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M E M O R A N D U M March 10, 2011

SUBJECT: Amendment to AS 11.61.110 (disorderly conduct) adding picketing or protesting at a funeral as an offense (Work Order No. 27-LS0627\A)

TO: Representative Bob Herron
Attn: Rob Earl
Representative Bill Thomas
Attn: Kaci Schroeder

FROM: Doug Gardner
Director

You asked for a bill that would limit picketing and protests at a funeral, and requested a criminal law solution as a way to achieve this limitation. I chose to amend AS 11.61.110, to add picketing or protesting at a funeral to the offense of Disorderly Conduct. Enclosed is a draft that I believe accomplishes your request. Given the extensive constitutional issues presented by this bill, I have briefly outlined the issues that may come up if this bill is introduced. If you would like more detail, please advise, and I can provide it.

Overview

At present, in excess of 45 states have passed laws that in one way or another, are very similar to the attached draft bill. Much of the litigation involving various state funeral protest laws has been concentrated in the states that comprise the Sixth Circuit (KY., MI., OH., and TN.), and the Eighth Circuit (AR., IA., MN., MO., NE., S.D.) federal courts. An observation about this trend is that the Westboro Baptist Church, which is a party to or involved in virtually all of these cases is based in Topeka, Kansas, and engages in protest activities with more frequency in areas near the church's home town. Given the volume of litigation in the Sixth and Eighth Circuit courts, and eventually at the appellate level, I chose to draft this bill based on lessons learned in litigation in these circuits, and to base this bill on state statutes that have passed constitutional muster. However, it is important to observe, that the U. S. Supreme Court has yet to address a criminal law involving funeral picketing or protests. The recent high profile decision in *Snyder v. Phelps*, 2011 WL 709517 (U.S.), was a decision that involved civil litigation for money damages, and not a criminal law, so the decision, while instructive, does not resolve some of the issues that are unique to criminal law in the context of free speech.

Snyder v. Phelps

With that backdrop, I want to briefly address and summarize the recent decision in *Snyder v. Phelps* issued by the Supreme Court last week. Mr. Snyder sued Westboro Church leader Albert Phelps in a civil action based on the theory that picketing, and the content of that picketing by Westboro Church at his son's funeral (Snyder's son was a Lance Corporal in the United States Marine Corps, and died as a result of injuries sustained in Iraq in the line of duty), was done in a way that intentionally caused him emotional distress. Some of the slogans on the pickets that Mr. Snyder acknowledged in court proceedings that he could briefly see the tops of from his position in the motorcade to the funeral, included "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell."

The first question for the *Snyder* Court was whether the highest protection afforded speech by the First Amendment of the U. S. Constitution applied to Westboro's speech. The Court concluded, that while offensive to many, the issues raised by Westboro's picket signs were public speech entitled to the "highest rung" of protection in the hierarchy of First Amendment protections. As a consequence, the Court decided that the jury verdict for over $10 million returned at trial in the lower district court had to be set aside because the public speech of Westboro was protected by the First Amendment, and as a consequence was not actionable in a claim for money damages by Mr. Snyder.

In *Snyder*, Chief Justice Roberts, writing for the majority of the Court, observed that after the protest in 2006 by Westboro church at Mr. Snyder's son's funeral, the Maryland Legislature passed a law that prohibits picketing within 100 feet of a funeral service or procession, and noted that Westboro's picketing would have complied with that law. The Court clearly wanted to point out that its decision in *Snyder* did not address Maryland's picketing law, and that "to the extent [law's like Maryland's] are content neutral, they raise very different questions from the tort verdict at issue in [*Snyder*]." However, Chief Justice Roberts noted that the Supreme Court has, in past cases where a law was content neutral, allowed time, place, and manner restrictions and regulation of public speech. These situations were noted by the Chief Justice as picketing around a home and a buffer zone between protesters and an abortion clinic entrance. *Snyder v. Phelps*, 2011 WL 709517 p.17-18 (U.S.), *citing Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (holding that a state has a significant interest in banning targeted picketing in front of private residences where individuals are captive audiences); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994) (court rejected a 300 foot buffer zone around an abortion clinic as overly broad restriction, but court approved a 36 foot buffer zone around clinic entrance).

Eighth Circuit Cases

The Eighth Circuit Court of Appeals, in *Olmer v. Lincoln*, 192 F.3d 1176 (8th Cir. 1999), decided in the context of an ordinance that restricted picketing of churches and other religious premises 30 minutes before during and after a funeral service, that while the state has a significant interest in banning targeted speech in front of a person's home

where individuals are captive audiences, that churches are distinguishable, and that the state's interest regarding a church is not as great. As a consequence, the Eighth Circuit cases where funeral protest ordinances or statutes have been litigated have been found unconstitutional, because the state interest in regulating public speech has not been significant enough to justify the state-imposed time, place, and manner restrictions. So, when addressing a content neutral restriction on speech, the Eighth Circuit Court of Appeals has not found funeral protest statutes constitutional, based on the state's failure to meet the first of the three-part test that the court applied in *Olmer*: (1) does the statute regulating speech serve a significant state interest; (2) is the statute narrowly tailored; and (3) does it leave open ample alternative channels of communication.

Despite the *Olmer* decision, a recent decision by a trial court in the Eighth Circuit regarding a Nebraska state criminal statute banning funeral protests within 300 feet of a cemetery, etc., and one hour before until one hour after a funeral, was upheld as constitutional. *Phelps-Roper v. Heineman*, 720 F.Supp.2d 1090 (D. Nebraska 2010). In *Heineman*, the trial court distinguished the *Olmer* decision, finding that the Nebraska statute, which included findings articulating the state's interest in protecting families of the deceased, demonstrated a significant state interest. The trial court also held, that despite the *Olmer*, decision, that it considered grieving family members a captive audience at a funeral, who may be under stress and may suffer emotional harm under circumstances at a funeral where they are unable to avoid pickets and protests. The *Heineman* case is on appeal to the Eighth Circuit Court of Appeals. In summary, the *Heineman* court found that in the case of the content neutral Nebraska statute: (1) the state demonstrated a significant state interest in protecting family members; (2) the statute was narrowly tailored both in time restrictions (hour before until an hour after the funeral with a 300 foot buffer); and that (3) alternate means of speech to communicate Westboro's messages exist (buffer zone is limited to an hour before until an hour after funeral and protesting outside the buffer zone is not restricted in any way at any time).

Sixth Circuit Cases

For purposes of this brief summary, it is not necessary to go into too much detail regarding funeral protests case law in the Sixth Circuit. In *Phelps-Roper v. Bob Taft*, 523 F.Supp.2d 612 (N.D. Ohio 2007), the trial court judge considered an Ohio statute essentially the same as the Nebraska statute in *Heineman*, which created a "fixed" buffer zone of 300 feet[1] around a church or other place where a funeral was being held. The

[1] Most of the state funeral protest statutes I reviewed provided for a 300 foot buffer zone between protesters and funeral attendees. I would note, that while the *Heineman* court and the *Taft* court found 300 foot buffer zones narrowly tailored and allowing alternative channels for speech, other courts have found 300 foot buffer zones overly broad, burdening substantially more speech than necessary to further the government's interest. See *Phelps-Roper v. County of St. Charles*, 2011 WL 227561 (E.D. MO.). I drafted this bill consistent with a 200 foot buffer, which is more conservative than the buffer found in

Ohio statute also imposed a "floating" buffer zone of 300 feet around a funeral procession. The court found the floating buffer unconstitutional, as has every court that I am aware of that has considered the "floating" buffer zone. I would note that on appeal, the Ohio attorney general's office made the decision not to cross-appeal or litigate the part of the trial court's decision involving the floating buffer zone, so I will not address that issue further. With regard to the "fixed" buffer zone, both the trial court and the Sixth Circuit Court of Appeals found the Ohio funeral protest statute content neutral, and constitutional for essentially the same reasons that the *Heineman* trial court did in Nebraska. *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

Alaska Law and Summary of Drafting Issues

In drafting the enclosed bill amending AS 11.61.110, to add a funeral picketing and protest provision to the offenses comprising disorderly conduct in Alaska, I tried to track both the legislative finding language in Revised Statute of Nebraska § 28-1320.01 to 28-1320.03 (2008), and the language of the statute itself. By tracking the Nebraska language and legislative findings and intent, the draft bill focuses on: (1) a statute that has already been found to be content-neutral; (2) a judicial finding of a strong state interest in protecting family members of the deceased, as opposed to a broader group of funeral attendees; (3) statutory language that only restricts picketing focused on a funeral, similar to the language of the ordinance in *Frisby*, 487 U.S. at 482; and (4) a statute that has been held to allow alternative channels for communication.

In Alaska, if the proposed amendments to AS 11.61.110 are scrutinized by the courts as time, place, and manner, content neutral restrictions on speech, the state will have to demonstrate that these restrictions are narrowly tailored, supported by a significant state interest, and leave open ample alternative channels for expression. *Prentzel v. State*, 1988 WL 1511365 (Alaska App.), *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). As with any constitutional challenge, the outcome of litigation is always difficult to predict, based on the facts and circumstances of each case, and based on the different outcomes observed in the analysis by the Sixth and Eighth Circuit Courts of Appeal. Please review the enclosed draft, and let me know how you would like to proceed. As you requested, I am also sending a copy of this draft to Representative Thomas's office.

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Enclosure

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most state statutes, but you may wish to narrow this buffer zone, perhaps to 150 feet as was done by Congress in 18 U.S.C.S 1388 (prohibition on disruption of funerals at Arlington National Cemetery) or to 100 feet as adopted by the State of Maryland in MD. Code Ann., Criminal Law, § 10-205 (West. 2010).