

HB

234

<TARGET><BILL>HB 234</BILL><SUBJECT>HB
234</SUBJECT><COMM>HJUD27</COMM></TARGET>



REPRESENTATIVE BILL THOMAS

ALASKA STATE LEGISLATURE DISTRICT 5

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Sponsor Statement HB 234

“An Act relating to picketing or protests at a funeral.”

The death of a loved one is one of life’s most tragic events. More than 46 states across the country have enacted laws protecting families at funerals during their time of grief. These laws establish standards of conduct which respect the family’s need for respect and privacy during this difficult time while also allowing others to express their viewpoints.

HB 234 brings Alaska in line with the majority of states and adopts the guidelines which govern conduct during a funeral. HB 234 is modeled after the guidelines used by our national cemeteries and requires that:

- Picketing not take place within 150 feet of the boundary of the cemetery, church, or other facility where the funeral services are occurring, and
- Picketing not take place one hour before or one hour after the service.

This bill asks anyone within the area of a funeral service to conduct themselves in a respectful manner for the duration of the service. HB 234 looks out for the interests of the grieving families while preserving the rights of others to voice their opinions.

I strongly urge your support of HB 234.

HOUSE BILL NO. 234

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - FIRST SESSION

**BY REPRESENTATIVES THOMAS, Herron, Olson, Thompson, Miller, Feige, Chenault, Johnson,
Peggy Wilson, Dick, Lynn, Saddler**

Introduced: 4/9/11

Referred: House Special Committee on Military and Veterans' Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to picketing or protests at a funeral."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
4 to read:

5 FINDINGS AND LEGISLATIVE INTENT. (a) The legislature finds that families
6 have a legitimate and legally cognizable interest in organizing and attending funerals for
7 deceased relatives, and that the rights of families to mourn the deaths of relatives peacefully
8 and privately are violated when funerals are targeted for picketing or other protest activities.
9 The legislature also finds that family members attending a funeral service are a captive
10 audience, and that it is very difficult for grieving family members to avoid picketing and
11 protest activities within 150 feet of the boundary of a cemetery, mortuary, church, or other
12 facility where a funeral is being held up to an hour before the beginning of a funeral and until
13 an hour after the conclusion of a funeral.

14 (b) The legislature also recognizes that individuals have a constitutional right to free
15 speech, and that, in the context of funeral ceremonies, the competing interests of picketers or

1 protesters and grieving family members must be balanced. Therefore, the legislature finds and
2 intends that the purpose of AS 11.61.110(a)(8), as enacted by sec. 2 of this Act, is to protect
3 the privacy of grieving families and to preserve the peaceful character of a cemetery,
4 mortuary, church, or other facility designated as the scheduled location for the funeral of a
5 deceased family member, while still providing picketers and protesters the opportunity to
6 communicate their message at a time and place that minimizes interference with the rights of
7 grieving family members of the deceased.

8 * **Sec. 2.** AS 11.61.110(a) is amended to read:

9 (a) A person commits the crime of disorderly conduct if,

10 (1) with intent to disturb the peace and privacy of another not
11 physically on the same premises or with reckless disregard that the conduct is having
12 that effect after being informed that it is having that effect, the person makes
13 unreasonably loud noise;

14 (2) in a public place or in a private place of another without consent,
15 and with intent to disturb the peace and privacy of another or with reckless disregard
16 that the conduct is having that effect after being informed that it is having that effect,
17 the person makes unreasonably loud noise;

18 (3) in a public place, when a crime has occurred, the person refuses to
19 comply with a lawful order of a peace officer to disperse;

20 (4) in a private place, the person refuses to comply with an order of a
21 peace officer to leave premises in which the person has neither a right of possession
22 nor the express invitation to remain of a person having a right of possession;

23 (5) in a public or private place, the person challenges another to fight
24 or engages in fighting other than in self-defense;

25 (6) the person recklessly creates a hazardous condition for others by an
26 act which has no legal justification or excuse; [OR]

27 (7) the offender intentionally exposes the offender's buttock or anus to
28 another with reckless disregard for the offensive or insulting effect the act may have
29 on that person; or

30 (8) the person knowingly engages in picketing with reckless
31 disregard that the picketing occurs

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(A) within 150 feet of the boundary of a cemetery, mortuary, church, or other facility; and

(B) while a funeral is occurring at the cemetery, mortuary, church, or other facility or during the 60-minute period

(i) before the start of the funeral; or

(ii) after the conclusion of the funeral.

* Sec. 3. AS 11.61.110(b) is amended to read:

(b) In [AS USED IN] this section,

(1) "funeral" means a ceremony or memorial service held in connection with the burial or cremation of a deceased person, but does not include a funeral procession on a public street or highway;

(2) "noise" is "unreasonably loud" if, considering the nature and purpose of the defendant's conduct and the circumstances known to the defendant, including the nature of the location and the time of day or night, the conduct involves a gross deviation from the standard of conduct that a reasonable person would follow in the same situation; "noise" ["NOISE"] does not include speech that is constitutionally protected;

(3) "picketing" means protest activities, engaged in by a person, that disrupt or are undertaken to disturb a funeral.

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MEMORANDUM

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.

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Representative Bill Thomas
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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 feet¹ 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

Representative Bob Herron
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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.

DDG:plm:ljw
11-129.plm

Enclosure

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).

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version HB 234
 Fiscal Note Number 1
 (H) Publish Date 2/10/12

Identifier (file name) HB234-LAW-CRIM-02-03-12 Dept. Affected Law
 Title An Act relating to picketing or protests at a funeral. Appropriation Criminal
 Allocation Criminal Justice Litigation
 Sponsor Representative Thomas
 Requester (H) Military & Veterans' Affairs OMB Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
OPERATING EXPENDITURES	FY13	FY13	FY14	FY15	FY16	FY17	FY18
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS

Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES

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Estimated **SUPPLEMENTAL (FY12) operating costs** _____ (separate supplemental appropriation required)
 (discuss reasons and fund source(s) in analysis section)

Estimated **CAPITAL (FY13) costs** _____ (separate capital appropriation required)
 (discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager
 Division Administrative Services
 Approved by Michael C. Geraghty, Attorney General
Department of Law

Phone 465-5427
 Date/Time 2/3/12 5:10PM
 Date 2/3/2012

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 234

Analysis

HB 234 amends the crime of disorderly conduct by adding the prohibition of engaging in picketing within 150 feet of a cemetery, church, and so on and within 60 minutes of the beginning or end of the funeral.

Disorderly conduct is a class B misdemeanor with a maximum term of imprisonment of 10 days.

The estimated fiscal impact of the bill is zero. The estimate does not include costs related to any legal challenges to the legislation, if it is enacted into law.

High Court Rules For Anti-Gay Protesters At Funerals

by NINA TOTENBERG



Nicholas Kamm/AFP/Getty Images

Members of the Westboro Baptist Church of Topeka, Kan., staged a protest across the street from a high school in Hyattsville, Md., a day before the Supreme Court ruling.

March 2, 2011

text size A A A

The U.S. Supreme Court has ruled that protesters at military funerals cannot be sued for inflicting emotional distress on the family of a dead soldier. The vote was 8 to 1.

When Marine Lance Cpl. Matthew Snyder was killed in Iraq, his funeral in Westminster, Md., drew thousands to pay their respects. But it also drew a protest from the Rev. Fred Phelps and six other members of the Westboro Baptist Church, based in Topeka, Kan.

Phelps and other church members have traveled the country for years, picketing hundreds of military funerals to communicate their belief that "God hates the USA" for its tolerance of homosexuality, particularly in the military.

The picketers did not contend that Snyder was gay. Rather, their message, as Phelps puts it, was that "the whole country is given over to sodomy and to sodomite enablers."

The picketers followed their usual practice at the Snyder funeral. They alerted police in advance and followed instructions to set up their protest on public property, at a site 1,000 feet away from the church, near the vehicle entrance.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and ... inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker.

Though the protest was peaceful and ended before the funeral began, the picketers carried signs with messages offensive to many, including "Thank God for Dead Soldiers," "Fags Doom Nations" and "America Is Doomed."

- Chief Justice John Roberts, in the majority opinion

Albert Snyder, the father of the dead Marine, did not see the signs until later when he viewed TV coverage. He says the picketers turned his son's funeral into a circus, taking away his "last moment" with his son.

"This was a funeral. This wasn't a parade going down the street. I shouldn't have to look away from anything at my own child's funeral," Snyder says. "That's absurd."

Snyder sued Phelps and his church for intentional infliction of emotional distress.

"These people targeted me and my family, and they have done this to over 200 other military men and women's families," Snyder says, his voice rising. "I want to know how you would feel if somebody stood 30 feet away from the main vehicle entrance of a church where you're trying to bury your mother, with a sign that says, 'Thank God for dead sluts.' You tell me that shouldn't be illegal. Is 'fag' any worse than 'slut'?"

A jury agreed with Snyder and awarded him \$5 million in damages. But the Supreme Court set aside that verdict Wednesday.

Writing for the court majority, Chief Justice John Roberts said that as repugnant as many of the signs were, they were still plainly related to public, rather than private, matters. They focused on "the political and moral conduct of the United States and its citizens," he said, and speech of such public concern is protected by the First Amendment.

Although Westboro may have chosen to protest the funeral to gain publicity for its views, said the chief justice, and although those views may be particularly hurtful to the dead soldier's father, that does not mean the church members' right of free speech can be curtailed or punished. And a jury award amounts to punishment, Roberts contended, by imposing a penalty for expressing an unpopular viewpoint.

"Speech is powerful," Roberts said in conclusion. "It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate."


Reaction to the decision was markedly muted, given the outrage voiced by veterans groups and politicians at the time the case was argued in the Supreme Court.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

- Justice Samuel Alito, who cast the lone dissenting vote

The Democratic and Republican leaders of the Senate, along with 40 other members of Congress, filed a brief on Snyder's side. But on Wednesday, reaction on Capitol Hill was nowhere to be found, except in a couple of written statements.

Lawyer Gene Schaerr, who filed a brief in the case for the American Legion, said he was heartened by the fact that the court specifically mentioned that 43 states have enacted laws that put a buffer zone of 100 feet or more around funeral sites. Such laws would not have affected the protest in this case, since protesters were 1,000 feet away.

 Nonetheless, says Schaerr, the decision "sends a clear signal to the lower courts that they should not interpret anything in this opinion as casting any doubt about those statutes." The court, however, specifically left open that question, noting that restrictions on the time, place and manner of protests are appropriate in some circumstances.

Wednesday's 8-to-1 ruling came as no surprise to First Amendment scholars, both right and left. They note that the decision is in line with many court decisions protecting the rights of fringe groups — from Nazis marching in Skokie, Ill., to flag burners at a Republican convention in Texas.

University of Chicago law professor Geoffrey Stone notes that Wednesday's ruling fits neatly into that tradition, calling it a "classic case." The only surprise, maintained Stone, was that anyone dissented.

Justice Samuel Alito was the lone dissenter. He viewed the protesters' speech as targeting a private person — the father of the dead soldier — and said that the First Amendment does not give license to such outrageous conduct.

"In order to have a society in which public issues can be openly and vigorously debated," wrote Alito. "it is not necessary to allow the brutalization of innocent victims."

Related NPR Stories

· A Peek Inside The Westboro Baptist Church March 2, 2011

LEGISLATIVE RESEARCH REPORT

DECEMBER 9, 2011



REPORT NUMBER 12.113

FUNERAL PROTEST LAWS IN OTHER STATES

PREPARED FOR REPRESENTATIVE BILL THOMAS, JR.

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

SUMMARY	1
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CHALLENGED AND UNCONSTITUTIONAL STATE FUNERAL PROTEST LAWS	3
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You asked for information on funeral protest laws. Specifically, you wished to know how many states currently have a law regulating funeral protests and what each state law stipulates. You also wanted to know for each state that currently has a funeral protest law if violating the restriction is considered a felony or misdemeanor offense. In addition, you asked if any of the state laws have been challenged and if any have been found unconstitutional.

SUMMARY

As you may know, for a number of years the Westboro Baptist Church of Topeka, Kansas has been protesting, among other events, military funerals. These protests have garnered the Church a great deal of national attention.¹ The Church's primary message at these protests is that God hates the United

¹ Summary information was extracted from Kathleen Ann Ruane, *Funeral Protests: Selected Federal Laws and Constitutional Issues*, Congressional Research Service, March 22, 2011, and the Westboro Baptist Church's website.

States for its tolerance of homosexuality. As punishment for its tolerance, God is killing soldiers "in righteous judgment against an evil nation."

As a result of these protests, state and local governments have adopted measures that create "buffer zones" that ban protests of funerals within a certain distance of the services and that establish time restrictions as to when protests can occur in relation to a funeral service. Additionally, the federal government has passed similar bans on protests at military funerals in federally controlled cemeteries.

STATE LAWS PERTAINING TO FUNERAL PROTESTS

According to the National Conference of State Legislatures (NCSL), 46 states currently have some form of a funeral protest law. In Table 1, we provide a summary of these state laws; we include a more detailed summary of each state's law in Attachment A.

Of the 31 states identified in Table 1 that impose a restriction on the time in which a protest may take place in relation to the funeral service, 22 specify that a protest may not occur any time one hour prior to, during, or one hour after the conclusion of the funeral or memorial service. The remaining nine states specify a time restriction range from 30 minutes to 120 minutes before and after the service.

As you can see from Table 1, 39 states create a "buffer zone" that restricts protests of funerals within a certain distance of the service. These buffer zones range from 150 feet to 1,500 feet. The most typical distance, used by 15 states, is 500 feet.

Seven states—California, Florida, Idaho, Louisiana, Maine, Rhode Island, and Virginia—chose not to create time or distance buffer zones but instead appear to have amended their disorderly conduct or disturbing the peace statutes to include protests at funeral or memorial services.

Thirty-six states classify the first violation of these funeral protest laws as misdemeanors. Although several states classify the second offense as a felony, two states—Indiana and Michigan—classify the first offense as a felony.

TABLE 1: SUMMARY OF STATE FUNERAL PROTEST LAWS, MAY 2011	
Regulation	States
Time Requirement	Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Kentucky, Michigan ⁽¹⁾ , Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming
Distance Requirement	Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming
First Offense Classified as a Misdemeanor	Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming
Source:	<i>Funeral Protest Regulation Statutory Provisions</i> , National Conference of State Legislatures, May 18, 2011, Jon Griffin, Policy Associate, Fiscal Affairs Program, National Conference of State Legislatures, 303-364-7700 ext. 1529.
Notes:	(1) Michigan law authorizes local governments to create laws that restrict funeral protests from one hour immediately before, or during, or two hours immediately following a service.

In Attachment B, we provide a sample of funeral protest laws from ten states—Alabama, Colorado, Connecticut, Idaho, Minnesota, Montana, New Mexico, Oklahoma, Rhode Island, and Washington.

According to the NCSL, all four of the states that do not currently have a funeral protest law—Alaska, Hawaii, Nevada, and Oregon—considered such a measure during the last legislative session. Measures in Alaska and Hawaii are still active, while the measures in Nevada and Oregon have failed. Additionally, many states sought to amend their existing laws. We include, as Attachment C, a NCSL summary of all state legislation considered during the last legislative session that pertains to funeral protests.



February 8, 2012

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The Honorable Dan Saddler, Co-Chair
The Honorable Steve Thompson, Co-Chair
House Military and Veterans' Affairs Special Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801

Via email: [Representative Dan Saddler@legis.state.ak.us](mailto:Representative_Dan_Saddler@legis.state.ak.us)
[Representative Steve Thompson@legis.state.ak.us](mailto:Representative_Steve_Thompson@legis.state.ak.us)

Re: HB 234: Funeral Picketing and Protests
ACLU Review of Constitutional Issues

Dear Co-Chairs Saddler & Thompson:

Thank you for the opportunity to provide written testimony with respect to House Bill 234.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. From that perspective, we wish to advise the Committee of our concern that the proposed bill, if enacted, would violate the rights of free speech and free assembly under the Alaska Constitution and the United States Constitution.

Bill Overview

The current draft of HB 234 proposes to amend the existing disorderly conduct statute, to criminalize the act of "knowingly engag[ing] in picketing with reckless disregard" that the picketing occurs within 150 feet of the boundaries of a "cemetery, mortuary, church, or other facility" and either during a funeral at that location or within an hour of the start or end of the funeral.

The bill goes on to define the term “funeral,” excluding a funeral procession from that definition. The bill also defines “picketing” as “protest activities . . . that disrupt or are undertaken to disturb a funeral.”

Freedom of Speech

Under the First Amendment to the United States Constitution, people have the freedom to speak without government interference. The freedom of speech is not absolute, *but government regulation of speech imposes a heavy burden on the government to justify the nature of its regulation and to show that alternative means of vindicating the government interests were inadequate.*

A. The Bill Would Regulate Speech on Sidewalks, a Traditional Public Forum

The present bill directly regulates speech on its face. “[P]rotest activities” are expressive activity, by the very basic meaning of the word “protest.” “Picketing” has long been recognized as expressive activity. *See, e.g., Carey v. Brown*, 447 U.S. 455 (1980).

Based on the broad scope of the bill and the real world context of the activities regulated, the bill would criminalize certain expressive activity both on one’s own private property – assuming the private property lay within 150 feet of a cemetery or church – as well as on a sidewalk or public park, which are recognized as “traditional public forums” for public speech. *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

Given that the bill directly regulates speech **on one’s own property and in traditional public forums**, the bill will be subject to the most careful scrutiny by a court, demanding that the restriction be “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (citation omitted).

B. The Bill is Not Content-Neutral, But Only Regulates Protest Activities

“The right to free speech . . . may not be curtailed simply because the speaker’s message may be offensive to his audience.” *Hill*, 530 U.S. at 716. For that reason, most restrictions on speech must be content-neutral, meaning that the regulation of speech may not refer to the content of the speech. *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 763 (1994). By contrast, content-neutral restrictions on speech in a public forum describe the time, place, and manner in which speech may be made, and must be narrowly tailored to serve a substantial government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Examples of a content-neutral regulation would include an ordinance against using a loudspeaker over a particular volume or after a certain hour.

In the recent funeral picketing case, the United States Supreme Court did admit that some state laws establishing a buffer zone would be analyzed differently (which does not necessarily mean that they would be *constitutional*), but only to "the extent [such state] laws are content neutral." *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011).

HB 234 appears to refer to the content of speech, and is thus not content-neutral. The term "protest activities" suggests that only the speech of those presenting a negative viewpoint would be affected by the regulation. Under the bill, a person loudly stating that the US military is contributing to the decline of moral values would presumably be engaged in "protest activities," while a person loudly stating that we must honor our veterans would not be engaged in "protest activities."¹ *Frisby*, 487 U.S. at 482. Therefore, the conduct prohibited is not merely traditional picketing, but protesting, oppositional speech. *Snyder*, 131 S. Ct. at 1219 (noting that the claims of the offended plaintiffs "turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself").

Heightening the inference that the bill is intended to discriminate between those presenting supporting views and those presenting opposing views at a funeral, the bill also prohibits activities that "disrupt or are undertaken to disturb a funeral." But in the context of the bill's language, activities that "disrupt" or "disturb" would likely be viewed in light of their content, rather than a neutral standard. "Disrupting" or "disturbing" entails that the activities run contrary to the purpose or plan of the funeral. Loud noises, such as amplified speech or, as has become more common at funerals, the loud revving of motorcycle engines may be viewed as non-disruptive when the expressive conduct accords with the purpose of the funeral, but disruptive when it is not. **Favoring certain expressive activity over another in regulating picketing violates the First Amendment.** *Carey*, 447 U.S. at 470. Notably, in one of the only cases upholding such a law, the parties *stipulated* that the law was content-neutral, rather than contesting the law's neutrality. *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008).

C. The Legislative History Suggests Lack of Content-Neutrality

Finally, the legislative history suggests that the bill was not intended to be content-neutral. The Sponsor Statement indicates that the bill "asks anyone within the area of a funeral service to conduct themselves in a respectful manner." Sponsor Statement, HB 234. While most – if not indeed nearly all – of us, can agree that permitting funerals to proceed in a peaceful, quiet environment is a laudable goal, nonetheless the state may not legislate "respectful" behavior on the streets and sidewalks of Alaska, nor in the front yards of its citizens. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180-81 (8th Cir. 1999) (holding that an ordinance prohibiting sign-holding outside churches was unconstitutional because it went "beyond the church building and

1. A protest is defined by the Merriam-Webster dictionary as an "act of objecting or a gesture of disapproval." By contrast, the general definition of "picketing" is merely "posting at a particular place."

church property, and seeks to forbid peaceful communication on property belonging to the public, even though the communication may be completely truthful, and even though there is absolutely no physical interference with access to the church"). If "protest activities" that "disrupt" or "disturb" are any activities that are "disrespectful," the law clearly discriminates based on the content of the speech and cannot stand.

D. No Compelling Governmental Interest in Restricting Speech at Funerals

Given that the bill is not content-neutral, the question is then whether "protecting families at funerals during their time of grief" is a compelling state interest justifying a restriction on free speech. **The Constitution requires that "to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."** *Snyder*, 131 S. Ct. at 1220 (emphasis added). The only cases in which the U.S. Supreme Court has upheld such laws have been content-neutral laws relating to the privacy of one's home. *Frisby*, 487 U.S. at 487-88 (upholding content-neutral ordinance banning picketing of a single home which made the resident a "prisoner" in his own home); *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970) (upholding statute permitting mail recipient to halt offensive mailings to his residence).

We emphasize that a funeral is a solemn occasion and that families in grief should be accorded the respect that such an occasion deserves. However, funerals are also traditionally public events, frequently held in places of worship or funeral homes that are open to the public. In Anchorage, for instance, numerous cathedrals and churches occupy the downtown area, as does a large cemetery. In Juneau, a Catholic cathedral and a Russian Orthodox church sit three blocks from the State Capitol. Expecting that one will neither see nor hear anything offensive in a heavily-trafficked public space is not reasonably comparable to an expectation that one can retire to one's private home without running a gauntlet of protestors.

While the members of the Westboro Baptist Church espouse an abhorrent ideology and express it in the most repulsive terms, this bill would affect all funerals and all protestors. Protesting a funeral, especially that of a public figure, may express an important view opposing an ideology or history of bad acts committed by the person being buried. Funerals are frequently centered around a eulogy, an opportunity to say complimentary things about the deceased. A protest outside a funeral may be an opportunity to present an alternative viewpoint about the deceased and to communicate it to passers-by.

Alternatively, when the death of an individual occurs under circumstances giving rise to matters of public concern, the funeral may be the locus of public debate. Famously, the lynching death of Emmett Till resulted in a dramatic funeral in Chicago which thousands of people attended; a dramatic moment that galvanized the civil rights movement. **A municipality could use the bill, for instance, to characterize angry or upset attendees at a funeral for a victim of a police shooting as "protestors" and arrest the attendees for disorderly conduct. A bill that restricts the freedom of speech on the basis of content is available for all kinds of mischief.**

E. The Bill Is Not Narrowly Tailored and Does Not Leave Adequate Avenues for Expression

Because the bill extends to 150 feet in every direction from a church, mortuary, funeral home, or cemetery where a funeral may take place, and extends from an hour before to an hour after a funeral, HB 234 unconstitutionally restricts speech in that it is neither narrowly tailored nor does it leave adequate avenues for expression. The only recognized constitutional interest at stake is the right of a listener in a private place to avoid being a captive audience to a message the listener has no desire to hear. *Phelps-Roper v. Strickland*, 539 F.3d at 364.

Funeral attendees are not a captive audience to a quiet protest, provided the protest does not enter the church or block the entrance to the church. *Olmer*, 192 F.3d at 1180-81. Funeral attendees may have to walk or drive past protestors holding signs that offend them, and might wish to avert their eyes for the period they would otherwise be exposed to the offensive messages. Clearly, protestors can be excluded from the funeral home, mortuary, cemetery, or church where the service takes place. **Thus, the statute is not narrowly tailored to the government interest in avoiding making funeral attendees a captive audience to the protest.**

Further, a primary function of a mortuary or funeral home is to serve as a space for funeral services. *Some funeral homes may hold more than one funeral in a day.* Given the length of services and the one hour window before and after the service when a protest may not take place, **HB 234 – as currently drafted – could prohibit even unrelated protests near a funeral home, for potentially many hours out of any given day.**

Since some important public buildings – likely sites for protests – are close to funeral homes, this would impose a serious burden. For instance, there is a funeral home across the street from the Atwood Building in Anchorage. An Episcopal church lies across the street from the Dena'ina Convention Center. A labor demonstration against a particular employer lacks the same efficacy if performed offsite. Employees at a business located next door to church, mortuary, funeral home, or cemetery would be unable to mount an effective protest about labor conditions if their protests had to start and stop every time a funeral was taking place. As an example, the Sheraton Hotel in Anchorage lies across the street from the municipal cemetery in the middle of downtown. Employees at similarly situated businesses could be seriously chilled from engaging in meaningful protests and could conduct regular, continuing protests only at the risk that someone would define their protests as “disrupt[ing]” the funeral service.

Last, the bill leaves open little alternative for those who actually wish to protest the church, funeral home, or cemetery in question, by mandating that the protestors stay at least 150 feet away from the property within an hour before or after funerals. Someone may seek to picket a church, such as to bring attention to victims of sexual assault. Someone may seek to picket a funeral home or a cemetery, such as in a labor dispute or a dispute about the policies of the business. While such protests may incidentally impact funeral attendees, the alternative would thwart the free expression of employees or those with legitimate concerns about the church, funeral home, or cemetery. Taken as a whole, the law would leave few alternatives open to those

who seek to protest outside public or private buildings that happen to be located near a church, funeral home, or cemetery, as well as those who seek to picket the church, funeral home, or cemetery itself.

The bill is not narrowly tailored to the legitimate state interests because the protestor must engage in picketing with "reckless disregard," rather than knowledge, that the picketing takes place within 150 feet of the site of a funeral and within one hour before or one hour after the funeral. "Recklessness" refers to a criminal law standard that a person consciously disregards a substantial risk of a certain condition being present. AS 11.81.900(a)(3). Presumably, there is a substantial "risk" that a funeral will take place at a church, funeral home, mortuary, or cemetery at any time. This standard unreasonably imposes on a protestor the duty of discovering whether or not a funeral is ongoing, recently took place, or will take place within an hour of a protest. Employees protesting labor conditions at the Sheraton will thus be required to find out if any funerals are taking place in the municipal cemetery on a day when they decide to protest. **Protesters should not be burdened with such a duty to discover whether a funeral is taking place at any given time.** Imposing the burden on protesters to discover when and whether a nearby church, cemetery, or funeral home is conducting a funeral leaves the law unreasonably ill-tailored to legitimate state interests and imposes an unconstitutional "protest at your own risk" policy.

Drafting Considerations

We suggest the Committee may wish to consider:

The protests staged by the Westboro Baptist Church express abhorrent views, for which the ACLU has no sympathy. Further, the manner in which they protest is deeply offensive. **The great maxim of free speech is that for all evil speech, "the remedy to be applied is *more speech, not enforced silence.*"** *Whitney v. California*, 274 U.S. 357, 378 (1927).

Rather than seeking to prohibit fools from saying foolish and hurtful words, we as a community should come together to show our appreciation for our service members and others in our community whose funerals may be subject to these protests. If the protests of a handful of people inspire a thousand people to come out to show their support and respect at a funeral, does that tribute not outweigh the ill words of a few? The true voice of Alaska should come out when a misguided minority threatens their protests, so we may show why their words are folly.

Second, the members of the Westboro Baptist Church thrive on the controversy and attention generated by their activity. They also thrive on the attorneys' fees generated when legislatures and municipal assemblies act hastily to prevent them from protesting. As truly painful as it is to watch such a protest unfold, it will surely be more galling to pay from the state treasury to facilitate more protests and more litigation by a tiny group of hateful individuals whose message has already received too much attention.

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Conclusion

We hope that the Military and Veterans' Affairs Special Committee will recognize that these are just some of the constitutional infirmities in House Bill 234.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned if you have any questions or wish additional information.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: The Honorable Carl Gatto, Vice Chair, [Representative Carl Gatto@legis.state.ak.us](mailto:Representative_Carl_Gatto@legis.state.ak.us)
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MEMORANDUM

Date: February 9, 2012

To: Representative Carl Gatto, Chair House Judiciary Committee

From: Representative Thomas

Re: HB 234 "An Act relating to picketing or protests at a funeral."

I respectfully request that the House Judiciary Committee hear HB 234, at its earliest convenience.

HB 234 brings Alaska in line with the majority of states and adopts the guidelines which govern conduct during a funeral. HB 234 is modeled after the guidelines used by our national cemeteries.

If you have any questions about this bill please contact Aaron Schroeder, in my office, at 465-3732.

Thank you.



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List of Witnesses for HB 234

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