

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 31 Funerals, Burials, and Memorial Services

**SPONSOR(S):** Rooney and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 632

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Smith	Cunningham
2) Judiciary Committee			

### SUMMARY ANALYSIS

Florida law currently contains a number of provisions that make it unlawful to incite riots, breach the peace, and disturb lawful assemblies. For example, s. 871.01, F.S., makes it unlawful for a person to:

- Willfully interrupt or disturb any lawful assembly, including schools and assemblies gathered for the worship of God.
- Willfully interrupt or disturb a group of people who are assembled to acknowledge the death of a person with a "military funeral honors detail" as defined by 10 U.S.C. s. 1491.

The bill expands current law targeting funeral disturbances by prohibiting a wider scope of conduct in a broader range of instances. Specifically, the bill makes it a first degree misdemeanor to knowingly picket or engage in protest activities or knowingly cause picketing or other protest activities to occur:

- Within 500 feet of the property line of any location,
- During or within 1 hour before or 1 hour after the conducting of a funeral, burial, or memorial service at that place for any military service member, emergency response worker, elected official, or minor.

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

The distinction between s. 871.01, F.S., and the bill's provisions are subtle but significant. Section 871.01, F.S., prohibits a person from acting with the intention to interrupt or disturb an assembly *and that does in fact significantly disturb the assembly*. The bill prohibits "actions that are undertaken to disrupt" certain funerals under the specified conditions, regardless of whether those actions *do in fact* disrupt such funerals.

The bill may have a fiscal impact on county jails in that it creates a new first degree misdemeanor offense.

The bill is effective October 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

Florida law currently contains a number of provisions that make it unlawful to incite riots, breach the peace, and disturb lawful assemblies. A summary of these statutes follows.

##### Section 877.03, F.S.

Section 877.03, F.S., relates to breach of the peace and disorderly conduct. The statute makes it a second degree misdemeanor<sup>1</sup> for a person to commit acts that:

- Corrupt public morals;
- Outrage the sense of public decency;
- Affect the peace and quiet of persons who may witness them;
- Engage in brawling or fighting; or
- Engage in such conduct as to constitute a breach of peace or disorderly conduct.

Florida courts have narrowed the construction of this language to prohibit speech that constitutes “fighting words”<sup>2</sup> or words that “inflict injury or tend to incite immediate breach of peace.”<sup>3</sup>

##### Section 870.01, F.S.

Section 870.01, F.S., makes it a first degree misdemeanor<sup>4</sup> for a person to commit an affray. The statute also makes it a third degree felony<sup>5</sup> for a person to riot, or incite or encourage a riot. Although the terms “affray” and “riot” are not defined, the courts have upheld the statute against vagueness challenges.<sup>6</sup>

##### Section 870.02, F.S.

Section 870.02, F.S., relates to unlawful assemblies. The statute makes it a second degree misdemeanor for three or more persons to meet together to commit a breach of the peace,<sup>7</sup> or to do any other unlawful act.

##### Section 871.01, F.S.

Section 871.01(1), F.S., makes it a second degree misdemeanor to willfully interrupt or disturb any lawful assembly, including schools and assemblies gathered for the worship of God. The Florida Supreme Court upheld this statute against First Amendment and overbreadth challenges.<sup>8</sup>

In 2006, in response to various groups creating public disturbances at high profile military funerals, subsection (2) was added to s. 871.01, F.S.<sup>9</sup> Section 871.01(2), F.S., makes it a first degree misdemeanor for a person to willfully interrupt or disturb a group of people who are assembled to acknowledge the death of a person with a “military funeral honors detail” as defined by 10 U.S.C. s. 1491. A military honors detail includes the presence of two uniformed members of the armed forces, the playing of Taps, the folding of the United States flag and its presentation to the family.<sup>10</sup>

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<sup>1</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

<sup>2</sup> *Macon v. State*, 854 So.2d 834, 837 (Fla. 5th DCA 2003)

<sup>3</sup> *United States v. Lyons*, 403 F.3d 1248, 1254 (11th Cir. 2005)

<sup>4</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>5</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>6</sup> *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 Section 870.01(2), F.S. as constitutional upon the Court’s authoritative, limiting construction).

<sup>7</sup> Breach of the peace is described in s. 877.03, F.S.

<sup>8</sup> *S.H.B. v. State*, 355 So.2d 1176 (Fla. 1978).

<sup>9</sup> Chapter 2006-264, L.O.F., *Also see*, Florida House of Representatives Staff Analysis, House Bill 7127 (2006).

<sup>10</sup> 10 U.S.C. s. 1491

Although s. 871.01, F.S., does not define the phrase “interrupt or disturb,” the Supreme Court of Florida has described the phrase as follows:

[A] person must have deliberately acted to create a disturbance...the person must have acted with the intention that his behavior impede the successful functioning of the assembly or with reckless disregard of the effect of his behavior; additionally, the acts complained of must be such that a reasonable person would expect them to be disruptive and the acts must, in fact, significantly disturb the assembly.<sup>11</sup>

### **Effect of the Bill**

The bill creates s. 871.015, F.S., which targets conduct that takes place within a specified time and distance of certain funerals. The bill expands current law targeting funeral disturbances by prohibiting a wider scope of conduct in a broader range of instances.

The bill makes it a first degree misdemeanor to knowingly picket or engage in protest activities or knowingly cause picketing or other protest activities to occur:

- Within 500 feet of the property line of any location,<sup>12</sup>
- During or within 1 hour before or 1 hour after the conducting of a funeral, burial, or memorial service at that place for any military service member, emergency response worker, elected official, or minor.

The bill defines “other protest activities” as “any actions that are disruptive or undertaken to disrupt or disturb a funeral, burial, or memorial service.”

The distinction between s. 871.01, F.S., and the bill’s provisions are subtle but significant. Section 871.01, F.S., prohibits a person from acting with the intention to interrupt or disturb an assembly *and that does in fact significantly disturb the assembly*. The bill prohibits “actions that are undertaken to disrupt” certain funerals under the specified conditions, regardless of whether those actions *do in fact* disrupt such funerals.

## **B. SECTION DIRECTORY:**

Section 1. Creates s. 871.015, F.S., relating to unlawful protests.

Section 2. Provides that the act shall take effect October 1, 2012.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

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<sup>11</sup> *S.H.B. v. State*, 355 So.2d 1176 (Fla. 1977) (“These elements are inherent in the statute as drafted.”).

<sup>12</sup> Including but not limited to a residence, cemetery, funeral home, or house of worship.

## B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

### 1. Revenues:

The bill does not appear to have any impact local government revenues.

### 2. Expenditures:

The bill may have a fiscal impact on county jails in that it creates a new first degree misdemeanor offense.

## C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

## D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

#### 2. Other:

#### **The First Amendment of the U.S. Constitution**

“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.”<sup>13</sup>

The First Amendment protects not only verbal speech, but also expressive conduct such as picketing.<sup>14</sup>

#### **Snyder v. Phelps**

A recent U.S. Supreme Court case 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 Westboro 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 Westboro’s speech because, among other reasons, the speech took place in a public forum and the content was a matter of public concern. The 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*.”<sup>15</sup>

It is important to note that the *Snyder* case did not involve the Court reviewing 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. Thus, when

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<sup>13</sup> Amendment I, United States Constitution (emphasis added).

<sup>14</sup> See *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“ordinance affects picketing, which is expressive conduct” and is protected by the First Amendment).

<sup>15</sup> *Snyder v. Phelps*, 131 S.Ct. 1207, 1218 (2011).

examining, the constitutionality of a statute that regulates picketing, it is important to examine whether the statute conforms to U.S. Supreme Court precedent.

## **Court Precedent**

### Content-Neutrality

The central analysis for First Amendment purposes is whether the government is restraining certain speech based on disagreement with its content.<sup>16</sup> Statutes that do not restrain speech based on content are referred to as content-neutral statutes, while statutes that restrain speech based on are referred to as content-based statutes.

A statute is “content-neutral” if it regulates the activity regardless of the subject matter of the speech.<sup>17</sup> The court reviews content-neutral time, place, manner regulations under “intermediate scrutiny.”<sup>18</sup> To survive intermediate scrutiny, the statute must (1) achieve a substantial state interest (2) through narrowly tailored means.<sup>19</sup> As to the first element, a U.S. District Court in Ohio held in 2007 that the state has a significant interest in protecting its citizens from disruption during events associated with a funeral or burial service.<sup>20</sup> As to the second element, a statute is not narrowly tailored where “a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals.”<sup>21</sup> For example, the District Court in the 2007 Ohio case held the 300 feet “fixed” buffer zone around funeral locations constitutional, but held the “floating buffer zone” around funeral processions unconstitutional because it was not narrowly tailored.<sup>22</sup>

On the other hand, a regulation is “content-based” if it makes distinctions between the subject matter of speech affected by the regulation.<sup>23</sup> If a statute regulates speech based on subject matter, it is said to be content-based, and is subject to strict scrutiny by the Court. Strict scrutiny is substantially more difficult to survive, as it requires a compelling state interest (as opposed to a significant state interest), and must be narrowly tailored to that interest.<sup>24</sup>

It could be argued that the bill is content-neutral, because it prohibits a person from engaging in protest activities with the intent to disrupt a funeral, regardless of the content of the protest activity. If content-neutral, the bill would be subject to intermediate scrutiny.<sup>25</sup>

However, it could also be argued that the bill is content-based, because in reality, only protest activities involving certain content will be targeted. If content-based, the bill would be subject to strict scrutiny.<sup>26</sup>

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<sup>16</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)

<sup>17</sup> For example, a U.S. Court of Appeals held in 2008 that an Ohio statute prohibiting protest activities within 300 ft of the location of a funeral during or within 1 hour before or 1 hour after a funeral being conducted is content-neutral. *See Phelps-Roper v. Taft*, 523 F.Supp.2d 612, 618 (N.D. Ohio 2007).

<sup>18</sup> *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (“regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny”).

<sup>19</sup> *Turner v. F.C.C.*, 512 U.S. at 662 (1994)

<sup>20</sup> *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)

<sup>21</sup> *Turner Broad. v. F.C.C.*, 512 U.S. at 682 (quoting *Simon & Schuster*, 502 U.S. 105, 122 (1991) (internal quotation marks omitted)).

<sup>22</sup> *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”).

<sup>23</sup> *Police Dept. v. Mosley*, 408 U.S. at 94 (statute that prohibits picketing within a certain distance of a school but exempts labor-related picketing is content-based).

<sup>24</sup> *Id.* at 535 (strict scrutiny means the statute must be “a narrowly tailored means of serving a compelling state interest”).

<sup>25</sup> *See McQueary v. Stumbo*, 453 F.Supp.2d 975 (E.D. Ky. 2006) (holding funeral protest statute constitutional).

<sup>26</sup> *See Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008).

### Overbreadth Doctrine of the First Amendment

A statute that prohibits a substantial amount of protected speech may be held to be unconstitutionally overbroad.<sup>27</sup> In order for a statute to overcome an overbreadth challenge, it must be narrowly tailored to serve a significant government interest, similar to the content-neutral First Amendment analysis. “Narrowly tailored” does not necessarily mean it must be the least restrictive means of achieving that interest. As a U.S. District Court noted, “the requirement of narrow tailoring is satisfied so long as regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>28</sup>

The bill may be vulnerable to overbreadth challenges for two reasons. First, it may prohibit a substantial amount of protected speech as it may have a chilling effect on constitutionally protected speech. Second, it may prohibit more conduct than that which is necessary to protect the state interest at issue. A July 2010 Michigan case provides a relevant example. In that case, a Michigan couple, who was part of a vehicle funeral procession, were in their van, which had for years displayed various messages critical of U.S. policy and President Bush. These messages were observable from the outside of the van. The couple was arrested and held in jail for 24 hours under Michigan’s funeral protest law which makes it illegal, in pertinent part, to engage in conduct that will adversely affect a funeral or funeral procession. The U.S. District Court found that parts of the statute were likely unconstitutional under the overbreadth doctrine of the First Amendment.<sup>29</sup>

### Vagueness Doctrine of the Fourteenth Amendment

A statute is unconstitutional under the vagueness doctrine if an ordinary person of average intelligence would not be put on notice as to what conduct is prohibited by the statute. Vague statutes invite arbitrary and discriminatory enforcement.<sup>30</sup> When a statute is challenged as having a chilling effect on constitutionally protected speech due to vagueness, courts have held that a more stringent vagueness test should apply.<sup>31</sup>

The bill may be vulnerable to vagueness challenges if an ordinary person of average intelligence would not understand what type of conduct would be deemed conduct “undertaken to disrupt” a funeral.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### **The bill uses the terms “disrupt,” without providing a definition.**

Section 871.01, F.S., prohibits conduct that “disturbs,” which is not defined in the statute but has withstood vagueness challenges in the Florida Supreme Court.<sup>32</sup> If the intent of the bill is to prohibit a broader scope of conduct than s. 871.01, F.S., by distinguishing “disturb” from “disrupt,” then “disrupt” may need to be defined, because the two terms are similar and are used in similar contexts, and therefore may be difficult for a common person to distinguish.

##### **The bill uses the term “picket” without providing a definition.**

The bill defines “other protest activities,” but it does not include “picket” within that definition. Instead, the bill prohibits picketing or other protest activities. If the intent of the bill is to prohibit picketing that disrupts or disturbs certain funerals, “picketing” should be included in the definition as a specific example of a protest activity.<sup>33</sup>

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<sup>27</sup> *United States v. Williams*, 553 U.S. 285, 292 (2008).

<sup>28</sup> *Phelps-Roper v. Taft*, 523 F.Supp.2d 612 (N.D. Ohio 2007).

<sup>29</sup> *Lowden v. County of Clare*, 709 F.Supp.2d 540, 563 (E.D. Mich. 2010) (“...the interaction of the 500 foot buffer zone and the “adversely affects” language is particularly problematic given the broad scope of expressive activity restricted in such a large space”).

<sup>30</sup> *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

<sup>31</sup> *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

<sup>32</sup> *S.H.B. v. State*, 355 So.2d 1176, 1178 (Fla. 1977)

<sup>33</sup> For example, the definition could read: “As used in this section, the term “other protest activities” means any actions, including but not limited to picketing, that are disruptive or undertaken to disrupt or disturb a funeral, burial, or memorial service.”

**The bill does not link the intent element of the conduct to the prohibited instance of that conduct.**

The bill prohibits “other protest activities” in instances where such conduct is within 500 feet and 1 hour of funerals, burials, or memorial services of specified individuals. The bill defines “other protest activities” as “any actions that are disruptive or undertaken to disrupt or disturb a funeral, burial, or memorial service.” If the intent of the bill is to prohibit protest activities that disrupt only the funerals, burials, or memorial services of the specified individuals, the definition should reference activities that disrupt only those specific funerals, burials, or memorial services. Otherwise, conduct that meets the criteria of a protest activity but does not meet the criteria for the prohibited instance of a protest activity could be prohibited.<sup>34</sup>

**The bill uses the terms “military service member,” “emergency service worker,” and “minor” without providing definitions.**

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>34</sup> For example, if there are two funerals taking place. A protest activity targeted at a military funeral could be 2 hours after that funeral, but within 30 minutes of the funeral for an emergency worker. The activity would be illegal, although it is not intended to disrupt the funeral for the emergency worker.