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ATTORNEY GENERAL OPINION NO. 92- 64

The Honorable Darrell Webb
State Representative, Ninety-Seventh District
2608 S. Fern
Wichita, Kansas 67217

The Honorable Jan Pauls
State Representative, One Hundred Second District
1634 N. Baker
Hutchinson, Kansas 67501

Re: Constitution of the State of Kansas--Bill of
Rights--Liberty of Press and Speech; Ban on Funeral
Picketing

Amendments to the Constitution of the United
States--Amendment I--Freedom of Religion, Speech
and Press, Ban on Funeral Picketing

Synopsis: The funeral picketing act is content-neutral,
leaves open ample alternative channels of
communication and can be read to be narrowly
tailored to serve a significant government
interest. As such, it is a valid restriction on
the time, place and manner of otherwise protected
speech. Cited herein: 1992 Senate Bill No. 626, §
4; U.S. Const., Amend. I.

* * *

Dear Representatives Webb and Pauls:

You request our opinion regarding the constitutionality of
section 4 of 1992 Senate Bill No. 626. Section 4 establishes

the Kansas funeral picketing act and provides substantially as follows:

"(b) The legislature finds that:

"(1) It is generally recognized that families have a substantial interest in organizing and attending funerals for deceased relatives; and

"(2) the interests of families in privately and peacefully mourning the loss of deceased relatives are violated when funerals are targeted for picketing and other public demonstrations; and

"(3) picketing of funerals causes emotional disturbance and distress to grieving families who participate in funerals; and

"(4) full opportunity exists under the terms and provisions of this section for the exercise of freedom of speech and other constitutional rights at times other than before, during and after funerals.

"(c) The purposes of this section are to:

"(1) Protect the privacy of grieving families before, during and after funerals; and

"(2) preserve the peaceful character of cemeteries, mortuaries and churches before, during and after funerals.

"(d) As used in this section:

"(1) 'Funeral' means the ceremonies, processions and memorial services held in connection with the burial or cremation of the dead.

"(2) 'Picketing' means protest activities engaged in by a person or persons stationed before or about a cemetery,

mortuary or church before, during and after a funeral.

"(e) It is unlawful for any person to engage in picketing before or about any cemetery, church or mortuary before, during and after a funeral.

"(f) A violation of subsection (e) is a class B misdemeanor. Each day on which a violation of subsection (e) occurs shall constitute a separate offense. . . ."

Determining the constitutionality of provisions such as this which restrict communication requires a review of U.S. Supreme Court cases involving free speech and the validity of attempted governmental limitations on speech. The U.S. Supreme Court has consistently held that peaceful picketing is expressive activity involving "speech," and as such is protected by the First Amendment. See e.g., U.S. v. Grace, 461 U.S. 171, 75 L.Ed.2d 736, 743, 103 S.Ct. 1702 (1983), and cases cited therein.

In analyzing the validity of a statute that limits free speech, the first determination to be made is the type of forum affected by the regulation. For purposes of this opinion, we will presume that the funeral picketing act affects a public forum -- "streets, sidewalks and parks, are considered, without more, to be 'public forums.'" See Perry Education Assn. v. Perry Local Educations' Assn., 460 U.S. 37, 74 L.Ed.2d 794, 804, 103 S.Ct. 948 (1983). We therefore apply the heightened scrutiny required when dealing with restrictions on speech in a public forum. (Picketing that takes place inside a cemetery, church or mortuary, may be scrutinized less strictly than picketing that takes place in a clearly public forum such as on the streets and sidewalks.)

"[E]ven in a public forum the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Ward

v. Rock Against Racism, 491 U.S. 781, 105 L.Ed.2d 661, 675, 109 S.Ct. 2746 (1989).

In determining whether a regulation is content-neutral, the government's purpose is the controlling consideration. Id. "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" Id. The stated purposes of the funeral picketing act are to: "(1) Protect the privacy of grieving families before, during and after funerals, and (2) preserve the peaceful character of cemeteries, mortuaries and churches before, during and after funerals." 1992 S.B. 626, § 4(c). The act is not on its face limited to prohibiting any particular subject matter, and there are no apparent exceptions to the prohibition. Any picketing focused on funeral attendees is the evil sought to be prevented, regardless of the content or subject of the picketing. Thus, the act appears on its face to be content-neutral.

A regulation that is content-neutral must be "narrowly tailored to serve a significant governmental interest, [and] leave open ample alternative channels for communication of the information." Ward, supra. (By contrast, a content-based regulation must be necessary to achieve a compelling state interest.) In determining that a town ordinance prohibiting picketing "before or about the residence or dwelling of any individual" sufficiently left open ample alternative channels, the United States Supreme Court applied the rule that "statutes will be interpreted to avoid constitutional difficulties," and construed the prohibition narrowly to do so. Frisby v. Schultz, 487 U.S. 474, 101 L.Ed.2d 420, 430, 108 S.Ct. 2495 (1988). "Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited. So narrowed, the ordinance permits the more general dissemination of a message" Id. at 431. The funeral picketing act can similarly be narrowly construed to prohibit only focused picketing solely in the immediate area of a mortuary, cemetery or church where a funeral is taking place and immediately prior to, during and after the funeral. Section 4(d)(2) defines "picketing" as "protest activities engaged in by a person or persons stationed before or about a cemetery, mortuary or church. . . ." (Emphasis added.) The entire act speaks to "picketing of funerals" or picketing "targeted" at funerals. See § 4(b)(2); (3). Protests which are not focused on people attending the funeral will not be considered prohibited. In other words, picketing that is aimed at the

public in general occurring in the general area surrounding the funeral rather than solely in the immediate vicinity of the funeral, and during a time period other than immediately proceeding and succeeding the funeral cannot be prohibited.

We next consider whether the funeral picketing act serves a significant government interest. The stated interest is allowing families to peacefully and privately organize, attend and mourn at funerals for deceased relatives without the emotional disturbance and distress associated with picketing which is targeted at the funeral. 1992 S.B. 626, § 4(b). In our opinion, preserving the integrity and sanctity of funerals is a legitimate government interest. According to long-standing tradition and custom in the state of Kansas, a funeral or memorial service is a solemn and often sad occasion calling for quiet times of grieving and contemplative remembrance of the departed. Historically, there is an expectation on the part of those attending a funeral that the solemnity of the occasion will be maintained. See, e.g., K.S.A. 65-1713b; 75-2741 et seq.; Cordts v. Cordts, 154 Kan. 354 (1941); Female Union Band Ass'n v. Unknown Heirs at Law, Ect., 403 F.Supp. 540, 548 (D.C. 1975).

The state of Kansas has a legitimate and abiding interest in providing its bereaved citizens a reasonable margin of space and time surrounding funerals and memorial services within which to pay last respects to friends and loved ones.

Finally, we must determine whether the funeral picketing act is narrowly tailored to protect only unwilling recipients of the communications. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of 'evil' it seeks to remedy." Frisby, supra at 432 . In contrast to the complete ban imposed in Frisby, the funeral picketing act is limited as to time; it prohibits picketing only before, during and after a funeral. While this is less restrictive than the ban in Frisby, we believe that it must nevertheless be narrowly construed to prohibit picketing only at times before, during and after the funeral when the funeral goers are present, arriving, attending or departing from the funeral site. As noted previously, the evil sought to be remedied is the targeting of funeral goers during a time and at a place where they have a significant interest in peace and privacy. This is precisely what the act prohibits.

"The type of picketers banned by the [statute] generally do not seek to disseminate a message to the general

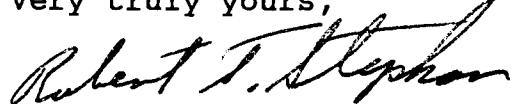
public, but to intrude upon the targeted [funeral goers], and to do so in an especially offensive way. Moreover, even if some picketers have a broader communicative purpose, their activity nevertheless inherently and offensively intrudes on [funeral] privacy."

Frisby, at 433.

While Frisby involved the privacy of a residence, we believe its tenets apply equally well to the privacy of a funeral, as illustrated by the quoted excerpt.

In conclusion, the funeral picketing act is content-neutral, leaves open ample alternative channels of communication and is narrowly tailored to serve a significant government interest. As such, it is a valid restriction on the time, place and manner of otherwise protected speech.

Very truly yours,



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RTS:JLM:jm