

LAW REVIEW¹ 11060

Supreme Court decision draws lines between rights and values

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

10.2—Other Supreme Court Cases

Snyder v. Phelps, 562 U.S. 443 (2011).

On March 2, 2011, the U.S. Supreme Court issued a near-unanimous decision upholding the right of a small church and its members to protest military funerals with odious signs. While I think the court got it right, I’m sure many ROA members will disagree. This case presents, in the starker way imaginable, a conflict of rights and democratic values. Please bear with me as I explain how this case reached the nation’s highest court.

In 1955, Fred W. Phelps Sr. founded the Westboro Baptist Church, located in Topeka, Kan. With perhaps 100 members—many of whom are members of Mr. Phelps’ extended family—the church’s congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in the military. The church frequently communicates its message

¹I invite the reader’s attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals.

When Marine Corps LCpl Matthew Snyder died in Iraq, Albert Snyder, Matthew's father and the plaintiff in the case, selected the Catholic Church in Westminster, Md., as the site for his son's funeral. Mr. Phelps became aware of the funeral and decided to travel to Maryland with six of his parishioners (two of his daughters and four of his grandchildren). On the day of the memorial service, Westboro members picketed at three locations—two of them in Annapolis (the State House and the U.S. Naval Academy) and the other near the church in Westminster. The signs were largely the same at all three locations and are the standard signs that Westboro has used for years.

Among the signs were those that said: "God Hates the USA/ Thank God for 9/11," "America is Doomed," "Don't Pray for the U.S.A.," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "God Hates Fags," "You're Going to Hell," and "God Hates You." The Westboro group pickets military funerals with these signs, without regard to the perceived sexual orientation of the deceased servicemember.

The Westminster picketing took place within a 10-foot by 25-foot plot of public land adjacent to a public street, behind a temporary fence, approximately 1,000 feet from the church where the funeral was conducted. Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.

The funeral procession passed within 200 to 300 feet of the picket site. Mr. Snyder testified that he could see the tops of the picket signs as he drove to the funeral, but he did not see what was written on the signs until he watched a newscast that night.

He then sued Mr. Phelps, the pastor's daughters, and the Westboro Baptist Church in the U.S. District Court for the District of Maryland. A jury awarded Mr. Snyder \$2.9 million in compensatory damages and \$8 million in punitive damages. The district court lowered the punitive damage award to \$2.1 million, but otherwise left the jury verdict intact. The defendants appealed to the U.S. Court of Appeals for the 4th Circuit. The 4th Circuit is the federal appellate court in Richmond, Va., and hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

The 4th Circuit reversed the district court judgment for Mr. Snyder, holding that the First Amendment forbids the imposition of tort liability under circumstances such as these. Mr. Snyder applied to the Supreme Court for certiorari (discretionary review), which the court granted. But the Supreme Court affirmed the 4th Circuit.

Chief Justice John Roberts' majority opinion (joined by six of his colleagues) includes the following: "The record makes clear that the applicable legal term— 'emotional distress'— fails

to capture fully the anguish Westboro's choice [as to its picketing] added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a 'special position in terms of First Amendment protection.'"

The majority opinion indicates that the federal government and 44 states (including Maryland) have enacted laws regulating the required distance that picketing must remain from a funeral—laws enacted in direct response to the Westboro Baptist's efforts. Maryland enacted the law after Westboro members picketed Matthew Snyder's funeral, but the court indicated that if that law had been in effect at the time of the Westboro picketing, the protestors would have been in compliance.

While the constitutionality of those laws was not before the court in this case, the majority opinion strongly implies that "to the extent these laws are content neutral," they will pass constitutional muster.

In this case, the Supreme Court applied and construed the U.S. Constitution (specifically, the First Amendment). Thus, Congress cannot overrule this result with simple legislation; it would require a constitutional amendment. Under Article V of the Constitution, an amendment must first be proposed by a margin of two-thirds or more in the Senate and the House of Representatives (separately), and then at least three-fourths of the states must ratify the amendment for it to become part of the Constitution.

The first 10 amendments (collectively called the "Bill of Rights") were proposed by the First Congress and quickly ratified by the states. Adding a Bill of Rights was part of the deal for the states to ratify the Constitution itself. In the 220 years since the First Congress, only 17 more amendments have been added to the Constitution. Amending the Constitution was intended to be difficult and rare.

USA Today has reported that Arizona, Arkansas, Nebraska, North Dakota, Oklahoma, West Virginia, and Wyoming have passed laws this year to establish or increase the "buffer zones" of time and distance around military funerals. The newspaper reports that such bills are pending in 14 other states (including California, Maryland, New Jersey, New York, Oregon, and Texas), but such bills have failed in Florida, Mississippi, Nevada, and Utah. "States want to keep peace at funerals," according to a USA Today story from June 3, 2011.

The article further reports that Congress is considering the proposed Sanctity of Eternal Rest for Veterans Act, which would increase the quiet time before and after military funerals at federal facilities from 60 minutes to 120 minutes, increase the buffer around funeral services from 150 feet to 300 feet, and increase the buffer around access routes to services from 300 feet to 500 feet. These regulations will almost certainly pass constitutional muster, so long as they are reasonable and content neutral.

I realize that many ROA members are greatly concerned about this Supreme Court decision and have demanded that Congress, state legislatures, or somebody "do something" about this odious picketing. As military personnel, we have taken an oath to uphold and defend the Constitution. The Supreme Court has now definitively interpreted the Constitution in this context, and we must respect that interpretation. Many military personnel, including Matthew Snyder, have laid down their lives to defend the free speech rights of all Americans, even when that speech dishonors those who serve and the ultimate sacrifices they have made.

Amending the Constitution is not feasible. The best that we can do is to improve upon the federal and state laws that provide "buffer zones" of time and distance around military funerals. This is primarily a matter of state law. The federal law only applies to a minority of military funerals-those held at Arlington National Cemetery and at cemeteries owned and operated by the Department of Veterans Affairs. This is an issue where ROA departments and chapters can most usefully make themselves heard in the state capitals.

Update – May 2022

The Sanctity of Eternal Rest for Veterans Act was never passed, however, many states have passed laws to establish or increase the "buffer zones" of time and distance around military funerals.

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ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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