The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL:	SB 118
INTRODUCER:	Senator Benacquisto
SUBJECT:	Funerals, Burials, and Memorial Services
DATE:	February 11, 2013 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Favorable**
2.	Spaulding	Ryon	MS	**Favorable**
3.	Cellon	Cannon	CJ	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

SB 118 provides that it is a misdemeanor of the first degree[1] to knowingly picket or engage in a protest to disrupt or intend to disrupt or disturb a funeral, burial, or memorial service for any military service member, emergency response worker, elected official, or minor. The prohibited protest activities may not occur:

- Within 500 feet of the property line of any residence, cemetery, funeral home, house of worship, or other location, and
- During or within 1 hour before or 1 hour after the conducting of a funeral, burial, or memorial service at that place.

A first degree misdemeanor is punishable by a term of imprisonment not exceeding one year and a fine not to exceed $1,000.

The bill defines "protest activities" to mean "any actions that are disruptive or undertaken to disrupt a funeral, burial, or memorial service."

This bill creates section 871.015, of the Florida Statutes.

[1] Section 775.082, F.S., provides that the penalty for a misdemeanor of the first degree is punishable by a term of imprisonment not exceeding one year. Section 775.083, F.S., provides that the penalty for a misdemeanor of the first degree is punishable by a fine not to exceed $1,000.

II. Present Situation:

Demonstrations at Funerals

Rev. Fred Phelps, a minister from Topeka, Kansas, has been picketing military funerals and the funerals of AIDS victims across America.[2] He and family members of his congregation now often appear at military funerals with signs stating "God Hates You," and "Thank God for Dead Soldiers."[3] The Phelps family's premise for its protests is that the American war casualties are divine punishment for the country tolerating homosexuality.[4] This same group threatened to picket the funerals of the 26 people, including 20 children, who were killed by a gunman at a Newtown, Connecticut elementary school on December 14, 2012.[5]

Florida Law Prohibiting Disturbances at Assemblies

Section 870.01, F.S., provides a first degree misdemeanor[6] for a person to commit an affray. This section also provides a third degree felony[7] for rioting, or inciting or encouraging a riot. Although the terms "affray" and "riot" are not defined, the courts have upheld the statute against vagueness challenges.[8]

Section 871.01(1), F.S., provides a misdemeanor of the second degree for willfully interrupting or disturbing any school or any assembly of people met for the worship of God or for any lawful purpose.[9] This provision was challenged on appeal as being overly broad and therefore void. The Florida Supreme Court upheld the constitutionality of this provision in 1978, holding that the provision was not unconstitutional or overbroad.[10] The Second District Court of Appeals has also upheld s. 871.01(1), F.S., as not unconstitutionally overbroad or vague.[11]

Section 871.01(2), F.S., provides a first degree misdemeanor[12] penalty for anyone who willfully interrupts or disturbs an assembly of people who have met for the purpose of acknowledging the death of an individual with a military funeral honors detail pursuant to 10 U.S.C. s. 1491.

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[2] "Targeting Protests at Military Funerals" *Capitol Hill Blue* (March 15, 2006).
[3] "Military Funeral Protests Outrage Families, Lawmakers" *ABC News* (March 15, 2006).
[4] "Constitutionality of Protest Ban At Issue" *Tallahassee Democrat* (April 7, 2006).
[5] "Phelps' Son Condemns Plan to Picket Newtown Funerals," The Washington Post (December 17, 2012).
[6] *Supra* n. 1.
[7] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not exceeding five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not exceeding $5,000.
[8] *See D.L.B. v. State*, 707 So.2d 844, 845 (Fla. 2d DCA 1998) (statute sufficiently defines "affray," given that "readily available dictionaries define "affray" as a public fight or brawl"); *State v. Beasley*, 317 So.2d 750, 753 (Fla. 1975) (upholding s. 870.01(2), F.S. as constitutional upon the court's authoritative, limiting construction).
[9] Section 775.082, F.S., provides that the penalty for a misdemeanor of the second degree is punishable by a term of imprisonment not exceeding 60 days. Section 775.083, F.S., provides that the penalty for a misdemeanor of the second degree is punishable by a fine not to exceed $500.
[10] *S.H.B. v. State*, 355 So. 2d 1176 (Fla. 1978).
[11] *State v. Sweet*, 616 So.2d 114 (Fla. 2nd DCA 1993).
[12] *Supra* n. 1.

Federal Law Prohibiting Disturbances at Military Funerals

Federal law prohibits persons to engage in a disruptive activity during the period beginning 60 minutes before and ending 60 minutes after a funeral for a member or former member of the Armed Forces that is not located at a cemetery under the control of the National Cemetery Administration or part of Arlington National Cemetery.[13]

The following activity is prohibited within the boundaries of the funeral's location or within 150 feet of the point of the intersection between the boundary of the location of such funeral, and a road, pathway, or other route of ingress to or egress from the location of such funeral:

Willfully making of any noise or diversion that is not part of such funeral and that disturbs or tends to disturb the peace or good order of such funeral with the intent of disturbing the peace or good order of that funeral.[14]

Within 300 feet of the boundary of the funeral's location, it is prohibited to willfully and without proper authorization impede "the access to or egress from such location with the intent to impede the access to or egress from such location."[15]

Persons who violate this prohibition may be subject to a fine or imprisonment of not more than one year, or both.[16]

Snyder v. Phelps

In *Snyder v. Phelps*,[17] the U.S. Supreme Court addressed the First Amendment's relation to funeral protests. In March 2006, Westboro Baptist Church demonstrated near the funeral of Marine Lance Cpl. Matthew Snyder, who had been killed in Iraq. The demonstration included the display of signs reading "Thank God for Dead Soldiers," took place within 200-300 feet of the funeral procession, and concluded before the funeral began. Cpl. Snyder's father subsequently sued Phelps under state tort law, including a claim for intentional infliction of emotional distress. The jury found in favor of Snyder and awarded damages.

On appeal, the U.S. Supreme Court found that the First Amendment protected Phelps' speech because the speech took place in a public forum and the content was a matter of public concern. The Supreme Court also noted that, even though the speech in this case was protected, even protected speech "may be subject to reasonable time, place, or manner restrictions that are consistent with the standards announced in this Court's precedents."[18]

The *Snyder* case did not involve the constitutionality of a state statute regulating picketing. Rather, the Court addressed whether the First Amendment was a defense to a state tort claim for intentional emotional distress, which is a separate issue.

[13] 18 U.S.C. s. 1388
[14] 18 U.S.C. s. 1388(a)(1)
[15] 18 U.S.C. s. 1388(a)(2)
[16] 18 U.S.C. s. 1388(b)
[17] *Snyder v. Phelps*, 131 S.Ct. 1207(2011).
[18] *Id.* at 1218.

Military Funeral Honors for Veterans

Under federal law, the Secretary of Defense is directed to provide special military funeral honors for any deceased veteran[19] when so requested by the veteran's family. The funeral honors detail must consist of at least two uniformed members of the armed forces, one of whom must be a member of the armed force of which the veteran was a member. At a minimum the detail shall perform the folding of the United States flag and its presentation to the family as well as the playing of Taps.[20]

III. Effect of Proposed Changes:

The bill creates s. 871.015, F.S, to prohibit a person to knowingly picket or engage in other protests at a funeral, burial, or memorial service for any military service member, emergency response worker, elected official, or minor. The prohibited protest activities may not occur:

- Within 500 feet of the property line of any residence, cemetery, funeral home, house of worship, or other location, and
- During or within 1 hour before or 1 hour after the conducting of a funeral, burial, or memorial service at that place.

The bill defines "protest activities" to mean "any actions that are disruptive or undertaken to disrupt a funeral, burial, or memorial service."

A person who violates this section commits a misdemeanor of the first degree.

The prohibition created in s. 871.015, F.S., differs in several respects from the prohibitions in s. 871.01(2), F.S., and in 18 U.S.C. s. 1388. To violate s. 871.01(2), F.S., a person must interrupt or disturb a military funeral honors detail pursuant to 10 U.S.C. s. 1491. This bill encompasses assemblies to honor military service members but does not require that the funeral must be a military funeral honors detail. The bill also relates to funerals, burial, memorial services for persons whose funerals do not fall within the scope of s. 871.01(2), F.S., to include an emergency response worker, elected official, and minor.

The term "emergency response worker" is not defined. It is not clear whether the term is limited to firefighters and paramedics, or whether the term also includes law enforcement officers or other public safety workers.[21]

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[19] A veteran is defined in Title 10 U.S.C. s. 1491(h) as a decedent who (1) served in the active military, naval, or air service, as defined in 38 U.S.C. s. 101(24), and who was discharged or released there from under conditions other than dishonorable; or (2) was a member or former member of the Selected Reserve described in 18 U.S.C. s. 2301(f).

[20] 10 U.S.C. s. 1491(b), (c).

[21] For example, s. 112.181(1) (b), F.S., defines the term: "emergency rescue or public safety worker" to mean "any person employed full time by the state or any political subdivision of the state as a firefighter, paramedic, emergency medical technician, law enforcement officer, or correctional officer who, in the course of employment, runs a high risk of occupational exposure to hepatitis, meningococcal meningitis, or tuberculosis and who is not employed elsewhere in a similar capacity. However, the term "emergency rescue or public safety worker" does not include any person employed by a public hospital licensed under chapter 395 or any person employed by a subsidiary thereof."

However, it appears that the facts or circumstances that would constitute a violation of s. 871.01(2), F.S., may also constitute a violation of the prohibition in this bill if the distance and time requirements in s. 871.015, F.S., are also met. Either violation would be a first degree misdemeanor.

Similar conduct may also violate both s. 871.015, F.S., and 18 U.S.C. s. 1388. For example, the distance restriction in 18 U.S.C. s. 1388 is 300 feet from the location of the assembly. Such a distance would fall well within the 500 feet restriction in the bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It is a fundamental constitutional principle that debate, particularly on issues of public concern, should not be inhibited by the government.[22] Therefore, the most important question regarding the First Amendment issues of the bill is *whether the government is prohibiting speech based on disfavored content*.[23] Such "content-based" regulations are presumptively suspect and are subject to strict scrutiny by the court.[24]

On the other hand, the government *may* restrict speech through time, place, and manner regulations that are *justified without reference to the content of the speech*.[25] The Eighth Circuit Court of Appeals has found both a city ordinance[26] and a state statute[27] prohibiting protest activities within a certain time and distance of a funeral to be content-neutral.

Content-neutral restrictions are subject to intermediate scrutiny by the court.[28] Under intermediate scrutiny, the court looks at the relationship, or "fit" between the *end* and the *means* of the statute. In other words, the restrictions of the statute must be *narrowly*

[22] *Snyder*, 131 S.Ct. at 1215 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).
[23] *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
[24] *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994).
[25] *See Ward*, 491 U.S. at 791 (emphasis added; internal quotations omitted); *Snyder*, 131 S.Ct. at 1218.
[26] *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012).
[27] *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008).
[28] *See Turner*, 512 U.S. at 642.

tailored to achieve a *significant state interest.*[29] Additionally, the statute must leave open "ample alternative channels" for the restricted speech.[30]

- A significant *state interest* is grounded in the state's traditionally broad police powers.[31] Courts have found a state has a significant interest in protecting its citizens from disruption during events associated with a funeral or burial service,[32] and in public safety concerns resulting from disruptions of the public order.[33] Additionally, citizens have a recognized interest in avoiding unwanted speech, including in confrontational settings.[34]
- A statute is *narrowly tailored* to a significant state interest if it does not burden substantially more speech than necessary to achieve the state's goal.[35] To be narrowly tailored in this context, the statute does *not* have to be the least restrictive means available.[36]
- In the context of a statute regulating picketing in residential areas, the U.S. Supreme Court found there were *ample alternative channels* when: "Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching.... They may go door-to-door to proselytize their views. They may distribute literature in this manner ... or through the mails. They may contact residents by telephone, short of harassment."[37]

The bill limits the definition of "protest activities" as actions "undertaken with the intent to interrupt or disturb a funeral, burial, or memorial service." The Sixth Circuit U.S. Court of Appeals found a statute was narrowly tailored that described protest activities as "any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service."[38] The court noted that the language limited "protest activities" to those *directed* at a particular funeral.[39] Furthermore, the Eighth Circuit U.S. Court of Appeals found that a statute that did *not* contain such language was likely *not* narrowly tailored for injunction purposes.[40]

Regarding the distance restrictions in the bill, in 2007, the U.S. District Court for the Northern District of Ohio held an Ohio statute's 300 feet "fixed" restriction surrounding funeral locations constitutional, but held the "floating buffer zone" surrounding funeral

[29] *Ward*, 491 U.S. at 791.
[30] *Id*.
[31] *See Hill v. Colorado*, 530 U.S. 703, 715 (2000).
[32] *Phelps-Roper v. Taft*, 523 F.Supp.2d 612, 618 (N.D. Ohio 2007) aff'd in part sub nom. *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).
[33] *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Dist. of Columbia*, 972 F.2d 365, 372 (D.C. Cir. 1992) (citing *Mosley*, 408 U.S. at 98).
[34] *Hill* at 716-17.
[35] *See Turner*, 512 U.S. at 662.
[36] *Id. See also Hill*, 530 U.S. at 726.
[37] *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).
[38] *Phelps-Roper v. Strickland*, 539 F.3d 356, 368 (6th Cir. 2008).
[39] *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474 (1988)).
[40] *Phelps-Roper v. Nixon*, 545 F.3d 685, 693 (finding statute likely not narrowly tailored "[b]ecause the Missouri statute does not contain any such [narrowing] provisions").

processions unconstitutional because it was not narrowly tailored.[41] That holding conforms to a prior Supreme Court case addressing buffer zones.[42] Additionally, courts have found the *size* of the restricted area itself to be context-specific.[43]

Regarding the bill's prohibitions against protest activities, the First Amendment affords the highest protection to speech based on matters of public concern or "political speech."[44] However, citizens also have a recognized interest not to be forced to hear unwanted speech.[45] Protecting citizens from hearing unwanted speech is referred to as the "captive audience" doctrine.[46] To illustrate the point, there is a difference between someone holding a sign displaying an offensive message, where the burden falls on offended viewers to "avoid further bombardment of their sensibilities simply by averting their eyes,"[47] and forcing citizens to "undertake Herculean efforts to escape the cacophony of political protests."[48] The Supreme Court has held that in some cases, funeral attendees are not a "captive audience" to protest speech.[49] In other cases, courts have held that forcing a funeral attendee to choose between attending a funeral and hearing the unwanted protest communication effectively makes the attendees a "captive audience."[50] The Supreme Court noted in *Snyder v. Phelps* that the captive audience doctrine has been applied "only sparingly."[51]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

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[41] *Phelps-Roper v. Taft*, 523 F.Supp.2d at 620 (N.D. Ohio 2007) ("statute not narrowly tailored, in that it burdens substantially more speech than necessary to serve the State of Ohio's interest protecting its citizens from disruption during the events associated with a funeral or burial service").
[42] *See Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 377 (1997) (finding that injunction imposing floating buffer zones of 15 feet from people and vehicles entering and leaving clinics were not narrowly tailored).
[43] *See Madsen*, 512 U.S. at 772; *Strickland*, 539 F.3d at 368.
[44] *See Snyder*, 131 S.Ct. at 1215.
[45] *See Hill*, 530 U.S. at 716-17.
[46] *Snyder*, 131 S.Ct. at 1220.
[47] *Hill* at 716 (internal quotations omitted).
[48] *Id.* (quoting *Madsen*, 512 U.S. at 772-73).
[49] *Snyder*, 131 S.Ct. at 1220 (finding mourner was not a captive audience to protest speech when protestors stayed 1,000 feet away from the funeral location, mourner could only see the tops of the signs when driving to the funeral, and there was no indication that the picketing in any way interfered with the funeral service itself.").
[50] *See Phelps-Roper v. Strickland*, at 362; *McQueary v. Stumbo*, 453 F.Supp.2d 975, 992 (E.D. Ky. 2006). *But compare Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008).
[51] *Snyder*, 131 S.Ct. at 1220.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.