Inc. v. FHFA, et al., Nos. 11-3408 and 11-3285 (2d Cir. Oct. 24, 2012).

First Amendment-Prohibition Against Picketing at Funerals

Shirley Phelps–Roper and her daughter are members of the Westboro Baptist Church of Topeka Kansas who contend that God punishes America for tolerating homosexuality. They picket at funerals, in particular those of soldiers killed in action, with signs saying "God Hates Fags" and "Thank God for Dead Soldiers."

Manchester, a city of 19,000 in St. Louis County, Missouri adopted an ordinance in 2007 to limit protests near funerals and burial services. The Manchester regulation prohibited picketing or other protest activities within 300 feet of a funeral service or burial beginning one hour before the service until one hour after the service ends.

Plaintiffs brought a facial First Amendment challenge to the Manchester ordinance, contending that it was overbroad and did not support any cognizable governmental interest. The District Court for the Eastern District of Missouri agreed, finding that the ordinance was an impermissible content-based restriction on expression. The district court's holding was guided by the Eighth Circuit's prior decisions on the subject, which had held that "the government has no compelling interest in protecting an individual from unwanted speech outside of the residential context." *Phelps-Roper v. Nixon*, 545 F.3d 685, 692 (8th Cir. 2008).

On appeal, the *Manchester* case provided the Eighth Circuit with another opportunity to review the legal landscape. In *Madsen v. Womens Health Ctr. Inc.*, 512 U.S. 753 (1994) and *Hill v. Colorado*, 530 U.S. 703 (2000) the Supreme Court had held that the freedom from unwanted communication extended to those entering abortion facilities. In 2008, in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), the Sixth Circuit had upheld an anti-picketing statute nearly identical to the Manchester ordinance. In 2011 the Supreme Court had affirmatively stated that funeral protesters did not enjoy unlimited scope; their picketing was subject to "reasonable time, manner and place restrictions." *Snyder v. Phelps*, 131 S.Ct. 137 (2011). And in August 2012 Congress had unanimously passed the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. 112-154, 126 Stat. 1165 § 601 (2012), which restricted protests at military funerals.

Under this constellation, the Eighth Circuit held that the Manchester ordinance created a permissible restriction on the time, manner and place of funeral protests. It rejected the district court's conclusion that the statute was content-oriented, finding that the regulation was content-neutral and only applied to conduct; therefore, the ordinance was subject to rational basis review. The Circuit Court looked to *Hill*, *Madsen*, *Strickland* and *Snyder* in discerning that there is a significant governmental interest in protecting the privacy of loved ones at funerals. Finally, it found that Manchester's ordinance was narrowly tailored and left open ample alternate channels of communication. The Eighth Circuit reversed the grant of summary judgment by the district court. *Phelps-Roper v. City of Manchester*, No. 10-3197 (8th Cir. Oct. 16, 2012). ML

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