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 PETITIONER

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STATEMENT OF THE QUESTIONS

I. Whether the First Amendment permits Mr. Snyder, a private figure plaintiff who had no connection to the "issues" cited by the Phelpses, to seek judicial recourse for the harm intentionally inflicted upon him by the Phelpses' tortious conduct?

II. Whether Mr. Snyder should not be required to prove that the Phelpses' speech could "reasonably be interpreted as stating actual facts" in order to recover for intentional infliction of emotional distress?

III. Whether Mr. Snyder, as a member of a captive audience mourning the loss of his son at a funeral, is entitled to a remedy for the Phelpses' intentional invasion of his privacy?

IV. Whether Mr. Snyder's First Amendment rights to free exercise of religion and peaceable assembly should outweigh the Phelpses' First Amendment right to target hateful speech at him during his son's funeral?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were Albert Snyder, Fred W. Phelps, Sr., Westboro Baptist Church, Inc., Rebekah A. Phelps-Davis, Shirley L. Phelps-Roper, and several John and Jane Doe Defendants-Appellants.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Snyder v. Phelps, et al.*, 580 F.3d 206 (4th Cir. 2009), and is reproduced in the petition for writ of certiorari. Pet. App. A. The Fourth Circuit reversed the October 31, 2007, jury verdict and the post-verdict decision of the United States District Court for the District of Maryland, reported at 533 F. Supp. 2d 567 (D. Md. 2008), also reproduced in the petition for writ of certiorari. Pet. App. B.

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on September 24, 2009. Pet. App. A. This Court granted Mr. Snyder's petition for writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case centers on a funeral protest and written "epic" targeted at the family of Matthew Snyder, a United States Marine killed in the line of duty. Searching for funerals of military personnel, Respondents (hereinafter "the Phelpses") traveled from Kansas to Maryland and stationed themselves outside of the church on the day of Matthew's funeral holding signs reading, among other things, "Thank God for Dead Soldiers," "God Hates Fags," and "You're Going to Hell." They also posted a lengthy, epithet-filled "epic poem" on their website titled, "The Burden of Marine Lance Cpl. Matthew A. Snyder" (hereinafter "the Epic"). Matthew Snyder's father, Albert Snyder (hereinafter "Mr. Snyder"), who became violently ill at the sight of the Phelpses' website and whose diabetes and depression worsened as a result of the Phelpses' intentionally harmful conduct, sued in tort and won a jury verdict against them. This jury verdict was upheld by the District Court, which rejected the Phelpses' free speech and free exercise arguments. The Court of

Appeals for the Fourth Circuit, however, reversed. Adopting the Phelpses' argument that their expressive conduct qualified as "rhetorical hyperbole" absolutely protected by the First Amendment, the Fourth Circuit immunized the Phelpses from any tort liability arising out of their protest or their Epic.

I. Statement of the Facts

After high school, Matthew Snyder fulfilled a lifelong dream and enlisted in the United States Marine Corps, ultimately rising to the rank of Lance Corporal. (Vol. VIII at 2063.)[1] On March 3, 2006, two uniformed Marines arrived at Mr. Snyder's home and informed him that his only son had been killed in Al Anbar Province, Iraq. (Vol. VII at 2064.) With heavy hearts, the Snyder family planned a traditional private burial service at their family church, St. John's Catholic Church in Westminster, Maryland. (Vol. VII at 2065, 2083.) Mr. Snyder testified that his family "wanted it to be a private funeral." (Vol. VIII at 2247.) At the funeral service, Marines ensured that the Snyder family received the full military honors to which fallen soldiers and their families are entitled. (Vol. VII at 2073.) The family held two viewings: one on March 9, 2006, for friends and extended family, and a second just prior to the funeral on March 10, 2006, for immediate family and a few friends. (Vol. VIII at 2156.)

On March 8, 2006, as Matthew's body arrived in the United States, the Phelpses—members of the Westboro

[1] References are to the Appendix submitted to the Court of Appeals.

Baptist Church (hereinafter "the WBC")—announced their intent to protest:

> WBC to picket funeral of Lance Cpl. Matthew A. Snyder—at 10:15 a.m., Friday, Mar. 10, at St. John's Catholic dog kennel, 43 Monroe St., Westminster, Maryland. Killed by IED—like the IED America bombed WBC with in a terroristic effort to silence our anti-gay Gospel preaching by violence.

(Vol. VIII at 2156, 2195.) Mr. Snyder knew that the Phelpses would be present; nonetheless, he attempted to put them out of his mind and focus instead on his son's burial. On the day of the funeral, the Phelpses placed themselves at the main entrance of St. John's Catholic Church property to ensure that Mr. Snyder and his family would encounter them. In response, Matthew Snyder's funeral procession was re-directed to an alternate entrance. (Vol. VIII at 2244.) Even after readjusting their route, the Snyders were only 200–300 feet from the Phelpses during the funeral procession. (Vol. VII at 2079, 2141.) On the way from the viewing to the funeral, as Mr. Snyder was trying to focus on the memory of his son, he looked at his daughters and saw the Phelpses' signs behind them. (Vol. VIII at 2144.)

Unsurprisingly, the Phelpses' presence turned Matthew Snyder's funeral into a circus. (Vol. VII at 2082.) Even according to *the Phelpses' expert*, they were a "petty irritant." (Vol. X at 2571.) The Phelpses staged their protest directly in front of the St. John's Catholic elementary school and across the street from a public school. (Vol. VIII at 2242, 2249.) To mitigate the harm

the Phelpses' presence and activities would have on the school children, the school mandated that all blinds be closed, covered doors and windows facing the Phelpses with paper, and offered "excused absences" to children whose parents chose to keep them out that day. (Vol. VIII at 2249–2250.) According to the testimony of Father Leo Patalinghug, the associate pastor at St. John's, the Phelpses' presence eliminated the "peaceful experience for our school or the community." (Vol. VIII at 2251.)

The Phelpses brought various signs with them to Westminster, Maryland, as part of their protest of Matthew's funeral. One of the signs read, "Thank God for Dead Soldiers." Mr. Snyder testified that he took the sign to mean that the Phelpses were "thanking God [his] son was dead." (Vol. VIII at 2113.) Additionally, the Phelpses attacked Mr. Snyder's religion at a time when he was particularly vulnerable: one of the Phelpses' signs read, "Priests Rape Boys." (Vol. VIII at 2115.) Several other signs included phrases directed specifically at Mr. Snyder's deceased son: "You're Going to Hell" and "God Hates You." These signs made Mr. Snyder "sick" because his son "was the only dead person there," and the signs "were definitely directed at" him. (Vol. VIII at 2119, 2121.) Though Matthew Snyder was not homosexual, at least two signs used a homophobic epithet (Vol. VIII at 2120, 2196) while another included a picture of two males performing anal sexual intercourse.[2] (Vol. VII at 2088–2089; Vol. VIII at

[2] The Phelpses' expert concluded that the picture of men performing anal sexual intercourse had no causal connection to the Phelpses' religion. (Vol. X, 2626).

2118, 2203–2204.) Even Fred Phelps, Sr., admitted that grieving family members would be offended by the latter sign. (Vol. VIII at 2205.)

The Phelpses' expert agreed that their signs were "personal" to the Snyder family. (Vol. X at 2572.) When discussing the "Thank God for Dead Soldiers" sign, the Phelpses' expert testified, "I think that goes a little bit further than protesting against a war." (Vol. X at 2572.) He further explained the consequences of the Phelpses' actions with regard to Mr. Snyder's depression: "[I]t interfered with the process that we go through of honoring our soldiers who die for their country and also could have surely interfered with the grieving process and allowing him to be a hero without any tarnish on his casket." (Vol. X at 2578.) In other words, the Phelpses' own expert witness conceded that their actions were intentionally targeted at Mr. Snyder and caused him harm.

Fred Phelps, Sr., candidly explained that his motive behind protesting military funerals was to seek revenge. According to Phelps, approximately three years before trial, members of the WBC were assaulted by Marines. (Vol. VIII at 2226.) In retaliation, WBC members began protesting military funerals and have continually terrorized grieving military families since the alleged assault. For example, the Phelpses created "Sign Movies" that replicated their protest of Matthew Snyder's funeral. (Vol. VIII at 2216.) Further, it was the Phelpses' stated goal to "place a little bug in" in Mr. Snyder's head. (Vol. VIII at 2111–2112.) The Phelpses knew that their conduct on March 10, 2006,

was tantamount to "pouring salt into the wound" and understood that they were not welcome at the funeral. (Vol. VIII at 2206, 2237.)

The Phelpses also knew, and their legal counsel conceded, that their presence at the funeral created a credible threat of violence. (Vol. VIII at 2281; Vol. XIV at 3776.) The local police deployed the S.W.A.T. team. (Vol. VIII at 2268, 2271.) Additional state, county, and local police collaborated to control potential violence. (Vol. VIII at 2272.) A mobile command center was deployed to coordinate the various law enforcement agencies. (Vol. VIII at 2274.) Five sheriffs in five patrol cars escorted the Phelpses to the church for the sole purpose of protecting them. (Vol. VIII at 2284.) The Phelpses' presence did, in fact, provoke some reaction from funeral-goers and passersby; however, police were able to prevent any violence from occurring. (Vol. VIII at 2286–2287.)

The Phelpses continued to target the Snyder family even after the funeral. Specifically, the Phelpses created an "epic poem" titled, "The Burden of Marine Lance Cpl. Matthew A. Snyder," and posted it on their website. (Vol. XV at 3788.) The Epic stated, in part,

> 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. . . . Albert and Julie RIPPED that body apart and

> taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.

(Vol. XV at 3791.) The Phelpses proclaimed that God "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 fulfilled his calling." (Vol. XV at 3793.) Not surprisingly, the Phelpses' own expert agreed that the Epic "was directed at a particular individual or particular family." (Vol. X at 2618.) The Phelpses' personal attacks on the Snyder family—and Matthew Snyder, in particular—caused Mr. Snyder to vomit when he read the Epic. (Vol. VIII at 2130.)

Mr. Snyder testified that the Phelpses' conduct has harmed his mental and physical wellbeing. (Vol. VIII at 2145.) When he thinks of his son's funeral, "it always turns into the bad." (Vol. VIII at 2139.) The Phelpses' conduct exacerbated Mr. Snyder's diabetes. (Vol. VIII at 2145.) In describing the permanent effect of the Phelpses' actions, Mr. Snyder stated, "I look at this as an assault on me. Somebody could have stabbed me in the arm or in the back and the wound would have healed. But I don't think this will heal." (Vol. VIII at 2145.)

It is undisputed that none of the Phelpses knew any of the Snyders personally. (Vol. VIII at 2110.) Mr. Snyder was not involved in the media or show business and has never pursued political office. (Vol. VIII at 2146–2147.) He did not participate in any peace, pro-war, or anti-war activities. (Vol. VIII at 2158.) Indeed, the Phelpses concede that Mr. Snyder did not have any political clout or the ability to change policy. (Vol. VIII at 2210.)

As Mr. Snyder's expert testified, funerals have a strong therapeutic value. (Vol. XI at 2728.) Funerals concerning sudden deaths like Matthew Snyder's have more of a significance because there is no time to say goodbye to the decedent when the death is unexpected. (Vol. XI at 2730.) Further, military funerals are particularly helpful to the grieving family and provide a "meaningful part of the ceremony." (Vol. XI at 2731.)

The importance and solemnity of funeral ceremonies is so universally accepted that, in all of recorded history, the Phelpses are the only individuals who have chosen to protest at funerals. (Vol. XI at 2732.) By targeting Mr. Snyder's faith and his son's status as a military casualty, the Phelpses intentionally interfered with Mr. Snyder's grieving process and caused him lasting physical and emotional harm. (Vol. XI at 2734, 2742.) Mr. Snyder will never have another opportunity to bury his son, and he will associate memories of his son with the Phelpses' hateful epithets and conduct for the rest of his life.

II. Procedural History

A. The District Court Opinion

On October 31, 2007, a jury found that the Phelpses' conduct towards Mr. Snyder constituted intentional infliction of emotional distress, invasion of privacy by intrusion upon seclusion, and conspiracy, awarding him $10.9 million in compensatory and punitive damages. The Phelpses moved for judgment as a matter of law, judgment notwithstanding the verdict, reconsideration and rehearing, a new trial, relief from judgment, relief of law and equity, and remittitur, alleging, *inter alia*, that their conduct was absolutely protected under the First Amendment and, in the alternative, that Mr. Snyder did not meet the elements of the claims alleged. The District Court rejected both of these arguments but ultimately granted a remittitur of the $8 million punitive damages award on due process grounds, lowering it to $2.1 million.

The District Court began its discussion of the Phelpses' "First Amendment defense" with the recognition that "there is not an absolute First Amendment right for any and all speech directed by private individuals against other private individuals." *Snyder v. Phelps*, 533 F. Supp. 2d 567, 576–77 (D. Md. 2008) (*citing Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758 (1985)). The District Court specifically rejected the Phelpses's contention that Matthew Snyder became a public figure "upon the filing of information in the obituary section of any newspaper," noting that Mr. Snyder did not "invite attention and comment" to the funeral and that the notoriety his

deceased son received as a result of the *Phelpses'* actions did not "transform a private funeral into a public event" or make Matthew Snyder a public figure. *Id.* at 577 (*citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)). The District Court further observed that the Phelpses "created an atmosphere of confrontation" at the funeral by carrying "signs that could reasonably be interpreted as being directed at the Snyder family." *Id.* The Court acknowledged that "signs expressing general points of view are afforded First Amendment protection." *Id.* at 578. Nevertheless, the Phelpses' protest and the Epic created issues of fact for the jury, which reasonably determined that Mr. Snyder had proven the elements of intentional infliction of emotional distress, invasion of privacy, and conspiracy under Maryland law. *Id.*

The Phelpses alternatively argued that their conduct was protected by the Free Exercise Clause of the First Amendment, asserting that "any comments and opinions expressed on signs or on their website were expressions of their fundamentalist religious beliefs." *Id.* In this vein, the Phelpses had presented to the jury a series of DVD video productions, including one titled, "Thank God for 9/11," in which members of the WBC celebrated the events of September 11, 2001, as a demonstration of God's hatred of America. *Id.* at 578 n.11. The District Court gave this argument short shrift, noting that the Phelpses' own "religious expert" acknowledged that "there was no Biblical or religious connection to [the Phelpses'] choice of demonstrations at military funerals." *Id.* at 578. Moreover, the Phelpses had "essentially acknowledged in their testimony that their choice of military funerals was driven by the publicity the demonstrations generated." *Id.*

Finally, the District Court described the state's interest in providing a tort remedy to its citizens for intentionally harmful conduct. *Id.* at 579. Consistent with Supreme Court precedent, the Court observed that "this case involves balancing [the Phelpses' First Amendment] rights with the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement." *Id.* Moreover, the Court noted, "an individual's First Amendment rights must be balanced against a *state's* interest in protecting its citizens." *Id.* (emphasis added). The Court held that the appropriate balance permitted the imposition of tort liability in the instant case. *Id.* at 579–80.

The District Court similarly rejected the Phelpses' contentions regarding the sufficiency of the evidence. As to the intentional infliction of emotional distress claim, Mr. Snyder was required to prove that the "'defendant[s], intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.'" *Id.* at 580 (*quoting Miller v. Bristol-Myers Squibb Co.*, 121 F. Supp. 2d 831, 839 (D. Md. 2000)). The Court rejected the Phelpses' argument that "the *only* way to satisfy the requirements of 'highly offensive' or 'extreme and outrageous' is to go to the content of religious speech"—*i.e.*, that any form of expressive conduct with religious overtones is immune from all regulation or liability. On the contrary, the District Court noted that the jury had been properly instructed and held that the evidence was sufficient to find that Mr. Snyder had met his burden. *Snyder*, 533 F. Supp. 2d at 580–81.

As to the "intrusion upon seclusion" claim, Maryland law required Mr. Snyder to prove that the Phelpses intentionally intruded upon his solitude, private affairs, or concerns in a manner that would be highly offensive to a reasonable person. (Vol. XI at 3004.) The District Court held that the evidence was sufficient for the jury to find that Mr. Snyder had met this burden. The Phelpses' signs, protest, television interviews, and Epic, the Court observed, "unreasonably invaded Snyder's privacy and intruded upon his seclusion during a time of bereavement." *Snyder*, 533 F. Supp. 2d at 581.

Finally, as to the civil conspiracy claim, the District Court observed that the Phelpses did not dispute the existence of an agreement to commit the challenged acts. *Id.* The jury had been properly instructed that "under Maryland law [Mr. Snyder] had to show that there was an agreement by at least two persons to accomplish an unlawful act, and that the act resulted in damages to Plaintiff." *Id.* at 581–82; (Vol. XI at 3005.) Further, "[t]he jury was specifically instructed that it could not find [the Phelpses] liable for civil conspiracy unless it found them liable for either intentional infliction of emotional distress or invasion of privacy by intrusion upon seclusion." *Snyder*, 533 F. Supp. 2d at 582. Given its analysis upholding the jury verdicts on both substantive torts, the Court upheld the civil conspiracy verdict. *Id.*

The Phelpses also argued that the evidence was insufficient to support the compensatory and punitive damages awarded by the jury. Applying Maryland law, the Court determined that the compensatory damages award did not "shock the conscience," given the expert

testimony regarding the harm that Mr. Snyder suffered as a result of the Phelpses' conduct. *Id.* at 585–89. With respect to punitive damages, the Court first noted that such damages were only available where a defendant acted with "actual malice" and that the jury had properly been instructed that "[a]n act is done maliciously if it is done with a sense of hate, ill-will, spite, or a desire to inflict unnecessary injury." *Id.* at 589; (Vol. XI at 3009.) Though the Court ultimately determined that due process required a remittitur, it also held that "utilizing Matthew Snyder's death as a vehicle for hateful expression was sufficient to support a punitive damages award." *Snyder*, 533 F. Supp. 2d at 590–96.

B. The Fourth Circuit Opinion

On September 24, 2009, the Fourth Circuit reversed the decision of the District Court, adopting the Phelpses' argument that their conduct was absolutely protected by the First Amendment. *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009). The Court grounded its analysis in an extension of *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). *See Snyder*, 580 F.3d at 217. These cases, the Court asserted, provide an immunity from tort to speakers of "rhetorical hyperbole." *Id.* at 220. Concluding that the Phelpses' funeral protest and the Epic fell squarely into this category, the Court immunized the Phelpses from tort liability. *Id.* at 226.

The Fourth Circuit began its analysis by acknowledging the intentional and targeted nature of the Phelpses' conduct. The Court explained that the Phelpses had traveled to Matthew's funeral solely to

"publicize their message of God's hatred of America for its tolerance of homosexuality." *Id.* at 212.[3] The Court recognized that the Phelpses had utilized Matthew's funeral as a vehicle for their message. *Id.* Finally, the Court acknowledged that the Phelpses did *not* challenge the sufficiency of the evidence underlying the District Court's decision and that, accordingly, the constitutional issues presented by the Phelpses' conduct could not be avoided. *Id.* at 216–17.

The Court then moved into its analysis of the Supreme Court's First Amendment jurisprudence. Citing *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964), the Court noted that public officials are barred from recovering damages for the common law tort of defamation unless the defamatory statement was made with "actual malice," defined as "knowing falsity or reckless disregard for the truth." *Snyder*, 580 F.3d at 218. The Court acknowledged that the Supreme Court has stopped short of extending the *New York Times* standard to private figures. *Id.* (*citing Gertz*, 418 U.S. at 344–46). Nevertheless, the Court then cited what it characterized as a "distinct but related line of decisions [in which] the [Supreme] Court has recognized that there are constitutional limits on the *type* of speech to which state tort liability may attach." *Id.* According to the Fourth Circuit, these cases—*Hustler* and *Milkovich*—stand for the proposition that "the First Amendment will *fully* protect 'statements that cannot "reasonably be interpreted as stating actual facts" about an individual.'" *Id.* (*quoting Milkovich*, 497 U.S.

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[3] As noted *infra*, however, many of the Phelpses' signs and much of the Epic had no apparent connection to this issue.

at 20; *Hustler*, 485 U.S. at 50) (emphasis added). Further, citing *Milkovich*, the Fourth Circuit held that there are "two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected": (1) statements on "matters of public concern that fail to contain a 'provably false factual connotation,'" and (2) "rhetorical hyperbole," defined as "rhetorical statements employing 'loose, figurative, or hyperbolic language.'" *Id.* at 219–20 (*citing Milkovich*, 497 U.S. at 20–21). With respect to the second subcategory, the Court made clear that, in its view, such "rhetorical hyperbole" was entitled to absolute First Amendment protection regardless of its subject matter or target. *Id.* at 218 (*citing Deupree v. Iliff*, 860 F.2d 300, 304–05 (8th Cir. 1988), for the proposition that "certain types of speech are protected regardless of plaintiff's status as private or public figure").

Applying these principles to the Phelpses' speech, the Court held that the District Court had erred in analyzing whether Mr. Snyder was a public or private figure and whether Matthew Snyder's funeral was a public or private event; in the Court's view, these issues were irrelevant if the "type" of speech at issue was entitled to absolute protection. *Id.* at 222. The Court then divided the Phelpses' statements into several categories. The Court grouped together the signs stating, "America is Doomed," "God Hates the USA/ Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." *Id.* at 222–

23. These signs, the Court concluded, were entitled to absolute First Amendment protection because they involved matters of "public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens." *Id.* at 223. The Court also explained that these statements would be protected because "no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son." *Id.* Indeed, the Court opined, these statements "contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned." *Id.* (*citing CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008)).

Next, the Court conceded that signs stating, "You're Going to Hell" and "God Hates You" presented a closer question. *Id.* at 224. The Court suggested that the term "You" could be interpreted as referring to either an individual or a collective audience and, thus, that "[t]he meaning of these signs is ambiguous." *Id.* The Court opined, however, that it was not necessary to resolve this ambiguity for two reasons. First, the Court concluded that a reasonable person could not interpret the statements as asserting actual and provable facts. *Id.* Second, the Court maintained that the signs "contain strong elements of rhetorical hyperbole and figurative expression." *Id.* The Court reasoned that the context and tenor of the speech, as well as the Phelpses' use of "irreverent and indefinite language," negated the impression that they asserted actual facts about Matthew Snyder. *Id.*

Finally, the Court addressed the Epic. Acknowledging that the Epic contained specific references to the Snyder family, the Court nevertheless held that "the Epic cannot be divorced from the general context of the funeral protest." *Id.* at 225. The Court framed the Epic as a "recap" of the protest, noting that the Phelpses had "utilized distasteful and offensive words, atypical capitalization, and exaggerated punctuation, all of which suggest the work of a hysterical protestor rather than an objective reporter of facts." *Id.* Further, the Court explained, the Epic was "primarily" concerned with the Phelpses' views on matters of public concern. *Id.* The Court ultimately concluded that a reasonable reader would not understand the Epic to assert actual facts about Mr. Snyder or his deceased son but, rather, as "loose, figurative, or hyperbolic language." *Id.* at 225–26. Accordingly, the Court held that the Epic was entitled to absolute First Amendment protection. *Id.*

SUMMARY OF ARGUMENT

I. Contrary to the Fourth Circuit's opinion, this Court has never granted absolute, categorical protection to speech that cannot "reasonably be interpreted as stating actual facts"; rather, the Court has granted certain types of speech heightened First Amendment protection only after considering the competing interests of the speaker, the listener, and the state. The Fourth Circuit's reliance on *Hustler v. Falwell* is misplaced because that case dealt with a public figure plaintiff. Where, as here, a private individual has done nothing to attach himself to a public event or controversy, there is no reason for the Court to extend

absolute protection to expressive conduct that intentionally harms that individual.

The Fourth Circuit also erred by unilaterally adopting the Phelpses' interpretation of their expressive conduct rather than examining that conduct within the broader context of the facts presented, without any deference to the fact finder. The signs and the Epic themselves did not, on their face, relate to matters of public concern, and the Phelpses admitted that they did not begin protesting military funerals until several members of the WBC were accosted by Marines. These facts suggest—and the jury apparently believed—that the Phelpses' expressive conduct did *not* relate to "homosexuals in the military, the sex abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens" but, instead, was what it appeared to be at first glance: harmful epithets being hurled at Mr. Snyder and his family in retaliation for this prior, unrelated physical assault.

Finally, the First Amendment protects speakers from tort liability only when there is a reasonable relationship between the "matter of public concern" and the speech's target. Here, Mr. Snyder has no rational connection to any of the purported "matters of public concern" that the Phelpses maintain they were protesting. The Phelpses should not be protected from tort liability because they unilaterally associated Mr. Snyder with their selected "issues."

II. The rule formulated by the Fourth Circuit prevents recovery under all causes of action brought by plaintiffs who are intentionally harmed by statements that cannot be proved true or false. The Court's ruling that extreme and outrageous statements are merely "rhetorical hyperbole" completely vitiates the tort of intentional infliction of emotional distress. It turns outrageousness from the threshold element of the tort into an affirmative defense. The common law requirement of outrageousness in the tort of intentional infliction of emotional distress is sufficient to provide a jury with an adequate means of distinguishing actionable from non-actionable expressive conduct.

III. Under the "captive audience" doctrine, the First Amendment rights of speakers may be curtailed when the listener's constitutional right to privacy justifies protection from the unwanted message. The privacy interest in avoiding unwanted communications varies according to the circumstances. This Court has recognized a survivor's right to privacy in protecting the memory of the dead. Thus, Mr. Snyder had a substantial privacy interest in attending his son's funeral without unwanted interference. The Phelpses' conduct during Matthew Snyder's funeral caused Mr. Snyder serious emotional and physical hardship and hindered his grieving process. Mr. Snyder was forced to tolerate the outrageous conduct that the Phelpses specifically directed at him during his son's funeral service. The Phelpses' conduct therefore interfered with Mr. Snyder's privacy interest in an intolerable manner.

IV. When the Fourth Circuit immunized the Phelpses from liability for their expressive conduct, it necessarily subordinated Mr. Snyder's First Amendment rights of free exercise and peaceful assembly. This Court has a history of balancing rights when evaluating free speech claims and conduct. This Court should consider, in that framework, Mr. Snyder's First Amendment rights of free exercise and assembly. The Phelpses' freedom of speech should have ended where it conflicted with Mr. Snyder's freedom to participate in his son's funeral, which was intended to be a solemn religious gathering.

ARGUMENT

The Fourth Circuit decision is striking for several reasons. First, while purporting to follow existing First Amendment jurisprudence, the Court created a new rule of law by requiring private plaintiffs to prove that intentionally harmful expressive conduct directed against them could "reasonably be interpreted as stating actual facts" about them regardless of its context or subject matter. Second, the Court relied on *Milkovich* for its protection of certain categories of speech but did not give due consideration to the differences between defamation and other torts. Third, the Court granted categorical protection to the Phelpses' speech without analyzing the state's interest in providing a tort remedy to captive audiences targeted by expressive conduct. Finally, the Fourth Circuit did not even attempt to balance the Phelpses' First Amendment free speech right against Mr. Snyder's First Amendment rights of free exercise and peaceable assembly.

This Court has never employed a categorical approach to the Free Speech Clause of the First Amendment. Indeed, the Court has resisted creating wholesale tort exemptions for particular categories of speech and, instead, has consistently balanced speakers' interests against the competing interests of the state and other private individuals. By holding that "rhetorical hyperbole" receives absolute First Amendment protection in all circumstances, the Fourth Circuit departed from judicial precedent and left private individuals who suffer intentionally inflicted emotional harm without recourse. Such an extension of First Amendment protection is unwarranted.

I. The First Amendment Permits Mr. Snyder to Seek Judicial Recourse for the Harm Intentionally Inflicted Upon Him by the Phelpses' Tortious Conduct.

A. As a Private Figure Plaintiff, Mr. Snyder Should Not Be Required to Prove that the Phelpses' Statements Could Reasonably be Read to State Actual Facts.

The Fourth Circuit asserted that, "[t]he Supreme Court has created a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain *types* of speech, and that does not depend upon the public or private status of the speech's target." *Snyder*, 580 F.3d 206, 222 (*citing Milkovich*, 497 U.S. at 16; *Hustler Magazine*, 485 U.S. at 50). A summary review of existing First Amendment jurisprudence and the express language of the *Hustler* and *Milkovich* decisions reveals

that this statement is simply incorrect; although certain types of speech receive heightened First Amendment protection in particular contexts, this Court has granted such protection only after considering the competing interests of the speaker, the listener, and the state. Moreover, courts generally recognize a distinction between "speech, however crude, somehow contributing to the public debate about a public figure or a matter of public concern . . . and speech intended merely to harass or cause others to harass the target. Speech of the latter sort is not entitled to First Amendment protection." *State v. Carpenter*, 171 P.3d 41, 57 (Alaska 2007). Rhetorical hyperbole about a public figure falls squarely in the former category because one "'of the prerogatives of American citizenship is the right to criticize public men and measures.'" *Hustler*, 485 U.S. at 51 (*quoting Baumgartner v. U.S.*, 322 U.S. 665, 673–74 (1944)). Rhetorical hyperbole targeting private figures is not equally positioned: such individuals have not voluntarily accepted an increased risk of emotional harm by stepping into the public arena and, unlike public figures, are not likely to have effective opportunities to counter the harmful speech with communications of their own. *See Gertz*, 418 U.S. at 344. Accordingly, this Court should not extend First Amendment protection to outrageous, intentionally harmful expressive conduct targeted at private individuals.

The constitutional regulation of tort actions based on speech began less than a half century ago when this Court, in *New York Times v. Sullivan*, held that a public official could not recover damages in a libel action without proving that a false statement was made with "actual malice"—"knowledge that it was false or reckless

disregard of falsity." *See* 376 U.S. at 279–80. Comparing that standard to the "conditional privilege" afforded to public officials for misstatements made while performing official duties, the *New York Times* Court stressed that "critics of official conduct [should] have a fair equivalent of the immunity granted to the officials themselves." *Id*. at 282–83. As the Court observed, "'public men are, as it were, public property,'" and the speech at issue criticized a public official on a matter "relating to his official conduct." *Id.* at 268, 279 (*quoting Beauharnais v. Illinois*, 343 U.S. 250, 263–64 (1952)). Under these circumstances, the Court opined that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'" *Id.* at 279. Balancing the interests of public officials and the state against the interests of critics, the Court set forth a rule specifically designed to protect public debate concerning official conduct.

The Court engaged in a similar balancing test in *Gertz v. Robert Welch, Inc.*, and concluded that the *New York Times* "actual malice" standard does not apply in a defamation action where the plaintiff is a private individual. In reaching this conclusion, the *Gertz* Court noted that "some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury" and that it was necessary to strike the appropriate balance between the desire to provide "breathing space" for speech and the state's need to protect individuals' interests through tort law by reference to the status of

the plaintiff as a public or private figure. 418 U.S. at 342–43. Ultimately, "the Court refuse[d] to provide, in [private figure] cases, the same level of constitutional protection that ha[d] been afforded the media in the context of defamation of public persons." *Id.* at 362.

In drawing the distinction between public and private figure plaintiffs, the Court highlighted that public figures had two principal advantages over private individuals. First, public figures have significantly greater access to the media and other channels of communication and, thus, a "more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344. Second, public officials and figures assume the risk of closer public scrutiny and invite attention and comment by their actions. *Id.* at 344–45. On the other hand, a private figure "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345. As a result, the Court concluded that states should "retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Id.*

In *Hustler Magazine, Inc. v. Falwell*, this Court's analysis shifted from the First Amendment implications of defamation claims to those of intentional infliction of emotional distress. *See* 485 U.S. at 50. The case arose when Hustler magazine published a lowbrow parody interview of Jerry Falwell in which he purportedly admitted to having had a drunken sexual encounter with his mother in an outhouse. *Id.* at 48. Falwell sued Hustler

for, *inter alia*, intentional infliction of emotional distress, and the jury found for Falwell on this claim. *Id.* The Fourth Circuit affirmed, and this Court granted certiorari to determine "whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most." *Id.* at 50. As in *New York Times*, the *Hustler* Court was required to balance the competing interests of persons who utter speech criticizing public figures with the state's interest in protecting its citizens from intentionally inflicted harm.

Chief Justice Rehnquist, speaking for the Court, began his analysis by opining on the primary purpose of protecting the freedom of speech: "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Id.* at 50–51. This purpose has special implications for public figures: "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those . . . public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" *Id.* at 51 (*quoting Associated Press v. Walker, decided with Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)). Moreover, some of this criticism may not be "reasoned or moderate." *Id.* The "caustic" or "unpleasantly sharp" nature of criticism, however, is a cost of entering public life, and those who enter the public arena must endure a certain amount of insult without judicial recourse. *See id.* at 51–52 ("[T]he

candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary.'" (*quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971))).

This does not mean "that *any* speech about a public figure is immune from sanction in the form of damages." *Id.* at 52. Traditional defamation may be penalized in some circumstances. Ultimately, however, the correct balance between speakers' rights and the rights of their public figure targets can be achieved only by applying the *New York Times* standard to claims for intentional infliction of emotional distress:

> Public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id. at 56. Without such heightened protection, Chief Justice Rehnquist reasoned, there is a significant danger that the media would engage in self-censorship for fear of tort claims by public figures. *Id.* at 52. Because the jury had found that the Hustler parody could not "reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated," Falwell had failed to prove actual malice,

and the Court granted judgment to Hustler on the intentional infliction of emotional distress claim. *Id.* at 57.

The *Hustler* Court grounded its opinion on the special status of those who intentionally enter the public arena. Since public figures have the capacity to "shape events," they must be willing to endure a certain level of harassment just as, in the defamation context, they must be willing to endure a certain amount of falsehood. This is precisely the rationale offered by the *Gertz* Court for providing greater protection to private figure plaintiffs. In a sense, then, *Hustler* is the mirror image of *Gertz*. While *Gertz* held that the *New York Times* "actual malice" standard did not apply to defamatory statements about private figures, *Hustler* recognized that public figures cannot avoid the "actual malice" standard merely by pleading causes of action other than defamation. Both opinions acknowledge that the states have a greater interest in protecting private figures from tortious conduct than they do in protecting public figures.

Two years after its *Hustler* decision, the Court was asked to determine whether it should recognize an "opinion" exception to the application of defamation laws. *See Milkovich*, 497 U.S. at 22. The underlying dispute arose when a high school wrestling coach sued a newspaper over an article implying that he had committed perjury. The newspaper maintained that its statements were absolutely protected as statements of opinion. *Id.* at 17–18.

The *Milkovich* Court began its analysis with an historical overview of defamation law and its interplay with the First Amendment. Citing *New York Times*, *Gertz*, and *Phila. Newspaper, Inc. v. Hepps*, 475 U.S. 767 (1986)—the last of which discussed the appropriate burden of proof in a defamation claim brought against a media defendant—the Court reviewed the differing concerns at stake when the target of defamatory speech is a public or private figure: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and . . . have voluntarily exposed themselves to increased risk of injury from defamatory falsehood." *Milkovich*, 497 U.S. at 12–16 (*quoting Gertz*, 418 U.S. at 344–45). The Court noted that it had "also recognized constitutional limits on the *type* of speech which may be the subject of *state defamation actions*." *Id.* at 16 (emphasis added). For example, the use of the term "blackmail" could not be considered defamatory where the circumstances made clear that the term was being used merely as "rhetorical hyperbole, a vigorous epithet" to describe an individual's negotiating position as "extremely unreasonable." *Id.* at 16–17 (*citing Greenbelt Coop. Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6 (1970)).[4] Likewise, courts confronted with First Amendment issues must "'make an independent examination of the whole record'" to ensure that "'the judgment does not constitute a

[4] The Court also cited *Hustler* in this context for the proposition that the "First Amendment precluded recovery under state emotional distress parody which 'could not reasonably have been interpreted as stating actual facts about the *public figure* involved.'" *Milkovich*, 497 U.S. at 16–17 (*quoting Hustler*, 485 U.S. at 50) (emphasis added).

forbidden intrusion on the field of free expression.'" *Id.* at 17 (*quoting Bose Corp. v. Consumers Union of U.S.*, *Inc.*, 466 U.S. 485 (1984)).

Given the "established safeguards" that it outlined, the Court opined that recognition of "still another First-Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact'" was not only unnecessary, but also illogical: such an extension of First Amendment protection to "opinion" would "ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 17–18. Once again, the Court held that it must "balance" the First Amendment's "vital guarantee of free and uninhibited discussion of public issues" against society's "pervasive and strong interest in preventing and redressing attacks upon reputation"—the latter of which, the Court noted, "reflects no more than our basic concept of the essential dignity and worth of every human being." *Id.* at 22 (internal quotation marks omitted). This balance is best achieved, the Court held, by refusing to take a categorical approach to speech under the First Amendment and, instead, by evaluating each allegedly defamatory statement under the standards set forth in *New York Times* and *Gertz*. *Id.* The Court held that the newspaper article's implication that the coach had committed perjury was sufficiently factual to be considered defamatory. *Id.* at 21–22.

Accordingly, far from creating an absolute tort exemption for "rhetorical hyperbole," the *Milkovich* Court explicitly refused to take a categorical approach, instead relying on the balancing test it had employed in

the defamation context in several prior cases. *Milkovich* thus contradicts the proposition for which the Fourth Circuit cited it: rather than recognizing "a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain *types* of speech," the *Milkovich* Court held that each cause of action and each instance of potentially tortious speech requires an analysis of the competing interests at stake.

Moreover, though the *Milkovich* Court required that an "opinion" imply "an assertion of objective fact" to qualify as defamation, its holding did not extend absolute First Amendment protection to all "rhetorical hyperbole" regardless of the cause of action. *Milkovich* did not involve a private figure's intentional infliction of emotional distress claim. Indeed, *Milkovich* merely applied the *New York Times* and *Gertz* standards to the defamation claim before the Court. Neither *Hustler* nor *Milkovich* addressed the question as framed by the Fourth Circuit here: whether a speaker engaged in "rhetorical hyperbole" is immune from any tort liability, regardless of the target of his or her speech. Such an extension of First Amendment protection is unnecessary and unwarranted.

A number of state courts have already reached this conclusion. For example, in *State v. Carpenter*, the Alaska Supreme Court permitted an intentional infliction of emotional distress claim to proceed against a radio host who had made targeted public statements towards a private individual. *See Carpenter*, 171 P.3d 41, 56 (Alaska 2007). The plaintiff had written a letter to a local station complaining about the host of a national radio show, and

the host read the letter on the air while making "derogatory and sexually explicit remarks about [the plaintiff] and making other comments that allegedly inflamed listeners and encouraged them to contact or confront [her]." *Id.* at 47. Because the statements were "hyperbole, used only for shock value and d[id] not state or imply any factual basis," the Court recognized that they were not capable of defamatory meaning. *Id.* at 51 (noting that defamation requires a "false and defamatory statement"). Nonetheless, the Court permitted the emotional distress claim to proceed because it was "not based on the truth or falsity of [the speech] and [was] not based on harm to her reputational interest." *Id.* at 56. Rather, although both the defamation and intentional infliction claims "arose out of words [the host] allegedly spoke . . . the essence of the viable part of the [intentional infliction of emotional distress] claim was the alleged outrageousness of his conduct in provoking his listeners and inviting them . . . to harass [the plaintiff] and, with him, make her life a 'living hell.'" *Id.* at 57. Moreover, the Court specifically distinguished *Hustler*, noting that, while "the First Amendment affords heightened protection to speech in the 'area of public debate *about* public figures,' . . . [h]eightened First Amendment protection does not extend to intentional infliction of emotional distress claims based on speech that is not *about* a public figure or *about* a matter of public concern." *Id.* at 56 (*citing Hustler*, 485 U.S. at 53); *see also Esposito-Hilder v. SFX Broad., Inc.*, 654 N.Y.S.2d 259, 263–64 (N.Y. Sup. Ct. 1996) (permitting intentional infliction of emotional distress claim to proceed against radio program that nominated local woman for its "ugliest bride" contest and observing that "[t]he First Amendment was not enacted to enable

wolves to parade around in sheep's clothing, feasting upon the character, reputation and sensibilities of innocent private persons").

Other courts have recognized that *Hustler* does not extend to speech targeting private figures even where the subject matter of the speech is of public concern. In *Van Duyn v. Smith*, for example, the Illinois Court of Appeals declined to extend *Hustler* where anti-abortion activists created "Wanted" posters naming the executive director of a local clinic and distributed them along with a "Face the American Holocaust" poster to the plaintiff's neighbors. 527 N.E.2d 1005, 1007–11 (Ill. App. 1988). As in *Carpenter*, the *Van Duyn* Court dismissed the plaintiff's defamation claim on the ground that the posters were comprised solely of hyperbole. *Id.* at 1014 (noting that "'[u]nder the First Amendment there is no such thing as a false idea'" (*quoting Gertz*, 418 U.S. at 339–40 (1974))). Nevertheless, the Court permitted the director's intentional infliction of emotional distress claim to proceed, explaining that the *Hustler* Court's "primary concern was with public officials and public figures." *Id.* at 1010–11; *see also Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 393 n.26 (Cal. App. 2007) (distinguishing *Hustler* on the ground that, "[h]ere, plaintiffs were not public officials or public figures, did not sue for defamation, and, in pleading the intentional and negligent infliction claims, were not attempting to plead an otherwise defective defamation claim").

The distinction drawn by these courts between the interests of public and private individuals makes sense given the rationales offered by this Court in its First

Amendment jurisprudence. The State of Maryland had a particularly strong interest in protecting Mr. Snyder from the Phelpses' expressive conduct by providing tort remedies for intentional infliction of emotional distress and invasion of privacy. Mr. Snyder was simply a private citizen attempting to attend his son's funeral without disruption. He took no action to inject himself into a public debate over the rights of homosexuals in the United States. He did not run for public office and did nothing to obtain the status of a celebrity or a public figure. Indeed, any publicity he may have received resulted solely from the Phelpses' decision to target Matthew Snyder's funeral. As this Court has explained, tortfeasors "cannot, by their own conduct, create their own defense by making the claimant a public figure." *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). Where, as here, a private figure has not linked himself to an issue of public concern and is, instead, engaged in the private religious act of mourning, the state's interest in protecting the private figure should outweigh an attacker's First Amendment right to publicly hurl epithets in his direction. Accordingly, the Court should reject the Fourth Circuit's attempt to extend absolute First Amendment protection to expressive conduct targeted at private figure plaintiffs.

B. The Phelpses' Expressive Conduct Did Not Relate to "Matters of Public Concern" Such that it Warranted Heightened First Amendment Protection.

As this Court observed in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, "[i]t is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" 472 U.S. at 758–59 (*quoting First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). In contrast, in matters of purely private concern, "'[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.'" *Id.* at 760 (*quoting Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Or. 1977)). The Fourth Circuit purported to examine the "content, form, and context" of the Phelpses' speech, "as revealed by the whole record," to determine whether it involved a matter of public concern. *Snyder*, 580 F.3d at 220. It erred, however, in answering this question in the affirmative.

The Fourth Circuit made a "public concern" finding only with respect to a small portion of the signs the Phelpses carried at their protest: "America is Doomed," "God hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." *See id.* at 222. Concluding that these signs involved matters of public concern, "including the issue of homosexuals in the military, the sex abuse scandal within

the Catholic Church, and the political and moral conduct of the United States and its citizens," the Court unilaterally adopted the Phelpses' interpretation instead of analyzing each statement on its own merits. *Id.* The evidence at trial, however, established that the Phelpses began protesting military funerals shortly after members of the WBC allegedly were accosted by Marines. This timeline suggests that the Phelpses' signs were *not* about the purported matters of public concern cited by the Fourth Circuit but were, instead, what they appeared to be at first glance: intentionally harmful epithets hurled at Mr. Snyder and his family in retaliation for this prior, unrelated physical assault.[5] While purporting to examine the context of the Phelpses' speech, the Court performed a decidedly selective analysis.

The Court declined to analyze whether the Phelpses' numerous other signs, including those saying, "You're Going to Hell" and "God Hates You," raised a matter of public concern, despite acknowledging that the signs could reasonably be interpreted as targeted specifically at Mr. Snyder. *See id.* at 224. Instead, the Court concluded that these signs were absolutely protected

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[5] Likewise, in Respondents' Brief in Opposition to Petition for Writ of Certiorari, the Phelpses assert that the "Matt in Hell" sign they created refers to Matthew Shepard—a young, homosexual man beaten to death in 1998—rather than Matthew Snyder. *See* Resp. Br. in Opp. to Pet. for Writ of Cert. at 1–2. Though the Phelpses insist that "[e]veryone in the case is well aware what Matt in Hell is about," they fail to explain how Mr. Snyder—or, indeed, anyone not already familiar with the Phelpses' mission and practices—was supposed to understand that "Matt in Hell" does not refer to Matthew Snyder.

under the First Amendment because "no reasonable reader would understand those statements . . . to assert provable facts" about Mr. Snyder or his son. *Id.* As set forth above, this holding misapplied *Milkovich*, which, on its face, relates only to defamation claims. The Court also erred by applying this categorical rule without first determining whether the signs related to a matter of public concern.

The Fourth Circuit likewise erred in concluding that the Epic was absolutely protected by the First Amendment. The Court acknowledged that the Epic personally targeted the Snyders by stating, among other things, that "Albert and Julie Snyder" had "taught Matthew to defy his Creator, to divorce, and to commit adultery." Nevertheless, the Court once again misapplied *Milkovich* and concluded that the Epic would be understood by a reasonable reader as containing rhetorical hyperbole and not actual facts. *Id.* at 224. Despite the fact that the Epic referred to the Snyder family by name, the Court opined that the Epic could not be "divorced from the general context of the funeral protest" and was "primarily concerned with the Defendants' strongly held views on matters of public concern." *Id.* at 225. But the issue of whether the Snyders raised their deceased son "to commit adultery"—which, itself, is a false statement of fact—bears no relationship to the so-called "public concern" issues cited by the Fourth Circuit. The Phelpses should not be permitted to gain First Amendment protection for specifically targeted falsehoods about Mr. Snyder and his family by camouflaging them with more general statements purportedly involving matters of public concern.

Indeed, the Fourth Circuit appears to have recognized that much of the Phelpses' expressive conduct did not relate to matters of public concern but was, instead, "intended to spark debate about issues with which the *Defendants* are concerned." *Id.* at 223 (emphasis added). No Court, however, has held that defendants can create a matter of public concern simply by protesting about it, and the Fourth Circuit erred by holding otherwise. *Cf. Waldbaum v. Fairchild Publ'ns*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) ("[E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention. Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." (*citing Time, Inc. v. Firestone*, 424 U.S. 448, 454–55 (1976))).

C. The Phelpses' Unilateral Association of Purportedly "Public" Issues With Matthew Snyder's Funeral Should Not Have Immunized Their Tortious Conduct.

Implicit in this Court's First Amendment jurisprudence is a requirement not only that protected speech relate to a public controversy, but also that the target of the harmful speech have some reasonable relationship to that controversy. When a plaintiff brings a defamation claim, for example, part of the "public figure" analysis requires a determination that the plaintiffs have "thrust themselves to the forefront" of a public controversy so as to influence its resolution. *See Gertz*, 418 U.S. at 345. Even where speech centers on a matter of public concern, the speaker cannot harass

a private individual who has no connection to that issue and hope to gain absolute constitutional protection for the harassment. By extending such protection to the Phelpses' intentionally harmful conduct, the Fourth Circuit ignored this principle and essentially immunized the Phelpses from liability without analyzing whether Matthew Snyder's funeral bore any logical connection to the Phelpses' allegedly "public" issues.

Even those few courts that have extended *Hustler* to speech targeting private individuals have done so only in the context of a debate with which the victim was already associated. For example, in *Deupree v. Iliff*, a local radio host aired a debate about sex education during which a local attorney claimed that the plaintiff, a sex education teacher, "derives probably a very secret sort of sexual gratification" from teaching the subject area. 860 F.2d 300, 302–03 (8th Cir. 1988). The teacher sued the attorney for defamation and intentional infliction of emotional distress, and the Eighth Circuit held that the attorney's statement was merely one of opinion and was, thus, "absolutely protected under the first amendment." *Id.* at 304 (internal citation and alterations omitted).[6] Essential to the Court's analysis, however, was the fact that the radio program centered on the teacher's sexual education course, which was a matter of concern to the local community. The Court specifically noted that the program "served as a broad-faced forum for opinions on the appropriateness of sex

[6] To the extent that the *Deupree* Court was recognizing an "opinion" privilege under the First Amendment, *Milkovich* Court explicitly overruled its holding. *See Milkovich*, 497 U.S. at 18.

education in schools generally as well as a forum for the specific discussion of a controversial sex education course in a local public school." *Id.* In discussing *Hustler*, the Court explained that, "'in areas of public debate,' First Amendment principles must operate to limit 'a State's authority to protect its citizens from the intentional infliction of emotional distress.'" *Id.* (*quoting Hustler*, 485 U.S. at 50). Deupree was at the center of a local public controversy whether or not she qualified as a "public figure."

Here, Snyder and his family have no rational connection to the public issues cited by the Fourth Circuit. Matthew was not homosexual, though many who heard and read the Phelpses' speech likely thought he was. Except for the fact that they were Catholics, the Snyder family had no connection to the sex-abuse scandal within the Catholic Church. As acknowledged by the Fourth Circuit, the Phelpses used Mr. Snyder's name, his personal details, and his son's funeral as a platform to bring their message to a broader audience. Outrageous, intentionally harmful personal attacks should not gain absolute First Amendment protection merely because they are hurled in conjunction with speech concerning matters that are arguably of public concern. *Cf. Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167 (1979) ("A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."). By the same token, even matters of "public concern" lose some of their protection when interjected into the context of a private funeral. The Fourth Circuit erred in holding otherwise.

II. Mr. Snyder Should Not Have to Prove that the Speech Associated with the Phelpses' Tortious Conduct Could "Reasonably Be Interpreted as Stating Actual Facts" to Sustain an Intentional Infliction of Emotional Distress Claim.

With minimal discussion of the underlying tort claims, the Fourth Circuit created a rule requiring a private figure plaintiff seeking to recover for intentional infliction of emotional distress based on expressive conduct to prove that the speech involved could "reasonably be read to state actual facts," as purportedly mandated by *Milkovich*. The Court ignored that *Milkovich*, as well as the *New York Times* standard it applied, arose out of defamation law. The torts of defamation and intentional infliction of emotional distress implicate distinct state and personal interests, and the Fourth Circuit erred in simply applying the rules of one tort to the other.

The states recognize the tort of defamation to provide their citizens with the means to protect their reputations from the damage caused by false statements. At common law, statements defaming a person are presumably false, but the publisher of those statements has an absolute defense if he can prove that the statements are true. The truth or falsity of the statement therefore determines the viability of a defamation claim. On the other hand, to recover for intentional infliction of emotional distress based on expressive conduct, a plaintiff must establish that the conduct was intended to inflict emotional distress, was outrageous, and did, in fact, inflict serious emotional

distress. The cause of action *does not* depend on whether the speech involved in the tortious conduct is fact or opinion or whether it is true or false.

With these principles in mind, this Court developed the *New York Times* and *Gertz* standards as a means of protecting certain speakers and speech from defamation claims. By injecting the requirement that the plaintiff prove falsity, the *New York Times* Court reversed the common law presumption. The plaintiff must dispense with the absolute defense—the truth of the statement—before his claim can proceed. Conversely, the speaker can engage in the type of speech to which the standard applies without fear of having to prove that his statements are true to avoid liability. Even with heightened protection, however, the tort of defamation still protects individuals from the same reputational hazards: a plaintiff may recover for false statements that damage his reputation so long as he meets the level of fault based on his status as a public or private figure.

Plugging these standards into the intentional infliction of emotional distress tort does not merely create heightened protection for certain speakers; indeed, it changes the very nature and scope of the remedy. When the element of falsity is added to an intentional infliction of emotional distress claim, the plaintiff loses protection from entire categories of expressive conduct. The plaintiff may recover for emotional distress caused by outrageous speech that includes false statements, but he may not recover for the same degree of emotional distress caused by outrageous and intentionally harmful statements that are not capable of being proven true or false.

Consequently, the speaker can ensure constitutional immunity from liability by uttering statements that are so outrageous that they "fail to contain a provably false factual connotation." In effect, the element of outrageousness—the very threshold separating actionable from non-actionable conduct under the common law—becomes an affirmative defense to the claim.

The *Hustler* Court recognized the difference between the torts of defamation and intentional infliction of emotional distress and, nevertheless, deemed it necessary to apply the *New York Times* standard to an emotional distress claim involving a public figure. Several factors not present here, however, guided the *Hustler* Court. First, as noted above, the Court repeatedly stressed the need to protect public debate concerning public officials. The Court was not blind to the interests of public officials in protecting themselves from emotional harm caused by speech, but it applied the heightened standard after noting that public figures assume the risk of emotional distress when they enter the public sphere. *Hustler*, 485 U.S. at 51–52. Second, Falwell's emotional distress claim essentially duplicated his defamation claim, and the Court recognized that Falwell was primarily concerned with "reputational" harm. Third, the Court was apprehensive that the common law element of outrageousness did not provide an adequate means for a jury to distinguish satire, which warrants constitutional protection because of its inherent value in political discourse, from speech of limited value. On balance, the Court felt that it was necessary to provide heightened protection to satirical statements to avoid chilling public debate.

In contrast to the careful analysis performed by the *Hustler* Court before it imported the *New York Times* standard from the defamation context, the Fourth Circuit here granted absolute protection to the Phelpses' expressive conduct without giving due consideration to the specific factors at play and the potential repercussions for intentional infliction of emotional distress claims. First, as noted previously, Mr. Snyder is a private individual who did not voluntarily inject himself into the public sphere. The state's interest in protecting Mr. Snyder from the emotional distress caused by the Phelpses' expressive conduct is therefore necessarily greater. Second, Mr. Snyder's claim for intentional infliction of emotional distress is distinct from any claim he may have had for defamation. Mr. Snyder had a clear interest in avoiding the unwarranted intrusion upon his son's funeral and the resulting emotional distress. He had only one opportunity to attend the event. Any damage to Mr. Snyder's reputation caused by the Phelpses' protest is unrelated to these concerns. Third, the common law outrageousness element of intentional infliction of emotional distress provides juries with an adequate means of distinguishing actionable conduct from protected speech. Here, the Phelpses' conduct was outrageous not only because of the words they chose but because they came uninvited to Matthew's funeral with the intention of disrupting the religious ritual.

Perhaps most notably, the Fourth Circuit failed to account for the repercussions of the rule it adopted. When the Fourth Circuit misapplied *Hustler* and *Milkovich* to grant heightened protection to the Phelpses' speech, it eliminated entirely Mr. Snyder's

emotional distress remedy and the remedies of other private individuals intentionally harmed by expressive conduct. Indeed, the Fourth Circuit's rule encourages parties to include outrageous speech in their disruptive activities because conduct associated with outrageous speech that cannot "reasonably be read to state actual facts" is given categorical protection. Since protesting Matthew Snyder's funeral, the Phelpses have threatened to protest the funerals of massacred Amish children in Pennsylvania and murdered students at Virginia Tech. Under the Fourth Circuit's holding, the victims of such torment have no remedy. This Court should be wary of such a rule.

III. As a Member of a Captive Audience at his Son's Funeral, Mr. Snyder Should Not Have Been Barred from Seeking a Remedy for the Intentional Invasion of his Privacy.

This Court has recognized that, in certain settings, regardless of the content of the speech associated with a protest, the privacy interests of an individual exceed the First Amendment rights of the protestors. Under the "captive audience" doctrine, the First Amendment rights of a speaker may be curtailed when the listener's constitutional right to privacy justifies protection from the unwanted messages. As set forth above, the Fourth Circuit erred by immunizing the Phelpses from liability due to the type and nature of their speech. Even assuming, *arguendo*, that the Phelpses' *speech alone* would be entitled to First Amendment protection in other circumstances, Mr. Snyder is entitled to governmental protection from the Phelpses' conduct because he was a captive audience at his son's funeral.

Application of the captive audience doctrine depends principally on two factors: whether a sufficient privacy interest of the listener is at stake to warrant protection and whether the speaker's conduct interferes with the listener's privacy in an intolerable manner. *See McQueary v. Stumbo*, 453 F. Supp. 2d 975, 990 (E.D. Ky. 2006). The doctrine is applicable to funeral picketing because the government has an interest in protecting the substantial privacy interests of mourners at funerals and memorial services. Funeral picketing is also subject to the captive audience doctrine because targeted protesting of private funerals amounts to an intolerable interference with the privacy interests of grieving friends and, especially, the decedent's family.

A. Substantial Privacy Interests are at Stake for Mourners at Funerals and Memorial Services.

The Court has noted that the "recognizable privacy interest in avoiding unwanted communications varies widely in different settings. It is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' it.'" *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (*quoting Cohen v. California*, 403 U.S. 15, 21–22 (1971)). The funeral service in this case was a private gathering and was not held in the type of public forum that would permit the Phelpses to claim that their right to speak there was constitutionally protected. Although the Phelpses separated themselves from the funeral service, they directed their hateful remarks at the funeral audience, making it impossible for Mr. Snyder to bury his son in peace.

This Court has recognized several contexts in which an unwilling listener is a "captive audience." The Court has not hesitated to protect individuals within their own homes from targeted protests. *See Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988). In *Frisby*, the Court upheld a municipal ordinance that restricted residential picketing. The ordinance at issue created a blanket ban on picketing "before or about" any residence, including public streets outside of a residence. *Id.* at 476. The Court had no trouble recognizing the "significant government interest" of "the protection of residential privacy." *Id.* at 484.

Although the *Frisby* Court stressed the uniqueness of the home as a refuge, *see id.*, its rationale for upholding the picketing restriction was more complex. The *Frisby* Court explained that the interest in protecting individuals from unwanted speech in their homes stems from their inability to avoid it:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often captives outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.

Id. at 484–85 (citations, quotation marks, and alterations omitted). On this basis, the Court concluded that "[t]here simply is no right to force speech into the home of an unwilling listener." *Id.* at 485.

Subsequently, the Court recognized that an individual can be a captive audience to unwanted speech outside of his home. In *Hill v. Colorado*, the Court was asked to determine the constitutionality of a statute that prohibited persons from knowingly approaching within eight feet of an individual who was within 100 feet of a health care facility entrance, for purposes of displaying signs, engaging in oral protests, education, counseling, or passing leaflets or handbills, without the individual's consent. 530 U.S. at 707. The Court upheld the statute after concluding that it served the "significant and legitimate" governmental interests of providing "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id.* at 715. The Court observed that individuals entering health care facilities "are often in particularly vulnerable physical and emotional conditions." *Id.* at 729. Further, the Court stressed that such individuals "may be under special physical or emotional stress," *id.*, and could "potential[ly] [suffer] physical and emotional harm when an unwelcome individual delivers a message (whatever its content) by physically approaching . . . at close range," *id.* at 718 n.25; s*ee also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (recognizing a significant governmental interest in protecting the "medical privacy" and the "psychological" and "physical well-being of the patient held 'captive' by medical circumstance").

In analyzing the privacy interest protected by the regulation, the *Hill* Court emphasized the "importan[ce of] conducting this interest analysis to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Hill*, 530 U.S. at 715–16. The Court also cited *Frisby* for the proposition that "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Id.* at 716 (*citing Frisby*, 487 U.S. at 487). Continuing, the Court noted that "it may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription." *Id.* at 716 (quotation marks and alteration omitted).

The *Hill* Court also explained the situations in which a listener could be "captive" and, therefore, protected from unwanted speech of any character. The Court noted that it has recognized "the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" *Id.* at 718 (*quoting Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)). Further, the Court explained that an individual's privacy interest in avoiding unwelcome speech was paramount in the individual's home but that the right "can also be protected in confrontational settings." *Id.* at 717.

This Court has not considered whether an individual attending a family member's funeral has a privacy interest that warrants protection from unwanted speech. The Court has, however, explicitly recognized the privacy interest of family members of the deceased in other

contexts. In *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2003), this Court was asked to determine whether a media group was entitled to obtain an individual's death scene photographs through a Freedom of Information Act ("FOIA") request. *Id.* at 161. Specifically, the Court interpreted an exemption within the FOIA for documents compiled for law enforcement purposes whose production "could reasonably be expected to constitute an unwarranted invasion of privacy." *Id.* at 160–61. After considering the importance of the family members' privacy interest in preventing broad exposure of the photographs, the Court held that the privacy interest outweighed any public interest in disclosure. *Id.* at 170.

In determining the extent of the family members' privacy interest in the death images, the *Favish* Court considered the significance of cultural traditions and common law protections applicable to death and burials:

> Burial 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 power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother.

Id. at 167–68 (citations omitted). Further, the Court explained the effect that unwanted public intrusion could

have on the mourning process of surviving family members:

> The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is but a modern instance of the same understanding of the interests decent people have for those whom they have lost. Family 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.

Id. at 168. The Court emphasized that, in addition to the "well-established cultural tradition acknowledging a family's control over the body and death images of the deceased," the common law recognized a survivor's right to privacy in protecting the memory of the deceased:

> 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. at 168–69 (*quoting Schuyler v. Curtis*, 42 N.E.22, 25 (N.Y. 1895)). Against this backdrop, the Court held that the FOIA "recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images" because "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution" and "[i]t would be anomalous to hold in the instant case that the statute provides even less protection than does the common law." *Id.* at 170.

In *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), the Phelpses challenged an Ohio statute that placed time, place, and manner restrictions on protest activities during or shortly after funeral processions. The Sixth Circuit held that the statute served a significant governmental interest in protecting the citizens of Ohio from disruption during events associated with funerals. *Id.* at 362. In reaching this conclusion, the Court first framed the analysis as requiring "an appropriate balance between the First Amendment rights of Phelps-Roper and the interests of funeral attendees." *Id.* The Court was quick to point out that, although the messages conveyed by the Phelpses were "widely offensive to many," their First Amendment protection was not thereby lost. *Id.* Next, citing *Hill* and *Frisby*, the Court outlined the captive audience doctrine and the situations where it previously had been applied. The Court observed that "[i]ndividuals mourning the loss of a loved one share a privacy right

similar to individuals in their homes or individuals entering a medical facility." *Id.* at 364–65. Moreover, the Court explained that the "concerns for a survivor's rights articulated in *Favish* are perhaps even greater in the context of a funeral or burial service." *Id.* at 366. Mourners cannot simply turn their heads to avoid protests without sacrificing their right to partake in the funeral service. *Id.* The Court also rejected the Phelpses' contention that funeral attendees can avoid the unwanted speech by not attending the funeral. As the Court explained, given the interests at stake, "a funeral or burial service cannot be dismissed as nothing more than a 'voluntary' activity." *Id.* The Court concluded that the state had an important interest in protecting funeral attendees because the family members of a deceased person have a privacy right in the character and memory of the deceased. *Id.* The Court ultimately held that the statute at issue was a reasonable time, place, and manner restriction that did not violate the First Amendment. *Id.* at 372.

Mr. Snyder had a privacy interest in attending his son's funeral without disruption by unwanted protests. Mr. Snyder had only one opportunity to attend his son's funeral. He could not avoid the Phelpses' speech without avoiding the funeral altogether. Although Mr. Snyder was not confined in the strict sense, this Court has recognized that a listener can be captive in confrontational settings outside of the home. Furthermore, Mr. Snyder was in a particularly vulnerable condition at the time he was confronted with the Phelpses' speech due to the emotions he felt in connection with the death of his son.

B. The Phelpses' Conduct Interfered with Mr. Snyder's Privacy Interest in an Intolerable Manner.

Given the substantial privacy interest in the context of funerals and memorial services, the next question is whether the Phelpses' conduct interfered with Mr. Snyder's interest in an intolerable manner. Answering this question requires analysis of the facts surrounding the Phelpses' protest to determine if it created a "confrontational setting," as described in *Hill*, such that the speech could be proscribed through the tort system.

The Phelpses' protest was a well-planned event. As noted above, to gain maximum exposure, the Phelpses placed themselves at the main entrance of St. John's Catholic Church property where Matthew Snyder's funeral was to occur. Matthew's funeral procession had to be re-directed to a service entrance to lessen the protest's impact on mourners. Despite this precaution, the Phelpses were a mere 200–300 feet from Mr. Snyder and the other funeral attendees during the procession. Even the Phelpses' own expert acknowledged that their actions had a serious impact on Mr. Snyder's grieving process. (Vol. X at 2578.) Moreover, the Phelpses' expert acknowledged that some of their signs went "further than protesting against a war." (Vol. X at 2572.) Thus, it was essentially undisputed at trial that the Phelpses had intentionally interfered with Mr. Snyder's grieving process in an intolerable manner.

By protesting Matthew Snyder's funeral, the Phelpses targeted a captive audience. Matthew's family members could not avoid the Phelpses' unwanted expressive conduct without avoiding the funeral altogether. Such measures are not required in light of the special interest family members have in mourning their deceased relatives. Because he was unable to avoid the Phelpses' harmful expressive conduct, Mr. Snyder was entitled to greater protection from it than may have been warranted in other circumstances. Consequently, the Fourth Circuit erred by immunizing the Phelpses from liability without considering Mr. Snyder's special status as a captive audience.

IV. Mr. Snyder's First Amendment Rights to Free Exercise and Peaceable Assembly Should Outweigh the Phelpses' First Amendment Right to Target Hateful Speech at Him During His Son's Funeral.

Even the Phelpses do not genuinely dispute that, by targeting their protests at Mr. Snyder, they disrupted his peaceful assembly and mourning process. As a consequence, when the Fourth Circuit immunized the Phelpses from liability, it necessarily chose to subordinate Mr. Snyder's First Amendment rights of free exercise and peaceful assembly to the Phelpses' free speech rights. Such a wholesale promotion of the free speech rights of one party without accounting for the free exercise and peaceful assembly rights of another has no support in the Constitution.

The party against whom civil damages are sought should not be able to engage in actions that infringe

constitutionally protected rights while, at the same time, cloaking such actions with the impregnability afforded by other constitutional rights. To quote Justice Holmes, "the right to swing [one's] fist ends where the other man's nose begins." Justice Holmes' notion of balancing freedoms is instructive. One's right or freedom ends where it conflicts with or infringes the right or freedom of another.

In this case, the Phelpses' conduct interfered with the Snyders' right to bury their son, a religious ceremony entitled to constitutional protection through the First Amendment's Free Exercise Clause. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (holding that First Amendment's protection of "exercise of religion" extends "not only [to] belief and profession but [also to] the performance of (or abstention from) physical acts," including, *inter alia*, assembling with others for worship service and participating in sacramental rituals). Likewise, attendance at a funeral service implicates the First Amendment right to peaceably assemble: the assembly of fellow believers at a funeral service provides support and a sense of historical continuity with past participants in the same ritual, reinforcing the members' commitments to their collective faith. *See* Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. Pa. L. Rev. 1131, 1150 (1984) ("A religious group is more than the sum of its individual believers: the assembly of its members is essential to the creation of a unified community with a shared spiritual life and common goals.").

The Phelpses have argued, and the Fourth Circuit held, that the District Court's failure to direct a verdict in their favor violated their First Amendment free speech rights. By the same token, however, the Fourth Circuit's decision to direct a verdict for the Phelpses on First Amendment grounds constitutes government action that adversely affects Mr. Snyder's First Amendment rights to free exercise and freedom of assembly. By immunizing obtrusive conduct under the guise of free speech, the Fourth Circuit's rule would allow uninvited, antagonistic individuals to infringe another citizen's constitutionally protected freedoms and leave the victim with no legal recourse.

Rather than simply elevating the Phelpses' free speech rights by granting absolute protection to their expressive conduct, the Court was required to balance those rights against Mr. Snyder's right to free exercise and assembly. This Court's treatment of the privacy interest is instructive on this point. As discussed above, where a person's free speech rights are infringing another's privacy rights, the Court has allowed those speech rights to be curtailed "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, (1975) (*quoting Cohen v. California*, 403 U.S. 15, 21 (1971)); *see also Hill v. Colorado*, 530 U.S. 703, 716 (2000). The case for protecting an individual's rights to exercise his religion and to peacefully assemble at a funeral service is even stronger. Indeed, the Founders chose to place these rights on equal footing with the right to free speech by listing all three protections in the First Amendment.

By choosing St. John's Catholic Church for Matthew's memorial service, Mr. Snyder was attempting to practice religion on his own terms. Members of the Snyder family had only one opportunity to assemble and support one another during Matthew's funeral service. On the other hand, the Phelpses could have presented their message in a setting that did not affect Mr. Snyder's ability to practice his religion or to enjoy the support of his family members during a highly emotional event. Instead, they intentionally used the funeral as a platform for their message. As "the right to swing [one's] fist ends where the other man's nose begins," the constitutional protection of the Phelpses' speech should have ended at the point where it prevented Mr. Snyder from attending his son's funeral on terms that he chose.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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