marketplace of ideas than they prevent to mourners.[227] However, the Constitution does not require a mourner attending a funeral to avert his or her eyes to a "God Hates F**s" sign over the shoulder of the pastor delivering the service. Neither should funeral attendees saying a prayer have to shout over the chants of protestors.

There is a more narrowly tailored solution that the Supreme Court after the *McCullen* decision would likely hold constitutional, and which would also protect captive funeral attendees. While the *McCullen* Court refused to cut into the First Amendment protections of traditional public fora by upholding a buffer zone displacing protestors, abortion protestors enjoy no right to communicate the message within the abortion clinic itself. So, instead of the fixed, speech-restricted buffer zones around funerals that are now shown to be unconstitutional, legislatures could pass statutes that require protestors not be visible or audible from the funeral service itself. This lack of visibility was sufficient for the *Snyder* court to conclude that no funeral disruption had occurred.[228] Those entering can still see the protestors and their message, but the speech will not bombard them audibly or visibly while captive during the service. Further, regular enforcement of noise ordinances and trespass laws would prevent disruptions of funerals.

This moderate approach removes the captive audience concerns that justified the statutes in *Strickland* and *City of Manchester*, while still preserving the Westboro Baptist Church's means and message. Protestors can still "target" a funeral service and draw media coverage, but they cannot disrupt the funeral service itself.

Another solution could be to pass statutes similar to those in *Frisby*.[229] In that case, there was no speech-chilling buffer zone around the home that prevented protests, but protests that focused on that particular home were

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[226] *See supra* note 79.

[227] This is not to say that there should be a balancing of interests on traditional public fora. *See supra* notes 188, 189.

[228] The Court pointed out that "Snyder could see no more than the tops of the picketers' signs, and there is no indication that the picketing interfered with the funeral service itself." *Snyder*, 131 U.S. at 1212.

[229] Although *Strickland* went through great efforts to interpret the statute contrary to its natural reading, the vague nature of the buffer zone and the natural reading of the statute will certainly lead to a chilling effect. *See supra* note 75.

banned.[230] The Supreme Court pointed out that the ordinance did not prevent marching through the residential neighborhood, but merely prevented protests upon that particular home. Funeral protest statutes could be written similar to Ohio's statute from 1961 until its amendment in 2006.[231] The earlier statute did not proscribe a buffer zone or residual clause, and would lead to a far more narrowly tailored law than the current version.[232]

If there is a valid interest in preventing crime or confrontational approaches, the state may also create eight foot "no approach zones" for funeral attendees.[233] A smaller buffer zone around entrances to funeral services could prevent the obstruction of access by attendees.[234]

Finally, many concerns regarding disruptions "can be readily addressed through existing local ordinances." The *McCullen* Court held that Massachusetts had failed to utilize less intrusive means, by pointing to existing laws against assault, trespass, vandalism, and other crimes as a means of addressing the problem without further burdening the First Amendment. These means are also available to governments to respond to protests that create illegal disturbances at funeral services. Funeral privacy can be protected by enforcing trespass laws, as well as by content-neutral noise ordinances already in place.[235]

V. AVOIDANCE OF UNWANTED COMMUNICATION IS THE TRUE STATE INTEREST, SO FUNERAL PROTEST STATUTES AS WRITTEN ARE ACTUALLY CONTENT-BASED AND ARE PRESUMPTIVELY INVALID UNDER STRICT SCRUTINY

The Supreme Court in *McCullen* held the thirty-five foot buffer zone statute to be content-neutral, before striking it down for failing the narrow tailoring prong. Because this restriction had an obvious disproportionate impact on one particular viewpoint and was clearly aimed at particular speakers, it should not have been classified as content-neutral. However,

[230] *Frisby*, 487 U.S. at 474, 486.
[231] Even though the Sixth Circuit failed to recognize the chilling effect of the amended statute, many troublesome parts were added. The residual clause with the buffer zone leads to a plain reading that is opposite of the Sixth Circuit's. 2005 Ohio HB 484.
[232] The earlier statute supports the Sixth Circuit's narrow reading far better than the amended version. However, the part of the earlier statute that prohibits protests up to one hour before a funeral service would likely need to be severed in order to be constitutional. 2005 Ohio HB 484.
[233] This possibility assumes that *Hill* was not overruled by *McCullen* and that there is still a valid interest in avoiding confrontational approaches.
[234] *Madsen*, 512 U.S. at 753.
[235] There have been no successful prosecutions, however, because Westboro Baptist Church members are usually careful to antagonize without violating any laws.

the Court has traditionally looked at a statute only facially, to see if it considers content before application.

A. WHEN THE LOCATION OF A STATUTE EVINCES SPEAKER DISCRIMINATION, IT SHOULD TRIGGER STRICT SCRUTINY

In *McCullen*, the Supreme Court addressed content-based concerns under the narrow tailoring analysis. Justice Scalia in his concurrence pointed out that the problems Massachusetts sought to address occurred only in one clinic and only once a week. Therefore, he wrote, the fact that Massachusetts passed a statute that created a buffer zone around every abortion clinic must indicate that the statute is based on the content of the speech being prevented. However, the majority in *McCullen* held that this "poor fit… goes to the question of narrow tailoring."

For this reason, the Court would likely consider much of the evidence pointing to a content-based statute under the narrow tailoring prong, ignoring the obvious bias it indicates. Moving protestors hundreds of feet from a funeral service an hour before the service begins shows that the law is intended to prevent communication of a particular message, not disruption of a funeral. An even better indicator of this intent was the original "floating" buffer zones that prohibited funeral procession protests struck down by the district court in *Strickland*.[236]

However, state courts are not required by Supreme Court precedent to ignore this evidence in interpreting their own state constitutions.[237] Courts should apply a common sense analysis of the statute to determine whether it intends to discriminate against particular speech. For example, statutes that create buffer zones outside of abortion clinics should carry a presumption of content discrimination, as they clearly target the pro-life viewpoint.[238] A statute that is amended to bar protests outside of a funeral should carry a presumption that it targets the one major group which protests certain funerals. This is not to say, however, that such areas should be beyond the government's ability to regulate. Instead, these statutes should be held to strict scrutiny and only be upheld if they are narrowly tailored to serve a compelling state interest.[239]

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[236] Ohio did not appeal this ruling.

[237] State Constitutions are not prohibited by the Supremacy Clause from providing *more* rights to citizens.

[238] Similarly, a statute barring protests outside of a prison that performs executions would presumptively target anti-death penalty activists.

[239] *McCullen* seems to tighten the narrow tailoring analysis under intermediate scrutiny in light of this plainly discriminatory statute.

B. THE BREADTH OF FUNERAL PROTEST STATUTES SHOW THEIR TRUE PURPOSE: TO SUPPRESS WESTBORO BAPTIST CHURCH SPEECH

The breadth of the funeral protest statutes show that their underlying concern is the prevention of speech. The statutes prohibit speech within 300 feet, regardless of whether the funeral attendees can see or hear the protestors. The time restrictions barred protestors even though the funeral was not to start for another hour or more. The state interest in preventing a funeral disruption could not justify a buffer zone when no funeral was underway. The only basis left for the statute is to prevent attendees arriving to the funeral – still on streets and sidewalks – from seeing offensive messages. As Justice Scalia wrote in his concurrence in *McCullen*:

> Whether the statute 'restrict[s] more speech than necessary' in light of the problems that it allegedly addresses… is powerfully relevant… to whether the law is really directed [at the purported content-neutral concern] or rather to the suppression of a particular type of speech. Showing that a law suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based."

An audience's reaction to a message cannot justify a content-neutral restriction. Therefore, the presence of restrictions on protesting in traditional public fora when there is no funeral in progress to disrupt shows that the statute's true purpose is to restrict certain speech. As Justice Scalia explains, this is evidence that goes to both the content-neutral classification as well as the narrow tailoring analysis. *McCullen* shows that this desire to suppress specific communication should not justify a buffer zone in traditional public fora.

The breadth of the statute also calls its content-neutrality into question. In Justice Souter's concurrence in *Hill*, he stated that "[t]he fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching." In this way, Colorado showed that the target of the provision was not the content of the speech, because it left the right to speak largely unburdened. Conversely, removing funeral protestors from view during any time in which the attendees may view them, points to the opposite. Justice Scalia argues in his concurrence in *McCullen* that the structure of the statute shows that the true purpose of the buffer zone was to "protect[] citizens' supposed right to avoid speech that they would rather not hear." In the context of funeral buffer zones, the

broad zones combined with the suspicious governmental interest makes the purpose clearly related to the offensive speech itself.[240]

CONCLUSION

Justice O' Connor has stated that "[a]s a general matter, courts indicate that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[241] The hateful message of the Westboro Baptist Church is losing in the marketplace of ideas. Unfortunately, the nation has sacrificed vital First Amendment rights fighting an enemy that never really posed a threat.

Funeral mourners should not have to tolerate hateful speech when it disrupts the service. On the other hand, that privacy interest does not support statutory buffer zones that are so extensive in square footage and time. The role of the courts is to protect the speech of unpopular minorities from the democratic power of the majority. The lower courts have failed to do so, and largely due to the Supreme Court's prior failure to protect the First Amendment. However, the recent decision of *McCullen v. Coakley* shows that the speech-protective Roberts Court will not likely permit this incursion into a traditional public forum.

[240] This is not the case with my proposed solution. Noise and waving signs by protestors within eyesight is disruptive, despite what the signs say. Of course, it could be argued that attendees who see protest signs prior to entry to the funeral may consider the funeral disrupted. However, as *McCullen* now shows, avoidance of unwanted communication is not a valid state interest in a traditional public forum.

[241] *Boos*, 485 U.S. at 312 (quoting Hustler Magazine v. Falwell, 485 U.S. 46 (1988)).