

No. 09-751

**In the
Supreme Court of the United States**

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., ET AL.,

Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit*

**BRIEF FOR THE STATE OF KANSAS, 47 OTHER
STATES, AND THE DISTRICT OF COLUMBIA
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

STEVE SIX

Attorney General of Kansas

STEPHEN R. McALLISTER

Solicitor General of Kansas

Counsel of Record

KRISTAFER R. AILSLIEGER

Deputy Solicitor General

120 S.W. 10th Street, 2nd Floor

Topeka, KS 66612

(785) 296-2215

stevermac@fastmail.fm

June, 2010

Counsel for Amici Curiae

[additional counsel listed inside cover]

Troy King
Attorney General of Alabama
500 Dexter Avenue
Montgomery, Alabama 36130

Daniel S. Sullivan
Attorney General of Alaska
P.O. Box 110300
Juneau, Alaska 99811

Terry Goddard
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007

Dustin McDaniel
Attorney General of Arkansas
323 Center Street
Little Rock, Arkansas 72201

Edmund G. Brown, Jr.
Attorney General of California
1300 I Street, Suite 125
Sacramento, California 94244

John W. Suthers
Attorney General of Colorado
1525 Sherman St.
Seventh Floor
Denver, Colorado 80203

Richard Blumenthal
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut 06106

Joseph R. Biden, III
Attorney General of Delaware
820 North French Street
Wilmington, Delaware 19801

Peter J. Nickles
Attorney General for the District of Columbia
One Judiciary Square
441 4th Street, N. W.
Suite 600 South
Washington, D.C. 20001

Bill McCollum
Attorney General of Florida
The Capitol PL-01
Tallahassee, Florida 32399

Thurbert E. Baker
Attorney General of Georgia
132 Judicial Building
40 Capitol Square, SW
Atlanta, Georgia 30334

Mark J. Bennett
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Lawrence G. Wasden
Attorney General of Idaho
P.O. Box 83720
Boise, Idaho 83720

Lisa Madigan
Attorney General of Illinois
100 W. Randolph St., 12th Floor
Chicago, Illinois 60601

Gregory F. Zoeller
Attorney General of Indiana
302 W. Washington Street
IGC-South, Fifth Floor
Indianapolis, Indiana 46204

Tom Miller
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

Jack Conway
Attorney General of Kentucky
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

James D. "Buddy" Caldwell
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, Louisiana
70804

Douglas F. Gansler
Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

Martha Coakley
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

Michael A. Cox
Attorney General of Michigan
P. O. Box 30212
Lansing, Michigan 48909

Lori Swanson
Attorney General of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Blvd.
St. Paul, Minnesota 55155

Jim Hood
Attorney General of Mississippi
Post Office Box 220
Jackson, Mississippi 39205

Chris Koster
Attorney General of Missouri
207 West High Street
Jefferson City, Missouri 65101

Steve Bullock
Attorney General of Montana
P.O. Box 201401
Helena, Montana 59620

Jon Bruning
Attorney General of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509

Catherine Cortez Masto
Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Michael A. Delaney
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

Paula T. Dow
Attorney General of New Jersey
Richard J. Hughes Justice
Complex
8th Floor, West Wing
25 Market Street
Trenton, New Jersey 08625

Gary K. King
Attorney General of New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504

Andrew Cuomo
Attorney General of New York
The Capitol
Albany, New York 12224

Roy A. Cooper
Attorney General of North Carolina
9001 Mail Service Center
Raleigh, North Carolina
27699

Wayne Stenehjem
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, North Dakota
58505

Richard Cordray
Attorney General of Ohio
30 East Broad Street
17th Floor
Columbus, Ohio 43215

W.A. Drew Edmondson
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma
73105

John R. Kroger
Attorney General of Oregon
1162 Court Street, N.E.
Salem, Oregon 97301

Thomas W. Corbett, Jr.
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania
17120

Patrick C. Lynch
Attorney General of Rhode Island
150 South Main Street
Providence, Rhode Island
02903

Henry D. McMaster
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina
29211

Marty J. Jackley
Attorney General of South Dakota
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501

Robert E. Cooper, Jr.
Attorney General of Tennessee
P. O. Box 20207
Nashville, Tennessee 37202

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

Mark L. Shurtleff
Attorney General of Utah
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114

William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609

Robert M. McKenna
*Attorney General of
Washington*
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504

Darrell V. McGraw, Jr.
*Attorney General of West
Virginia*
State Capitol, Room 26-E
Charleston, West Virginia
25305

J.B. Van Hollen
*Attorney General of
Wisconsin*
P.O. Box 7857
Madison, Wisconsin 53707

Bruce A. Salzburg
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

QUESTION PRESENTED

May the States protect the privacy and emotional health of grieving families from the psychological terrorism of persons who target such families with hostile picketing at funerals and internet postings that include personal attacks on the families and their deceased children?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. Funerals Represent A Special Circumstance
Warranting State Protection. 5

 Introduction 5

 A. The Sanctity And Privacy Of Funerals Is
 Unique. 7

 1. Centuries Of Human Tradition And
 Common Law Recognize That Funerals
 Are Unique And Sacred, A Recognition
 That Far Predates The U.S.
 Constitution. 7

 2. No Court Has Ever Held That A Funeral
 Service Is A Public Forum, And Even
 Public Cemeteries Are Not Considered
 Public Fora For First Amendment
 Purposes. 9

 B. Mourners Attending A Funeral Are A
 “Captive Audience”. 11

C. Targeted Picketing Is An Intrusive And Harassing Method Of Expression With Limited Value In Public Discourse.	14
II. The First Amendment Does Not Bar Tort Liability for Extreme And Outrageous Expression That Intentionally Inflicts Severe Emotional Distress On Targeted Private Citizens.	18
Introduction – The Tort Of Intentional Infliction Of Emotional Distress	18
A. The Fourth Circuit Erred By Ignoring Critical Distinctions Between Private Citizen Plaintiffs And Public Official / Public Figure Plaintiffs, As Well As Between Media And Non-Media Defendants.	24
B. The Fourth Circuit Erred By Effectively Treating All Statements That Implicate Public Affairs As Involving Matters Of Public Concern, And All Outrageous And Intentionally Hurtful Statements As “Opinion”, Immunized By The First Amendment.	27
1. The Phelps’ Attacks On Matthew Snyder And His Family Did Not Address Matters Of Public Concern.	30
2. The First Amendment Does Not Immunize The Phelps’ Statements Because They Are Not Provably False.	33
CONCLUSION	34

TABLE OF AUTHORITIES

CASES

<i>Brandon v. County of Richardson</i> , 624 N.W.2d 604 (Neb. 2001)	22
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	18, 24
<i>Cantrell v. Forest City Pub. Co.</i> , 419 U.S. 245 (1974)	18
<i>Carey v. Brown</i> , 447 U.S. 455 (1980)	12, 13
<i>City of San Jose v. Superior Court</i> , 38 Cal. Rptr. 2d 205 (Cal. App. 1995)	15
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	12, 13
<i>Cohen v. Cowles Media Co.</i> , 501 U.S. 663 (1991)	18
<i>Delta Fin. Co. v. Ganakas</i> , 91 S.E.2d 383 (Ga. App. 1956)	22
<i>Dreja v. Vaccaro</i> , 650 A.2d 1308 (D.C. App. 1994)	21
<i>Ford v. Revlon, Inc.</i> , 734 P.2d 580 (Ariz. 1987)	21
<i>Frisby v. Schultz</i> , 487 U.S. 474 (1988)	<i>passim</i>

<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	<i>passim</i>
<i>Griffin v. Sec’y of Veterans Affairs</i> , 288 F.3d 1309 (Fed. Cir. 2002)	10
<i>Halio v. Lurie</i> , 222 N.Y.S.2d 759 (1961)	20
<i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988)	<i>passim</i>
<i>Jackson v. City of Stone Mountain</i> , 232 F. Supp. 2d 1337 (N.D.Ga. 2002)	10
<i>Jones v. Clinton</i> , 990 F. Supp. 657 (E.D. Ark. 1998)	20
<i>Lower v. Bd. of Dirs. of Haskell County Cemetery Dist.</i> , 56 P.3d 235 (Kan. 2002)	10
<i>McQueary v. Stumbo</i> , 453 F. Supp. 2d 975 (E.D. Ky. 2006)	9
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990)	25, 26, 27, 29, 30
<i>National Archives and Records Admin. v. Favish</i> , 541 U.S. 157 (2003)	7, 8, 9
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	3, 20, 25, 26
<i>Phelps-Roper v. Strickland</i> , 539 F.3d 356 (6th Cir. 2008)	13, 14, 26

<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767 (1986)	27
<i>Rowan v. United States Post Office Dep't</i> , 397 U.S. 728 (1970)	12, 13
<i>Schuyler v. Curtis</i> , 147 N.Y. 434, 42 N.E. 22 (1895)	9
<i>Slocum v. Food Fair Stores of Florida</i> , 100 So. 2d 396 (Fla. 1958)	21
<i>Snyder v. Phelps</i> , 580 F.3d 206 (4 th Cir. 2009).	24
<i>State Rubbish Collectors Assoc. v. Siliznoff</i> , 240 P.2d 282 (Cal. 1952)	20
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1990)	32
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967)	18
<i>Ugalde v. W.A. McKenzie Asphalt Co.</i> , 990 F.2d 239 (5 th Cir. 1993)	21
<i>United States v. Grace</i> , 461 U.S. 171 (1983)	10
<i>Virginia v. Black</i> , 538 U.S. 343 (2003)	34
<i>Warner v. City of Boca Raton</i> , 420 F.3d 1308 (11 th Cir. 2005)	10

Warren v. Fairfax County,
196 F.3d 186 (4th Cir. 1999) 10

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562 (1977) 19

CONSTITUTION

U.S. Const. amend 1 *passim*

STATUTES

18 Pa. Cons. Stat. Ann. § 7517 1

720 Ill. Comp. Stat. 5/26-6 1

Ala. Code § 13A-11-17 1

Ark. Code. Ann. § 5-71-230 1

Cal. Penal Code § 594.353 1

Colo. Rev. Stat. § 18-9-125 1

Conn. Gen. Stat. § 53a-183c 1

Del. Code. Ann. tit. 11, § 1303 1

Fla. Stat. § 871.01 1

Ga. Code. Ann. § 16-11-34.2 1

Idaho Code Ann. § 18-6409 1

Ind. Code § 35-45-1-3 1

Iowa Code § 723.5	1
Kan. Stat. Ann. § 21-4015a	1
Ky. Rev. Stat. Ann. §§ 525.145, 525.155	1
La. Rev. Stat. Ann. § 14:103	1
Mass. Gen. Laws Ann. ch. 272, § 42A	1
Me. Rev. Stat. Ann. tit. 17, § 501-A	1
Md. Code Ann., Criminal § 10-205	1
Mich. Comp. Laws § 750.167d	1
Minn. Stat. § 609.501	1
Miss. Code. Ann. § 97-35-18	1
Mo. Rev. Stat. § 578.501	1
Mont. Code Ann. § 45-8-116	1
N.C. Gen. Stat. § 14-288.4(a)(8)	1
N.D. Cent. Code § 12.1-31-01.1	1
N.H. Rev. Stat. Ann. § 644:2-b	1
N.J. Stat. Ann. § 2C:33-8.1	1
N.M. Stat. §§ 30-20B-1 to 30-20B-5	1
N.Y. Penal Law § 240.21	1

Neb. Rev. Stat. §§ 28-1320.01 to 28-1320.03	1
Ohio Rev. Code Ann. § 3767.30	1
Okla. Stat. tit. 21, § 1380	1
R.I. Gen. Laws § 11-11-1	1
S.D. Codified Laws §§ 22-13-17 to 22-13-20	1
Tenn. Code Ann. § 39-17-317	1
Tex. Penal Code Ann. § 42.055	1
Utah Code Ann. § 76-9-108	2
Va. Code Ann. § 18.2-415	2
Vt. Stat. Ann. tit. 13, § 3771	2
Wash. Rev. Code Ann. § 9A.84.030	2
Wis. Stat. § 947.011	2
Wyo. Stat. Ann. § 6-6-105	2

OTHER AUTHORITIES

26 Encyclopedia Britannica 851 (15 th ed. 1985). . .	9
<i>Air Time Instead of Funeral Protest</i> , New York Times, Oct. 6, 2006, at A14	6
Alan Phelps, Note, <i>Picketing and Prayer: Restricting Freedom of Expression Outside Churches</i> , 85 Cornell L. Rev. 271 (1999)	12

PROSSER AND KEETON ON TORTS 63 (5 th ed. 1984) .	20
RESTATEMENT OF TORTS 2D § 46	21
RESTATEMENT OF TORTS 2D § 46(1)	20
RESTATEMENT OF TORTS 2D § 868	20
Steven J. Heyman, FREE SPEECH AND HUMAN DIGNITY 15455 (Yale U. Press 2008)	17

INTEREST OF THE *AMICI* STATES

The States have a compelling interest in protecting the sanctity and privacy of funerals, both to honor deceased citizens and to support and comfort grieving families. Honoring the dead is a tradition that stretches back for centuries of human history, one shared across diverse cultures and national borders. The dignity and sanctity of burial rites far predates the U.S. Constitution, and gives the States two strong legal interests in the questions presented in this case.

First, in recognition of the ancient cultural and common law traditions of honoring the dead and protecting the privacy of mourners, more than 40 States have enacted “funeral picketing” or “funeral protest” time, place and manner statutes that regulate protests around funerals.¹ **Second**, the States long

¹ See Ala. Code § 13A-11-17; Ark. Code. Ann. § 5-71-230; Cal. Penal Code § 594.353; Colo. Rev. Stat. § 18-9-125; Conn. Gen. Stat. § 53a-183c; Del. Code. Ann. tit. 11, § 1303; Fla. Stat. § 871.01; Ga. Code. Ann. § 16-11-34.2; Idaho Code Ann. § 18-6409; 720 Ill. Comp. Stat. 5/26-6; Ind. Code § 35-45-1-3; Iowa Code § 723.5; Kan. Stat. Ann. § 21-4015a; Ky. Rev. Stat. Ann. §§525.145, 525.155; La. Rev. Stat. Ann. § 14:103; Me. Rev. Stat. Ann. tit. 17, § 501-A; Md. Code Ann., Criminal § 10-205; Mass. Gen. Laws Ann. ch. 272, § 42A; Mich. Comp. Laws § 750.167d; Minn. Stat. § 609.501; Miss. Code. Ann. § 97-35-18; Mo. Rev. Stat. § 578.501; Mont. Code Ann. § 45-8-116; Neb. Rev. Stat. §§ 28-1320.01 to 28-1320.03; N.H. Rev. Stat. Ann. § 644:2-b; N.J. Stat. Ann. § 2C:33-8.1; N.M. Stat. §§ 30-20B-1 to 30-20B-5; N.Y. Penal Law § 240.21; N.C. Gen. Stat. § 14-288.4(a)(8); N.D. Cent. Code § 12.1-31-01.1; Ohio Rev. Code Ann. § 3767.30; Okla. Stat. tit. 21, § 1380; 18 Pa. Cons. Stat. Ann. § 7517; R.I. Gen. Laws § 11-11-1; S.D. Codified Laws §§ 22-13-17 to 22-13-20; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann.

have protected the emotional well-being of grieving families through traditional tort law, which is first and foremost a creature of state law, not federal law. For 100 years or more, the States have imposed tort liability for inflicting emotional harm on the families of the deceased. The States' tort law will not turn a blind eye to psychological terrorism that targets grieving families.

SUMMARY OF THE ARGUMENT

State laws protecting the sanctity of funerals, such as the States' "funeral picketing/protest" laws, are constitutional for at least three reasons. **First**, the privacy interests inherent in funeral proceedings are at least as strong as the compelling privacy interests in the home which the Court explicitly recognized in *Frisby v. Schultz*, 487 U.S. 474 (1988); accordingly, funerals should be afforded at least as much protection. **Second**, those attending funerals are a "captive audience" for First Amendment purposes. Parents, siblings, family, close friends, and neighbors cannot be expected to skip a loved one's funeral in order to avoid the malicious and intentionally hurtful messages the Respondents (Phelpses) love to use to target mourners. **Third**, this Court, as well as many lower courts, has recognized that targeted picketing—the Phelpses' primary means of terrorizing mourners at a funeral—is a particularly intrusive and harassing form of speech.

§ 42.055; Utah Code Ann. § 76-9-108; Vt. Stat. Ann. tit. 13, § 3771; Va. Code Ann. § 18.2-415; Wash. Rev. Code Ann. § 9A.84.030; Wis. Stat. § 947.011; Wyo. Stat. Ann. § 6-6-105.

State tort law that protects the privacy and emotional health of grieving families is also constitutional for at least three reasons. **First**, the common law long has provided protection for private citizens in cases involving harmful speech. Until the Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the First Amendment generally placed no limits on state tort law, and the actual malice rule of *New York Times* has no place outside of defamation claims brought by public officials and public figures against media defendants in situations involving matters of legitimate public concern. The targets of the picketing and internet postings in this case are not the general public but, rather, a deceased soldier and his private citizen father mourning the loss of his son in private. This is not a defamation case, does not involve media defendants, and there are no public officials or public figures here.

Second, the Phelps' outrageous personal attacks on Matthew Snyder and his family did not involve a matter of public concern. The Snyders as private citizens had no connection to the Phelps' world views, and thus the Snyders' grief was not itself a matter of public concern. If the test is simply that any citizen may be attacked viciously and personally so long as the speaker addresses a matter involving a class of which such private citizens are members, then there is no longer any constitutional distinction between matters of public and private concern. A war is a matter of public concern, but that does not give the Phelps a license to attack personally *every soldier* and *every soldier's family*, any more than publicized troubles of the Catholic Church give the Phelps a license to target and personally attack any private citizen who happens to be Catholic.

Third, the tort of intentional infliction of emotional distress (“IIED”)² imposes such a high bar for recovery that any federal constitutional concerns are satisfied by proving a prima facie case of IIED. In particular, IIED requires proof of (1) intentional or reckless conduct, (2) that is extreme and outrageous, and (3) that causes severe emotional distress in the plaintiff. The first element imposes the same high standard (intent or recklessness) that the Court adopted in the *New York Times* actual malice rule. Although state tort cases applying the “extreme and outrageous” conduct element often have involved speech or expressive conduct, the state courts have been extremely stingy in finding that conduct rises to the level required; mere insults or annoying behavior will not satisfy this element. Finally, because the tort of IIED requires proof that the defendants have caused *severe* emotional distress, there is no risk of imposing liability when citizens are simply offended or irritated, even assuming the conduct is intentional and outrageous. The harm caused must be both *intended* and *severe*.

Condemning the Phelps’ conduct here will not open the door to wide-ranging tort liability, because *no one else in the history of this country* has utilized their tactics. No one else has engaged in the targeted picketing of funerals to attack deceased soldiers (and others) and their grieving families, or used internet postings to terrorize the grieving. No one has engaged

² The jury also imposed liability for the tort usually referred to as “intrusion upon seclusion”. Although liability under that tort also may be appropriate here, the States focus on the tort of intentional infliction of emotional distress because it provides the narrowest basis for upholding tort liability in this case.

in copycat picketing since the Phelps began their attacks, in spite of the obvious publicity and notoriety the Phelps' tactics have gained them. *No one*. Thus, no traditional, necessary or even marginally valuable method of protest will be lost by holding the Phelps accountable for their emotional terrorism.

The IIED tort is appropriate in the circumstances presented here, and for decades the state courts have applied and developed this tort in situations involving abusive speech, holding plaintiffs to compelling proof in order to recover. Indeed, this Court should hold that requiring proof of the elements of the tort of IIED is the full extent of the legal protection to which the Phelps are entitled. Immunizing the Phelps in the name of the First Amendment is an unwarranted interference with decades of state tort jurisprudence, is legally unnecessary to protect public debate on matters of public concern, and is not supported by a careful reading of this Court's defamation-oriented First Amendment precedents.

ARGUMENT

I. Funerals Represent A Special Circumstance Warranting State Protection.

Introduction

This case involves the Phelps' targeted picketing of a particular private family, the Snyders, in a venue that both by human tradition and common law is considered sacred and unique: a private funeral service. The targets of the Phelps' conduct, a soldier killed in the line of duty in Iraq and his grieving father, are not public officials or public figures. They

are simply private Americans, one who made the ultimate sacrifice for his country, and the other who is mourning that sacrifice and the loss of his son. The Phelpsés' targeting of the Snyders ensured that the son could not be laid to rest in peace with the full dignity and respect he deserved, and that his father could not grieve in peace with the sanctity and privacy he deserved.

The Phelpsés are not war protesters; they are zealots who target private citizens for harassment and psychological attack, exploiting those citizens' private grief and unbearable suffering to gain public attention and notoriety for the Phelpsés' causes.³ It is important for the Court to recognize and appreciate that the Phelpsés' methods are unprecedented in American history; do not mistake them for Vietnam War protesters, Jehovah's Witnesses, or Hare Krishnas. Indeed, to compare the Phelpsés to any other protesters or religious groups in the Court's past cases is to insult and demean such groups.

First Amendment freedom of speech is not absolute. Fundamentally, this case boils down to whether the States may protect the privacy and emotional health of grieving families from the targeted harassment in which the Phelpsés engage. No one questions that the Phelpsés are "speaking" when they picket private funerals. But how are the values of the First Amendment and the interests of American society

³ The Phelpsés even proposed to picket the funerals of five Amish girls killed by a crazed gunman, but apparently were persuaded to forego that endeavor by a radio talk show host who gave the Phelpsés time on the air to espouse their views instead. *Air Time Instead of Funeral Protest*, New York Times, Oct. 6, 2006, A14.

served by tolerating such tactics in the unique and sacred setting of funerals for private citizens?

The decision below must be reversed.

A. The Sanctity And Privacy Of Funerals Is Unique.

1. Centuries Of Human Tradition And Common Law Recognize That Funerals Are Unique And Sacred, A Recognition That Far Predates The U.S. Constitution.

Funerals are a special and truly unique circumstance for First Amendment analysis, with the closest and best analogy in this Court's decisions being the sanctity of the home. Funerals should receive at least as much protection from unwanted emotional terrorism as the Court has accorded private homes. The States should be accorded their traditionally recognized police powers to adopt and enforce reasonable time, place, and manner regulations on activities that may disrupt funerals, and to define civil tort liability for conduct that intentionally inflicts emotional distress and invades sacred privacy interests.

This Court already has recognized the unique and important nature of funerals, their special solemnity, and the substantial privacy rights that inhere in them. In *National Archives and Records Administration v. Favish*, 541 U.S. 157, 167-68 (2003) (internal citation omitted), the Court observed, "[b]urial rites or their counterparts have been respected in almost all civilizations from time immemorial. They are a sign of the respect a society shows for the deceased and for the

surviving family members.” The Phelpses, however, have chosen to desecrate these ancient rites, most recently at the funerals of America’s fallen soldiers, and are intentionally inflicting emotional harm on grieving families that is in effect much like the “outrage at seeing the bodies of American soldiers mutilated and dragged through the streets.” *Id.* at 168.

The Court emphasized in *Favish* that “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.” 541 U.S. at 168. Thus, the Court recognized a right to privacy inherent in funeral proceedings that has deep roots in the common law and human tradition:

It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.

Id. (quoting *Schuyler v. Curtis*, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895)).⁴

It is this solemn right of privacy in one of the most sacred traditions of human civilization that the Phelpses have attacked, denigrated, and violated. The Snyder family had but one opportunity to honor and mourn their fallen son, one opportunity to pay their final respects, one opportunity to bury him with solemn dignity in a time-honored tradition that far predates the founding of our country and the adoption of our Constitution. The Snyder family should have been guaranteed their time of mourning in peace, with privacy, tranquility, and dignity. Traditions as old as humanity,⁵ much older than our Constitution, demand such privacy; the First Amendment does not abrogate all history and cultural norms to protect the Phelpses' unprecedented tactics.

2. No Court Has Ever Held That A Funeral Service Is A Public Forum, And Even Public Cemeteries Are Not Considered Public Fora For First Amendment Purposes.

Funeral services are not themselves traditional public fora in which the Phelpses could claim a First Amendment right to express their hateful messages. Not surprisingly, no court has ever held or suggested

⁴ Compare *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006), in which the Court put it this way: "A funeral is a deeply personal, emotional and solemn occasion."

⁵ "The ritual burial of the dead" has been practiced "from the very dawn of human culture and . . . in most parts of the world." 26 *Encyclopedia Britannica* 851 (15th ed. 1985).

that a funeral service is a public forum for First Amendment purposes. Instead, courts across the country have ruled uniformly that even *public* cemeteries are not public fora for First Amendment purposes. *See, e.g., Warner v. City of Boca Raton*, 420 F.3d 1308 n.1 (11th Cir. 2005); *Griffin v. Sec’y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Cir. 2002); *Warren v. Fairfax County*, 196 F.3d 186, 201 (4th Cir. 1999); *Jackson v. City of Stone Mountain*, 232 F. Supp. 2d 1337, 1353 (N.D.Ga. 2002); *Lower v. Bd. of Dirs. of Haskell County Cemetery Dist.*, 56 P.3d 235, 244 (Kan. 2002). Thus, any claim by the Phelpsés that they have a First Amendment right to intrude upon a funeral service is a nonstarter.

Although the Phelpsés stood on public ground to conduct their targeted picketing, that has never been the sole or determinative inquiry for First Amendment purposes. Indeed, this Court’s front steps and plaza are public property, but that does not mean the Phelpsés could engage in targeted picketing of Justices or Court employees and their families in such places simply because the government owns the ground under the Phelpsés’ feet. *Cf. United States v. Grace*, 461 U.S. 171, 176-83 (1983) (striking down federal statute that barred protests on the public sidewalks along the street passing by the Court building, but carefully distinguishing those sidewalks from other areas open to the public, including the Court’s plaza and front steps).

The Phelpsés’ avowedly intend to and succeed in delivering their targeted messages beyond public ground; indeed, their goal is to harass and target those attending private funeral services. Thus, the primary effect of their protest was to intrude upon the peace

and tranquility of the Snyder family and other funeral attendees, all of whom were mourning on private ground. The Phelps' target audience was the funeral service and those attending it; the Phelps were not present to display signs to passing motorists or pedestrians who were not attending the funeral. Because the Phelps had both the intent to intrude into a private, nonpublic forum, and succeeded in doing so, they should not be accorded the same First Amendment protection they might receive if they had simply been standing on a street corner to display signs to passing motorists, or even standing on the public sidewalk in front of this Court displaying signs to passing pedestrians.

B. Mourners Attending A Funeral Are A “Captive Audience”.

In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a municipal ordinance prohibiting picketing “before or about” any residence or dwelling. The *Frisby* Court began its examination with the recognition that “[e]ven protected speech is not equally permissible in all places and at all times,” and that “the standards by which limitations on speech must be evaluated ‘differ depending on the character of the property at issue.’” 487 U.S. at 479. The Court emphasized the sanctity and privacy inherent in the home and the concomitant interest of the State in protecting “the well-being, tranquility, and privacy” of the home. *Id.* at 480. Finally, the Court pointed out that persons within their own home are a captive audience with no ability to avoid or retreat from unwelcome speech taking place immediately outside. *Id.* Thus, the Court held that “[t]he First Amendment permits the government to prohibit offensive speech as

intrusive when the ‘captive’ audience cannot avoid the objectionable speech.” *Id.* at 487; *cf. Carey v. Brown*, 447 U.S. 455, 478-79 (1980) (Rehnquist, J., dissenting) (“few of us would feel comfortable knowing that a stranger lurks outside our home”).

In *Rowan v. United States Post Office Dep’t*, 397 U.S. 728 (1970), the Court upheld a statute permitting individuals—assisted by the U.S. Postal Service—to preclude the delivery to their homes of some offensive mail. Indeed, the Court recognized that, at least in the home, people should have the right “to be free from sights, sounds, and tangible matter we do not want.” *Id.*, at 736. In *Cohen v. California*, 403 U.S. 15 (1971), the Court struck down the disorderly conduct conviction of a man who wore a jacket with the inscription “Fuck the Draft” in a Los Angeles courthouse. Understandably, the Court in *Cohen* was reluctant to apply a “captive audience” rationale to justify the suppression of speech that was not targeting or being used to harass any particular individuals and which occurred passively in a public courthouse. But the facts of *Cohen* are significantly different from the situation here, not least because the Phelps were specifically targeting the Snyders (and other mourners) who were attending a private funeral for a private citizen in a private facility (a church).⁶

⁶ Indeed, it has been observed that “[i]f the current Supreme Court were to expand the captive audience doctrine beyond the four walls of the home, churches present one of the strongest cases.” Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 Cornell L. Rev. 271, 300 (1999). Moreover, the States’ interest in protecting privacy and sanctity is even stronger in the context of private funeral services at churches than for general religious services.

Moreover, in *Cohen* the Court recognized that the “captive audience” rationale would permit restrictions on speech when “substantial privacy interests are being invaded in an essentially intolerable manner.” *Id.* at 21.

The rationales that *Frisby*, *Rowan*, and *Cohen* recognized for restricting expressive activities apply with full force in the present case. The substantial privacy interests inherent in a private funeral proceeding for a private citizen held in a private facility are at least as significant as the privacy interests at stake in one’s home. Like the residents inside a home, funeral attendees are a captive audience, with “no recourse of escape whatsoever.” *Carey*, 447 U.S. at 479 (Rehnquist, J., dissenting). Importantly, the Phelpses deliberately and maliciously invaded the Snyders’ privacy, not just in an “essentially intolerable manner,” but in the most offensive and obnoxious manner anyone has ever utilized at private funerals. Like a private home, a private funeral service is a paradigm for a captive audience.

The Sixth Circuit reached that conclusion in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), a case involving the Phelpses’ challenge to an Ohio statute that restricted their targeted picketing activities at funerals in Ohio. The Sixth Circuit observed that “[i]ndividuals mourning the loss of a loved one share a privacy right similar to individuals in their homes.” *Id.* at 364-65. Moreover, the court recognized that “‘deep tradition and social obligation, quite apart from the emotional support the grieving require,’ compel individuals to attend a funeral or burial service,” and “[f]riends and family of the

deceased should not be expected to opt-out from attending their loved one's funeral or burial service." *Id.* at 366. Funeral attendees, just like residents at home, do not have the option of avoiding or retreating from unwelcome speech occurring at the funeral proceeding; they are a "captive audience." And, "it goes without saying that funeral attendees are also emotionally vulnerable," *id.*; in fact, they are if anything *more* emotionally vulnerable than typical residents in a private home. Thus, the Sixth Circuit concluded that "[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." *Id.* The Court should reach the same conclusion here.

C. Targeted Picketing Is An Intrusive And Harassing Method Of Expression With Limited Value In Public Discourse.

This Court and others long have recognized that targeted picketing inherently inflicts harms that do not accompany more generally utilized and accepted methods of communication, with the result that targeted picketing may receive less First Amendment protection than other methods of expression. For instance, in *Frisby* the Court made clear that targeted picketing does "not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way." 487 U.S. at 486. As Justice Stevens put it, "[p]icketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantial message conveyed." *Id.* at 498 (Stevens, J., dissenting). One lower court summarized the Court's

cases as follows: “In short, the United States Supreme Court has described targeted picketing as highly offensive conduct which is not entitled to the same level of First Amendment protection as is more general expression of political or social views.” *City of San Jose v. Superior Court*, 38 Cal. Rptr. 2d 205, 209 (Cal. App. 1995).

In fact, the Phelps’ targeted picketing is directly analogous to and (other than subject matter) indistinguishable from the targeted picketing the Court held could be regulated in *Frisby*. Some of the Phelps’ signs and statements arguably may have been intended to serve a broader communicative purpose, but several signs were personal, and are reasonably construed as targeting the Snyders. Certainly, notwithstanding the Fourth Circuit’s surprising conclusion to the contrary, the “Epic” the Phelps published on their website after the protest directed personal attacks specifically at the Snyders.

Among the signs the Phelps used to target the Snyders at their son’s funeral were the following: “You’re Going To Hell”, “God Is Your Enemy”, “God Hates You”, “Thank God For Dead Soldiers”, “Semper Fi Fags”, and “Not Blessed Just Cursed.” These signs are plausibly read as targeting Matthew Snyder and his family. These were not “War Is Wrong” or “U.S. Out Of Iraq” signs; they were personal and vicious attacks, fully intended to target the mourners and intrude on the privacy of the funeral.

But it gets worse, significantly so. In their “Epic”, the Phelps followed up their funeral attacks with even more personal invective directed at the Snyder family. In a document that begins with the title “The

Burden of Marine Lance Cpl. Matthew A. Snyder,” the Phelpses proceed to quote Bible verses interspersed with vicious personal attacks on the Snyders, including the following:

God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD – PERIOD! You did JUST THE OPPOSITE – you raised him for the devil.

You taught him that God was a liar. * * *

Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. * * * They also, in supporting satanic Catholicism, taught Matthew to be an idolater. * * *

God rose up Matthew for the very purpose of striking him down, so that God’s name might be declared throughout all the earth. He killed Matthew so that His servants would have an opportunity to preach his words to the U.S. Naval Academy at Annapolis, the Maryland Legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.

The Phelpses’ messages, both at the funeral and in the Epic, target the Snyders personally and were intended to harass and inflict psychological injury. This Court and others have recognized that the Phelpses’ chosen methods of communication are

particularly intrusive and hostile, and thus are of less value than more conventional methods of sharing religious beliefs. The Court also has recognized that these methods are far more injurious to those targeted, and far more intrusive on substantial privacy interests, particularly when the audience is captive.

Because (1) funerals are unique in their sanctity and the substantial privacy interests inherent in them, (2) funeral attendees are a captive audience, and (3) the Phelps' targeted picketing is a particularly intrusive and injurious method of expression with limited public value, the Court should reach the same result as in *Frisby*. Just as the *Frisby* Court ruled that "individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom," 487 U.S. at 485, the First Amendment does not compel private families attending a private funeral for a lost child to welcome offensive and hostile targeted picketing into such solemn and sacred ceremonies. Instead, the States may protect the families' substantial privacy interests through content-neutral time, place, and manner regulations,⁷ as well as the application of general tort law principles, as explained below.

⁷ As one First Amendment scholar puts it: "It is difficult to imagine a deeper intrusion into private life – or a more outrageous infliction of emotional distress – than a demonstration that intentionally interferes with the ability of family members to mourn a loved one in peace. To the extent that the protest disrupts a funeral, it also interferes with the mourners' right to religious or spiritual freedom. These injuries are not justified by the value of the speech, for the protesters have many other avenues of expression that do not have such a serious impact on the rights of others." Steven J. Heyman, *FREE SPEECH AND HUMAN DIGNITY* 15455 (Yale U. Press 2008).

II. The First Amendment Does Not Bar Tort Liability For Extreme And Outrageous Expression That Intentionally Inflicts Severe Emotional Distress On Targeted Private Citizens.

Introduction - The Tort Of Intentional Infliction Of Emotional Distress

No decision of this Court has ever exempted a non-media defendant from generally applicable state tort law on First Amendment grounds, and there is no reason to break such ground in this case. Even with media defendants, numerous decisions of the Court have emphasized that the First Amendment provides “no special immunity from the application of general laws,” nor does it grant any special privilege “to invade the rights and liberties of others.” *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972). Indeed, the Court has observed that it is “well-established” that the First Amendment does not forbid enforcement of a state cause of action, based on laws of general applicability, against a party for damage caused by the party’s speech. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (media defendant can be sued for “promissory estoppel” for publishing identity of an anonymous source when it had promised the source it would not do so).

For example, defamatory speech against private citizens is actionable, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-47 (1974), as is speech that portrays a plaintiff in a false light, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Speech that violates copyright laws or offends a state-created “right of publicity” is also

actionable. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574-75 (1977). These and many other decisions make clear that the First Amendment does not immunize the Phelps from state tort liability simply because their activities may be characterized as expressive.

The States have a strong interest in shaping their tort law doctrines to protect the substantial privacy interests of their citizens, including protection from intentionally injurious and targeted picketing. Acknowledging such interests, the Court long has recognized that States “should retain substantial latitude” in protecting the privacy of private citizens. *Gertz*, 418 U.S. at 345-46. A jury in this case reasonably found that the Phelps’ conduct here satisfied the strict elements of a well-established state law tort of general applicability, a verdict that should be upheld.

The tort at issue here—the intentional infliction of emotional distress (“IIED”)⁸—imposes such a high bar for recovery that its proper application establishes a very narrow limitation on expressive activities, and does so in a way that inflicts no harm on the First Amendment. Indeed, any federal constitutional concerns are satisfied by proper proof of a prima facie case of IIED. Furthermore, state courts long have recognized tort liability for intentionally inflicted emotional distress in cases involving the grieving families of the deceased: “there are a great many cases

⁸ As noted above in footnote 2, the States focus on the IIED tort because it provides the narrowest basis for upholding liability in this case.

involving the mishandling of dead bodies, whether by mutilation, disinterment, interference with proper burial, or other forms of intentional disturbance.” PROSSER AND KEETON ON TORTS 63 (5th ed. 1984) (footnotes omitted) (citing cases).⁹ Today, these cases would be treated as IIED cases, and the point is that liability for interfering with interment of the deceased is deeply anchored in state tort law, predating even the recognition of the IIED tort.

IIED requires proof of (1) intentional or reckless conduct, (2) that is extreme and outrageous, and (3) that causes severe emotional distress in the plaintiff. See, e.g., RESTATEMENT OF TORTS 2D § 46(1). The first element imposes the same high standard – intent or recklessness – that the Court incorporated in the *New York Times* actual malice rule. Thus, IIED liability can only be found when there is a high degree of culpability. No accidental or unintended consequences can give rise to such liability.

Although tort cases applying the “extreme and outrageous” conduct element often have involved speech or expressive conduct, see, e.g., *State Rubbish Collectors Assoc. v. Siliznoff*, 240 P.2d 282 (Cal. 1952) (unlawful threats and intimidation by business competitors); *Jones v. Clinton*, 990 F. Supp. 657, 677 (E.D. Ark. 1998) (sexual propositions); *Halio v. Lurie*, 222 N.Y.S.2d 759 (1961) (taunting letters and jeering

⁹ RESTATEMENT OF TORTS 2D § 868 goes perhaps even further than the old cases, suggesting that “[o]ne who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.”

verses); *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987) (vulgar remarks to co-worker); *Dreja v. Vaccaro*, 650 A.2d 1308 (D.C. App. 1994) (interview by police officer), state courts have been extremely stingy in finding conduct to rise to the level required to satisfy this element of the tort.¹⁰ Moreover, this element is subject to significant control by the courts, because “[i]t is for the court to determine, in the first instance, whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery” REST. 2D § 46, Comment h. Further, “[w]here reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.” *Id.*

Importantly, the law is clear that mere insults or annoying behavior will not satisfy this element of the tort; in fact, even epithets, profanity, and racial slurs may not suffice, unless other outrageous conduct is present. *See, e.g., Slocum v. Food Fair Stores of Florida*, 100 So. 2d 396 (Fla. 1958) (statement to customer by employee that “you stink to me” not actionable); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993) (Texas law, racial slur not actionable). It is also clear that context matters, and the “extreme and outrageous character of the conduct may arise from the actor’s knowledge that the other is peculiarly susceptible to emotional distress, by reason

¹⁰ “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” RESTATEMENT OF TORTS 2D § 46, Comment d.

of some physical or mental condition,” RESTATEMENT OF TORTS 2D § 46, Comment f., and the “conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge” *Id.* The Phelps target grieving families like the Snyders precisely because such families are “peculiarly susceptible [and vulnerable] to emotional distress.” *Cf. Delta Fin. Co. v. Ganakas*, 91 S.E.2d 383 (Ga. App. 1956) (threats to 11-year-old girl home alone that she would be taken to jail); *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001) (statements made by law enforcement officer to rape victim shortly after the crime had occurred).

Finally, because IIED requires proof that the defendants have caused severe emotional distress, there is no risk of imposing liability when citizens are simply offended or irritated, even assuming the conduct is intentional and outrageous. In this regard, Snyder presented compelling evidence of the psychological harm he has suffered as a result of the Phelps’ targeting the family with their vicious attacks. Indeed, as the Fourth Circuit explicitly held, the Phelps did not appeal the sufficiency of the evidence to support the jury’s finding that they had committed IIED, nor realistically could they have done so. In fact, their conduct is the epitome of this tort; the Phelps’ actions were intentional, their unprecedented tactics are extreme and outrageous, and Mr. Snyder had overwhelming proof of the severe distress the Phelps inflicted on him.

Importantly, holding the Phelps’ responsible here will not open the door to wide-ranging tort liability, both because the IIED tort is very restrictive and because no one else in the history of this country has

utilized the Phelps' tactics. No one else has ever engaged in the targeted picketing of funerals to attack the deceased and their grieving families, or used internet postings to terrorize the grieving. No one has engaged in copycat picketing since the Phelps began their attacks, in spite of the obvious publicity and notoriety the Phelps' tactics have gained them. No one. Thus, no traditional or necessary or even marginally valuable method of protest will be lost by holding the Phelps accountable for their emotional terrorism.

IIED is appropriate in the circumstances presented here, and for decades state courts have applied and developed the IIED tort in abusive speech situations. This Court should hold that requiring proof of the elements of IIED is the full extent of the legal protection to which the Phelps are entitled. Imposing further obstacles to liability in the name of the First Amendment, as the Fourth Circuit erroneously did here, is an unwarranted interference with decades of state tort jurisprudence. Further, imposing phantom First Amendment obstacles is legally unnecessary to protect public debate on public matters, and is not supported by a careful reading of this Court's defamation-oriented First Amendment precedents.

The Phelps should not be permitted to wield the First Amendment as a sword to sever the States' ability to recognize and apply the IIED tort (and possibly others) from the States' general authority to create and mold tort law. The Phelps are not media defendants reporting about public officials or figures, nor are they commenting on matters of public concern when they target the Snyders personally and attempt

to draw this private family into the Phelps' crusade. Especially for non-media defendants, the First Amendment creates no "special immunity from the application of general laws," nor is it a license "to invade the rights and liberties of others." *Branzburg*, 408 U.S. at 683. Rather, the Court should give effect to the States' traditional latitude to define and enforce tort remedies for intentional interference with privacy interests.

A. The Fourth Circuit Erred By Ignoring Critical Distinctions Between Private Citizen Plaintiffs And Public Official / Public Figure Plaintiffs, As Well As Between Media And Non-Media Defendants.

Two critical distinctions in this case which the Fourth Circuit effectively ignored are (1) that the plaintiff here, Mr. Snyder, is a private citizen, not a public official or a public figure, and (2) that the Phelps are not media defendants reporting on matters of public concern. No prior First Amendment decision of this Court involves these two circumstances in the same case: a private plaintiff suing non-media defendants for expressive activities that violate well-recognized state tort law principles. Thus, no prior defamation decision of the Court involves facts directly analogous to the situation here.¹¹

¹¹ The Fourth Circuit recognized as much, pointing out that this Court has never "addressed the question of whether constitutional protections afforded statements not provably false should apply with equal force to both media and non-media defendants." *Snyder v. Phelps*, 580 F.3d 206, 220 n. 13 (4th Cir. 2009).

Of all the Court's First Amendment decisions, the most relevant and analogous is *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Fourth Circuit, however, virtually ignored *Gertz*, and instead relied heavily on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), in reversing the verdict. As explained below, *Milkovich* and *Hustler* are the wrong reference points for deciding this case, while careful adherence to *Gertz* is crucial.

Gertz involved defamatory statements about a private attorney published in a nationally distributed periodical. The publisher of the periodical, relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), argued that it could not be held liable for defamation under state tort law unless the plaintiff satisfied the "actual malice" standard. The Court rejected that argument, noting that "[t]he *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person." 418 U.S. at 342. Instead, the Court found that "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." *Id.* at 343.

The same conclusion holds here, and the reasons the *Gertz* Court gave for applying a different standard to private citizen defamation plaintiffs apply with equal if not more force in this case. The *Gertz* Court noted that "[p]rivate individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater." 418 U.S. at 344. Further, public officials and public figures have voluntarily placed themselves on the public

stage, warranting less protection. Private persons, on the other hand, have not and retain all of their privacy interests. Accordingly, “private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.” *Gertz*, 418 U.S. at 345. It was for these reasons that the *Gertz* Court recognized the “strong and legitimate state interest in compensating private individuals” for harmful speech, 418 U.S. at 348, and concluded that “the States should retain substantial latitude in their efforts to enforce a legal remedy” for speech harmful to a private individual. 418 U.S. at 345-46.

These same reasons and same interests are present here, where the Phelps targeted private individuals attempting to grieve the death of their son at a private funeral. First, not only are private citizens such as the Snyders more vulnerable generally, “it goes without saying that funeral attendees are also emotionally vulnerable.” *Phelps-Roper*, 539 F.3d at 366. Second, the Snyders were not public officials or public figures; they did nothing to seek a public stage. They wanted privacy, not publicity, for their son’s funeral and their grief.

Moreover, this case does not raise any concern about media self-censorship or the potential to chill public debate, concerns that largely motivated the Court’s decisions in cases against media defendants, such as *New York Times*, *Milkovich*, and *Hustler*. *Milkovich* in particular, which the Fourth Circuit called “crucial precedent,” was an application of an earlier rule arising out of this Court’s specific concern that “media defendants who publish speech of public concern” might be unconstitutionally deterred if they

had to prove the truth of every assertion they make. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *Milkovich*, 497 U.S. at 20. That concern necessitated the rule in *Milkovich* and *Hepps*—on which the Fourth Circuit relied—that the First Amendment protected speech without a provably false assertion; but that concern does not exist when the defendant is not a member of the media in any sense.

Critically, and unlike *Milkovich*, *Hepps*, *Hustler*, and other such cases, this case does not involve a news organization, a book or magazine publisher, radio or television broadcasts, or a public media commentator of any sort. The Phelpses can make no legitimate claim to public media status. They are simply private persons who seek media attention by attacking private families at an especially vulnerable moment in one of the most outrageous ways imaginable. These factors distinguish this case from all others the Court has ever decided, and further weigh in favor of deferring to the “substantial latitude” the Court traditionally has afforded the States in resolving private disputes.

B. The Fourth Circuit Erred By Effectively Treating All Statements That Implicate Public Affairs As Involving Matters Of Public Concern, And All Outrageous And Intentionally Hurtful Statements As “Opinion”, Immunized By The First Amendment.

Essentially, the Fourth Circuit concluded that so long as the Phelpses did not deliver messages that are provably false (the Fourth Circuit characterized the Phelpses’ signs and the Epic as hyperbolic rhetoric),

and some of their signs addressed public affairs (*e.g.*, war in Iraq, scandal in the Catholic Church), their activities are completely immunized by the First Amendment. According to the Fourth Circuit, that immunity applies no matter whether the plaintiff is a private citizen or a public figure, no matter whether the defendant is a media entity or a private citizen, no matter whether the speaker believes the statements to be true, and no matter whether the speaker intends the statements to inflict emotional harm on the target audience. Indeed, the Fourth Circuit seems to adopt a Catch-22 for private citizen plaintiffs: if the Phelps' statements involve matters of public concern, then they are protected by the "actual malice" standard; if, on the other hand, the statements do not address matters of public concern, then they are protected because no reasonable listener would believe such hyperbole (even though the Phelps absolutely believe what they are saying), making this protected "opinion."

The Fourth Circuit seems to have concluded that the Phelps were expressing unverifiable opinions on matters of public concern, and thus the First Amendment insulated them from all legal responsibility for the intentional harms their actions caused. The Fourth Circuit was fundamentally wrong for at least two reasons, as further explained below. **First**, the Phelps were not addressing a matter of public concern when they attacked purely private citizens. Not only did their messages include private themes in addition to public ones, but their efforts to exploit the grief and dignity of private citizens in order to gain publicity should not result in characterizing their methods as discussion on a matter of public concern, although that seems to be what the Fourth Circuit held.

Second, the Phelps are not asserting exaggerated opinions or hyperbolic overstatements for rhetorical purposes. The Phelps cannot and do not claim that their messages are parody or satire; *they mean every word they say*, at least perhaps until they get sued and try to rewrite their motives in litigation. Yet the Fourth Circuit immunized the Phelps from liability in part because their statements were so outrageous and vile. That result turns traditional tort law on its head: the messages were much more likely to inflict serious emotional harm on their target precisely because they were so unconscionable. In fact, the Fourth Circuit created a perverse incentive for emotional terrorists to be outrageous and extreme, because First Amendment immunity will apply if reasonable people would not actually believe the statements.

Thus, under the Fourth Circuit's reading of *Milkovich* and *Hustler*, private citizen speakers have an incentive to speak in especially inflammatory – even abusive and malicious – terms. The more outrageous the attack on others, the more likely such statements will be deemed either (1) hyperbole (*i.e.*, protected “opinion”) or (2) incapable of being proven false (protected by the “actual malice” rule so long as the statements have any connection to public affairs). The reality, however, is that the more abusive and outrageous the statements the more effectively such efforts will terrorize the target captive audience of private citizens. The Phelps intentionally strike at private American families who are grieving, a setting in which such families are at their most vulnerable, one of the worst imaginable times of suffering that any family may ever experience—the violent death of a child.

With all due respect, the Fourth Circuit dramatically misread the Court's decisions in both *Hustler* and *Milkovich*. *Hustler* dealt with the parody of a public figure by a media defendant, and such matters are effectively per se matters of public concern, at least under current doctrine. Here, none of those circumstances are present: the Snyders are not public figures, the Phelpses are not media defendants, and there is no parody. Likewise, *Milkovich* does not purport to immunize all statements that arguably can be labeled "opinion"; indeed, the essential holding of *Milkovich* is that statements cannot be per se immunized by such labels.

1. The Phelpses' Attacks On Matthew Snyder And His Family Did Not Address Matters Of Public Concern.

A crucial flaw in the Fourth Circuit's reasoning is that the Phelpses' statements in this case address matters of public concern when they implicate Matthew Snyder and his family personally in the Phelpses' religious crusade. Of course topics like war, homosexuals serving in the military, and scandal within major religious institutions are of interest to the public. But the question of what is a matter of public concern should not be answered, and in all fairness cannot be answered, without reference to the privacy interests of the citizens the Phelpses are implicating in—and attempting to connect to—their picketing topics. Instead, the determinative question should be, "what connection does *the plaintiff* have to the speech at issue?"

The public attention that the Phelpses' antics brought to Matthew Snyder's funeral does not make

Matthew Snyder or his family public figures. It was the Phelps who thrust the Snyder family into the unwelcome glare of national media coverage; it was the Phelps who transformed a solemn and sacred private proceeding into a media circus. Until the Phelps came along, this country and the media did not know of Matthew Snyder or his family.

Essentially, the Fourth Circuit permitted the Phelps to bootstrap in the most egregious fashion imaginable. Under the Fourth Circuit's analysis, all the Phelps have to do to obtain First Amendment immunity is carry pickets that mention or implicate war, and they are then free to attack personally *any soldier* and *any soldier's family*, no matter the circumstances or the methods utilized. That result obtains even though the private citizens being targeted have never sought the public eye, and even though the speaker's specific intent is to harm these private citizens. That result is wrong; the Phelps' targeted personal abuse of private citizens should not be mischaracterized as protests on matters of public concern.

Instead, when a speaker targets a particular private individual or family, the critical analysis is whether the plaintiffs have a significant and personal connection to a matter of legitimate public concern. Otherwise, the door is wide open for speakers to criticize any and all members of a given class whenever that class as a whole is implicated in some way in a matter of public concern. Properly, this Court has never viewed the situation that way. For example, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court made clear that the topic of public concern was the allegation that the plaintiff lawyer had

participated in framing a Chicago police officer who was being prosecuted for murder. If the speaker's claim had been more general (*e.g.*, "that all lawyers are scoundrels"), and the speaker had leveled a personal attack against Gertz, it seems clear the Court would not have deemed such speech to involve a matter of public concern with respect to Gertz personally. In sharp contrast, however, the Fourth Circuit's rationale would protect a personal attack against *any* lawyer under the banner of "all lawyers are scoundrels."

Similarly, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1990), the Court refused to hold that any "public controversy" is necessarily a matter of public concern for purposes of applying the actual malice rule. Instead, the Court rejected the argument that the lurid details of a divorce in a wealthy family were a matter of public concern, even though some in the general public might well have considerable interest in such details. Again, in sharp contrast, the Fourth Circuit's reasoning would permit the Phelps to engage in targeted picketing on the sidewalks outside the homes or offices of divorcees so long as the Phelps carried some signs that, for example, decried the breakdown of marriage in this country, high rates of divorce, adultery, and the like. Because such topics are matters of public concern, the Phelps could target anyone who is or ever has been divorced. Further, the more outrageous the claims made (*e.g.*, "God Hates Divorcees"), the more likely the statements would be absolutely protected under the Fourth Circuit's analysis. Again, with all due respect, the Fourth Circuit misread this Court's cases.

2. The First Amendment Does Not Immunize The Phelps' Statements Because They Are Not Provably False.

The Fourth Circuit's expansion of *Hustler* fails to respect the "substantial latitude" that the Court historically has accorded the States in the area of tort law generally, and in the context of privacy and emotional distress torts in particular. The Fourth Circuit effectively immunized all outrageous statements from any tort liability because they cannot be proven false. Of course, no one can know who or what, if anything, "God Hates." But that answer begs the question whether the Phelps' malicious and hateful messages targeting private citizens merit First Amendment protection. The Fourth Circuit's analysis also ignores the emotionally devastating effect that outrageous and unprovable statements can have on targeted private citizens who necessarily cannot defend themselves from such unprovable claims.

Under the Fourth Circuit's analysis, the Phelps would walk away, scot-free, from the emotional devastation they have wrought. Meanwhile, private American families like the Snyders, the Shepards, and others are caught in an inescapable constitutional Catch-22: if the Phelps' statements are not about these families personally, then such statements are protected as "opinions" addressing matters of public concern; but if the Phelps' statements are about these families personally, then the statements are protected as unprovable hyperbole. Either way, the families and the States lose.

The Court's cases do not require such a repulsive result. When public officials and public figures engage

in heated debate over public issues they may engage in hyperbole, using strong rhetoric and sometimes overactive imaginations. The fact that such tactics are tolerated in that context does not mean they must be embraced in all contexts. Just as a “true threat” may be prohibited, indeed criminalized, even though it is speech and may express an opinion, *cf. Virginia v. Black*, 538 U.S. 343 (2003), the Phelps’ statements may subject them to liability under the rigorous standards of IIED. The Constitution does not stand in the way of the States acting to prevent the Phelps from hijacking solemn funeral proceedings for their own hateful purposes at the expense of grieving American families.

CONCLUSION

The judgment of the Fourth Circuit immunizing the Phelps from all responsibility for their intentional infliction of emotional distress must be reversed.

35

Respectfully submitted,

Steve Six

Attorney General of Kansas

STEPHEN R. MCALLISTER

Solicitor General of Kansas

Counsel of Record

KRISTAFER R. AILSLIEGER

Deputy Solicitor General

120 S.W. 10th Street, 2nd Floor

Topeka, KS 66612

(785) 296-2215

stevermac@fastmail.fm

June 2010