HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 31 Protest Activities
SPONSOR(S): Criminal Justice Subcommittee; Rooney and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 632

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 3 N, As CS	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 engage in protest activities or knowingly cause protest activities to occur:

- Within 500 feet of the property line of any location where a funeral, burial, or memorial service is being conducted,
- During or within 1 hour before or 1 hour after the conducting of the funeral, burial, or memorial service.

The bill defines "protest activities" as "any action, including picketing, that is undertaken with the intent to interrupt 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 "any action…that is undertaken with the intent to interrupt or disturb" a funeral, burial, or memorial service under the specified conditions, regardless of whether those actions *do in fact cause* such a disturbance.

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[1] 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"[2] or words that "inflict injury or tend to incite immediate breach of peace."[3]

Section 870.01, F.S.

Section 870.01, F.S., makes it a first degree misdemeanor[4] for a person to commit an affray. The statute also makes it a third degree felony[5] 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.[6]

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,[7] 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.[8]

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.[9] 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.[10]

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[1] 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.
[2] *Macon v. State*, 854 So.2d 834, 837 (Fla. 5th DCA 2003).
[3] *United States v. Lyons*, 403 F.3d 1248, 1254 (11th Cir. 2005).
[4] 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.
[5] 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.
[6] *See D.L.B. v. State*, 707 So.2d 844, 845 (Fla. 2d DCA 1998) (finding that 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).
[7] Breach of the peace is described in s. 877.03, F.S.
[8] *S.H.B. v. State*, 355 So.2d 1176 (Fla. 1978).
[9] Chapter 2006-264, L.O.F. *Also see*, Florida House of Representatives Staff Analysis, House Bill 7127 (2006).
[10] 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.[11]

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 a funeral, burial, or memorial service. 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 engage in protest activities or knowingly cause protest activities to occur:

- Within 500 feet of the property line of any location,[12]
- During or within 1 hour before or 1 hour after the conducting of a funeral, burial, or memorial service at that place.

Definitions:

- The bill defines "protest activities" as "any action, including picketing, that is undertaken with the intent to interrupt or disturb a funeral, burial, or memorial service."
- The bill defines the phrase "funeral, burial, or memorial service" as "any service offered or provided in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains or cremated human remains."

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 "any action…that is undertaken with the intent to interrupt or disturb" a funeral, burial, or memorial service under the specified conditions, regardless of whether those actions *do in fact cause* such a disturbance.

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.

[11] *S.H.B. v. State*, 355 So.2d 1176, 1178 (Fla. 1977) (finding "[t]hese elements are inherent in the statute as drafted.").
[12] Including but not limited to a residence, cemetery, funeral home, or house of worship.

2. Expenditures:

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

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."[13]

The First Amendment protects not only verbal speech, but also *expressive conduct* such as picketing.[14]

When considering this bill, it should be noted that First Amendment jurisprudence in this area is complex and highly nuanced. Statutes relating to protest activities are often distinguished by the courts based on seemingly subtle differences, and may be upheld or struck down based on those differences. In addition, funeral protest statutes of this kind are relatively new and often controversial, making it difficult to predict with assurance how courts will rule on the various issues they present.

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 was 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

[13] Amendment I, United States Constitution (emphasis added).
[14] *See Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

protected speech "may be subject to reasonable *time, place, or manner* restrictions that are *consistent with the standards announced in this Court's precedents*."[15]

It is important to note that the *Snyder* case did not involve the Court reviewing the constitutionality of a state statute regulating picketing.[16] 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 examining the constitutionality of a statute that regulates protest activities, it is important to examine whether the statute conforms to U.S. Supreme Court precedent.

Court Precedent

Content-Based vs. Content-Neutral Restrictions

It is a fundamental Constitutional principle that debate, particularly on issues of public concern, should not be inhibited by the government.[17] Therefore, the most important question regarding the First Amendment issues of the bill is *whether the government is prohibiting speech based on disfavored content*.[18] Such "content-based" regulations are presumptively suspect and are subject to strict scrutiny by the court.[19]

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*.[20] The Eighth Circuit Court of Appeals has found both a city ordinance[21] and a state statute[22] prohibiting protest activities within a certain time and distance of a funeral content-neutral.

Content neutral restrictions are subject to intermediate scrutiny by the court.[23] 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 tailored* to achieve a *significant state interest.*[24] Additionally, the statute must leave open "ample alternative channels" for the restricted speech.[25]

- A *significant state interest* is grounded in the state's traditionally broad police powers.[26] Courts have found a state has a significant interest in protecting its citizens from disruption during events associated with a funeral or burial service,[27] and in public safety concerns resulting from disruptions of the public order.[28] Additionally, citizens have a recognized interest in avoiding unwanted speech, including in confrontational settings.[29]
- 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.[30] To be narrowly tailored in this context, the statute does *not* have to be the least restrictive means available.[31]

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[15] *Snyder v. Phelps*, 131 S.Ct. 1207, 1218 (2011) (emphasis added).
[16] *Id.* ("Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.").
[17] *Id.* at 1215 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).
[18] *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
[19] *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994).
[20] *See Ward*, 491 U.S. at 791 (emphasis added; internal quotations omitted); *Snyder*, 131 S.Ct. at 1218.
[21] *Phelps-Roper v. City of Manchester, Mo.*, 658 F.3d 813, 816 (8th Cir. 2011).
[22] *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008).
[23] *See Turner Broad.*, 512 U.S. at 642.
[24] *Ward*, 491 U.S. at 791.
[25] *Id.*
[26] *See Hill v. Colorado*, 530 U.S. 703, 715 (2000).
[27] *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).
[28] *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).
[29] *Hill* at 716-17.
[30] *See Turner Broad.*, 512 U.S. at 662.
[31] *Id. See also Hill*, 530 U.S. at 726.

- 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."[32]

HB 31

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."[33] The court noted that the language limited "protest activities" to those *directed* at a particular funeral.[34] 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.[35]

The bill establishes a 500 foot fixed buffer zone around funeral locations. Buffer zones are potentially too broad, and therefore not narrowly tailored, if they restrict too much protected speech. Criteria include the reference point that the buffer zone surrounds, and the size of the buffer zone itself. The nature of the bill's buffer zone likely conforms to U.S. Supreme Court precedent. A U.S. District Court in 2007 held an Ohio statute's 300 feet "fixed" buffer zone surrounding funeral locations constitutional, but held the "floating buffer zone" surrounding funeral *processions* unconstitutional because it was not narrowly tailored.[36] That holding conforms to a prior Supreme Court case addressing buffer zones.[37] Additionally, courts have found the *size* of the buffer zone itself to be context-specific.[38]

Finally, the bill addresses the competing interests of funeral protestors and funeral attendees in a specific location. It is therefore important to carefully define the nature of those interests. The First Amendment protects expressive conduct such as picketing, and affords the highest protection to speech based on matters of public concern, or "political speech."[39] On the other hand, citizens also have a recognized interest not to be forced to hear unwanted speech.[40] Protecting citizens from hearing unwanted speech is referred to as the "captive audience" doctrine.[41] 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,"[42] and forcing citizens to "undertake Herculean efforts to escape the cacophony of political protests."[43] The Court has held that in some cases, funeral attendees are not a "captive audience" to protest speech.[44] 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

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[32] *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).
[33] *Phelps-Roper v. Strickland*, 539 F.3d 356, 368 (6th Cir. 2008).
[34] *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474 (1988)).
[35] *Nixon*, 545 F.3d 685, 693 (finding statute likely not narrowly tailored "[b]ecause the Missouri statute does not contain any such [narrowing] provisions").
[36] *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").
[37] *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).
[38] *See Madsen*, 512 U.S. at 772; *Strickland*, 539 F.3d at 368.
[39] *See Snyder*, 131 S.Ct. at 1215.
[40] *See Hill*, 530 U.S. at 716-17.
[41] *Snyder*, 131 S.Ct. at 1220.
[42] *Hill* at 716 (internal quotations omitted).
[43] *Id.* (quoting *Madsen*, 512 U.S. at 772-773).
[44] *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.").

"captive audience."[45] The Court noted in *Snyder v. Phelps* that the captive audience doctrine has been applied "only sparingly."[46]

Overbreadth Doctrine of the First Amendment

Even if a statute legitimately prohibits some speech, if it also prohibits a substantial amount of protected speech in relation to its legitimate sweep it may be unconstitutionally overbroad.[47]

This overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially "because it also threatens others not before the court-- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."[48] The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected expression.[49] Invalidation for overbreadth is "strong medicine that is not to be casually employed."[50] The overbreadth must be "real" and "substantial."[51]

A July 2010 Michigan case provides a relevant example of overbreadth. In that case, a Michigan couple was part of a vehicle funeral procession in their van. The van had for years openly displayed various messages critical of U.S. policy and President Bush. The couple was arrested and held in jail for 24 hours under Michigan's funeral protest law which made it illegal, in pertinent part, to engage in conduct that will "adversely affect" a funeral or funeral processional.[52] The U.S. District Court found that those parts of the statute were likely unconstitutional under the overbreadth doctrine of the First Amendment.[53]

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. Additionally, vague statutes invite arbitrary and discriminatory enforcement.[54] It should be noted that 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.[55]

The bill would be vulnerable to a vagueness challenge if a law enforcement officer would not understand what constitutes prohibited protest activity as it is defined. When considering this issue it should be noted that the Florida Supreme Court has upheld s. 871.01, F.S., against a vagueness challenge as to the meaning of the phrase "interrupt or disturb."[56] That phrase is used in the bill, although it should be noted that the bill would *not* require an actual disturbance to take place as in the Florida Supreme Court's definition in *S.H.B v. State*.

The bill would also be vulnerable to a vagueness challenge if an ordinary person of average intelligence would not understand what type of conduct would be deemed conduct "undertaken with the intent to interrupt or disturb a funeral, burial, or memorial service."

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[45] *See Phelps-Roper v. Strickland*, 539 F.3d 356, 362 (6th Cir. 2008); *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).

[46] *Snyder*, 131 S.Ct. at 1220.

[47] *United States v. Williams*, 553 U.S. 285, 292 (2008).

[48] *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

[49] *Sult v. State*, 906 So.2d 1013 (Fla. 2005) (citations omitted).

[50] *Williams* at 293 (internal quotations omitted).

[51] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[52] Mich. Comp. Laws Ann. s. 750.167d.

[53] *Lowden v. County of Clare*, 709 F.Supp.2d 540, 563 (E.D. Mich. 2010) (finding "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").

[54] *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

[55] *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

[56] *See S.H.B. v. State*, 355 So.2d 1176, 1178 (Fla. 1977).

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 15, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment clarifies the meaning of "protest activities," defines the phrase "funerals, burials, and memorial services," and makes the bill applicable to all funerals.

The analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.