Supreme Court Case

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THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket NO. 02-1832-cv

Ryan Fields, True Church of Christ, Inc.
Petitioner-Appellant

v.

State of Ohio, et al.
Respondents-Appellees

PRIOR HISTORY: Appeal from the Federal District Court for the State of Ohio

DISPOSITION: REVERSED

COUNSEL: For, petitioner: Robert Simpton, Pro Se, Cincinnati, OH; for Ryan Fields and True Church of Christ, Inc., respondent: Ryan Fields

JUDGES: Before ZAMBROWSKI, Doris K., SPANGLER, C. Dixon, and MARAMBIO, Imtiyaz H., Circuit Judges

OPINION BY: ZAMBROWSKI, Circuit Judge

Background

Ryan Fields is the pastor of the True Church of Christ, which claims to undertake God's word as the original apostles and Ancient teachers had in preaching the "pure Bible." They have become most widely recognized in the United States as aggressive advocates of anti-homosexuality that picket the funerals of dead soldiers. Founded in 1973 by Mr. Fields, the congregation

consists of 80 members, 60 of which are related to Mr. Fields.

At pickets, members of the church chant and carry signs that proclaim: "God hates fags" and "Thank God for Dead Soldiers." Mr. Field's claimed the church's signs are meant to proclaim a theologically legitimate and philosophically sound interpretation of the Bible. In his preaching, he claims that God kills soldiers in Iraq and Afghanistan as punishment for America's tolerance of homosexuals.

On June 2nd, 2007, Mr. Fields held a rally at the funeral of Sergeant Samuel Packard, who died in Iraq in the line of duty. Mr. Fields and his followers stood outside the memorial service, 500 feet away from the church, and then followed 500 feet behind the line of mourners proceeding to the burial site. A "patriot guard" composed of volunteers forming an anti-protest provided a buffer between the church picketers and the funeral proceedings. There were 15 members of the True Church of Christ picketing Samuel Packard's funeral. They shouted slogans, sang songs, and held up signs conveying the message that America is a doomed nation that will burn in hell because everyone that does not follow Fields' word is a "fag-enabler." They shouted to the mourners that Mr. Packard's death was the vengeance of God and that he was burning in hell. In addition, they claimed that Samuel Packard was a homosexual, an adulterer, and raised to worship the devil.

One of the members is documented as saying:

> "These idiots are not heroes. This country is lying to itself. The government is lying to its people. The country is being propped up by a bunch of idiots. These supposed heroes are lazy, incompetent clowns looking for jobs because they're not qualified for honest work. They are raised on a steady diet of fag propaganda in the home, on the TV, in church, in school, in mass media – everywhere – the two-pronged lie: 1) it's OK to be gay; and, 2) Anyone saying otherwise…is a hatemonger who much be vilified, demonized, marginalized into silence. Therefore, with full knowledge of what they are doing, they voluntarily joined a fag-infested army for a fag-run country now utterly and finally forsaken by God who Himself is fighting against that country."[1]

As Ryan Fields shouted these words through a speakerphone into the crows, the mourners were getting visibly upset. One mourner, Andrew Richards, approached Mr. Fields to request him to show respect for the dead. Mr. Fields spit in his face. At this point, Mr. Fields shouted:

> "The Lord has struck down one minion of the devil-worshipping country of America and he will righteously

[1] Based off of the true words found in *Snyder v. Phelps*, Complaint.

> strike down hundreds more, thousands more until the entire country is being licked tortuously by the fiery flames of hell. We, of the True Church of Christ, are the sole saviors of this generation. You should praise us, but for your ignorance you will be punished. We must carry out God's work on this earth. He has shown us how his vengeance is to be carried out and we *will carry* his will out to its faithful conclusion. Now is the time to take the Final Judgment."

Another member of Mr. Field's party then handed him an American flag, that was doused in gasoline, which Mr. Fields light on fire with a lighter he held ready in his pocket. He waved the flag, as flames consumed it, over his head for approximately two minutes. At this point, a police cruiser drove up beside Mr. Fields' truck. Police Officer Max Simmons arrested Mr. Fields. He was brought Mr. Fields in under the Ohio Criminal Syndicalism statute, Ohio Rev. Code § 2923.13. The District Court of Cincinnati subsequently convicted Mr. Fields under the statute for: "advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Additionally, the True Church of Christ was convicted under the recently passed Ohio Funeral Picketing Act. 2006 Ohio Laws Ch. 50 (S.B. 93)(effective March 27, 2006).

Ryan Fields was convicted in the District Court of Cincinnati. He was charged under the Ohio Syndicalism statute for advocating crime at the picketing of a military funeral on June 2nd, 2007. Ryan Fields was subsequently charged and forced to discontinue the True Church of Christ's more controversial practices under the Ohio Syndicalism statute. Ryan Fields has appealed, arguing that his church's general practices are protected under the First Amendment's Free Speech Clause and that the Ohio Syndicalism Statute and Anti-Picketing at Funeral law are unconstitutional for restricting his and his church members' rights as protected by the U.S. Constitution.

An Introduction to the Free Speech Clause

The First Amendment of the United States Constitution reads:

> "Congress 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 a redress of grievances."

Although each section has played a heavy-hand in shaping the country's laws, the section "Congress shall make no law…abridging the freedom of speech, or of the press" enshrines what has become known as the Free Speech Clause, a fundamental democratic principle. In this case, you will consider the complications that accompany limitations on free speech. What sort of "speech" is protected under the clause has proven to be complicated and very nuanced. The clause, although a foundational concept in the U.S., was not heavily debated until the 20th century. It has undergone interpretive changes as each new cases forces the justices to consider the clause in different lights.

Three possible, but general, interpretations to the First Amendment are: the absolutist, categorical, and balancing approach. The Absolutist approach states that the Free Speech Clause means exactly what it says; however, it still draws a distinction between 'speech' (which is protected under the clause) and 'conduct' (which is subject to state regulation). It also considers that speech can be connected with a specific undesirable and illegal action e.g. yelling "Fire!" in a crowded movie theater when no fire exists, which would not be protected by the Free Speech Clause. The Categorical Approach evaluates speech based on what category it falls into. 'Fight words,' which have historically included words such as 'nigger' and 'fag,' would not be protected. Recent rulings, however, have had to reconsider the categories because the force behind and connotations of the words change and often change to become milder. The Balance approach rejects the other two approaches as oversimplified and inflexible and instead believes that each case should weigh the individual's or group's interest in the speech and the government's interest in restricting it.

The most commonly used test to decide whether speech is or is not protected by the Free Speech Clause is the **"clear and present danger" test**. The cases that defined the discussion on free speech were based on a period in history where communist revolutions were disrupting the global balance. The United States was deathly afraid of the revolutions begun in Europe to spill over. Articulated by Justice Oliver Wendell Holmes in *Schenck v. United States* in 1917, he stated that the court must determine whether "the words create a clear and present danger that they will bring about substantive evils Congress has a right to prevent. It is a question of proximity and degree." In this case, the court ruled to uphold Schenck's conviction: he had distributed pamphlets during World War I urging citizens to "Assert your rights—Do not submit to intimidation." The court believed that there was sufficient evidence to prove that this speech had a strong likelihood of persuading someone to evade the draft. Yet, in many cases, the justices split on what they believed were standards adequate to assess the danger speech posed.

In *Abrams v. United States* (1919), the justices ruled using the "bad tendency" test, rather than the "clear and present danger" test. Abrams distributed leaflets criticizing the

deployment of U.S. troops to defend Czarist Russia against the Bolsheviks. In his opinion, Justice Holmes dissenting wrote, "persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole- heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Abrams v. United States*, 250 U.S. 616, 630 (1919).

Nonetheless, despite Holmes dissent, the majority ruled that speech's **"bad tendency,"** literally that it *tended* to produce actions that the Congress had a right to restrict, was enough to validate restriction. Holmes and Brandeis issued strong dissents. Holmes wrote that the "silly pamphlets" could pose no serious threat to the U.S. Government. Holmes argued that the government could only "punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils." He added that "Congress certainly cannot forbid all effort to change the mind of the country." Instead, it is limited to regulating expressions that "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

In *Whitney v. California* (1927), a woman attended an organizational meeting of the Communist Labor Party California branch. The court again used the "bad tendency" test to conclude that the legislature had the right to enact laws punishing her participation as an abuse of free speech because it determined it was "inimical to the public welfare, tend[ed] to incite to crime, disturb[ed] the public peace, or endanger[ed] the foundations of organized government and threaten[ed] its overthrow by unlawful means." However, the difficulty of dealing with free speech cases meant that the standard of evaluation was and will be constantly in flux. In determining how to judge the case, Justice Brandeis concurring wrote, "the fixing of a standard is necessary, by which it can be determined what degree of evil is sufficiently substantial to justify resort to abridgment of speech and press and assembly as a means of protection and how clear and imminent and likely the danger is. That standard has fluctuated over a period of some fifty years now and it cannot be asserted with a great degree of confidence that the Court has yet settled on any firm standard or any set of standards for differing forms of

expression. The cases are instructive of the difficulty." *Whitney v. California*, 274 U.S. 357, 375 -76 (1927).
In explaining their choice of a standard, Justice Brandeis and Holmes offered a counterpoint in their opinion:

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . .even advocacy of [law] violation however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon."

However, a shift was being felt that increased the threshold for what speech would constitute "imminent danger," and thus be an exception to the Free Speech Clause. *Dennis v. United States* (1951) saw the sentencing of teacher who taught the books of prominent communists. The court upheld the Smith Act of 1940 the prohibited any person from advocating, abetting, advising or teaching the "duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence." In dissent, Holmes criticized the majority decision for believing that "miserable merchants of unwanted ideas" posed any significant threat. And *Yates v. United States* (1957)

Brandenburg v. Ohio (1969) made the breakthrough into the current popular standard of the Free Speech Clause: **the imminent lawless action test**. The test, however, did not originate with *Brandenburg*. Justice Learned Hand made a distinction in s 1917 case *Masses Publishing v. Patten* that reversed the decision to punish the publishing company for a revolutionary journal attacking capitalism. He stated that the government may prosecute words that are "triggers to action" but not words that are "keys of persuasion." In *Brandenburg*, the incitement test was paired with the "clear and present danger" test when the court reversed the lower court conviction of a Ku Klux Klan member who was videotaped giving an inflammatory speech. The Court articulated the incitement test as: "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent

lawless action and is likely to incite or produce such action." In *Hess v. Indiana*, the Court ruled in favor of a demonstrator who was overheard by a police officer as saying "we'll take the fucking street later." The Court explained that at most the statement, taken in context, advocated lawless action in an indefinite future time, but did not aim to produce *imminent* lawless action.

Two examples of how the incitement test was used by justices can be seen in *NAACP v. Clairborne Hardware* (1982) and *Rice v. Paladin Enterprises* (1997). In *NAACP*, the Court found First Amendment protection for the NAACP practice of writing down names of Black's who violated a boycott of chosen white businesses. At meetings, they were read out loud and at one point a leader said, "If we catch any of you going in any of them racist stores, we're going to break your damn neck." The Court said the statement fell short of a direct threat or ratification of violence.

In *Rice*, Paladin was held liable for writing a hit man's guide, *Hit Man: A Technical Manual for Independent Contractors*, which was used by a reader to commit three brutal murders. In this case, the Court found that Paladin's speech was a clear ratification of violence and thus not protected by the Free Speech Clause.

This introduction only touches upon the fundamentals of the debate concerning the interpretation and standards of the Free Speech Clause, and First Amendment in general. The Constitution is a living document – its principles, as interpreted by the Supreme Court, have been applied to hundreds of different cases that span the cultural, intellectual and technological revolutions of two centuries. No standard has been absolutely accepted by the Court, even in the most recent cases.

Criminal Syndicalism Statute

The relevant portions of the Ohio Criminal Syndicalism Statute read:

Section 1.- *Criminal syndicalism defined.*
Criminal Syndicalism is hereby defined as which advocates crime, sabotage...violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends. The advocacy of such doctrine, whether by word of mouth or writing is a felony punishable as in this act otherwise provided.

'Sabotage' is hereby defined to be malicious, felonious, intentional or unlawful damage, injury or destruction of real or personal property."

Section 2. - *Teaching or advocating syndicalism declared a felony.*
Any person by word of mouth or writing advocates or teaches they duty, necessity, or propriety of crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing

industrial or political ends, or prints, publishes, edits, issues or knowingly circulates, sells, distributes, or publicly displays any book, paper, document or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political ends should be brought about by crime, sabotage, violence, or other unlawful methods of terrorism, or openly, willfully, and deliberately justifies by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or other unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of doctrines of criminal syndicalism, or organizes or helps to organize or becomes a member or voluntarily assembles with any society, group or assemblage of persons formed to teach or advocate the doctrine of criminal syndicalism, is guilty of a felony and punishable by imprisonment in the state prison for no more than five years.

Section 3. - *Assembling for purpose declared a felony.*
Wherever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal syndicalism defined in this act, such an assemblage is unlawful and every person voluntarily participating therein by his presence, aid or instigation is guilty of a felony punishable by imprisonment.

Anti-Picketing at Funerals Acts – Disputed Sections

Section 1 – *Disorderly Conduct.*
Section 1 of the Act provides that a person is guilty of disorderly conduct in the first degree when he or she:
(a) In a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof:

1. engages in fighting or in violent, tumultuous, or threatening behavior;
2. makes unreasonable noise; or
3. creates a hazardous or physically offensive condition by any act that serves no legitimate purpose; and

(b) Acts in a way described in paragraph (a) of this subsection within three hundred (300) feet of a:

1. Cemetery during a funeral or burial;
2. Funeral home during the viewing of a deceased person;
3. Funeral procession; or
4. Funeral or memorial service; and

c) Knows that he or she is within three hundred (300) feet of an occasion described in paragraph (b) of this subsection.

Section 3 – *Disrupting a Funeral.*
Section 3 of the Act provides that a person is guilty of disrupting meetings and processions in the first degree when: with intent to prevent or disrupt a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, he or she does any act

tending to obstruct or interfere with it physically or makes any utterance, gesture, or display designed to outrage the sensibilities of the group attending the occasion.

Section 5 – *Interfering with a Funeral.*
Section 5 of the Act provides the following:
(1) A person is guilty of interference with a funeral when he or she at any time on any day:

(a) Blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial services, or burial is being conducted;
(b) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property that is within three hundred (300) feet of an event specified in paragraph (a) of this subsection; or
(c) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:

1. Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or

2. Distributes literature or any other item.

(2) Interference with a funeral is a Class B misdemeanor.[2]

Legal Questions

The Supreme Court today is judging the constitutionality of the Ohio Syndicalism Statute and the Ohio Anti-Picketing Funeral Act that were used to convict Ryan Fields, leader of the True Church of Christ. Did Ohio's criminal syndicalism law, prohibiting public speech that advocates various illegal activities, violate Ryan Fields' right to free speech as protected by the First Amendment? Did the Anti-Picketing Funeral Act, restricting all protests within a certain distance of military funerals, infringe upon Ryan Fields’ First Amendment rights?

Justice Zambrowski delivered the opinion of the Court of Appeals:

Assessing the practical application of the Ohio Syndicalism Statute, it is clear it restricts Ryan Fields’ speech, which is protected by the First Amendment. The advocacy of violence in

[2] McQueary v. Stumbo, 453 F. Supp.2d 975, 979 (E.D. Ky. 2006)

this case is abstract and does not meet the imminent lawless action test. Abstract advocacy of violence is still protected by the First Amendment. A proper and consistent application of this Court's and the Supreme
Court's pertinent First Amendment precedents yields two conclusions when assessing the Ohio Anti-Picketing Act: first, that it is not only content, but viewpoint biased, and abridges freedom of expression on that basis; and second, that even if the challenged statute were to be deemed content and viewpoint neutral, it would nonetheless violate the First Amendment. The government can achieve their aim in a less speech restrictive way. Therefore, the decision of the District Court of Cincinnati is overturned.

REVERSED.

Discussion

I. The Complaint

There are two distinct parts to this decision, although they deal with overlapping issues of law. The Court will first examine the constitutionality of the Ohio Syndicalism Statute. The Statute was proposed and passed as a content-based statute to limit particular speech. Therefore, the Court will look directly at the particular speech that it restricted to determine that Ryan Fields' speech was indeed protected under the First Amendment. Based on this finding, the Ohio Syndicalism Statute is overbroad and the Court will discuss no further issues. The Court will next discuss The Anti-Picketing at Funerals Act. The Act, unlike the Statute, was established as an allegedly content-neutral law. According to the state of Ohio, the Act was not meant to limit free speech, but rather to protect the rights and interests of funeral attendees from being trampled on by individuals such as those belonging to the True Church of Christ.

a. Ohio Syndicalism Statute ("the Statute")

Ryan Fields was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism. Ryan Fields is challenging the constitutionality of the Statute.

b. Anti-Picketing at Funerals Act ("the Act")

Ryan Fields challenges Section 5(1)(b) and (c) of the Anti-Picketing Act. He does not challenge any other provision of the Anti-Picketing Act. Specifically, he asserts that Sections

5(1)(b) and (c) are unconstitutional prior restraints on speech and are not narrowly tailored to serve a significant government interest and do not leave open alternative channels for communication. Finally, he asserts that Section 5(1)(c) unconstitutionally makes speech upon the approval of a private party.

Fields argues that picketing at military funerals is an effective way to convey the message of the True Church of Christ. The Church has picketed at over 25 funerals in the past across the country, including in countries that have not passed laws against picketing at military funerals. He argues that he was wrongly convicted for exercising his free speech rights on June 2nd, 2007 under the Ohio Anti-Picketing at Funerals Act.

Both parties agree that there are no issues of fact disputed, but only issues of law. The court will be looking at whether or not the speech that the True Church of Christ engages in is protected by the First Amendment. The boundary defining protected and unprotected speech has never been historically clear and thus must be evaluated on a case-by-case basis. If the speech is indeed *unprotected*, as the state of Ohio argues, then the state may have some latitude in regulating unprotected speech. In this case, the federal law statute of Ohio regulating the unprotected speech must be evaluated to ascertain whether the statute is narrowly tailored enough to regulate only the speech that is unprotected and does not impede upon an individual's freedom of speech. If the speech is protected, the state of Ohio may still have a compelling government interest to justify the statutes.

II. Protection under the Free Speech Clause

This Court acknowledges that the views propounded by the True Church of Christ are abhorrent to the majority of U.S. Citizens and are equally so to the justices of this Court. No matter how repugnant these views may be, the message cannot be judged through a socially accepted moral standard. Only the rarest of cases are not protected under the First Amendment.

Two fundamental principles of the First Amendment must be considered. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

> "Discrimination against speech because of its message is presumed to be unconstitutional…. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v.*

Rector and *Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995) (citation omitted).

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. See *Brandenburg v. Ohio*, 395 U. S. 444, 449 (1969) (per curiam) (distinguishing "mere advocacy" of illegal conduct from "incitement to imminent lawless action"). The Attorney General of the state of Ohio claims that the speech of the True Christ Church advocates gay hate crime and an overthrow of the U.S. Government. The Court will subsequently address the concern over gay hate crime, but notes now that the advocacy to overthrow the U.S. Government, to borrow from Justice Holmes, "ha[s] no chance of starting a present conflagration." Gitlow v. New York, 268 U. S. 652, 673 (1925) (dissenting opinion).

The issues of law force this Court to weigh two contradicting interests. "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values." *Doe v. University of Michigan*, 1989.

III. Imminent Lawless Action

In considering the Ohio Syndicalism Statute, the general question before us is whether the words of the True Church of Christ incite "imminent lawless action." The imminent lawless action test is a fairly recent standard. Historically, the Supreme Court ruled harshly on speech that threatened to uproot the government. At various points, the federal and state governments were granted arguably more latitude than was actually allowed by the Constitution. Tests such as the "bad tendency" and "clear and present danger" were products of a period in American history when there was global threat of a communist uprising. Perhaps, it is impossible to envision a revolution and overthrow of the current government, but in the early 20th century through World War II, uprisings were a legitimate fear striking the hearts of numerous superficially stable governments. 1905 saw the upheaval of the established Russian Tsar by revolutionaries. The interwar period saw the creeping gains of the future Nazi regime. Previously, courts had ruled that all advocacy of crime was punishable and not protected by the First Amendment. Since the early foundational ruling in *Abrams*, the Supreme Court has continuously been clarifying the limits on free speech in distinguishing between speech that contributed to democratic deliberation and speech that simply incited illegality.

The Court in *Brandenburg v. Ohio* determined that a Ku Klux Klan member could not be punished for his speech at a KKK rally. Among other things, he proclaimed that "We're not a revengent

organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken" [sic}. In explaining its break with previous decisions, the *Brandenburg* Court wrote: "the [*Whitney*] Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske v. Kansas*, 274 U.S. 380 (1927). But Whitney has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in Noto v. United States, 367 U.S. 290, 297-298 (1961): the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg v. Ohio* 395 U.S. 444 (1969). Following the precedent laid down by the *Brandenbug* decision, this Court will use the imminent lawless action test.

In order to meet the full requirements of this test, the government must demonstrate: first, the speaker promoted not just any lawless action but "imminent" lawless action. Second, the imminent lawless action was "likely" to occur. Third, the speaker intended to produce imminent lawless action ("directed to inciting or producing imminent lawless action"). See *Id.* Clearly, the government's task is extraordinarily difficult because a high degree of protection and breathing space is granted to political protest, which lies at the core of the First Amendment.

a. Advocating Imminent Criminal Action

The Attorney General of Ohio expresses deep concern Fields' speech in its advocacy of gay hate crime. He turned the Court's attention specifically to the following section:

> "They are raised on a steady diet of fag propaganda in the home, on the TV, in church, in school, in mass media – everywhere – the two-pronged lie: 1) it's OK to be gay…Therefore, with full knowledge of what they are doing, they voluntarily joined a fag-infested army for a fag-run country now utterly and finally forsaken by God who Himself is fighting against that country."
>
> Ryan Fields soon followed with: "we *will carry* his will out to its faithful conclusion. Now is the time for the Final Judgment."

The Attorney General argues that the speech was likely to incite "imminent" lawless actions against homosexuals within the funeral setting. When pressed further, the Attorney General elaborated that given the heightened tensions, the proximity between the funeral attendees and members of the TCC, Ryan Fields was practically commanding his congregation to attack the mourners ('fag-enablers' in the words of the Church) that were getting closer to the protesters. In this case, it may be useful to consider the hypothetical of whether violence would have ensued had the Cincinnati police not stepped in to draw Ryan Fields' protest to an unplanned, early conclusion. The hypothetical serves to spotlight the environment the speech was given in.

Despite his inflammatory remarks, Ryan Fields never made any gestures to indicate a command for violence – he never pointed, signaled, or shouted direct orders. His "advocacy" heavily evokes biblical references. In particular, the Attorney General highlights the claim that "now is the time for the Final Judgment." The "now" did not indicate the immediate moment, but rather conveyed a general sense of urgency. The "now" heralded by Ryan Fields was a rhetorical flourish that did not convey a more specific time than the next few decades.

In *Planned Parenthood v. ACLA*, the Court dealt with First Amendment limitations on internet speech. The ACLA published pictures, names and addresses of abortion providers. The ACLA did not explicitly advocate violence, but it heavily implied it. When a person listed on the website was murdered, his name was crossed off the list. When a person on the list was injured, his information was displayed in grey. See *Planned Parenthood of the Columbia/ Willamette, Inc. v. ACLA*, 23 F. Supp. 2d 1182 (1998). The *Planned Parenthood* Court refused to allow political speech to be punished simply because it "makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party" *id*.

In this case, the TCC is not explicitly advocating violence – if the proclamation of judgment day and encouragement for individuals to follow the will of God is to be understood as criminalized violent speech, then the courts will have to take a closer look at all religious speech in churches and public forums across the country. There is no question that Ryan Fields' speech could be understand by the average listener as advocating abstract violence, given the language and context. This Court recognizes that ambiguous language advocating abstract violence may, given the particular circumstances, be examined more critically if it reaches a significantly large audience. However, 80 people, 20 TCC members and 60 funeral attendees, were present at the funeral. This Court believes that authorizing the restriction of any speech, even counsels of violent crime, has risks. Governments can overreact to short-term events. Vigorous, even hateful criticism of government is very much at the heart of the right to free speech.

Measured by the imminent lawless action test described by

Brandenburg v. Ohio, Ohio's Criminal Syndicalism Statute cannot be sustained. The Statute punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First Amendment.

IV. The Appropriate Constitutional Standard for evaluating the Anti-Picketing at Funeral Act: Strict First Amendment Scrutiny

In cases where the constitutionality of a federal law is disputed – whether or not it restricts free speech – the interest of the government must be weighed with the private constitutional right allegedly compromised by the government's particular means to safeguard its interest. The Anti-Picketing Act is examined separately from the Ohio Syndicalism Statute because the Act does not explicitly limit speech whereas charging TCC under the Ohio Syndicalism Statute required the State to prove that Ryan Fields' speech was not protected by the First Amendment. In this case, the appropriate constitutional standard is **strict judicial scrutiny**. Strict scrutiny is the most stringent judicial review of a federal statute. The speech of Ryan Fields' and the members of the True Church of Christ has been restricted because of a strong government interest to safeguard the rights of funeral attendees and families. A statute limiting the rights guaranteed under the First Amendment is subject to strict scrutiny. In determining whether Section 5(1)(b) or (c) of the Anti-Picketing at Funerals Act is unconstitutional, the first issue is whether the challenged provisions are "content based" or "content neutral." Resolution of this issue determines the level of judicial scrutiny to apply to the provisions.

c. The Act is not Content and Viewpoint Neutral

A content-neutral regulation is subject to an intermediate level of scrutiny pursuant to which the law survives if it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Frisby*, 487 U.S. at 481. In contrast, a content-based regulation

is subject to the highest degree of constitutional scrutiny pursuant to which the regulation must be necessary and narrowly tailored to achieve a compelling public interest (6 Cir. 1999); *See also Frisby*, 487 U.S. at 481. In order for a federal statute to pass strict first amendment scrutiny, (1) it must be justified by a compelling government interest, (2) it must be narrowly tailored, and (3) it must accomplish the compelling government interest in the least restrictive way possible. Conditions (2) and (3) are frequently considered together and often satisfy each other.

"Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994)(quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "We thus look to the government's purpose as the threshold consideration." *Id.* The principal inquiry in determining content neutrality "is whether the government has adopted a regulation because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. "The government's purpose is the controlling consideration." *Id.* A "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others." *Id.*

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court determined that, if the government's "predominate intent" in regulating speech is content neutral, then the statute will be deemed content neutral, even where the statute is content based on its face and suppression of content was "a motivating factor" behind the statute. In *Renton*, the city ordinance did not treat adult film theatres differently from children's film theatre, but was "aimed not at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary Id.* at 47.

The very title of this statute evidences a biased and selective goal or purpose. Captioned the "Spc. Isaac Jacob Smith Law," this legislative act seeks to honor a fallen Ohio soldier by protecting the legacy and the families of other military personnel against expression that might taint or tarnish their burials and memorial services. However commendable such a rationale may seem, it unmistakably reflects a statutory focus on a particular message within the broader context of messages that might be conveyed during a military funeral. Thus it seems clear that under the Missouri law (unlike the Kentucky statute found to be content- neutral in *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006)) an onlooker at the burial site could with impunity display a message reading "Thank you for your service" or "We honor with pride an American hero" but would be barred from flaunting such an uncongenial message as "Thank God for Dead Soldiers" or "This Victim Got What He Deserved." The fatal flaw in such a targeted or selective speech ban has been consistently recognized by the Supreme Court in cases such as *Carey v. Brown*,

447 U.S. 455, 463 (1980) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable but deny use to those wishing to express less favored or more controversial views," quoting *Police Department of Chicago v. Mosely*, 408 U.S. 92, 95- 96 (1972)) . Even when dealing with less than fully protected expression, it has been clear since *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), that "the First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects." In effect, Ohio's law would have allowed laudatory or praiseworthy messages to be displayed at a military funeral, while forbidding demeaning or disparaging messages. However strongly citizens may wish to differentiate between such messages, our commitment to free expression forbids government to discriminate in that fashion.

V. The Act is not Narrowly Tailored and Fails to Provide Alternative Channels

The Act fails to satisfy the First Amendment standard. Its broad scope has not been satisfied by an evidenced suitable government interest; it is not narrowly tailored; and it fails to provide adequate alternatives to express the beliefs it restricts. However abhorrent these views may be to most American citizens, there must be an adequate avenue for their expression, even more so because they are so contrary to the majority view.

The Act specifically purports to protect "the emotional well-being of persons paying respect to the deceased;" however its provisions have extended in practice to prohibit speech that goes beyond its initial aims. In the closely analogous case of *McQueary v. Stumbo*, another federal court deemed even a content-neutral funeral protest restriction to be unconstitutionally broad because it burdened "substantially more speech than [was] necessary to prevent interferences with a funeral or to protect funeral attendees from unwanted, obtrusive communications." 453 F. Supp. 2d a t 995- 96. On that basis, the district court in that case ruled that the challenged Kentucky statute burdened more speech than was necessary or warranted, and despite its content neutrality, abridged First Amendment freedoms. Regardless of the effect that the True Church of Christ's speech may have on a military funeral, the Ohio Act clearly burdens more speech than could be justified in the service of the asserted state interest.

The Act also fails to meet the requirement applied to all such cases – that the act should be narrowly tailored. Even if the law is content-neutral, a law that "restricts speech that is completely unrelated to the [asserted regulatory] interest" and goes beyond any need to "eliminate the evil it seeks to remedy" is properly found not to be narrowly tailored and invalid for that reason. 92 F.3d at 660, 665. The Act establishes 300 and 500 foot buffer zones around funeral services and processions, which are exponentially larger than the buffer zones upheld in *Madsen*

(thirty- six feet) and *Hill* (eight feet). In both *McQueary* and *Phelps-Roper v. Taft 452 U.S. 640 (1981)* where buffers were of comparable side, the acts restricting picketing and protesting at military funerals were deemed narrowly-tailored.

Finally, this act fails to provide adequate alternative means to disseminate the message. Here, the True Church of Christ tried to convey a message and wishes to do so in the future to an audience that can only be reached during this particular occasion. As the Supreme Court declared nearly seventy years ago, "[a speaker] 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 (1939). By placing temporal and spatial limits on speech, the Ohio Act fails to leave open alternative avenues for protest. This failure to afford or preserve adequate alternative channels by which a protestor or demonstrator may convey a particular message to a desired audience compounds the constitutional failures of this statute.

VI. Conclusion

The Ohio Syndicalism Statute and the Ohio Anti-Picketing at Funerals Act violate the First Amendment. The Ohio Syndicalism Statute as it was written practically restricts speech that is protected under the Constitution, no matter how abhorrent- the abstract advocacy of violence. Such advocacy does not incite imminent lawless action. The Anti-Picketing at Funeral Act is too broad, not narrowly tailored, and leaves no adequate alternative avenues for the particular speech it banned.

REVERSED.