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May 13, 2011

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: Senate Bill 977

Dear Governor O'Malley:

We have reviewed Senate Bill 977, "Freedom of Speech - Picketing at a Funeral - Distance," for constitutionality and legal sufficiency. It is our view that the change made by the bill is not clearly unconstitutional. It is also our view that if a reviewing court should determine that the bill is unconstitutional it will result in restoring the law to its previous form.

Senate Bill 977 amends Criminal Law Article, § 10-205(c) by expanding the radius around a funeral in which people may not engage in picketing activities:

> A person may not engage in picketing activity within [100] 500 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.

It continues to be our view that the provision as it now stands with a 100 foot radius, is constitutional. *See* Bill Review Letter on House Bill 850 (Chapter 357) of 2006 and attached letters. Courts that have analyzed similar statutes have uniformly agreed that they are content-neutral regulations of the time, place, and manner of speech and should be upheld so long as they: (1) serve a significant government interest; (2) are narrowly tailored; and (3) leave open ample alternative channels of communication. *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008); *Phelps-Roper v. Strickland*,

539 F.3d 356, 361 (6th Cir. 2008); *Phelps-Roper v. City of St. Charles*, 2011 U.S. Dist. LEXIS 18159 (E.D. Mo. Feb. 24, 2011); *Phelps-Roper v. County of St. Charles*, 2011 U.S. Dist. LEXIS 6219 (E.D. Mo. Jan. 24, 2011); *Phelps-Roper v. City of Manchester*, 738 F. Supp. 2d 947, 954-956 (E.D. Mo. 2010); *Phelps-Roper v. Heineman*, 720 F. Supp. 2d 1090, 1098 (D. Neb. 2010); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 985-986 (E.D. Ky 2006).

Looking at similar statutes, two Circuit Courts have taken different views. In *Phelps-Roper v. Strickland*, the Sixth Circuit concluded that a state has an important interest in the protection of funeral attendees, because "[u]nwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual surely infringes upon the recognized right of survivors to mourn the deceased," and the mourners are, in effect, a captive audience. 539 F.3d 356, 366 (6th Cir. 2008). The Eighth Circuit Court of Appeals, however, held that a state has no interest in protecting an individual from unwanted speech outside the residential context, and found that the Plaintiff "is likely to prove any interest the state has in protecting funeral mourners from unwanted speech is outweighed by the First Amendment right to free speech." *Phelps-Roper v. Nixon*, 545 F.3d 685, 692 (8th Cir. 2008). It is our view that the Sixth Circuit's approach is the better view, and we note that it is supported by the subsequent comments of the Supreme Court in *Snyder v. Phelps*, suggesting that funeral protests are amenable to content-neutral regulation by the states. 131 S.Ct. 1207, 1218 (2011), *see also Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) ("governmental bodies are entitled to place reasonable and content-neutral time, place, and manner restrictions on activities that are otherwise constitutionally protected.").

Funeral picketing laws have also been found to leave open ample alternative channels of communication. In *Phelps-Roper v. Strickland*, 539 F.3d 356, 372-373 (6th Cir. 2008), the court noted that the picketing ordinance in question not only left open the entire range of communication other than picketing directed at funerals, it also allowed protests at funeral sites at any time other than the proscribed time period, and at any time outside the 300 foot limit drawn by the statute. The court further stated that the plaintiff was not "entitled to her best means of communication," and that she admitted in her brief that a "funeral is the occasion of her speech, not its audience." In *Phelps-Roper v. Nixon*, 545 F.3d 685, 694 (8th Cir. 2008), the court stated that the plaintiff had presented a "viable argument that those who protest or picket at or near a military funeral wish to reach an audience that can only be addressed at such occasion and to convey to and through such an audience a particular message." It is worthy of note, however, that this ruling was not on the merits, but on preliminary injunction, and, as noted by the district

court in *Phelps-Roper v. County of St. Charles*, 2011 U.S. Dist. LEXIS 6219 (E.D. Mo. Jan. 24, 2011), which followed the holding in the *Nixon* case in granting a preliminary injunction, "[t]his does not mean that Plaintiffs here will succeed on the merits." Moreover, the court in *Phelps-Roper v. Heineman*, 720 F. Supp. 2d 1090, 1107 (D. Neb. 2010) distinguished the *Nixon* conclusion because the statute at issue in *Nixon* was not limited to activities that targeted funerals, while the ordinance considered in *Heineman*, like Maryland's Criminal Law Article § 10-205(c), did. The court concluded:

> The NFPL [picketing statute] does not restrict general dissemination of a message throughout the buffer zone; it specifically restricts protest or picket activities targeting the funeral or burial. Although the NFPL keeps protesters targeting the funeral to a certain distance, their access to funeral attendees is not completely banned. The NFPL merely balances the significant interest of protecting a grieving family's privacy with the rights of funeral protestors by setting certain time and space limitations.

As a result, the court concluded that the plaintiff in that case was unlikely to meet her burden of showing that the statute did not leave ample alternatives for her communication.

The final consideration, and the one that is relevant to the validity of the change made by Senate Bill 977, is whether the regulation is narrowly tailored to the accomplishment of the State interest. It seems clear that the 100 foot limit in existing law is narrowly tailored. At the time of the adoption of that limit, however, this office expressed concerns about the validity of a larger limit, specifically addressing the possibility of a 300 foot limit. Letter to the Honorable Joseph F. Vallario, Jr. dated March 17, 2006. Some courts have expressed the view that 300 feet is not narrowly tailored, but these cases have generally involved broader limitations than that found in Maryland's Criminal Law Article § 10-205(c). *Phelps-Roper v. City of St. Charles*, 2011 U.S. Dist. LEXIS 18159 (E.D. Mo. Feb. 24, 2011) (preliminary injunction); *Phelps-Roper v. County of St. Charles*, 2011 U.S. Dist. LEXIS 6219 (E.D. Mo. Jan. 24, 2011) (preliminary injunction); *Phelps-Roper v. City of Manchester*, 738 F. Supp. 2d 947, 958-959 (E.D. Mo. 2010) (complete ban on pickets and protests within a 300 foot radius whether or not it is unwanted or disrupts a funeral is invalid); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 996 (E.D. Ky 2006) (statute prohibiting all congregating, picketing, patrolling, demonstrating or entering on property within 300 feet of a funeral whether such activities interfere with the funeral or not and whether such activities are authorized by funeral attendees or not is invalid). Those cases that have addressed statutes that are

limited to restricting activities that are targeted at, or that actively disrupt, funerals, on the other hand, have found that a 300 foot boundary is narrowly tailored. *Phelps-Roper v. Strickland*, 539 F.3d 356, 368-371 (6th Cir. 2008) (statute restricting only activities that are directed at a funeral or burial service is narrowly tailored); *Phelps-Roper v. Heineman*, 720 F. Supp. 2d 1090, 1104-1105 (D. Neb. 2010) (denying preliminary injunction).

The above cases demonstrate that a 300 foot limit in the context of a statute limited to activities directed at funerals is clearly defensible. We have not found any case that addresses a 500 foot limit in this context. Nevertheless, in light of the above, we cannot say that the extension is clearly unconstitutional. Should the 500 foot limit be found unconstitutional, however, the effect would be that the statute would revert to the 100 foot limit. Norman J. Singer, *Statutes and Statutory Construction* (7th Ed. 2010); *Knowles v. Unites States*, 91 F.3d 1147, 1149 (8th Cir. 1196); *Copp v. Redmond*, 858 D.2d 1125 (Wya 1983) (Generally, when an amendment to an original act is declared unconstitutional, the unconstitutional amendment has no effect, and the law as it existed before the amendment is controlling).

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Lisa A. Gladden
The Honorable John P. McDonough
Joseph Bryce
Karl Aro