Testimony of David F. Forte, Professor of Law, Cleveland-Marshall College of Law, Cleveland State University, in support of H.R. 5037
before the House Committee on Veterans Affairs, Subcommittee on Disability Assistance and Memorial Affairs, Jeff Miller, Chairman
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I. Introduction

H.R. 5037, entitled the "Respect for America's Fallen Heroes Act," seeks to limit "certain demonstrations" in cemeteries under the control of the National Cemetery Administration or on the property of Arlington National Cemetery. The bill defines what constitutes a demonstration disruptive of the memorial services or funerals being held in or within 500 feet of such cemeteries, but allows an exception for demonstrations on cemetery grounds if "approved by the cemetery superintendent." There are thus two constitutional issues to be confronted: 1) Does the ban on "certain" demonstrations meet the requirements of First Amendment law as laid down in Supreme Court precedents, and 2) Is the discretion lodged in the cemetery superintendent to permit exceptions fall within an acceptable constitutional range? I conclude that the answer to both questions is in the affirmative and that the bill is well within constitutional limits.

II. The Ban on Demonstrations

Demonstrations are a form of expressive conduct. In all governmental restrictions on expressive conduct, Supreme Court jurisprudence requires application of the *O'Brien* test, *United States v. O'Brien*, 391 U.S. 367 (1968) or of the "time, place, and manner" test. *Cox v. New Hampshire*, 312 U.S. 569 (1941). The Court has declared that both tests have similar standards. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

Under the *O'Brien* test, "a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 376. Under the "time, place, and manner" test, government regulations of expressive conduct are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open alternative channels for communication of the information." *Clark*, 468 U.S. at 293.

It is clear from the text of H.R. 5037 that the purpose of the bill is to assure the dignity of funerals or memorial services held in honor of our fallen dead by preventing demonstrations that are disruptive of those ceremonies. To that end, the bill delineates what kind of demonstrations shall be prohibited, *viz*, a demonstration within five hundred feet of a cemetery in which a funeral or memorial service is to be held if the demonstration takes place within a time period from 60 minutes before until 60 minutes after the funeral or memorial service. Furthermore, the bill requires that only those demonstrations in which a "noise or diversion" is willfully made and "that disturbs or tends to disturb the peace or good order of the funeral service or memorial service or ceremony" shall be prohibited.

Maintaining cemeteries for veterans is clearly within the constitutional power of government. It is also clear that, under 38 U.S.C. sect. 2403, the purpose of maintaining

cemeteries “as a tribute to our gallant dead” is an important or substantial governmental interest. It is similarly evident from the text of the bill that its purpose is to prevent conduct that is intentionally disruptive of a funeral or memorial service without reference to the content of the expressive conduct. The text does not ban accidental noises present in our modern society near to many cemeteries, such as traffic or the sounds of children playing. Nor does it ban only demonstrations with a particular kind of message. A demonstration connected with a labor dispute that is disruptive of a funeral is as violative of the law as would be an anti-war demonstration or a “support our troops” march. Finally, “the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance” of the interest of maintaining the dignity of a funeral for our fallen dead. Demonstrations 60 minutes before or 60 minutes after the ceremony are permitted. Even during the period in which a ceremony is being held, a demonstration beyond 500 feet of the cemetery is permitted. This is no blanket ban at all.

The fact that H.R. 5037 prohibits disruptive demonstrations on grounds that are not part of a national cemetery finds support in Supreme Court precedent. The case of *Grayned v. City of Rockford*, 408 U.S. 104 (1972) is directly on point. In *Grayned*, the Supreme Court upheld an antinoise ordinance, which read: “No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making on any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.” 408 U.S. at 107-08. It is axiomatic in our legal tradition that the state may take reasonable steps to abate a nuisance that may emanate from private property. What H.R. 5037 does is to abate a nuisance that would disturb the good order of a federally mandated activity in our

national cemeteries, namely, to provide memorial services and ceremonies that are "a tribute to our gallant dead."

It should be noted that in *Grayned*, the Supreme Court held that the antinoise ordinance was good against claims of overbreadth or vagueness. H.R. 5037's prohibition on "willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral or memorial service or ceremony" tracks the language approved by the Court in *Grayned*.

Furthermore, the language of H.R. 5037 finds support in the case of *Boos v. Barry*, 485 U.S. 312 (1988). In the case, the Supreme Court reviewed a District of Columbia law that made it unlawful to display any sign that brought a foreign government into "public odium" or "public disrepute" within 500 feet of an embassy, and which banned "congregating" within 500 feet of an embassy. The Court struck down the ban on displaying a sign critical of a foreign government, but upheld the ban on congregating if, as construed by the lower courts, the congregation was "directed at a foreign embassy." H.R. 5037 bans only those demonstrations within 500 feet of a cemetery that are intentionally disruptive of ceremonies or funerals within national cemeteries. The disruptive requirement does not need judicial construction. It is made in the terms of the statute and is fully supported by the decision in *Boos v. Barry*.

Under H.R. 5037, a person who displays "any placard, banner, flag, or similar device, unless the display is part of a funeral or memorial service or ceremony," and such a display causes a "diversion that disturbs or tends to disturb the good order of the funeral

or memorial service" is subject to the law. This prohibition is closely akin to the focused picketing ordinance upheld by the Supreme Court in *Frisby v. Schultz*, 484 U.S. 474 (1988). That ordinance banned picketing "before and about" any residence. Although in most public areas, people may picket and expostulate even though others may object to the message, in certain areas the functioning of the forum takes precedence, provided there are alternative ways the protestor may express his message. Schools are one forum whose functioning may not be disturbed or diverted. *Grayned.* The home is another place. Justice O'Connor noted that the picketers could still march through the neighborhood to express their opposition to abortion and abortionists. They simply could not disrupt the "tranquility" of a doctor's home. 484 U.S. at 484. Similarly, in H.R. 5037, the bill seeks to protect the tranquility and dignity of a memorial service. It allows the picketer or demonstrator to display whatever kind of sign or device he wishes one hour before or one hour after the ceremony, or at any time if more than 500 feet distant from the cemetery, even if it offends those who may be traveling to the ceremony.

If, however, a person displays "any placard, banner, flag, or similar device, unless the display is part of a funeral or memorial service or ceremony," and the display occurs within a cemetery, there is no requirement in the bill that it be part of a disruptive demonstration. But in that case, the display does not take place in a traditional public forum, such as a public sidewalk, but rather within a non-public forum dedicated to honoring our veterans. In that situation, the ban is a reasonable, and thereby a valid, restriction in a non-public forum designed to preserve the appropriate functioning of the

forum, *i.e.*, a national cemetery. I discuss the law applying to non-public forums in Part III below.

Thus, under either the *O'Brien* test or under the time, place and manner test, the statute is drawn to be within Constitutional standards.

Nonetheless, I find one phrase in the bill puzzling. Under section (b)(2), a demonstration is defined as "Any oration, speech, use of sound amplification equipment or device, or similar conduct *before an assembled group of people* that is not part of a funeral or memorial service or ceremony." (emphasis added) It would see that a single individual with a bullhorn who disrupts a ceremony might not be covered under this section. Thus, I do not see the use of the phrase "before an assembled group of people." In any event, with such a phrase, the restriction on expressive conduct is even less than would be permitted to be under the Constitution.

III. The discretion of the cemetery superintendent.

It is a central canon of our First Amendment jurisprudence that permission to engage in expressive conduct cannot be left to the unbridled discretion of a governmental official. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). Such a discretion carries with it the dangers of prior restraint, vagueness, overbreadth, and content and viewpoint discrimination. Section (a)(1) of H.R. 5037 prohibits demonstrations in cemeteries under the control of the National Cemetery Administration or in Arlington National Cemetery "unless the demonstration has been approved by the cemetery superintendent." Nonetheless, I do not believe that this section permits

unbridled discretion in the cemetery superintendent. Rather, I think that his discretion is well-cabined within and defined by the administrative function the law places upon the cemetery superintendent.

A case directly on point is *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002). Some veterans were not permitted under federal regulations from placing a Confederate flag at a national cemetery. Placing a flag was interpreted as a forbidden demonstration under 38 C.F.R., sect. 1.218(a)(14). Subsection (i) declares in part, "[A]ny service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited." Petitioners asserted that the section gave unconstitutional discretion to the administrator of the facility.

In *Griffin*, the Federal Circuit Court pointed out that cemeteries are non-public forums the regulations of which are subject only to a reasonable basis test. However, although the government may limit the content of expression in non-public forums, it may not engage in viewpoint discrimination. The question was whether the discretion given by the law to the cemetery's administrator brought with it the danger of viewpoint discrimination. After all, a Confederate flag carries a different viewpoint from the Stars and Stripes.

The Federal Circuit found that the Supreme Court had applied the viewpoint discrimination doctrine only in traditional public forums or in designated public forums. 288 F.3d at 1321. The court zeroed in on the relevant variable in this kind of case: "We are obliged to examine the nature of the forum because the restrictions in nonpublic fora may be reasonable if they are aimed at preserving the property for the purpose to which it is dedicated." 288 F.3d at 1323. Finding that there was sufficient Supreme Court support,

citing *United States v. Kokinda*, 497 U.S. 720 (1990), the Federal Circuit upheld the discretion lodged in the cemetery's administrator "when such discretion is necessary to preserve the function and character of the forum." 288 F.3d at 1323.

The purpose of many non-public forums is normative and preserving the function of that forum may entail restricting opposing normative viewpoints. Schools, for example, are nonpublic forums charged with developing students' character for participation as well-informed and well-developed citizens in our system of representative government. To that end, schools may insist that students observe rules of respect and avoid hateful or immoral language. A student with an opposite viewpoint who fails to observe the rules of respect and makes his point with crude language is not protected by the First Amendment. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1968). Accordingly, the superintendent of a national cemetery is charged with maintaining the cemetery and its activities "as a tribute to our gallant dead." Under H.R. 5037 he is granted reasonable discretion to assure that all activities within the cemetery accord with its lawfully stated purpose. He may permit ceremonies or demonstrations or signs or programs that accord with such purpose and forbid those that do not. In doing so, the restriction imposed is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 288 F.3d at 1321, citing, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

IV. Conclusion

H.R. 5037 is a well-crafted bill that seeks to maintain the decorum necessary to honor our veterans and those who have died for our freedoms and who now rest in national

cemeteries. I find that the bill's careful limitations on disruptive demonstrations and the limited discretion it gives to cemetery superintendents to be well with constitutional limits.