No. 10-3197

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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SHIRLEY PHELPS-ROPER, ET AL.,

Appellees,

v.

CITY OF MANCHESTER, MISSOURI,

Appellant.

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Appeal from the United States District Court
for the Eastern District of Missouri
Hon. Catherine Perry, United States District Judge

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# APPELLANT'S PETITION FOR REHEARING EN BANC

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## I. RULE 35(b) STATEMENT.

The panel opinion in this appeal, filed on October 5, 2011, is in direct conflict with the decision of the Sixth Circuit Court of Appeals in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008). The Ohio funeral protest statutory provisions that were upheld as constitutional in *Strickland* are substantively identical to the provisions of the Manchester ordinance that were declared unconstitutional by the panel on October 5. Moreover, the rationale of the Sixth Circuit in *Strickland*, finding a significant government interest in protecting mourning family members from unwanted speech, was recently echoed by the Supreme Court in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

The panel's opinion, if it is allowed to stand, means that citizens living within the confines of the Sixth Circuit will be governed by a substantive rule of law on a crucial issue that is diametrically opposed to the substantive rule of law governing the citizens living in this Circuit with respect to that same crucial issue. Sufferance of this situation is anathema in a country where all citizens are guaranteed equal protection of the laws. A direct, unresolved circuit split on an issue of considerable national interest does not merely present an academic question, it actively breeds confusion about the law among the public and raises questions concerning the role of the courts in our society. This proceeding

presents a question of exceptional importance that must be addressed by the Court *en banc*.

## II. INTRODUCTION.

In March, 2007, the City of Manchester adopted an ordinance that was based on § 578.502 R.S.Mo. and which imposed certain time, place, and manner limitations on protests directed at funerals within the confines of the municipality. This ordinance was codified as § 210.264, Revised Code of the City of Manchester, and remained on the books without controversy or challenge until late Summer, 2009. At that time, the American Civil Liberties Union filed eight identical suits against eight Missouri municipalities that had adopted funeral protest ordinances, including this action against Manchester.

The plaintiffs in this action, Shirley Phelps-Roper and her daughter, Megan Phelps-Roper, are members of Westboro Baptist Church in Topeka, Kansas. Members of Westboro regularly engage in protest activities in conjunction with funerals or burial services in order to express their religious and political views. While neither the plaintiffs here (nor any other member of Westboro) has ever protested at a funeral in Manchester, the plaintiffs did hold a protest within the city limits of Manchester, but only after commencing this action.

In an effort to ensure that its ordinance was constitutional, Manchester in September, 2009 adopted the language of Ohio Revised Statute § 3767.30 in an

amended ordinance, language that had been declared constitutional in 2008 by the United States Court of Appeals for the Sixth Circuit in the *Strickland* case. In October, 2009, the ordinance was further refined to remove a floating privacy zone that had not been at issue on appeal in *Strickland* but which had been invalidated at the trial court level in that case. The third and final version of Manchester's § 210.264 provides as follows:

> FUNERAL PROTESTS PROHIBITED, WHEN
>
> A. Every citizen may freely speak, write and publish the person's sentiments on all subjects, being responsible for the abuse of the right, but no person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred (300) feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one (1) hour before or one (1) hour after the conducting of any actual funeral or burial service at that place.
>
> B. As used in this section, "other protest activities" means any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service.
>
> C. As used in this section, "funeral" and "burial service" mean the ceremonies and memorial services held in conjunction with the burial

> or cremation of the dead, but this section does not apply to processions while they are in transit beyond any 300-foot zone that is established under Subsection A above.

§ 210.264, Revised Code of the City of Manchester. In response to the adoption of the final version of the ordinance, Plaintiffs filed their Second Amended Complaint.[1] The parties each filed motions for summary judgment and the trial court granted summary judgment in favor of Plaintiffs.

On appeal by Manchester, the panel affirmed the trial court's judgment. The panel's conclusion was that the trial court, and the panel, were bound by a prior panel's decision in *Phelps-Roper v. Nixon*, 545 F.3d 684 (8th Cir. 2008) (Slip Op. at 4). Specifically, the panel found that the trial court erred in finding that Manchester's ordinance was not content-neutral, but was nevertheless correct in holding that Manchester did not have a significant government interest that would justify limiting Plaintiffs' free speech rights. *Id.* Judge Diana Murphy, concurring in the judgment, correctly wrote that the Supreme Court's opinion in *Snyder*, rather than the earlier panel decision in *Nixon*, "provides the proper method of analysis

[1] Plaintiffs' Second Amended Complaint continued the action against the two prior versions of the ordinance. As the panel correctly found, Plaintiffs' challenge to those repealed versions of the ordinance are moot. Plaintiffs did not oppose this holding by asking for rehearing, and there is no reason for the Court *en banc* to revive Plaintiffs' challenges to the earlier versions of the ordinance. The sole issue being presented for rehearing is the constitutionality of the final version of the ordinance.

for deciding whether the Manchester ordinance is constitutional." (Slip Op. at 7). That task now properly falls to the Court *en banc*.

## III. THE *SNYDER* CASE CONFIRMS THAT THE SIXTH CIRCUIT WAS CORRECT IN HOLDING THAT THERE IS A SIGNIFICANT GOVERNMENT INTEREST IN PROTECTING FUNERAL GOERS FROM UNWANTED SPEECH.

### A. Ordinance Is Content Neutral.

The overbreadth doctrine provides that the government may not proscribe a "substantial" amount of constitutionally protested speech when judged in relation to a statute's plainly legitimate sweep. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Because the current version of the ordinance is content-neutral, the appropriate test is intermediate scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Pursuant to *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), a governmental entity may impose reasonable content-neutral restrictions on the time, place, and/or manner of protected speech. The restrictions must: (1) serve a significant governmental interest; (2) be narrowly tailored; and (3) leave open ample alternative channels for communication. *Id.* at 791.

There is no legitimate dispute that the ordinance in question is content-neutral. The Sixth Circuit found that the Ohio statute with its identical provisions to the Manchester ordinance was content-neutral. *Strickland*, 539 F.3d at 361. The panel here found that Manchester's ordinance likewise was content-neutral. (Slip

Op. at 4). The ordinance is obviously not a regulation of speech itself but of the places where some speech may occur, and only for a brief period of time within a fixed privacy zone. Manchester's ordinance makes no mention of the Plaintiffs, of Westboro Baptist Church, of their message or, for that matter, of any other individual or message.

### B. *Snyder* Confirms That Manchester's Ordinance Serves A Significant Governmental Interest.

The linchpin of the trial court's judgment below and the panel opinion here was the conclusion that *Nixon* and its predecessor, *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999), foreclosed the possibility of there being a significant government interest in protecting the right of emotionally vulnerable funeral goers to mourn their loved ones in peace. This conclusion led the panel to create the split with the Sixth Circuit, which had reached precisely the opposite conclusion in *Strickland*. The Supreme Court's opinions in *Snyder* and *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004), demonstrate that the Sixth Circuit was correct in *Strickland* and that the contrary conclusions of the trial court and the panel here were erroneous.

"Burial rites or their counterparts have been respected in almost all civilizations from time immemorial." *Favish*, 541 U.S. 167-70. Funerals help families and communities cope with their loss and celebrate the life of the deceased

in several ways. "They are a sign of the respect a society shows for the deceased and for the surviving family members." *Id.* at 168.

When funerals and burial rites are disrupted, it interferes with the family's process of grieving and healing. The death of a loved one places great strains on the bereaved, affecting their emotions, often their finances, and even their physical health. *See, e.g.*, Margaret Stroebe et al., *Health Outcomes of Bereavement*, 370 Lancet 1960 (2007) (reviewing recent studies and concluding that there is an increased risk of mortality and physical and psychological ill-health in the bereaved). Families of young men and women killed in combat are particularly vulnerable to emotional distress. J. William Worden, *Grief Counseling and Grief Therapy: A Handbook for the Mental Health Practitioner* 40 (3d ed. 2003) (noting complications in the grieving process caused by sudden deaths, avoidable deaths, and violent deaths).

Mourners at funerals are emotionally vulnerable and are at significant risk of harm to their mental well-being arising from assaults on the memory of their departed loved one as well as from attacks on the solemnity of the occasion. In the *Favish* case, the Supreme Court held that an individual's Freedom of Information Act Request for images of bodies at the scene of death were subject to Exemption 7(c) of FOIA when the family objects to the release of the images. 541 U.S. at 160. The court issued a broad-based ruling that emphasized the cultural role of

grieving and the common law rights of survivors to protect the memory of the deceased. *Id.* at 167-69.

The court in *Favish* first discussed the cultural history and significance of funerals and similar ceremonies:

> Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. See generally 26 Encyclopaedia Britannica 851 (15th ed.1985) (noting that "[t]he ritual burial of the dead" has been practiced "from the very dawn of human culture and ... in most parts of the world"); 5 Encyclopedia of Religion 450 (1987) ("[F]uneral rites ... are the conscious cultural forms of one of our most ancient, universal, and unconscious impulses"). They are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother. See Antigone of Sophocles, 8 Harvard Classics: Nine Greek Dramas 255 (C. Eliot ed. 1909).

*Id.* at 167-68. The Supreme Court then acknowledged the importance of these traditions to the surviving family members, observing that:

> Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

*Id.* at 168.

The *Favish* opinion unequivocally—even eloquently—explains the right of the survivor in properly remembering, memorializing, and grieving the lost. In this definitive passage, *Favish* recognizes a privacy right that is instantly recognizable in the context of funerals and burial services and which should be protected. The Sixth Circuit correctly followed *Favish* in the *Strickland* case.

The Supreme Court went on to explain in *Favish* that beyond societal and cultural history and practice, the privacy rights of survivors are rooted in common law:

> It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but **the privilege exists for the benefit of the**

> **living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.**

*Id.* at 168-169, quoting *Schuyler v. Curtis*, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895) (emphasis added).

The recent *Snyder* opinion links the interest identified in *Favish* to the setting of the funeral protest. In *Snyder*, the father of deceased Marine Lance Corporal Matthew Snyder sued the plaintiff here, Shirley Phelps-Roper, and others associated with her family's Westboro Baptist Church for intentional infliction of emotional distress after they had conducted a funeral protest at the services for Matthew, who had been killed in action in Iraq. 131 S. Ct. at 1213. The Supreme Court held that the Westboro protest, held on a public street and addressing matters of public concern, was entitled to First Amendment protection that outweighed the right of Snyder's father to seek redress for his injuries. *Id.* at 1219.

In writing for the majority, however, Chief Justice Roberts took great care to distance the holding in *Snyder* from the situation at bar, specifically, the right of a government to enact reasonable restrictions on funeral protests. The majority opinion states that:

> Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach-it is "subject to reasonable time, place, or manner restrictions" that are consistent with the

> standards announced in this Court's precedents. . . To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case.

*Id.* at 1218 (citation omitted). Justice Breyer, concurring, wrote to emphasize that the majority opinion "does not hold or imply that the State is always powerless to provide private individuals with necessary protection." *Id.* at 1221 (Breyer, J., concurring).

The majority also recognized the harm that funeral protests inflict on grieving family members, writing that "[t]he record makes clear that the applicable legal term-"emotional distress"-fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief." *Id.* at 1217-18. Justice Alito, dissenting, was more blunt. Quoting *Favish*, Justice Alito wrote that "Exploitation of a funeral for the purpose of attracting public attention 'intrud[es] upon their ... grief,' and may permanently stain their memories of the final moments before a loved one is laid to rest." *Id.* at 1228 (Alito, J., dissenting), *quoting Favish*, 541 U.S. at 568. Referring to laws such as the ordinance presently before this Court, Justice Alito wrote that:

> [T]heir enactment dramatically illustrates the fundamental point that funerals are unique events at which special protection against

> emotional assaults is in order. At funerals, the emotional well-being of bereaved relatives is particularly vulnerable.

*Id.* at 1227.

*Snyder* thus makes it clear that a door that the trial court and panel believed to be closed is in fact wide open and that the Sixth Circuit in *Strickland* made the correct decision. The errors of the trial court and the panel here stem from their dependence on *Nixon* and in turn on that panel's mistaken reliance on *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999). *Olmer* followed the issuance of *Frisby v. Schultz*, 487 U.S. 474 (1988). In *Frisby*, the Supreme Court upheld a complete ban on picketing directed at individual residences. *Id.* at 476. The court emphasized the captive nature of individuals in their homes, and held that "[t]here is simply no right to force speech into the home of an unwilling listener." *Id.* at 485.

*Olmer* struck down an ordinance that limited "focused picketing" conducted "outside religious premises" within a certain time of scheduled "religious activity". 192 F.3d at 1179. The ordinance at issue in *Olmer* was unconnected with funerals and did not consider the particular importance of funerals and communal mourning in our society. Instead, the City of Lincoln apparently wanted to keep protesters away from religious services generally. In considering *Olmer* and the Missouri funeral protest statute before it, the *Nixon* court found that "the government has no

compelling interest in protecting an individual from unwanted speech outside of the residential context." *Nixon*, 545 F.3d at 692.[2]

The holding of the *Nixon* panel (and by extension that of the panel here) ignores the fact that even if *Olmer* is read to draw a line with respect to the "captive audience" doctrine at residential picketing, the Supreme Court erased that line almost immediately after *Olmer* was handed down in 1999. In *Hill v. Colorado*, 530 U.S. 703 (2000), the court recognized an interest in privacy that extended well beyond the home-based interest in *Frisby*, allowing protections from unwanted speech for persons entering medical clinics. Moreover, the court wrote that:

> States and municipalities plainly have a substantial interest in controlling the activity around certain public and private places. For example, we have recognized the special governmental interests surrounding schools, courthouses, polling places, and private homes.

530 U.S. at 728 (citations omitted). *See also Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (approving an injunction requiring a buffer zone between protesters and an abortion clinic entrance); *Grayned v. City of Rockford*, 408 U.S. 104, 119-21 (1972) (upholding limitations on disruptive protests outside schools

[2] It bears noting that "compelling" is not the correct test for content-neutral statutes or ordinances. Rather, the correct test is whether there is a "significant" interest, a lower bar. *Ward*, 491 U.S. at 791.

during school hours); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding city ordinance barring "loud and raucous" sound amplification on city streets).

Thus, even before one considers the language in the majority, the concurrence, and the dissent in *Snyder* universally approving of the right of governments to impose time, place, and manner restrictions on funeral protests, it is clear that the residential-only rule imposed in *Olmer* has long been obsolete. The addition of *Snyder* to the calculus only confirms that this Court *en banc* must reexamine the rule announced in *Olmer* and propagated both in *Nixon* and in the panel opinion here by considering the constitutionality of Manchester's ordinance within the context of *Snyder*, as urged by Judge Murphy.

## IV. CONCLUSION.

There is no question that funeral protests cause harm to those who must watch as their unique and final opportunity to say farewell to a loved one is seized by a person with an agenda that has nothing to do with the deceased or the life that was lived. Governments have the right to try to ameliorate this harm particularly where, as here, ample alternative opportunities for communications exist through any number of other protest venues (of which Plaintiffs frequently avail themselves). Judge Murphy, in her concurrence in the judgment of the panel, recognized that:

> To conclude otherwise would leave funeral attendees "practically helpless to escape . . . interference with [their] privacy," *Kovacs*, 336 U.S. at 87, at a moment when they "have a personal stake in honoring and mourning their dead." *Nat'l Archives & Records Admin.*, 541 U.S. at 168.

(Slip Op. at 8, Murphy, J., concurring in the judgment). The Supreme Court has recognized the risks inherent in exalting one party's free speech rights at the cost of the legitimate competing rights of others, stating that "[t]o enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." *Kovacs*, 336 U.S. at 88.

There is no justifiable basis in this Court's jurisprudence for the split created by the panel between this Circuit and the Sixth Circuit over essentially the same statutory language. Even if *Olmer* was somehow still good law after its central premise regarding residential-only restrictions on picketing was rendered moot by the Supreme Court in *Hill* and *Madsen*, the Supreme Court's recent pronouncements in *Snyder* clearly demonstrate that *Olmer* can no longer be followed. In turn, the *Nixon* panel decision, which relies on *Olmer*, cannot support the resulting circuit split in this case which permits disparate treatment of citizens depending on where they reside. This Court should accept rehearing *en banc* and reverse the judgment of the trial court.

Respectfully submitted,

**LEWIS, RICE & FINGERSH, L.C.**

By: /s/ Evan Z. Reid

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via this Court's electronic mail system to counsel of record, this 2nd day of November, 2011. A copy was sent the same date via first-class mail, postage prepaid, to Patrick Gunn, Esq., at the above-listed address.

/s/ Evan Z. Reid