

Westlaw

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PHelps-Roper v. Nixon

C.A.8 (Mo.),2007.

Only the Westlaw citation is currently available.

United States Court of Appeals,Eighth Circuit.

Shirley **PHELPS-ROPER**, Plaintiff-Appellant,

v.

Jeremiah NIXON, Defendant-Appellee,

Mark Goodwin, Defendant,

Matt Blunt, Defendant-Appellee.

Thomas Jefferson Center for the Protection of Free

Expression, Amicus on Behalf of Appellant,

Judicial Watch, Amicus on Behalf of Appellee.

No. 07-1295.

Submitted: Oct. 15, 2007.

Filed: Dec. 6, 2007.

Background: Church member brought § 1983 action against, inter alia, state Attorney General and state Governor, challenging constitutionality under First Amendment of Missouri statutes that criminalized picketing “in front or about” a funeral location or procession. Church member moved for preliminary injunction enjoining enforcement of statute The United States District Court for the Western District of Missouri, Fernando J. Gaitan, J., [504 F.Supp.2d 691](#), denied injunctive relief and member appealed.

Holdings: The Court of Appeals, [Bye](#), Circuit Judge, held that:

(1) member had fair chance of success on claim that state's interest was outweighed by her First Amendment rights;

(2) member had fair chance of success on claim that statute was not narrowly tailored; and

(3) member had fair chance of success on claim that statute failed to offer open, ample, and adequate channels for the dissemination of her particular message.

Reversed.

[1] Federal Courts 170B [170B](#) Federal Courts

Standard of review for the denial of a motion for preliminary injunction is abuse of discretion.

[2] Injunction 212 [212](#) Injunction

A court considering a motion for preliminary injunction must consider (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury in granting the injunction will inflict on the other party; (3) the probability of the movant succeeding on the merits; and (4) the public interest.

[3] Constitutional Law 92 [92](#) Constitutional Law

Peaceful picketing is an expressive activity protected by the First Amendment. [U.S.C.A. Const.Amend. 1](#).

[4] Constitutional Law 92 [92](#) Constitutional Law

A loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury, for purposes of a request for injunctive relief. [U.S.C.A. Const.Amend. 1](#).

[5] Constitutional Law 92 [92](#) Constitutional Law

If a plaintiff can establish a fair chance of success on the merits of a First Amendment claim, thus weighing in favor of injunctive relief, plaintiff will also have established irreparable harm as the result of the deprivation. [U.S.C.A. Const.Amend. 1](#).

[6] Constitutional Law 92 [92](#) Constitutional Law

Determination of where the public interest lies, in weighing injunctive relief on a First Amendment Claim, is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights. [U.S.C.A. Const.Amend. 1](#).

[7] Constitutional Law 92 

92 Constitutional Law

On a request for injunctive relief on a First Amendment claim, balance of equities generally favors the constitutionally-protected freedom of expression. [U.S.C.A. Const.Amend. 1.](#)

[8] Constitutional Law 92 

92 Constitutional Law

In a First Amendment case, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue. [U.S.C.A. Const.Amend. 1.](#)

[9] Constitutional Law 92 

92 Constitutional Law

Missouri misdemeanor statute criminalizing picketing or other protest activities “in front of or about” funeral location was a content-neutral restriction on free speech, and thus statute was subject to intermediate, rather than strict scrutiny under First Amendment, even if the statute targeted funeral picketing and was enacted for the purpose of silencing church member's speech in particular. [U.S.C.A. Const.Amend. 1;](#) [V.A.M.S. § 578.501.](#)

[10] Constitutional Law 92 

92 Constitutional Law

In determining whether a statute is content-neutral restriction under the First Amendment, plain meaning of the text controls and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face. [U.S.C.A. Const.Amend. 1.](#)

[11] Constitutional Law 92 

92 Constitutional Law

Missouri misdemeanor statute criminalizing picketing or other protest activities “in front of or about” funeral location regulated traditional public fora, and was thus required to satisfy standard of review for traditional public fora, even though cemeteries themselves were nonpublic forums, given that statute restricted First Amendment expressive activity not just within or on the premises of a

cemetery or church, but also on traditional public fora, such as the adjacent public streets and sidewalks. [U.S.C.A. Const.Amend. 1;](#) [V.A.M.S. § 578.501.](#)

[12] Constitutional Law 92 


92 Constitutional Law

A “traditional public forum” is one traditionally used as a forum for First Amendment expression, such as a public street or a sidewalk. [U.S.C.A. Const.Amend. 1.](#)

[13] Constitutional Law 92 

92 Constitutional Law

A content-neutral time, place and manner regulation on First Amendment speech or expression may be imposed in a public forum if it (1) serves a significant government interest; (2) is narrowly tailored; and (3) leaves open ample alternative channels of communication. [U.S.C.A. Const.Amend. 1.](#)

[14] Injunction 212 

212 Injunction

Church member seeking preliminary injunction against Missouri misdemeanor statute criminalizing picketing or other protest activities “in front of or about” funeral locations had fair chance of success on merits of her claim that state's interest in protecting funeral mourners from unwanted speech was outweighed by the first Amendment right to free speech, as an element to showing that statute was not a content-neutral time, place, and manner regulation. [U.S.C.A. Const.Amend. 1;](#) [V.A.M.S. § 578.501.](#)

[15] Constitutional Law 92 

92 Constitutional Law

For a statute to be narrowly tailored, as an element to providing that statute is a content-neutral time, place, and manner regulation, it must not burden substantially more First Amendment speech than necessary to further the state's legitimate interests. [U.S.C.A. Const.Amend. 1.](#)

[16] Constitutional Law 92 

92 Constitutional Law

An overbroad statute may be challenged on its face as

a violation of First Amendment speech or expression even though a more narrowly drawn statute would be valid as applied to the party in the case before it. [U.S.C.A. Const.Amend. 1.](#)

[17] Constitutional Law 92 0

[92](#) Constitutional Law

To prevail on an overbreadth claim, a plaintiff must show the challenged law either could never be applied in a valid manner or it is written so broadly that it may inhibit the First Amendment speech of third parties. [U.S.C.A. Const.Amend. 1.](#)

[18] Injunction 212 0

[212](#) Injunction

Church member seeking preliminary injunction against Missouri misdemeanor statute criminalizing picketing or other protest activities “in front of or about” funeral locations had fair chance of success on merits of her claim that statute was not narrowly tailored or that it was facially overbroad, as an element to showing that statute was not a content-neutral time, place, and manner regulation of First Amendment speech. [U.S.C.A. Const.Amend. 1;](#) [V.A.M.S. § 578.501.](#)

[19] Constitutional Law 92 0

[92](#) Constitutional Law

One is not to have the exercise of his liberty of First Amendment expression in appropriate places abridged on the plea that it may be exercised in some other place. [U.S.C.A. Const.Amend. 1.](#)

[20] Injunction 212 0

[212](#) Injunction

Church member seeking preliminary injunction against Missouri misdemeanor statute criminalizing picketing or other protest activities “in front of or about” funeral locations had fair chance of success on merits of her claim that statute failed to afford open, ample, and adequate alternative channels for the dissemination of her particular message to military funeral attendees, as an element to showing that statute was not a content-neutral time, place, and manner regulation under the First Amendment. [U.S.C.A. Const.Amend. 1;](#) [V.A.M.S. § 578.501.](#)
West Codenotes Validity Called into Doubt [V.A.M.S. § 578.501](#)

Appeal from the United States District Court for the Western District of Missouri.

Before [BYE](#), [BOWMAN](#), and SMITH, Circuit Judges.

[BYE](#), Circuit Judge.

*1 Shirley **Phelps-Roper** brought suit in the Western District of Missouri, challenging the validity of [sections 578.501](#) and [578.502 of the Missouri revised statutes](#) under the freedom of speech protection of the First Amendment of the U.S. Constitution.^{FN1} **Phelps-Roper** requested a preliminary injunction to prevent enforcement of [section 578.501](#) until the statute could be reviewed; the district court denied her motion, holding she did not demonstrate she was likely to succeed on the merits, did not demonstrate irreparable harm, and the public interest weighed in favor of upholding the challenged statutory provisions. This appeal followed. We reverse.

I

Phelps-Roper is a member of the Westboro Baptist Church (WBC) in Topeka, Kansas. Phelps alleges members of her church believe God is punishing America for what WBC considers the sin of homosexuality by killing Americans, including soldiers. As part of her religious duties, she believes she must protest and picket at certain funerals, including the funerals of United States soldiers, to publish the church's religious message: that God's promise of love and heaven for those who obey him in this life is counterbalanced by God's wrath and hell for those who do not. Phelps believes funerals are the only place where her religious message can be delivered in a timely and relevant manner.^{FN2}

On August 5, 2005, **Phelps-Roper** and other WBC members held a picket and protest near the location of the funeral of Army Spc. Edward Lee Myers in St. Joseph, Missouri. In direct response to the protest, Missouri enacted [section 578.501](#), which criminalizes picketing “in front or about” a funeral location or procession, and [section 578.502](#), which criminalizes picketing within 300 feet of a funeral location or procession, in the event [section 578.501](#) is declared unconstitutional. [Section 578.501](#) states, in pertinent part:

(1) This section shall be known as “Spc. Edward Lee Myers' Law.”

(2) It shall be unlawful for any person to engage in

picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. Each day on which a violation occurs shall constitute a separate offense. Violation of this section is a class B misdemeanor, unless committed by a person who has previously pled guilty to or been found guilty of a violation of this section, in which case the violation is a class A misdemeanor.

(3) For the purposes of this section, "funeral" means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.

[Mo.Rev.Stat. § 578.501](#).

Phelps-Roper brought suit under [42 U.S.C. § 1983](#) alleging these laws invade her First Amendment rights. She seeks: (1) entry of a declaratory judgment finding [sections 578.501](#) and [578.502](#) unconstitutional; (2) issuance of a preliminary and permanent injunction enjoining enforcement of [sections 578.501](#) and [578.502](#); and (3) an award of costs, including reasonable attorneys fees, pursuant to [42 U.S.C. § 1988](#). On appeal, **Phelps-Roper** appeals the denial of her motion for preliminary injunction against Jeremiah Nixon, Attorney General of Missouri, and Matt Blunt, Governor of Missouri. ^{FN3}

II

*2[1][2] The standard of review for the denial of a motion for preliminary injunction is abuse of discretion. [Entergy, Arkansas, Inc. v. Nebraska, 210 F.3d 887, 898 \(8th Cir.2000\)](#); [Kirkeby v. Furness, 52 F.3d 772, 774 \(8th Cir.1995\)](#) (reversing district court's denial of a motion for preliminary injunction to enjoin City of Fargo from enforcing an anti-picketing ordinance). A court considering a motion for preliminary injunction must consider (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury in granting the injunction will inflict on the other party; (3) the probability of the movant succeeding on the merits; and (4) the public interest. *Id.* citing [Dataphase Sys. Inc. v. CL Sys., Inc., 640 F.2d 109, 113 \(8th Cir.1981\)](#) (en banc). The district court weighed these considerations and concluded **Phelps-Roper** was not entitled to a preliminary injunction. We have weighed these same considerations and come to a contrary conclusion.

III

[3][4][5][6][7][8] Peaceful picketing is an expressive activity protected by the First Amendment. [Olmer v. Lincoln, 192 F.3d 1176, 1179 \(8th Cir.1999\)](#). It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." [Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 \(1976\)](#) (plurality). If **Phelps-Roper** can establish a substantial likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation. See [Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1140-41 \(8th Cir.1996\)](#); [Kirkeby, 52 F.3d at 775](#). Likewise, the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights. [Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 \(6th Cir.1998\)](#) (quotation omitted); [Kirkeby, 52 F.3d at 775](#) (citing [Frisby v. Schultz, 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 \(1988\)](#)). The balance of equities, too, generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue. [McQueary v. Stumbo, 453 F.Supp.2d 975, 979 \(E.D.Ky.2006\)](#) (granting preliminary injunction to WBC precluding enforcement of Kentucky statute imposing time, place and manner restrictions on gatherings near funerals) (citing [Connection Distrib. Co., 154 F.3d at 288](#)).

We begin with an assessment of the likelihood of success on the merits. At this stage in the litigation, we only assess preliminarily whether **Phelps-Roper** has a substantial likelihood of prevailing on the merits of her claim. We do not determine the constitutionality of the Missouri statute at issue. See [Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 371 \(8th Cir.1991\)](#) (stating, in considering the likelihood of the movant prevailing on the merits, a court does not decide whether the movant will ultimately win). While "an injunction cannot issue if there is no chance on the merits," [Mid-Am. Real Estate Co. v. Iowa Realty Co., 406 F.3d 969, 972 \(8th Cir.2005\)](#), the Eighth Circuit has rejected a requirement that a "party seeking preliminary relief prove a greater than fifty per cent likelihood that he

will prevail on the merits.” *Dataphase*, 640 F.2d at 113. The question is whether **Phelps-Roper** has a “fair chance of prevailing.” *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir.2003).

*3[9][10] When analyzing the merits of **Phelps-Roper's** claim, the district court correctly concluded the statute's speech restrictions are content-neutral and subjected the statute to intermediate judicial scrutiny. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 653, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). We reject **Phelps-Roper's** contention that [section 578.501](#) is content-based because it targets funeral picketing and was enacted for the purpose of silencing her speech in particular. The plain meaning of the text controls and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring) (stating “whether a statute is content neutral or content based is something that can be determined on the face of it...”); *Hill v. Colorado*, 530 U.S. 703, 724-25, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (stating “the contention that a statute is ‘viewpoint based’ simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support” and finding a statute content-neutral despite its being enacted to end harassment outside clinics by abortion opponents); *Frisby*, 487 U.S. at 482 (1988) (finding statute content-neutral despite its being enacted in response to anti-abortion protesters).

[11][12] [Section 578.501](#) regulates traditional public fora. A traditional public forum is one traditionally used as a forum for expression, such as a public street or a sidewalk. *Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); *Olmer*, 192 F.3d at 1179. While we recognize a cemetery is a nonpublic forum,^{FN4} [section 578.501](#) restricts expressive activity not just within or on the premises of a cemetery or a church, but also on traditional public fora such as the adjacent public streets and sidewalks. The statute must therefore satisfy the standard of review for traditional public fora.

[13] A content-neutral time, place and manner regulation may be imposed in a public forum if it: (1) serves a significant government interest; (2) is narrowly tailored; and (3) leaves open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746,

105 L.Ed.2d 661 (1989); *Veneklase v. City of Fargo*, 248 F.3d 738, 744 (8th Cir.2001) (en banc) (upholding the constitutionality of a Fargo ordinance prohibiting the targeted picketing of a residence as a content neutral time, place, manner restriction).

A

The district court found the state has a significant interest in preserving and protecting the sanctity and dignity of memorial and funeral services, as well as protecting the privacy of family and friends of the deceased during a time of mourning and distress. *Phelps-Roper v. Nixon*, 504 F.Supp.2d 691, 696 (W.D.Mo.2007). The Supreme Court has not addressed this issue, but has recognized the state's interest in protecting citizens from unwanted communications while in their homes, *Frisby*, 487 U.S. at 482, and when otherwise “captive,” *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 768, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Two other district courts, which recently analyzed the constitutionality of similar funeral protest statutes, extended *Frisby* and acknowledged the state has an interest in protecting mourners, which were found to be a captive audience, from unwanted speech during a burial or funeral. See *Phelps-Roper v. Taft*, No. 1:06 CV 2038, 2007 WL 915109, at *4-5 (N.D. Ohio Mar.23, 2007) (finding the state interest was significant); *McQueary v. Stumbo*, 453 F.Supp.2d 975, 992 (E.D.Ky.2006) (assuming, without finding, for the purpose of preliminary injunction, the state has an interest in protecting funeral attendees from unwanted communications so obtrusive they are impractical to avoid).

*4[14] We note our own opinion in *Olmer v. Lincoln*, 192 F.3d 1176, 1178 (8th Cir.1999), which affirmed a preliminary injunction enjoining the enforcement of an ordinance, which “restrict[ed] to certain areas the ‘focused picketing’ of churches and other religious premises thirty minutes before, during, and thirty minutes after any scheduled religious activity” because it violated the First Amendment. In *Olmer*, we held the government has no compelling interest in protecting an individual from unwanted speech outside of the residential context. *Id.* at 1182 (refusing to allow other locations, even churches, to claim the same level of constitutionally protected privacy afforded to the home by *Frisby*). We stated: As the Supreme Court said in *Frisby*, ‘the home is different,’ and, in our view, unique. Allowing other locations, even churches, to claim the same level of

constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication. We recognize that lines have to be drawn, and we choose to draw the line in such a way as to give the maximum possible protection to speech, which is protected by the express words of the Constitution.

Id. (citation omitted). Because of our holding in *Olmer*, we conclude **Phelps-Roper** has a fair chance of proving any interest the state has in protecting funeral mourners from unwanted speech is outweighed by the First Amendment right to free speech.

B

[15][16][17] For a statute to be narrowly tailored, it must not burden substantially more speech than necessary to further the state's legitimate interests. *Bd. of Tr. of State Univ. of New York v. Fox*, 492 U.S. 469, 478, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Frisby*, 487 U.S. at 485. An overbroad statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). To prevail, a plaintiff must show the challenged law either “could never be applied in a valid manner” or it is “written so broadly that [it] may inhibit the constitutionally protected speech of third parties.” *Id.* The district court did not engage in a meaningful analysis of whether [section 578.501](#) is narrowly tailored or overbroad; it found only that the statutory language has plain meaning, which a person of ordinary intelligence could ascertain.

[18] Since we do not decide the merits of **Phelps-Roper** claim, we decline to engage in a rigorous analysis of whether [section 578.501](#) is overbroad. We do point out the cases upon which the district court relied to support [section 578.501](#)'s “in front or about” language, e.g., *Frisby*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (upholding ordinance concerning targeted picketing “in front of” a particular residence); *Douglas v. Brownwell*, 88 F.3d 1511 (8th Cir.1996) (upholding a ban on picketing “before, about, or immediately adjacent to” a residence), are distinguishable because they involve residences and fixed locations. [Section 578.501](#), by contrast, defines a “funeral” to include “processions” held in connection with burial and cremation.^{FN5} [Mo.Rev.Stat. § 578.501\(3\)](#). Its

“floating” buffer-zones, therefore, provide citizens with no guidance as to what locations will be protest and picket-free zones and at what times. See [Phelps-Roper v. Taft](#), 2007 WL 915109 at *6 (holding the language of the statute applicable to floating buffer zones was substantially overbroad and burdened substantially more speech than necessary to serve the state's interest). In addition, [Section 578.501](#) does not limit itself to activity which targets, disrupts, or is otherwise related to the funeral, memorial service or procession.^{FN6} See [Olmer](#), 192 F.3d at 1180 (finding an ordinance overbroad because it “purports to make the carrying of signs at the indicated times and places unlawful, no matter what the signs say or depict, and this prohibition is much broader than necessary.... [T]he ordinance bans certain forms of communication even if all of those to whom it is directed in fact wish to hear it.”); [McQueary](#), 453 F.Supp.2d at 995-96 (finding Kentucky funeral protest statute, which prohibited all congregating, picketing, patrolling, demonstrating or entering property within 300 feet of a funeral whether or not such activities were visible or audible to, interfered with, or were authorized by the funeral attendees, restricted “substantially more speech than is necessary to prevent interferences with a funeral or to protect funeral attendees from unwanted, obtrusive communications that are otherwise impractical to avoid.”).

*5 We conclude there is enough likelihood **Phelps-Roper** will be able to prove [section 578.501](#) is not narrowly tailored or is facially overbroad to the point she has a fair chance of prevailing on the merits of her claim.

C

[19] The remaining requirement the state must satisfy to defend its time, place and manner restrictions is that such restrictions must leave open ample alternative channels for communication of the information. See [Ward](#), 491 U.S. at 791. As the Supreme Court has stated, “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” [Schneider v. New Jersey](#), 308 U.S. 147, 151-52, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

[20] The Eighth Circuit has found other anti-picket regulations did not leave open ample alternative channels for communication of the information. When addressing whether a permanent injunction

should issue in *Kirkeby*, the Court reasoned:
[P]laintiffs wish to express an opinion about an individual to that individual and others, and they wish to direct their message at that individual.... Therefore, allowing them to picket in the town square or even the next block does not satisfy the second *Ward* requirement [of leaving open ample alternative channels for communication]. These time limits do not give the plaintiffs enough opportunity to direct their intended message at their intended recipients.

Kirkeby v. Furness, 92 F.3d 655, 662 (8th Cir.1996). By analogy, **Phelps-Roper** presents a viable argument that those who protest or picket at or near a military funeral wish to reach an audience which can only be addressed at such occasion and to convey to and through such an audience a particular message. She has a fair chance of proving [section 578.501](#) fails to afford open, ample and adequate alternative channels for the dissemination of her particular message.

IV

Because we conclude **Phelps-Roper** has demonstrated a fair chance of prevailing on the merits of her claim, we find she will suffer irreparable injury if the preliminary injunction is not issued. The injunction will not cause substantial harm to others, and the public is served by the preservation of constitutional rights. The district court abused its discretion when it concluded the balance of harms weighed toward denying the motion for a preliminary injunction based on its erroneous determination as to **Phelps-Roper** being unlikely to succeed on the merits.

We emphasize again we do not today determine the constitutionality of [section 578.501](#). We hold only that **Phelps-Roper** is entitled to a preliminary injunction while the constitutionality of [section 578.501](#) is thoroughly reviewed. The contrary judgment of the district court is reversed.

[FN1.Section 578.502](#) is a fall-back provision to be enacted if [section 578.501](#) is declared unconstitutional. It is not ripe for review at this time since we are only reviewing the propriety of a preliminary injunction, not determining the constitutionality of the statute.

[FN2.](#) Although the exact content of WBC's group speech at the funerals of soldiers is not part of the record to date, in previous funeral protests the WBC has conveyed messages including "Thank God for Dead Soldiers," "God Blew Up The Troops," "God Hates Fags," and "AIDS Cures Fags." See The Westboro Baptist Church Home Page, <http://www.godhatesfags.com/main/aboutwbc.html> (last visited October 26, 2007) (describing the messages on the "large, colorful signs" they display during their "daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning, nation-destroying filth.")

[FN3.](#) **Phelps-Roper** does not appeal with respect to Mark Goodwin, the prosecuting attorney for Carroll County, Missouri. Goodwin and **Phelps-Roper** filed a stipulation for entry of consent judgment, which would permanently enjoin Goodwin, in his official capacity as prosecuting attorney for Carroll County, and his employees, representatives, agents, servants, assigns, and successors, from enforcing or attempting to enforce [§§ 578.501](#) and [578.502](#). The district court deferred ruling on the proposed consent judgment until a final judgment has been entered as to the constitutionality of Missouri's funeral protest statutes. Notwithstanding the agreement between **Phelps-Roper** and the local prosecutor, we have jurisdiction over this appeal between **Phelps-Roper** and the governor and [attorney general of Missouri](#). See *Reprod. Health Servs. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir.2005); but see *id.* at 1146-48 (Bye, J., dissenting) (concluding Article III jurisdiction is lacking over a Missouri action to enjoin enforcement of an allegedly unconstitutional statute, where the local prosecutor charged with enforcing the statute is not part of the appeal).

[FN4.](#) *Warner v. City of Boca Raton*, 420 F.3d 1308, 1310 n. 1 (11th Cir.2005); *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed.Cir.2002); *Warren v. Fairfax County*, 196 F.3d 186, 201 (4th Cir.1999); *Jackson v. City of Stone Mountain*, 232 F.Supp.2d 1337, 1353 (N.D.Ga.2002).

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[FN5](#). A funeral procession may be as few as two cars, according to statute. [Mo. Ann. Stat. § 194.500.3](#).

[FN6](#). We note the Eighth Circuit has found the term “picketing” to include a wide range of activities, including prayer. [Veneklas, 248 F.3d at 743; Douglas, 88 F.3d at 1521](#).

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