



**Senate Judicial Proceedings Committee  
March 30, 2011**

**SB 977 – Freedom of Speech – Picketing at a Funeral – Distance**

**SB 982 – Criminal Law – Funerals, Burials, Memorial Services, and Funeral Processions  
– Picketing and Penalties**

**OPPOSE**

The ACLU of Maryland opposes SB 977 and SB 982, which increase the distance within which a person is prohibited from engaging in picketing activities at a funeral, burial, memorial service, or funeral procession from 100 feet to 500 feet and 1,000 feet, respectively. As we opposed Chapter 357 of 2006, which placed restrictions on protests and related activities at a funeral, memorial service, burial, or funeral procession that were enacted, we also oppose the expansion of such restrictions. As such, we request an unfavorable report on this bill.

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History

The 2006 legislation was originally enacted to prohibit certain demonstrations by members of Fred Phelps' Westboro Baptist Church (WBC), who have engaged in anti-gay protests at the funerals of gay Americans, including at the funeral for Matthew Shepard, a gay college student brutally killed in a hate crime in Wyoming, and the military funeral for Marine Lance Corporal Matthew Snyder in Westminster.

As we stated in 2006, we wish to make clear again that we find the activities of this church to be abhorrent. While WBC's actions are hateful and despicable, we nevertheless believed that the 2006 legislation was unconstitutional, which in relevant part, prohibited a person from engaging "in picketing activity within 100 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession."<sup>1</sup> We believed that the 2006 distance provision was unconstitutional, and we continue to maintain such a stance. As such, we also oppose any expansion of such an unconstitutional provision.

Free Speech Restrictions

SB 977 and SB 982 cannot be defended as a reasonable and permissible "time, place, and manner" restriction on free speech for two reasons. First, the prohibition is not content neutral. In order to be constitutional, a restriction on the time, place, or manner of speech must be content neutral, narrowly tailored to a significant governmental interest, and leave open ample alternative channels of communication. E.g. United States v. Grace, 461 U.S. 171, 177 (1983). Marine Lance Corporal Matthew Snyder's father brought a lawsuit for, among other things, intentional infliction of emotional distress, against WBC for the WBC's anti-gay demonstration at his son's funeral. Snyder v. Phelps, 131 S.Ct. 1207 (2011).<sup>2</sup> The United States Supreme Court held that "[t]he 'content' of [WBC]'s signs plainly relates to broad issues of interest to society at large," and that WBC's "signs certainly convey[ed their] position on [certain] issues, in a manner designed, unlike the private speech in [Dun & Bradstreet, Inc. v. Greenmoss Builders,

<sup>1</sup> The original bill, HB 850, prohibited such activities "within 300 feet," and was later amended to reflect the 100 foot distance.

<sup>2</sup> Snyder did not address the issue of buffer zones at the funeral.

Inc., 472 U.S. 749 (1985)], to reach as broad a public audience as possible.” Snyder, 131 S.Ct. at 1216-17. Therefore, the Court held that WBC’s speech was of public concern and entitled to special protection under the First Amendment, with respect the plaintiff’s tort claim. Id. at 1217-19.

Additionally, a provision that prohibits only those pickets “targetted at one or more persons attending the funeral” is not content neutral, because all other protests are permitted in the same location. E.g. Carey v. Brown, 447 U.S. 455 (1980) (statute prohibiting all residential picketing except labor picketing is unconstitutional); Police Dep’t of Chicago v. Mosley, 408 U.S. 92 (1972) (ordinance prohibiting picketing within 150 feet of a school, but permitting labor picketing in same area, is unconstitutional); City of Grayned v. Rockford, 408 U.S. 104 (1972) (same).

Second, even if the restriction on picketing were content neutral, and prohibited all picketing within the proscribed zone, it would not be narrowly tailored, and thus would be unconstitutional. The Supreme Court has repeatedly considered attempts to create buffer zones around certain locations within which all demonstrations are prohibited. In no case has it ever upheld a restriction as large as 300 feet (and the restriction here is not limited to specific locations, but floats with the procession, or wherever a memorial service happens to be taking place). In Madsen v. Women’s Health Center, Inc., 512 U.S. 753 (1994), the Court upheld a 36-foot buffer zone around a clinic’s entrances and driveway, but rejected a 300 foot “no approach” zone around the clinic. In Schenck v. Pro Choice Network of Western NY, 519 U.S. 357 (1997), the Court held that a *fifteen* foot buffer around women entering a clinic was too restrictive of free speech rights. In Hill v. Colorado, 530 U.S. 703 (2000), the Court upheld an *eight* foot buffer around those entering a clinic. There is simply no authority to support the notion that a 500 foot, no less 1,000 foot, buffer zone is constitutionally permissible. A content neutral statute would also reach a great deal of speech the sponsors do not intend to prohibit. Presumably protestors opining about something wholly unrelated to the funeral or procession would have no reason to know it was happening, and should not have to stop or move their unrelated protest just because a procession is passing or a burial or memorial service happens to be taking place nearby. And a content neutral statute would also prohibit the activities of the Patriot Guard, a group organized to engage in counter-demonstrations to Westboro Baptist Church. See [www.patriotguard.org](http://www.patriotguard.org).

A narrowly drawn and content neutral statute, that applied reasonable spacial restrictions on demonstrations at certain *locations*, as opposed to events, might pass constitutional muster, but it would not bar the demonstrations that this bill seeks to forbid. Similarly, a statute that focused on the noise created by demonstrators, rather than the content of their speech, might pass constitutional muster, but also would not prohibit the demonstrations targetted by this legislation.

In short, while we understand the impulse to prevent families at funerals from having to see protesters, we do not think that the First Amendment permits the State to completely prohibit peaceful picketing at such events (either through flat-out bans, or through excessive or content based buffer zones), no matter how offensive the speech. We do not see that as useful outcome, and hope the General Assembly will not expand such restrictions.

The ACLU of Maryland respectfully urges the Committee to unfavorably report SB 977 and SB 982.