



Attorney General Doug Peterson

# News Release

## **Attorney General's Response to Westboro Baptist Decision**

March 23, 2106

Lincoln--The Nebraska Federal District Court has upheld the constitutionality of Nebraska's Funeral Picketing Law against the claims of Westboro Baptist Church members that Nebraska's law violated their constitutional right to free speech.

The history of the Westboro Baptist Church protests at military funerals has been well documented, both in Nebraska and nationally. In 2006, a Nebraska state law was enacted establishing a 300-foot buffer zone for those protesting at funerals. In 2011, Nebraska law increased the buffer zone to 500 feet. The Westboro Baptist Church responded to Nebraska's law by suing Nebraska's Governor, Attorney General, and the Omaha Chief of Police.

Today's decision was issued after a week-long trial in federal court in which the Attorney General's Office defended the constitutionality of Nebraska's law by emphasizing that Nebraska has a substantial interest in protecting the peace and privacy of funeral attendees so that they may express the respect accorded to the deceased. Nebraska's Funeral Picketing Law does not restrict Westboro Baptist Church from expressing its protest message by ample, alternative methods, which methods should not include disrupting funerals.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**SHIRLEY L. PHELPS-ROPER,**

**Plaintiff,**

**vs.**

**PETE RICKETTS, in his Capacity as  
Governor of the State of Nebraska;  
DOUG PETERSON, in his Capacity as  
Attorney General of the State of  
Nebraska; and TODD SCHMADERER,**

**Defendants.**

**4: 09CV3268**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

This matter is before the Court after a trial to the bench held on March 17 through March 19, 2015. The parties submitted post-trial briefs (Filing Nos. 317, 323, 324) and Plaintiff submitted supplemental legal authority (Filing No. 326). The Court now makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Plaintiff Shirley Phelps-Roper (“Phelps-Roper”) has been a member of the Westboro Baptist Church (“WBC”) for 48 years. She has participated in picketing activities for 25 years, including funeral picketing in Nebraska. (Tr. 597-598.)<sup>1</sup>

2. Defendant Pete Ricketts (“Ricketts”) is Governor of the State of Nebraska, and is named in his official capacity. (Final Pretrial Order Uncontroverted Facts (“PTO”), Filing No. 278 ¶ 3.)

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<sup>1</sup> The abbreviation “Tr.” refers to the consecutively numbered page of the Trial Transcript (Filing Nos. 309-312). The abbreviation “Ex.” refers to the trial exhibit number.

3. Defendant Doug Peterson (“Peterson”) is Attorney General of the State of Nebraska, and is named in his official capacity (Ricketts and Peterson are referred to jointly as “State Defendants”). (PTO ¶ 4.)

4. Defendant Todd Schmaderer (“Schmaderer”) is the Chief of Police for the City of Omaha. Because Omaha is a Metropolitan Class Home Rule Charter City, the Omaha police have the power to arrest persons for violations of state laws and city ordinances. See Neb. Rev. Stat. § 14-102(2) and § 14-606 (Reissue 2012) and Omaha Home Rule Charter § 3.11. (PTO ¶ 6.) The City of Omaha, through the City Prosecutor’s Office, has the authority to prosecute non-domestic violence misdemeanor and traffic offenses and City of Omaha Ordinance violations that occur within the City of Omaha. (PTO ¶ 7.)

5. The current version of the Nebraska Funeral Picketing Law (“NFPL”), Neb. Rev. Stat. §§ 28-1320.01 through 28-1320.03 (Reissue 2008 & Cum. Supp. 2014), became effective August 27, 2011. (PTO ¶ 1.)

6. The NFPL provides for a temporary buffer zone of 500 feet for those engaged in protest activities targeting a funeral. (Filing No. 116 at 23-24.)

7. The picketing restrictions imposed by the NFPL are limited to the actual ceremonies and memorial services held in connection with the burial or cremation of the dead and do not apply to funeral processions on public streets or highways. Neb. Rev. Stat. § 28-1320.02(1). Under the NFPL, picketing restrictions are limited to one hour before, through two hours after, the commencement of a funeral. Neb. Rev. Stat. § 28-1320.03(1).

8. Nebraska has statutes that prohibit disturbing the peace (Neb. Rev. Stat. §28-1322); assault (Neb. Rev. Stat. §§28-308, 309 and 310); criminal trespass (Neb. Rev. Stat. §§28-520, 521 and 522); resisting arrest (Neb. Rev. Stat. §28-904); and obstructing a peace officer (Neb. Rev. Stat. §28-906).

9. The City of Omaha has local ordinances that prohibit disorderly conduct (City of Omaha Mun. Code § 20-42 (2015)); failure to disperse (§ 20-43); obstructing public ways (§ 20-44); refusal of lawful requests to move (§ 20-45); disruption of meetings or processions (§ 20-47); unlawful assembly (§ 20-48); assault and battery (§ 20-61); trespass (§ 20-47); and failure or refusal to leave (§ 20-155).

10. The City of Omaha has an ordinance that requires a permit for a “public assembly,” defined as any meeting, demonstration, picket line, rally, or gathering of more than 25 people on city property for a common purpose as a result of prior planning and that interferes with normal use of such city property (Omaha Mun. Code § 20-291). The permit can be revoked if conditions or standards for issuance are violated; if a public emergency arises requiring police or other resources such that deployment of city services for the public assembly would have an immediate and adverse effect on the welfare and safety of persons or property; or if other unforeseen conditions exist that may render the event unsafe (§ 20-307).

#### **Defendants’ Evidence of Justifications for NFPL**

11. Dr. Scott A. Bresler (“Dr. Bresler”), an expert in forensic psychology, presented a report about the effect protests have on mourners at funerals. Dr. Bresler’s stated that a decedent’s family and friends are in a vulnerable emotional condition when attending a funeral; they can suffer emotional injury by protestors at the funeral; and

they are in need of access to the funeral unimpeded by protestors. Dr. Bresler stated that mourning family members and friends generally feel victimized by funeral protestors, and keeping protestors at a distance of 500 feet from the funeral would help address the emotional needs of those grieving. (Ex. 480.)

12. At trial, Dr. Bresler explained that bereavement can be expressed emotionally, physically, and behaviorally. (Tr. 535-537.) He testified that intense grief can lead to adverse psychological reactions, including acute stress disorder, post-traumatic stress disorder, and traumatic confusion. (Tr. 538-540.)

13. Dr. Bresler testified that the funeral setting plays an important role in the emotional well-being of the deceased's loved ones, because of the funeral's proximity to the time of death. (Tr. 540-541.) He testified that funeral picketers can trigger negative emotional reactions from mourners, including expressions of anger and/or violence, given incongruity of picketing and the solemnity of the funeral. (Tr. 542-543.)

14. To arrive at his conclusions, Dr. Bresler interviewed many Nebraskans who experienced picketers at the funerals of loved ones, to assess the emotional impact of the picketing. (See Tr. 546-552.) The majority of individuals interviewed by Dr. Bresler said they suffered emotionally as a result of the picketers' presence. (Tr. 549:11-15; 550:23-551:3; 551:17-19; 552:18-20.)

15. Dr. Bresler concluded that there is a subgroup of the population that is particularly vulnerable to the visible or audible presence of funeral picketers, and may react with physical violence. (Tr. 558:3-8.)

16. James Davidsaver ("Davidsaver"), an expert in crowd control and crowd management, opined that a 500-foot buffer zone between a funeral setting and funeral

picketers provides adequate space for crowd control and management. (Ex. 482.) Davidsaver also testified about challenges of ensuring the safety of a large number of people within a city block. (Tr. 469.)

17. Professor Phyllis V. Larsen (“Larsen”), an expert in communications, opined that the Plaintiff and WBC members are not hindered by the NFPL’s 500-foot buffer zone. Larsen stated that effective communication is not dependent on close physical proximity of the messenger and the intended recipient, and there are many alternative channels of communication available to WBC members. (Ex. 478.)

18. Larsen noted that WBC often gives prior notice when they intend to picket, so news media will publicize the picketing. (Tr. 500.) Larsen also noted that, on at least one occasion, the WBC accepted radio air time in lieu of picketing a funeral. (Tr. 500.) Larsen described the WBC’s extensive and sophisticated use of social media and websites to convey its messages. (Tr. 503-504.) Because of the many alternative methods of communication available to and used by WBC, Larsen concluded that the 500-foot buffer does not hinder Phelps-Roper from conveying her messages to her target audience. (Tr. 506-507, 508.)

### **WBC Picketing Practices**

19. WBC members have engaged in over 55,000 pickets. Violence in response to the picketing, whether funeral or non-funeral, has been rare. (Tr. 21, 99, 110, 177-178.)

20. WBC members testified that, in anticipation of others’ disagreement with their messages, they regularly take steps to prevent violence from occurring, including self-regulating their distance from events; writing and calling law enforcement in

advance; working with law enforcement before and during events; obeying all law enforcement orders; and writing thank you letters to law enforcement after the pickets. (Tr. 14-16, 19-21, 99, 110, 116-117, 138 142-145, 161-164, 168.)

21. On several occasions, the WBC has warned Nebraska law enforcement that third parties may become violent at WBC pickets. (Ex. 33.) In their contact with law enforcement, WBC members have requested that areas be marked and separated for their protests. WBC refers to the areas of separation as “dead zones,” and has requested these zones since 2006 to keep order and lessen the chance of violence. (See Ex. 50; Ex. 468.) Nebraska law enforcement has, at times, complied with these requests, and separation zones have been defined by chalk lines, yellow tape, barricades, driveways, or streets, during WBC’s pickets. If law enforcement declines the request, in advance or on the scene, WBC members often proceed with the picket and attempt to keep themselves separate from counter protestors, by retreating from them if necessary. (Tr. 16-20, 145-146; 161-164, 172-176, 295-300, 351-352.)

22. WBC picketers testified that, when conducting funeral-related pickets, they do not approach family members or funeral goers; they do not go on private property; they do not block ingress/egress; they do not engage in civil disobedience; they do not disobey police orders; they do not engage with people who are angry, confrontational, provocative or disruptive; they remain on the public sidewalk or public rights of way or easements; and they leave the area at the announced starting time for the funeral. (Tr. 14-15, 116-117, 134-135, 138, 282.)

23. In advance of funeral-related pickets, it is a common practice for the WBC to send press releases to local media and advertise their upcoming picket. (Tr. 81-82; Tr. 237-238.) The WBC puts press releases out “all the time.” (Tr. 216:4.)

24. At the time of trial, the WBC was operating at least eight separate websites. (Tr. 82; Tr. 227.) The WBC had a Facebook account. (Tr. 248.) The WBC and its members operated a Twitter account and approximately 20 Twitter subaccounts. (Tr. 247.) The WBC uploaded videos to YouTube (Tr. 249). The WBC and its members conveyed the WBC messages by Vine videos. (Tr. 253.) The WBC created at least one “feature-length” documentary and many shorter films. (Tr. 256.) The WBC made videos about signs that are held at funeral pickets. (Tr. 256-257.)

#### **WBC Purpose and Message**

25. WBC picketers testified that their messages were related to funerals and were often tailored to each individual event, depending on factors such as the status of the deceased and the presence of patriotic displays outside the funeral. WBC members testified that their messages were directed to funeral goers, those putting on the event, those participating in the event, and those passing by. (Tr. 114-116, 147, 164, 182-183, 224-226, 277-279, 646-648.)

26. WBC members, including Phelps-Roper, began to picket at soldiers’ funerals when WBC members perceived the events to be patriotic displays suggesting that God blesses and approves national policies that WBC considers contrary to biblical scripture, such as tolerance for homosexual conduct, adultery, and idolatry. (Tr. 80-81, 607-608.)

27. WBC members testified that they wish to communicate their messages at funerals, because that is where they can warn against sin in progress, such as the perceived worship of dead bodies. Their target audience includes funeral goers, the crowd outside the event, and passersby. (Tr. 150-51.)

28. In attempting to publish their message, WBC members choose picketing locations with high traffic volume. (Tr. 136; Tr. 343; Ex. 467; Ex. 468.) WBC Member Timothy Phelps testified that the WBC's first priority in choosing a picketing location is visibility to the WBC's target audience. (Tr. 170.) Other criteria include the WBC members' ability to exit safely and quickly. (Tr. 170.)

29. WBC members testified that it is important for them to go to funerals to picket because the people going to funerals and conducting funerals are their target audience, and presence at funerals is the only means by which they can communicate their message to the target audience. (Tr. 183-85, 186-87.) WBC members assert that they cannot reach their intended audience through other means such as social media, mass mailing, email, or websites. (See e.g. Tr. 191-96, 200-07.) At least one member of the WBC stated at trial that the unpopularity of WBC's messages makes traditional means of marketing ineffective. (Tr. 218-19.)

30. With respect to the distance between a funeral setting and the WBC picketers, WBC member Steve Drain ("Drain") testified that "as long as I'm not out of sight and sound of my target audience, I'm good." (Tr. 263:18-23.) Drain explained that that as long as the target audience could see his sign and hear the WBC members, the distance between the picketers and the target audience is acceptable. (Tr. 263:24-264:2.)

### **WBC Picketing in Omaha, Nebraska**

31. On July 8, 2006, approximately 10 WBC picketers conducted a funeral-related picket in Omaha (the “July 2006 Picket”). Before the event, WBC representatives contacted law enforcement and understood they had agreement with law enforcement about where WBC would stand for the picket. When the WBC picketers arrived, law enforcement moved the location of the picket to an area farther away from the funeral than 300 feet, putting WBC picketers out of sight and sound of the funeral. (Tr. 41-42, 44; Exs. 79-83.) Before beginning their picket, WBC picketers observed that there were hundreds of other individuals with flags, signs, and revving motorcycles immediately outside the front door of the church that hosted the funeral. (Tr. 42; Exhibits 84-85.) As WBC members set up their picket location, some of the individuals around the church moved to a location near the WBC picketers. (Tr. 42.)

32. On August 28, 2010, WBC picketers conducted another funeral-related picket in Omaha (the “August 2010 Picket”). Shortly before this picket, charges against Phelps-Roper in state court in Sarpy County had been dismissed, and a federal judge in this Court enjoined enforcement of Nebraska’s Flag Mutilation Law, Neb. Rev. Stat. § 28-928 (Reissue 2008), against Phelps-Roper and other WBC members. (Tr. 153-54); see *Phelps-Roper v. Bruning*, No. 4:10CV3131, 2010 WL 2723202 (D. Neb. July 6, 2010).

33. WBC members testified that, as a result of the recent legal proceedings, they believed the local community was agitated. Given the perceived tension in the community, when a WBC member contacted law enforcement in Omaha to arrange the August 2010 Picket, the WBC member proposed use of an intersection about a half mile

from the target church. (Tr. 320-23.) The WBC member stated that he chose the more distant location to afford law enforcement ample ability to maintain a separation. (Tr. 323-28.)

34. WBC members testified that law enforcement declined to separate WBC protestors from others at the August 2010 Picket. WBC members stood on two corners of an intersection, and people with flags who had been standing on the sidewalk near the church moved toward the WBC picketers. An unrelated group of people stood on another corner across from WBC picketers, engaging in counter-protests against the WBC. Others comingled with WBC members. (Tr. 153-159, 320-328; Ex. 211, 215, 223, 225.)

35. Near the end of the August 2010 Picket, George Vogel (“Vogel”), a Marine Corps veteran from Omaha, Nebraska, sprayed bear mace at the WBC picketers. (Tr. 431.) Vogel did not hit any WBC picketers, and instead hit 16 other individuals who were comingled with the WBC picketers. Vogel testified that his actions were not planned, but an emotional, angry, response to the picketing. (Tr. 429-31.) Vogel was not related to the deceased (Tr. 429), nor was he a member of the Patriot Guard Riders (“PGR”), a group that volunteered to shield funeral attendees from the picketers. (Tr. 431.) Mr. Vogel was immediately arrested by the Omaha Police Department, charged with assault, fined, and spent four days in jail. (Tr. 434-35; Ex. 410.)

36. On October 13, 2011 (the “October 2011 Picket”), WBC picketers, including Plaintiff, conducted a funeral picket in Omaha, for approximately 45 minutes before the funeral. (PTO ¶ 12.) The parties disagree as to who chose the location for the picket. Phelps-Roper testified that she identified a location 500 feet from the

funeral, and told another WBC member to request that spot. (Tr. 629-30.) The WBC member who contacted law enforcement in Omaha testified that law enforcement instructed her to have the WBC picketers stand at a location roughly 2,000 feet from the funeral. (Tr. 60.) The member testified that she did not try to persuade law enforcement to allow WBC members to protest in a different location, because she perceived a Biblical duty to follow the law. (Tr. 60-61.) The WBC member's notes from her conversations with law enforcement state "Good – stand, southwest corner of north/south 108 Avenue and Frontage Road." (Tr. 90; Ex. 251.) The WBC member explained that she characterized the location as good after having a conversation with Phelps-Roper. (Tr. 90.) Phelps-Roper told the WBC member that if that location was where law enforcement wanted the WBC picketers to stand, "that's good with us." (Tr. 90:13-15.)

37. The Defendants presented evidence that law enforcement did not instruct WBC picketers where to stand during the October 2011 Picket. (Tr. 580.) Omaha Police Lieutenant Jay Leavitt ("Leavitt") testified that his duties during the October 2011 Picket were to ensure WBC members were not harassed. (Tr. 580.) Leavitt testified that he assisted Phelps-Roper in determining where the public right-of-way ended and private property began (Tr. 580), and that he did not tell Phelps-Roper where she had to stand, make any markings on the pavement indicating where Phelps-Roper had to stand, or prohibit Phelps-Roper from picketing in a location of her choice. (Tr. 580-81.) Leavitt also testified that, to the best of his knowledge, no officer of the Omaha Police Department told any member of the WBC where they could or could not stand during the October 2011 Picket. (Tr. 587.)

38. The WBC sent a thank you letter per standard practice to Omaha's then-Chief of Police, Alex Hayes, which in relevant part stated:

Without people such as yourself, and members of your departments (specifically Lieutenant Jay Leavitt & Captain Greg Gonzalez), that appear dedicated to the proposition that 1st Amendment rights are precious, and those rights are what set us apart from the rest of the world, our Constitution would not be worth the paper it is written on.

(Ex. 252.)

39. In each of the funeral protests in Omaha, WBC members testified that there were people near the funeral waving flags and holding signs. WBC members testified that when other individuals chanted "USA, USA", the chant was directed at WBC picketers. (Tr. 104.) WBC members stated that when others were waving flags, they were conveying to WBC members a disagreement with WBC's message. (Tr. 104.) Davidsaver testified that when he witnessed counter-pickers, the counter-pickers' message targeted the WBC and not the funeral itself.

40. The PGR often attended the same funerals attended by WBC members, but only when the family of the deceased asked the PGR to attend. (Tr. 409; Ex. 484-489.) According to John Scott Knudsen, State Captain of the Nebraska PGR since 2008, the PGR has not engaged in protest activities at funerals, nor has it targeted a particular audience. (Tr. 408-409.)

### **CONCLUSIONS OF LAW**

The First Amendment states that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. Const. amend. I.

Picketing is considered expressive conduct and falls within the protections of the First Amendment. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972). Under the First Amendment, citizens have a “right to attempt to persuade others to change their views” which “may not be curtailed simply because the speaker's message may be offensive to his audience.” *Hill v. Colorado*, 530 U.S. 703, 716 (2000). However, “that right is not absolute,” and “the government may restrict disruptive and unwelcome speech to protect unwilling listeners when there are other important interests at stake.” *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 686 (8th Cir. 2012) (en banc) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-09 (1975)). “Where there are competing interests and values, courts must find an ‘acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners.’” *City of Manchester*, 697 F.3d at 686 (quoting *Hill*, 530 U.S. at 714).

Phelps-Roper asserts that the Nebraska Funeral Picketing Law (“NFPL”), Neb. Rev. Stat. §§ 28-1320.01 to 28-1320.03 (Reissue 2008 & Cum. Supp. 2014), violates her First Amendment rights. She also asserts that the manner in which the NFPL has been applied to her violates the First Amendment. Based on the evidence adduced at trial, and for the reasons stated below, the Court concludes that Phelps-Roper’s facial challenge fails because the NFPL can be interpreted in a manner that does not violate the First Amendment. Also, while Nebraska law enforcement officials must enforce the NFPL equally as to all picketing that targets a funeral, Phelps-Roper has not shown that Defendant Schmaderer has applied the NFPL to Phelps-Roper in a manner that violates constitutional principles.

## I. Facial Challenge to the NFPL

Phelps-Roper argues that the NFPL is unconstitutional on its face. “Facial challenges are disfavored’ because they ‘often rest on speculation.... [and] raise the risk of ‘premature interpretation of statutes on the basis of factually barebones records.’” *City of Manchester*, 697 F.3d at 686 (quoting *Wash. State Grange v. Wash. State Republican Party et al.*, 552 U.S. 442, 450 (2008)). “To succeed challengers would have to establish ‘that no set of circumstances exists under which [the statute] would be valid’ or “that the statute lacks any ‘plainly legitimate sweep.’” *City of Manchester*, 697 F.3d at 686 (citation omitted).

“The constitutionality of a restriction on speech depends in large part upon whether it is content based and thus ‘subject to the most exacting scrutiny, . . . or a content neutral time, place, or manner regulation subject to intermediate scrutiny.” *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 789 (8th Cir. 2015) (quoting *City of Manchester*, 697 F.3d at 686). If a statute is content based, it must be “narrowly tailored to serve compelling state interests.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). Content based statutes “are presumptively invalid.” *City of Manchester*, 697 F.3d at 686 (citations omitted).

If a statute is content neutral on its face, it is analyzed under intermediate scrutiny. *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 775 F.3d 969, 974 (8th Cir. 2014) (citing *City of Manchester*, 697 F.3d at 686). “Content neutral regulations of the time, place, or manner of speech in a public forum are permissible under the First Amendment if ‘they are narrowly tailored to serve a significant governmental interest and . . . they leave open ample alternative channels for

communication of the information.” *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). As discussed below, the Court concludes that the NFPL is content neutral and subject to intermediate scrutiny. The Court also finds that the NFPL is narrowly tailored and allows ample alternative channels for communication.

**A. The NFPL is Subject to Intermediate Scrutiny**

The Court previously held that the NFPL was content neutral and subject to intermediate scrutiny. (Memorandum and Order (“SJ Order”), Filing No. 258 at 26-30.)

The Court incorporates its previous analysis into these Conclusions of Law.

The NFPL states:

Section 28-1320.01 – Unlawful picketing of a funeral; legislative findings.

(1) The Legislature finds that families have a legitimate and legally cognizable interest in organizing and attending funerals for deceased relatives and that the rights of families to peacefully and privately mourn the death of relatives are violated when funerals are targeted for picketing or protest activities.

(2) The Legislature also recognizes that individuals have a constitutional right to free speech and that in the context of funeral ceremonies, the competing interests of picketers and funeral participants must be balanced. Therefore, the Legislature declares that the purposes of sections 28-1320.01 to 28-1320.03 are to protect the privacy of grieving families and to preserve the peaceful character of cemeteries, mortuaries, churches, and other places of worship during a funeral while still providing picketers and protestors the opportunity to communicate their message at a time and place that minimizes the interference with the rights of funeral participants.

Section 28-1320.02 – Unlawful picketing of a funeral; terms, defined.

For purposes of sections 28-1320.01 to 28-1320.03, the following definitions apply:

(1) Funeral means the ceremonies and memorial services held in connection with the burial or cremation of the dead but does not include funeral processions on public streets or highways; and

(2) Picketing of a funeral means protest activities engaged in by a person or persons located within five hundred feet of a cemetery, mortuary, church, or other place of worship during a funeral.

Section 28-1320.03 – Unlawful picketing of a funeral; penalty.

(1) A person commits the offense of unlawful picketing of a funeral if he or she engages in picketing from one hour prior to through two hours following the commencement of a funeral.

(2) Unlawful picketing of a funeral is a Class III misdemeanor.

Neb. Rev. Stat. §§ 28-1320.01 to 28-1320.03 (Reissue 2008 & Cum. Supp. 2014).

Phelps-Roper argued in a motion for summary judgment, at trial, and in her post-trial brief, that the NFPL is not content-neutral, and is subject to strict scrutiny. She asserts that the NFPL's legislative history demonstrates that the statute was adopted solely out of disagreement with the WBC's message. The Court reiterates that when deciding whether a statute is content-neutral, courts look to the plain meaning of the statute, and the "legislature's specific motivation is not relevant, so long as the provision is neutral on its face." *City of Manchester*, 697 F.3d at 688. Further, the Eighth Circuit has expressly determined that funeral picketing statutes are not content-based merely because they address funeral picketing and were enacted for the purpose of discouraging the WBC's speech. *Phelps-Roper v. Nixon*, 545 F.3d 685, 690-91 (8th Cir. 2008), *overruled on other grounds by City of Manchester*, 697 F.3d 678. Accordingly, the Nebraska Legislature's reasons for adopting the NFPL are irrelevant so long as the NFPL is neutral on its face.

Phelps-Roper also argues that the NFPL is content-based because the statute's reach is limited to protest activities "targeting" the funeral. In *City of Manchester*, the Eighth Circuit held that the funeral picketing law at issue was similar to the ordinance in

*Thorburn v. Austin*, 231 F.3d 1114, 1117 (8th Cir. 2000), and was content-neutral because it applied “equally to anyone engaged in focused picketing without regard to his message.” 697 F.3d at 689. In *Thorburn*, the Eighth Circuit analyzed a picketing ordinance that stated: “The practice of **focused** picketing before or about a dwelling, **targeted** at the occupant or occupants of such dwelling, causes emotional disturbance and distress to the occupant or occupants, [and] disturbs the sense of peace and tranquility traditionally enjoyed by individuals in their dwellings.” *Thorburn*, 231 F.3d at 1116 (emphasis added). The Eighth Circuit determined that this language did not express disagreement with a particular message and applied “equally to anyone engaged in focused picketing without regard to his message.” *Id.* at 1117.

Based on the Eighth Circuit’s reasoning in the above mentioned cases, the Court concludes that the NFPL is content-neutral. As noted in *Thorburn*, the term “targeted” is not dispositive of whether a picketing statute is content-based. Similar to the ordinance in *City of Manchester*, the NFPL “makes ‘no reference to the content of the speech’ and is only a ‘regulation of the places where some speech may occur.’” *City of Manchester*, 697 F.3d at 689 (quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000)). Under the NFPL, “[a] person may be regulated under the [statute] for disrupting or attempting to disrupt a funeral or burial service with speech concerning any topic or viewpoint.” *City of Manchester*, 697 F.3d at 689. The NFPL’s restrictions on speech apply to all picketers targeting a funeral, regardless of the content of their message. Accordingly, the Court concludes that the NFPL is content-neutral and intermediate scrutiny is the appropriate standard for analyzing Phelps-Roper’s First Amendment claims.

## **B. The NFPL is Narrowly Tailored**

To be narrowly tailored, a statute must “promote a substantial government interest that would be achieved less effectively absent the regulation.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The Court has already held, in accordance with the Eighth Circuit’s decision in *City of Manchester*, that the government has a substantial interest in protecting “the peace and privacy of funeral attendees [. . .] so that they may express the ‘respect they seek to accord to the deceased person who was once their own.’” 697 F.3d at 693 (quoting *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 168 (2004)). Specifically, the Eighth Circuit stated that “[a] significant governmental interest exists in protecting their privacy because mourners are in a vulnerable emotional condition and in need of ‘unimpeded access’ to a funeral or burial, quite like the patients entering medical facilities protected in *Hill*.” *Id.* (citing *Hill*, 530 U.S. at 715, 729). The express purpose of the NFPL is to protect the privacy of grieving families and preserve the peaceful character of funerals, balanced against the rights of protestors and picketers. Neb. Rev. Stat. § 28-1320.01(2).

The State’s evidence regarding the interests of funeral attendees was credible and reliable. At trial, Dr. Scott A. Bresler, an expert in forensic psychology, testified that bereavement—a person’s psychological experience when someone dear to them dies—can be manifested emotionally, physically, and behaviorally. (Tr. 535:25-537:17.) Further, the intensity of a bereaved party’s grief can lead to adverse subsequent reactions, including acute stress disorder, post-traumatic stress disorder, and traumatic confusion. (Tr. 538:5-540:2.) According to Dr. Bresler’s testimony, a funeral setting is

usually has a significant relationship to the bereaved party's emotional vulnerability given the closeness in time between the death and the funeral. (Tr. 540:21-541:6.)

Dr. Bresler testified that he interviewed several Nebraska residents who experienced picketing at the funeral of a loved one. (Tr. 546:11-548:13.) Most of the individuals interviewed by Dr. Bresler indicated that they suffered emotionally as a result of the picketers' presence at the loved ones' funerals. (See Tr. 549:11-15; 550:23-551:3; 551:17-19; 552:18-20.) Dr. Bresler's opined that, based on his interviews, experience, and expertise, a subgroup of the interviewees were either angry and/or very anxious about the presence of the funeral picketers, with at least one indicating concern that violence could have occurred. (Tr. 553:12-554:1.) Accordingly, the Defendants have demonstrated that mourners at funerals in Nebraska are in "vulnerable physical and emotional conditions." *City of Manchester*, 697 F.3d at 695 (quoting *Hill*, 530 U.S. at 729). The NFPL advances a "significant government interest in protecting the peace and privacy of funeral attendees." *City of Manchester*, 697 F.3d at 693.

To pass constitutional muster, in addition to advancing a substantial government interest, the statute must not restrict "substantially more speech than is necessary" to promote the government's interest. *City of Manchester*, 697 F.3d at 693 (quoting *Ward*, 491 U.S. at, 799). Courts have found that funeral picketing laws do not restrict substantially more speech than is necessary (1) when the restriction is temporary and finite, and (2) when protestors can reasonably communicate their message to funeral attendees and others. See *City of Manchester*, 697 F.3d at 694-95 ("Where the restriction on speech is relatively brief in time, it is not unreasonable to increase the range of a buffer zone without significantly burdening protesters's [sic] opportunity to

convey their message.”); *Phelps-Roper v. Strickland*, 539 F.3d 356, 370 (6th Cir. 2011) (holding that funeral picketing law was narrowly tailored where it was in effect for a limited time and it was conceivable that protestors could still communicate their message to funeral attendees); see also *Hill*, 530 U.S. at 726-28 (holding that a buffer was permissible because it still allowed protestors to “win [the public’s] attention”)

**1. The Restrictions in the NFPL are Temporary and Finite**

The Court ruled in its SJ Order that the NFPL’s restrictions are temporary and finite. (Filing No. 258 at 32-33.) The NFPL states that a “person commits the offense of unlawful picketing of a funeral if he or she engages in picketing from one hour prior to through two hours following the commencement of a funeral.” Neb. Rev. Stat. § 28-1320.03(1). This time restriction is significantly more narrow and definite than other funeral picketing statutes that have been upheld. The restriction terminates automatically two hours from the commencement of the funeral, and does not depend on the time the funeral ends, which may vary from funeral to funeral. See, e.g., *City of Manchester*, 697 F.3d at 694 (upholding a city ordinance that prohibited protest activities within 300 feet of any funeral or burial site during or within one hour before or one hour after the conducting of a funeral); *Strickland*, 539 F.3d 356, 370 (upholding an Ohio statute that prohibited protest activities within 300 feet of any funeral or burial site during or within one hour before or one hour after the conducting of a funeral). By way of illustration, in *Strickland*, the evidence in the record demonstrated that in Ashland, Ohio, most funerals began at 11:00 a.m. and the burial ceremonies ended before 3:00 p.m. *Strickland*, 539 F.3d at 372 n.2. Thus, in a typical funeral, under the statute addressed in *Strickland* and ordinance at issue in *City of Manchester*, protest

restrictions would be in place from 10:00 a.m. until approximately 4:00 p.m., though the expiration time of the restrictions would vary depending on the funeral. Under the NFPL, protest restrictions for the same funeral would be in place from 10:00 a.m. until 1:00 p.m. The expiration time for the protest restrictions would not vary from funeral to funeral. Thus, the NFPL's restriction window would be several hours shorter, and protestors would know the exact duration of the restrictions.

The NFPL's restrictions are also finite in that the statute specifically identifies the types of events regulated. The NFPL specifically excludes funeral processions, thus eliminating any restriction on "floating zones." See *City of Manchester*, 697 F.3d at 694 (stating that the ordinance was narrowly tailored because it eliminated restrictions on protesting funeral processions). Further, the NFPL's restrictions are limited to an event rather than a location. See *id.* (stating that an ordinance was narrowly tailored because it restricted events rather than locations, and permitted protestors to picket through the area for most of the day, while placing a relatively brief restriction on speech). Accordingly, the NFPL's restrictions are temporary and finite.

## **2. Phelps-Roper Can Communicate Her Message To Funeral Attendees and Others with Reasonable Ease**

The principal question before the Court is whether the NFPL's temporary 500-foot buffer zone around funerals prevents Phelps-Roper from communicating her message. The Supreme Court has stated that "the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Hill*, 530 U.S. at 728 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). The Eighth Circuit has concluded that the "size of a buffer zone

necessary to protect the privacy of an entire funeral gathering can be expected to be larger than that necessary to protect the privacy of a single residence . . . .” *Id.* (citing *Strickland*, 539 F.3d at 371) (“[Because] numerous mourners usually attend a funeral or burial service, the size of a buffer zone necessary to protect the privacy of an entire funeral gathering can be expected to be larger than that necessary to protect the privacy of a single residence, or a single individual entering a medical clinic.”).

The parties have not identified, and the Court has not found, any case in which a court has upheld a funeral picketing law that includes a buffer zone larger than 300 feet. However, the decisions in both *City of Manchester* and *Strickland* provide guidance for the analysis of the constitutionality of a larger temporary buffer zone. In approving a temporary 300-foot buffer zone, the Eighth Circuit in *City of Manchester* noted that “[o]ther than the narrow time and place restrictions in the ordinance, no limit is placed ‘on the number of speakers or the noise level, including the use of amplification equipment’ or ‘on the number, size, text, or images of placards.’” *City of Manchester*, 697 F.3d at 694 (quoting *Strickland*, 539 F.3d at 371). Thus picketers could “reasonably communicate their message to funeral attendees and others.” *City of Manchester*, 697 F.3d at 694. For the same reasons, the court in *Strickland* noted that because there was no limitation on the size of the text or noise level, it was “conceivable that picketers outside of the 300-foot buffer zone can still communicate their message to funeral attendees.” *Strickland*, 539 F.3d at 370. Thus, in balancing the protestors’ rights and the rights of funeral attendees, the Court must determine whether the NFPL allows protestors targeting a funeral to communicate their message to funeral attendees and others with reasonable ease.

The evidence demonstrates that the NFPL's temporary buffer zone affords picketers an opportunity "to reach the minds of willing listeners" and "win their attention." *Hill*, 530 U.S. at 728. "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Like the restrictions in *City of Manchester* and *Strickland*, the NFPL does not place any limitation on the number of protestors, the noise level, or the number, size, text, or images of placards.<sup>2</sup> The evidence introduced shows that 500 feet is approximately one city block. (Tr. 659:12-14; Tr. 469:16-19.) Phelps-Roper testified that this distance "generally" removes the WBC from sight and sound of their target audience. (Tr. 629:6-9.) However, another WBC member, Steve Drain ("Drain"), testified that, at least at one picket, he close a protest location more than 500 feet away from the funeral site. (Tr. 331:2-4.) Though Drain did not have personal knowledge as to whether funeral attendees actually saw and heard his messages, he testified that WBC members were able to deliver the WBC message.<sup>3</sup> (Tr. 331:5-13.) There also is evidence that the messages conveyed by WBC protestors could be seen and heard from a block away.<sup>4</sup> (Tr. 387:3-16.)

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<sup>2</sup> Most WBC messages are concise, e.g., "God Hates Fags," "God Hates You," and "Thank God for IEDs," conducive to use of large font.

<sup>3</sup> WBC members testified that the WBC's intended audience is broader than funeral attendees. Members stated that it was their duty to publish their message to as many people as possible, (Tr. 81:11-82:9), leading them to choose picketing locations based on traffic volume for maximum effect. (Tr. 136:19-22; Tr. 343:19-24; Ex. 467; Ex. 468.) Members noted that the WBC target audience includes funeral goers as well as counter-pickers and passersby. (Tr. 151:1-16; Tr. 226:14-18.)

<sup>4</sup> Steven Hecker ("Hecker"), a former Norfolk Police Officer, testified that he could see and hear protestors from a block away. (Tr. 387:3-16.) The Court acknowledges that although Hecker stated that

Regardless of whether the WBC's message was in fact seen and heard by the target audience at any given protest, the question is whether the NFPL's restrictions afford an *opportunity* for protestors to communicate their message to willing listeners. Given its relatively few restrictions on the manner of speech, the NFPL does not deny funeral protestors the opportunity to reach their target audience.

Although the NFPL's temporary buffer zone is wider than in similar cases previously considered, the evidence in this case shows that the same factors that support a finding of constitutionality in the earlier cases also support a finding of constitutionality with respect to the NFPL's buffer zone.

In *Strickland*, the court explained further that "a 300-foot buffer zone takes account of the logistical problems associated with moving large numbers of people from the site of a funeral to the burial site." *Strickland*, 539 F.3d at 371. Regarding crowd control, Davidsaver provided testimony that a 500-foot buffer addresses the logistical crowd control issues present where hundreds or thousands of individuals are attending funerals in Nebraska. (Tr. 482.) Davidsaver explained that, to address logistical and safety concerns, the terrain and environment in certain locations may permit a smaller buffer zone, while other locations may require a larger buffer zone. (Tr. 482.) Considering variations in terrain, Davidsaver opined that 500 feet was an adequate statewide standard for law enforcement. (Tr. 471:1-3.)

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he was a block away, he estimated his distance from the protestors at 360 or 400 feet. (Tr. 387:12-13.) The Court notes that the question on a facial challenge is not whether the WBC's message can be seen and heard, but whether picketers can still reasonably communicate their message to funeral attendees and others. *City of Manchester*, 697 F.3d at 694. The evidence demonstrates that, given the lack of restrictions on size and volume, the NFPL gives protestors the opportunity to win the attention of funeral attendees.

The Court concludes that the NFPL is narrowly tailored. The evidence supports a finding that the temporary 500-foot buffer does not deprive protestors of the opportunity to reach their target audience. The evidence also demonstrates that the 500-foot buffer zone permits law enforcement to manage the logistical concerns of large crowds attending a funeral. Further, the NFPL's restrictions are shorter in duration and better defined than restrictions previously considered.

### **C. The NFPL Allows Ample Alternative Channels of Communication**

The NFPL's narrow time and place restrictions allow for ample alternative channels of communication. In *City of Manchester*, the Eighth Circuit described the "ample alternative channels" question as closely related to the question of whether a funeral picketing law is narrowly tailored. 697 F.3d at 695. The Court held in *City of Manchester* that the ordinance at issue allowed ample alternative channels because it did not restrict individuals from expressing their opinions, did not restrict the content of the expression, and allowed expression freely "anywhere in the city except during a short period immediately surrounding a funeral service." *Id.*

Similar to the ordinance at issue in *City of Manchester*, the NFPL does not restrict individuals from expressing their opinions. The WBC, for example, uses many other channels of communication to publish its messages.<sup>5</sup> Larsen, the State's expert in communications, opined that Phelps-Roper was "not hindered by the law restricting

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<sup>5</sup> These alternative channels include at least eight separate websites, (Tr. 82:18-20; Tr. 227:13-16), a Facebook account (Tr. 248:2), a WBC Twitter account and approximately 20 Twitter subaccounts, (Tr. 247:2-17), uploaded videos to YouTube, (Tr. 249:3-12), Vine videos, (Tr. 253:20-22), one "feature-length" documentary and multiple shorter films, (Tr. 256:1-7), videos about signs that are held at funeral pickets, (Tr. 256:18-257:10), press releases to local media, (Tr. 81:21-82:2; Tr. 216:4), radio air time, (Tr. 500:22-24), national and international media coverage of funeral pickets and interviews, (Tr. 240:24-241:3; Tr. 661:3-7), tens of thousands of articles, (Tr. 185:21-22), and third party redistribution of WBC content, (Tr. 251:16-24).

picketers to remain 500 feet from funerals because effective communication is not dependent on close physical proximity of the message sender and the intended recipient.” (Ex. 478 at 3.) As with the ordinance at issue in *City of Manchester*, the NFPL does not limit the number of picketers, their noise level, or the number, size, text, or images of signs. Moreover, the NFPL does not prohibit the WBC from going door-to-door, using the mail or telephone, or placing advertisements on the obituary pages of newspapers to reach their target audience. (Tr. 264:6-15.) Under the NFPL, protestors retain the ability to “express any viewpoint or discuss any topic at nearly any location and nearly any time” in the State of Nebraska. See *City of Manchester*, 697 F.3d at 695. Accordingly, the NFPL does not restrict more speech than necessary, and allows ample alternative channels of communication.

## **II. As-Applied Challenge to the NFPL**

In an as-applied challenge, challengers must show that a statute is unconstitutional “because of the way it was applied to the particular facts of their case.” *U.S. v. Salerno*, 481 U.S. 739, 745 n.3 (1937). If the as-applied challenge is successful, it “vindicates a claimant whose conduct is within the First Amendment but invalidates the challenged statute only to the extent of the impermissible application.” *Turchick v. U.S.*, 561 F.2d 719, 721 (8th Cir. 1977).

The scope of the Court’s as-applied review is distinguished from the review of *Phelps-Roper’s* facial challenge. The Supreme Court has made clear that “[t]he label is not what matters.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Instead, “[t]he ‘important’ inquiry is whether the ‘claim and the relief that would follow . . . reach beyond the particular circumstances of the[] plaintiffs.’” *Iowa Right To Life Comm., Inc. v.*

*Tooker*, 717 F.3d 576, 587 (8th Cir. 2013) (quoting *Reed*, 561 U.S. at 194). To the extent Phelps-Roper's as-applied claim is "not limited to plaintiff's particular case, but challenges application of the law more broadly," it is a facial challenge.<sup>6</sup> *Reed*, 561 U.S. at 194. This distinction is supported by an "uncontroversial principle of constitutional adjudication: that a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him [or her]." *McCullen v. Coakley*, 134 S. Ct. 2518, 2548 n.4 (2014) (emphasis in original); see also *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004) (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758-59 (1988)). ("An as-applied challenge consists of a challenge to the statute's application only as-applied to the party before the court.").

The only party before the Court who could have applied the statute to Phelps-Roper is Todd Schmaderer ("Schmaderer"), in his official capacity as Chief of Police for the City of Omaha.<sup>7</sup> Thus, the Court's inquiry is whether the Omaha Police Department ("OPD") applied the NFPL to Phelps-Roper in an unconstitutional manner.

The evidence demonstrates that while the WBC has participated in three pickets in Omaha since the original version of the NFPL went into effect, only the October 2011

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<sup>6</sup> Phelps-Roper generally argues that the NFPL is overbroad and vague and that, due to its overbreadth, has been applied in an unconstitutional manner. The Court has previously addressed this argument in its SJ Order and incorporates its reasoning here. To the extent Phelps-Roper's claim challenges the NFPL as overbroad, it is a facial challenge.

<sup>7</sup> There is no evidence or allegation that the State Defendants applied the NFPL to Phelps-Roper in an unconstitutional manner. Phelps-Roper has not alleged that each political subdivision acted on directive or instruction from the State Defendants, nor is there any evidence that would support vicarious liability to the State Defendants based on the actions of any political subdivision. Phelps-Roper's claims against the State Defendants are based on the statute itself and, if successful, would result in an injunction extending beyond the facts of this case. Thus, the claims against the State Defendants are facial challenges to the NFPL.

Picket occurred after the current version of the NFPL was in place. Of the three pickets in Omaha, Phelps-Roper participated only in the October 2011 Picket. Phelps-Roper alleges that law enforcement applied the NFPL unconstitutionally in three ways: 1) it applied the NFPL to WBC picketers and no one else; 2) it applied the NFPL too broadly, moving WBC picketers farther than 500 feet from the funeral; and 3) it applied the NFPL in a manner that permitted those with competing viewpoints to block WBC's message. For the reasons stated, the evidence does not support a finding that Schmaderer or the OPD applied the NFPL in an unconstitutional manner.

**A. Application of NFPL to Persons Other than WBC Members**

Phelps-Roper first argues that the NFPL has been applied to WBC members only, even though others inside the temporary buffer zone were engaged in protest activities by waving flags, chanting, holding signs, and revving motorcycle engines. The Supreme Court has stated, "when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 n.4 (2014). To sustain a challenge based on viewpoint discrimination, a plaintiff must establish a "a pattern of unlawful favoritism." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002).

The NFPL does not prohibit all forms of speech or expressive conduct within the temporary buffer zone. The NFPL prohibits a particular form of speech: protest

activities targeting a funeral.<sup>8</sup> While Phelps-Roper has demonstrated that others inside the temporary buffer zone were engaged in expressive conduct, she has not shown that the others were engaged in protest activities *targeting a funeral*, as would be required to trigger the NFPL. For example, the PGR and its members attended funerals only when they were invited to do so by the family of the deceased. (Tr. 409; Ex. 484-489.) In such circumstances, PGR members were “funeral attendees.” See *City of Manchester*, 697 F.3d at 694 (concluding that funeral picketing law advanced “significant interest in protecting the privacy of funeral attendees.”). WBC members testified that when other individuals chanted “USA, USA”, the chant was directed at WBC picketers, and when others were waving flags they were conveying disagreement with the WBC’s message to the WBC picketers. (Tr. 104.) These activities suggest that the acts of waving flags and chanting, if protest activities, were directed at the WBC, and not the funeral. There is no evidence to suggest that the NFPL was applied to Phelps-Roper and not others similarly situated at the October 2011 Picket, or at any other picket in Omaha.

#### **B. WBC Allegedly Forced Beyond 500-Foot Radius**

Phelps-Roper next argues that the NFPL was unconstitutionally applied to her because she was frequently forced to stand farther than 500 feet from funerals. The

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<sup>8</sup> In *Phelps-Roper v. Koster*, 713 F.3d 942, 951-52 (8th Cir. 2013), Phelps-Roper argued that the Missouri statute at issue burdened more speech than necessary because the phrase “picketing and other protest activities” was not limited to speech which targeted and disrupted a funeral. *Id.* at 951-52. Following the principle that a court must “interpret statutes to avoid constitutional issues,” the Eighth Circuit narrowly construed the Missouri statute at issue to exclude “picketing and protest activities unwittingly occurring in the buffer zone.” *Id.* at 952. Following the same principle of statutory interpretation, the NFPL is subject to a narrowing construction that avoids constitutional difficulties. For this reason, the Court has already determined that the NFPL limits its restrictions to picketing directed at or targeting a funeral.

Court again concludes that there is insufficient evidence from which to infer that the NFPL has been applied to Phelps-Roper in an unconstitutional manner.

The WBC clearly chose its own location for the August 2010 Picket. Regarding the October 2011 Picket, the Defendants presented evidence that law enforcement did not instruct WBC picketers where to stand. (Tr. 580.) Phelps-Roper testified that she identified a location 500 feet from the funeral, and told another WBC member to request that spot. (Tr. 629-30.) The WBC member who contacted law enforcement in Omaha testified that law enforcement instructed her to have the WBC picketers stand at a location roughly 2,000 feet from the funeral. (Tr. 60.) The WBC member testified that she did not try to persuade law enforcement to allow WBC members to protest in a different location, because of her Biblical duty to follow the law. (Tr. 60-61.) The WBC member's notes from her conversations with law enforcement state "Good – stand, southwest corner of north/south 108 Avenue and Frontage Road." (Tr. 90; Ex. 251.) The WBC member explained that she characterized the location as good after having a conversation with Phelps-Roper. (Tr. 90.) Phelps-Roper told the WBC member that if that location was where law enforcement wanted the WBC picketers to stand, "that's good with us." (Tr. 90:13-15.)

Leavitt testified that he assisted Phelps-Roper in determining where the public right-of-way ended and private property began (Tr. 580), and that he did not tell Phelps-Roper where she had to stand, make any markings on the pavement indicating where Phelps-Roper had to stand, or prohibit Phelps-Roper from picketing in a location of her choice. (Tr. 580-81.) Leavitt also testified that, to the best of his knowledge, no officer of the Omaha Police Department told any member of the WBC where they could or

could not stand during the October 2011 Picket. (Tr. 587.) The WBC sent a thank you letter to then Omaha Chief of Police, Alex Hayes, which in relevant part stated:

Without people such as yourself, and members of your departments (specifically Lieutenant Jay Leavitt & Captain Greg Gonzalez), that appear dedicated to the proposition that 1st Amendment rights are precious, and those rights are what set us apart from the rest of the world, our Constitution would not be worth the paper it is written on.

(Ex. 252.) While the WBC had a standard practice of sending such letters, it rarely identified officers who helped. (Tr. 24:1-7.)

The Court is not persuaded that the OPD engaged in any pattern of forcing Phelps-Roper farther than the 500 foot temporary buffer zone required by the NFPL. The evidence demonstrated that the areas chosen for the pickets would be visible to those arriving at or leaving the funeral. Even if Phelps-Roper was dissatisfied with the protest location at the October 2011 Picket, there is no evidence that she requested a closer picket location. Further, she communicated approval of the location to other WBC members, and expressly praised the efforts of law enforcement in upholding her First Amendment rights. Leavitt testified that neither he nor any member of the OPD instructed Phelps-Roper where to picket. Accordingly, the Court concludes that the evidence has not shown that OPD restricted Phelps-Roper's picketing to areas beyond the 500-foot buffer zone, or treated her differently than any other funeral protestors.

**C. Permitting Others to Block WBC's Message**

Phelps-Roper argues that the NFPL has been applied unconstitutionally because law enforcement allowed others to block WBC's message. As noted above, "[t]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647. The

Constitution does not mandate that law enforcement regulate the manner of speech of third parties to ensure that Phelps-Roper's chosen method of protest is effective.

Interpreting the NFPL with the "well-established principle that statutes will be interpreted to avoid constitutional difficulties," *Frisby v. Schultz*, 487 U.S. 474, 483 (1988), the Court concludes that the NFPL's restrictions apply only to picketing or other protest activities targeting the funeral. See *City of Manchester*, 697 F.3d at 694. Thus, the NFPL's restrictions do not apply to individuals engaged in protest activities that target or are directed at matters other than a funeral, including the WBC. Phelps-Roper has not demonstrated that the OPD permitted others to block Phelps-Roper from communicating her message in a way that violates her First Amendment rights.

Phelps-Roper indirectly argues that law enforcement blocked her message by permitting counter-protestors to intermingle with WBC members. In supplemental briefing, she cites to *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228 (6th Cir. 2015), *petition for cert. filed*, (U.S. February 29, 2016) (No. 15-1090). In *Bible Believers*, picketers from the Bible Believers group picketed at an annual Arab International Festival in Dearborn, Michigan, walking the streets and sidewalks in the area with signs and verbal statements that the crowd found hateful. *Id.* at 236. Muslim youth responded with violence. *Id.* at 239. Police intermittently intervened, and ultimately ordered the Bible Believer group to leave. *Id.* at 240. In regards to what the court called the "heckler's veto", the Sixth Circuit held that "[w]hen a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals." *Id.* at 252 (citing *Watson v. City of Memphis*, 373

U.S. 526, 535-36 (1963)). The Sixth Circuit explained that law enforcement “may take any appropriate action<sup>9</sup> to maintain law and order that does not destroy the right to free speech by indefinitely silencing the speaker.” *Bible Believers*, 805 F.3d at 253 (footnote added).

The Court agrees with the reasoning of the Sixth Circuit, but finds this case distinguishable on its facts. Regarding the October 2011 Picket, the only one Phelps-Roper attended in Omaha, there is no evidence that counter protestors or any other individuals engaged in “lawless behavior” meant to silence Phelps-Roper’s speech. See *Bible Believers*, 805 F.3d at 252. Further, there is no evidence that the actions of others “indefinitely silenc[ed]” Phelps-Roper. *Id.* at 253. Even when considering the August 2010 Picket, where counter protestors comingled with the WBC, there is no evidence that counter protestors, other than Vogel, engaged in lawless behavior, nor is there evidence that OPD failed to act and indefinitely silenced the WBC’s speech.

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<sup>9</sup> With respect to potentially appropriate actions, the Sixth Circuit stated:

We do not presume to dictate to law enforcement precisely how it should maintain the public order. But in this case, there were a number of easily identifiable measures that could have been taken short of removing the speaker: *e.g.*, increasing police presence in the immediate vicinity, as was requested; erecting a barricade for free speech, as was requested; arresting or threatening to arrest more of the law breakers, as was also requested; or allowing the Bible Believers to speak from the already constructed barricade to which they were eventually secluded prior to being ejected from the Festival. If none of these measures were feasible or had been deemed unlikely to prevail, the WCSO officers could have called for backup—as they appear to have done when they decided to eject the Bible Believers from the Festival—prior to finding that it was necessary to infringe on the group’s First Amendment rights. We simply cannot accept Defendants’ position that they were compelled to abridge constitutional rights for the sake of public safety, when at the same time the lawless adolescents who caused the risk with their assaultive behavior were left unmolested.

*Bible Believers*, 805 F.3d at 254.

Moreover, there is no indication that the OPD's alleged failure to disperse the crowd was an application of the NFPL.

### **CONCLUSION**

The Court concludes that Phelps-Roper's facial challenge fails because the NFPL is narrowly tailored and allows for ample alternative channels for Phelps-Roper to communicate her messages. The Court also concludes that Phelps-Roper's as-applied challenge fails because she has not demonstrated that OPD applied the NFPL to her in an unconstitutional manner.

Accordingly,

IT IS ORDERED:

1. Judgment is entered in favor of Defendant Pete Ricketts in his official capacity as the Governor of the State of Nebraska, Defendant Doug Peterson in his official capacity as Attorney General of the State of Nebraska, and Defendant Todd Schmaderer, Chief of Police of the City of Omaha, and against Plaintiff Shirley L. Phelps-Roper; and
2. A separate judgment will be entered.

Dated this 22<sup>nd</sup> day of March, 2016.

BY THE COURT:

s/Laurie Smith Camp  
Chief United States District Judge