No. 09-751

IN THE
Supreme Court of the United States

ALBERT SNYDER,
Petitioner,
v.

FRED W. PHELPS, SR.; SHIRLEY L. PHELPS-ROPER;
REBEKAH A. PHELPS-DAVIS;
AND, WESTBORO BAPTIST CHURCH, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner fails to present an issue worthy of consideration by this Court, because:

1. **This case does not involve private matters, and this Court has already established that speech on public matters is protected.**

2. **This case does not present the question of whether funeral goers are a captive audience or have the right to avoid unwanted communication, because respondents picketed over 1,000 feet from a funeral that was a highly public event, on a public right of way, engaging in speech on public issues; were not seen by those going in; and did not impact or disrupt the funeral in any slightest degree.**

3. **There is no split in the circuits relevant to this case, because this case is not about whether laws limiting the time, place and manner of funeral pickets are constitutional.**

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STATEMENT OF THE CASE

The Fourth Circuit Court of Appeals set aside a verdict of $5 million (remitted from $10.9 million) against a small church, her pastor, and two of her members (respondents), which was rendered on theories of intentional infliction of emotional distress and invasion of privacy by intrusion upon seclusion, because respondents held some picket signs over 1,000 feet away from a church where a funeral was held, before the funeral started, which none of the funeral goers saw, addressing issues of vital public importance. Now petitioner – the father of the soldier being buried – wants this Court to review that decision and set aside well-settled First Amendment law, because the father did not like the words.

The signs held by the three individual respondents, and four children of one of the respondents, were these: Don't Pray for the USA; God Hates Fags; God Hates You; God Hates America; God's View/Not Blessed Just Cursed; Semper Fi Fags; Pope in Hell; God Hates the USA/Thank God for 911; You are Going to Hell; Fag Troops; Thank God for Dead Soldiers; Thank God for IEDs; Priests Rape Boys.

The petition falsely asserts at p. 4 that respondents had a sign saying Matt in Hell, and that this sign referred to the dead soldier, Lance Corporal Matthew Snyder. The record is clear what signs were used, this fact being driven home repeatedly at the trial court level. During the deposition of respondent Fred Phelps on April 16, 2007, he testified that "Matt

in Hell" referred to Matthew Shepard, the man whose death is memorialized in a play called "The Laramie Project," which also features these respondents, and which respondents frequently picket. Everyone in the case is well aware what Matt in Hell is about, and that it was not present at the funeral in this case. A disturbing falsehood, though such a sign is not tortious or criminal. It does underscore that this case is designed to gain a rule of law that you cannot say someone is in hell in this nation, especially if that person died in a uniform; and is *not* about invasion of privacy or legally sufficient outrageous conduct. That petitioner's counsel is reduced to misstating this salient fact to this Court underscores the paucity of any merit to this petition.

When Matthew Snyder enlisted in the Marines in October, 2003, the United States had been at war in Iraq for seven months, and the whole world was talking about the war. At the same time, the nation was occupied with the question of homosexuals in the military; and with the issue of the ongoing sex-abuse scandal in the Catholic Church. Not to mention the ongoing debate in this nation in the churches, the legislative halls, the schools, and every other major institution or public forum, about the morals and conduct of America.

As the soldiers began to die, their funerals were turned into substantial public ordeals. The Court can take judicial notice of the fact that these soldiers' lives, deaths and funerals have received considerable public attention since they started, with lengthy news stories, lots of public discussion by family and friends,

commentary in the media and often at the funeral by various public officials and figures, including elected leaders and clergy, and with lots of pomp and circumstance by the military. How these soldiers are living and dying is a topic of substantial public interest and dialogue, at least nationwide, probably worldwide. The prevailing view is that the soldiers are heroes, and that God is obligated to bless America. Those views clash with the Bible, in respondents' sincerely held religious opinion, and when these funerals are used to express those viewpoints, respondents feel duty bound to provide a countervailing message, to wit, if you want God's blessings, you have to obey him, and if you want the soldiers to stop dying, you have to stop sinning in this nation.

On March 3, 2006, Lance Corporal Snyder was killed in Iraq, when a Humvee he was in flipped after the driver lost control after he ignored orders from a superior to slow down. The media commenced covering the life and death of this young man, and petitioner, his father, participated in detailed interviews with the media. He also contacted Congressman John Murtha to inquire about his son's death and to express his disagreement with the war, which he reported to the media. In the course of talking with the media, petitioner revealed that he was divorced from the dead soldier's mother and other details about how he raised his son. Public reports also indicated the funeral would be held at a Catholic church, which the young marine attended as a child. Petitioner expected media to be present at the funeral because he had spoken with them in

advance of the funeral. The media sought but did not receive permission to come onto the campus, but they were given a place to set up just off the grounds of the church, and were present before, during and after the funeral, filming and interviewing people besides respondents.

Meanwhile, given the very public nature of the soldiers' funerals, and the vast dialogue held in connection with their lives and deaths; and given the strong religious belief held by respondents that the soldiers were dying for the sins of America; in June 2005 respondents and other members of Westboro Baptist Church (WBC) began picketing in proximity to these funerals and memorial services. WBC's picketing has spanned nearly twenty years, starting in early 1991, and has addressed the morality of this nation and the consequences of proud institutionalized sin, including homosexuality (including same-sex marriage), fornication, adultery (including divorce and remarriage, called adultery by the Lord Jesus Christ), murder (especially of unborn babies), greed, and idolatry. Often the picketing has been directed to church goers in proximity to churches because respondents believe, in short, that the churches and those calling themselves Christian have lost all moral authority by their own sinful way of life, and now actively teach people to sin, instead of urging and warning them not to. After the fashion of the prophets and apostles, and Christ himself, respondents go into public arenas and warn their fellow man not to sin, and that the wrath of God will pour out on them if they do sin, and especially if they forget God's word, and make proud sin a way of life.

While this is an extraordinarily unpopular view today, in a nation that is largely disinterested in and unlearned about the Scriptures, it bears noting that when this country was formed, there were many preachers and church goers who believed these things, and the pulpits were full of preachers who warned people not to sin, after the fashion of Jonathan Edwards, whose sermon *Sinners in the Hands of an Angry God* is still found in the English textbooks in most high schools.

Respondents have, after nearly twenty years, learned that this message is not well received in this country; a fact which according to their religious beliefs makes it that much more imperative that the message be delivered. All of the evidence reflects that from the Scriptures respondents find a clear duty to warn a nation that is sinning away its final days of grace, that the nation will have the wrath of God poured out on its people for such proud and pervasive sin; and that this duty is, per such passages as Ezekiel 3 and 33, most pronounced when the sword is brought on a nation (per the expositors and the language, this at least includes when the nation is at war and its soldiers are dying). There is nothing pleasant about the straits this nation is in; but that only underscores – not lessens – the duty to speak. The funerals are where the eyes, ears, hearts and minds of the nation are focused; that is the audience – those who are still living and who can still repent and obey – to whom respondents deliver the message.

The manner in which the picketing is done is well-established. Respondents always stay a distance from the building or location of the event; always stay on public easements or right of ways; hold signs, sing songs (hymns and parodies) in natural voice (without amplification), and answer questions of passersby and the media. They contact law enforcement in advance as a courtesy and to prevent disturbances of the peace; and they obey all police directives. Respondents followed the same protocol here; stood where the police told them to stand; stayed 30 minutes; spoke with the media who approached them; and before the funeral began, stopped picketing and left.

The date, time and location of this funeral were published in several newspapers, including the large *Baltimore Sun* and on the Internet. The large Catholic Church where the funeral was held is part of an even larger complex, including more than one entrance, and including a school. The school is not a party to this action, and any thought petitioner may have about the impact on the students is legally irrelevant. The fact is that one of the priests at the church (who wrote and had published a letter to the editor about the funeral and critical of respondents' religious viewpoints within a few days after the funeral) made it his business to contact the school and have them close the blinds, and reroute the children out another door *as they came out to hold up picket signs outside the funeral.* This same priest arranged with law enforcement where the respondents would stand, and ensured all traffic was routed away from them during the funeral.

Besides the school children and their picket signs, a group called the Patriot Guard Riders (PGR) had a large presence, one group set up immediately outside the doorway into the church, and another group set up on the church property, closer to the intersection where respondents stood. The PGR routinely have numerous flags, insignia on their clothing and motorcycles, and at times their own signs. The PGR routinely picket in connection with the deaths of soldiers, often when respondents are not present, and when they are present, they counter the message of respondents with their own. (At the center of this debate is whether God is blessing or cursing America, and whether these soldiers are dying as heroes or not.) In this instance, the PGR contacted law enforcement, coordinated with them where they would stand, and made plans to attend before respondents announced any plans to picket in connection with this funeral. The PGR are often joined by local law enforcement, emergency responders, and military officials, who also stand outside and use official vehicles to engage in expressive activity (such as lining up the vehicles; gunning engines of motorcycles, cars and trucks, using large fire trucks to hoist giant-sized flags, etc.).

Petitioner and his daughters drove into the church, along with others attending the funeral, hundreds of feet away from respondents, up and over a hill. He did not see the respondents, and at most claims to have seen the tips of some signs. No one else testified to seeing the signs as they went into the funeral. The priest who conducted the funeral

testified that there was no disruption to the funeral, and in fact he was not even aware picketing was occurring, and he centered the congregants so they fully focused on the funeral and the deceased soldier. Petitioner testified that the funeral went beautifully just as planned, and he stayed focused on his son during the funeral. The petition falsely states at pp. 3-4 that petitioner saw respondents and law enforcement, and watched his family and friends see respondents and law enforcement, all of which is specifically untrue. Because respondents were placed so far from any entrance to the church, including the main entrance used by funeral goers, none of them saw respondents. All they saw by all reports were the school children with signs and the PGR riders with flags and insignia.

During the funeral, all 1200 seats of the church were full; strangers attended and no one was blocked from the funeral. The service was described by witnesses at trial as a beautiful military ceremony full of pageantry with Marine pallbearers, and a moving tribute. Funeral goers walked through a tunnel of flags going in, and passed school children and PGR members lining the road on the way to the cemetery, as well as citizens, law enforcement, emergency responders and fire fighters, all honoring plaintiff's son. Members of the press had a designated spot off church grounds; petitioner did not see or hear them, and they did not approach the funeral procession. After the funeral, petitioner talked to the media about his son, his death, and his funeral. Petitioner received an outpouring of

support, including hundreds of supportive e-mails, calls and cards, and other community support.

Not a single portion of the ceremony, funeral, procession or burial was in any slightest degree impacted or disrupted by respondents. Respondents did not go near the church, into the church, near petitioner, near any funeral goer, or do anything else but stand on a public easement over 1,000 feet from the funeral, out of sight and sound, and engage in peaceful non-disruptive expressive activity.

After the funeral, petitioner chose to watch and read news stories that depicted some of respondents' signs and quoted some of their words. A few weeks after the funeral one respondent, Shirley Phelps-Roper wrote a document about the funeral and picket, called an epic, and it was posted on WBC's passive Website. Petitioner searched the Internet for writings about his son, and on one occasion the search produced this document, which petitioner chose to read and show to others. Though the epic was asserted as a basis for the claims at trial, the petition before this Court appears to be addressing only claims based on the picketing.

Petitioner sued for defamation, invasion of privacy by publicity given to private life, intentional infliction of emotional distress, invasion of privacy through intrusion upon seclusion, and conspiracy to commit these four torts. Before trial, the trial court granted summary judgment on the defamation claims, because the respondents' speech was essentially religious opinion and would not

realistically tend to expose petitioner to public hatred or scorn. The trial court also granted summary judgment on the invasion of privacy by publicity given to private life claim, because respondents had not made public any private information, and had published only information gleaned from a newspaper obituary and such publication would not be highly offensive to a reasonable person because the information was already a matter of public record.

The trial court allowed the claims of intentional infliction of emotional distress and invasion of privacy through intrusion upon seclusion to go to the jury. The jury was inflamed during the trial through strong rhetoric by petitioner and his counsel who demonstrated great hostility towards respondents' religious beliefs, often mocking their statements and religious views; and by the fact that almost no one believes the things respondents believe in this country anymore, so it is an easy thing to inflame people by questioning respondents and making them answer for what they believe, which is precisely what happened extensively during the trial.

Respondents repeatedly asked the trial court to clarify what words, specifically, including which signs and which portion of the epic, constituted the basis for the claims. The trial court opined during a pretrial conference that some signs, such as America is Doomed and God Hates America, expressed general points of view that may have merited First Amendment protection, but that others, such as Thank God for Dead Soldiers, Semper Fi Fags, You're Going to Hell and God Hates You, created a fact issue

for the jury because they could be interpreted as being directed at the petitioner's family.

At trial, the court issued an instruction, No. 21, which allowed the jury to decide the relevant legal issues, telling the jury that certain speech, including that which is vulgar, offensive and shocking, is not entitled to absolute constitutional projection. Also that First Amendment protections vary with the nature and subject matter of the speech, and that when speech on matters of private concern is directed at private figures, the First Amendment must be balanced against the state's interest in protecting its citizens. Thus, the trial court left to the jury to assess the nature of the speech and whether it was protected, letting it decide whether it was directed at the petitioner's family and was so offensive and shocking as to not be entitled to protection. Thereby the trial court failed to perform its gatekeeper role as to protected speech, and let the jury decide legal issues reserved for the court.

The jury issued an award of $2.9 million in compensatory damages, and $8 million in punitive damages. When ruling on post trial motions, the trial court applied the standard of speech directed by private individuals against other individuals, and denied relief, beyond remitting the award to $5 million.

The Fourth Circuit found that the trial court wrongly permitted the jury to rule on legal issues reserved to the trial court, saying that at the least the judgment must be vacated for a new trial because of

Instruction No. 21. Also the court held that the trial court applied the wrong standard by treating the speech as private. The court conducted an independent examination of the whole record as is required in First Amendment cases, and concluded that the speech was on issues of public importance, including 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 also concluded that no reasonable reader could interpret the signs as asserting actual and objectively verifiable facts about petitioner or his son; and that even if the signs could reasonably be read to imply an assertion about petitioner or his son, the statements were protected because 1) they did not assert provable facts about an individual, and clearly contained imaginative and hyperbolic rhetoric intended to spark debate, and 2) a reasonable reader would not interpret the signs as including verifiable facts, as they contain loose, figurative or hyperbolic language that seriously negates any impression that the speaker is asserting actual facts about an individual.

The Fourth Circuit also found that the epic similarly consisted of religious opinion, by its context and tenor, and did not contain statements that would lead a reasonable reader to expect actual facts to be asserted therein.

A concurring opinion held that there was insufficient evidence to establish invasion of privacy by intrusion upon seclusion, because respondents did not intrude upon a private place; the protest occurred

in a public place 1,000 feet from the funeral; respondents never confronted petitioner; petitioner did not see the protest; the evidence was undisputed that the church service was never disrupted; and, respondents never entered the church, and left before the funeral began. Further, that the epic was not an intrusion upon seclusion, because respondents did nothing to direct it to petitioner (such as email or transmit it to him); instead, petitioner learned of it during an Internet search and upon finding it chose to read it. The concurring opinion also found that there was insufficient evidence to establish intentional infliction of emotional distress because the protest was confined to a public area under supervision and regulation of local law enforcement and did not disrupt the church service; and that the epic which the trial court found was non-defamatory as a matter of law was not sufficient to support a finding of extreme and outrageous conduct.

REASONS FOR DENYING THE WRIT

This is a case involving speech on vital public issues, by a group that is probably fairly characterized as media (though the media/non-media distinction makes no difference here), that angered by its content a man who is probably a limited purpose public figure (which if not so, still does not remove the speech from the realm of public issue speech). The speech occurred in a traditionally public forum, far removed from any topic or place that could be deemed private by any analysis. The Fourth Circuit's decision does nothing but logically apply well-established legal principles under the First Amendment, concluding the obvious fact that the speech by respondents was on public issues, and was protected. No circuit has disagreed with this analysis under any circumstances.

The fact that there may be some issues about the laws of over forty states (and the federal government) about funeral picketing, which may at some time be presented to this Court in another case, on which the circuits may end up being split, does not make this case an appropriate one for review. Even if this Court were to agree to hear a case about a state or federal funeral picketing law, and were to a) find a privacy right in a funeral, b) regardless of the circumstances of the funeral, no matter how public an event it was, and c) expand the time, place and manner limits that can be imposed to protect such a privacy interest far beyond what it has ever done, none of those rulings would change the outcome in *this* case.

Review is not appropriate in *this* case because the issues are not novel, and the ruling by the Fourth Circuit is not in conflict with any other circuit, or with this Court's opinions. To the contrary, the Fourth Circuit's ruling is the only sound one given this Court's past rulings about public speech under the First Amendment.

I. THIS CASE DOES NOT INVOLVE PRIVATE MATTERS, AND THIS COURT HAS ALREADY ESTABLISHED THAT SPEECH ON PUBLIC MATTERS IS PROTECTED

Petitioner persists in treating this case as though it is a dispute between two private individuals about a private matter. The opposite is the case. Of greatest importance is the fact that the speech at issue was speech on public issues. That fact cannot be gainsaid, because the topics were the dying soldiers, homosexuality in the military, the sex-abuse scandal in the Catholic Church, and the morals of this nation. Given the magnitude and gravity of the problems facing this once-great nation, nothing could be more important at this hour than the question of how God is dealing with this nation, especially on the battlefield.

From this flawed vantage point, petitioner says the Fourth Circuit should not have extended the rule of law announced in *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), to disputes between private individuals. Yet this Court has recognized that there are constitutional limits on

the type of speech to which state tort liability may attach, regardless of whether the plaintiff is a private or public figure. Thus, as the Fourth Circuit noted, this Court has held that the First Amendment protects statements on matters of public concern that fail to contain a provably false factual connotation. And, speech that is loose, figurative or hyperbolic language is protected to ensure that public debate will not suffer.

Even when finding that the New York Times actual malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest, this Court said that constitutional protections were warranted; and that states could not impose liability without requiring a showing of fault, and could not permit recovery of presumed or punitive damages on less than a showing of the New York Times malice, see *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15, 110 S.Ct. 2695, 2704, 111 L.Ed.2d 1 (1990).

Further, this Court noted in *Milkovich* that in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), this Court held that the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern, *id*, 497 U.S. at 16, 110 S.Ct. at 2704. From there, in *Milkovich*, this Court went on to give protection to statements that cannot reasonably be interpreted as stating actual facts, to provide "assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical

hyperbole' which has traditionally added much to the discourse of our Nation,'" *id.*, 497 U.S. at 19, 110 S.Ct. at 2706.[1]

Even if the Court has not expressly said the *Falwell* case applies specifically to private figures if the speech is on public issues, that conclusion is obvious from other decisions by this Court. Indeed, within the *Falwell* case itself, the Court held that public figures may not recover for intentional infliction of emotional distress by reason of a publication, without showing that the publication contains a false statement of fact made with actual malice, *because* of the need to ensure the free flow of ideas and opinions on matters of public interest and concern, 485 U.S. at 50, 108 S.Ct. at 879.

The core reason this Court has put limits on the ability of states to attach tort liability to speech regarding public figures is because of the importance

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[1] As the Fourth Circuit noted, neither this Court nor the Fourth Circuit had addressed whether these constitutional protections apply to nonmedia defendants. After noting that the Second and Eighth Circuits have rejected any media/nonmedia distinction, the Fourth Circuit concluded: "Like those two circuits, we believe that the First Amendment protects nonmedia speech on matters of public concern that does not contain provably false factual assertions. Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the 'media.'" *Snyder v. Phelps*, 580 F.3d 206, 2009 U.S.App. LEXIS 21173 (4th Cir. 2009), at 29, footnote 13. Respondents are publishers; they have Websites; they have as much standing as any entity dubbed "media" to First Amendment protections.

of debate about public issues. So it is certainly logical to extend that same reasoning to speech on public issues, and this Court has done so.

Petitioner complains that giving First Amendment protection to speech about a private individual leaves the speaker able to subjectively dictate the definition of what is an issue of public concern or interest (pp. 8-9). To the contrary, this Court has articulated how to determine whether speech is of public or private interest, and the Fourth Circuit correctly recognized that this is a legal question for the court, not a jury question. (Otherwise, the great temptation to label speech private when you do not like the content would prevail – which is exactly what happened at the trial court level in this case.) Whether speech involves a matter of public concern is determined by examining the content, form and context of the speech, as revealed by the whole record. This was established in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 2946-2947, 86 L.Ed.2d 593 (1985). There is no way to examine the content, form and context of respondents' speech without quickly reaching the conclusion that it is public speech. In spite of herculean efforts by petitioner, his counsel, and the trial court, to wrench the plain meaning of the signs into applying personally to the private individual-ness of petitioner and his son, the facts simply do not support this strained conclusion.

The content of the speech is religious language about the wrath of God on this nation for its sin. The form of the speech is traditional public speech, to wit,

picket signs on public right-of-ways; related expression such as media interviews, singing parodies, etc.; and the use of the Internet, the most public forum in existence. The context of the speech is a high profile public funeral, heavily covered by the media, heavily attended by the public at large, with two other groups picketing at the same time, and scores of people lining the roads to express themselves about this dead soldier, against a backdrop of a war that has the world's attention, being held at a church that is part of the Catholic Church, which has been the topic of intense public attention for his sex-abuse scandal, in a nation that claims to be the Christian leader of the world while establishing itself as a nation of extraordinarily proud and sinful people. What could possibly be more public interest than these issues?

(As discussed further below, in addition to the speech being on public issues, respondents contend that the funeral was public, not private, so any discussion about the speech being private because the funeral was private is inapposite here. Further, respondents submit there is a viable basis for concluding that petitioner is a limited purpose public figure. Petitioner's son voluntarily enlisted knowing the war in Iraq was of national importance and interest. Petitioner spoke with the media about his son, attempting to influence the public to believe his son was a hero. He spoke with the media and his Congressman attempting to influence views on the ongoing war. He invited the public at large to the funeral, and encouraged the participation of PGR, school children and citizens. He chose to have the

funeral at a Catholic church, knowing the public's attention on the sex-abuse scandal. "[T]he New York Times standard is not limited to discussion of individuals who deliberately seek to involve themselves in public issues to influence their outcome. Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern," *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 963, 106 S.Ct. 322, 329, 88 L.Ed.2d 305 (1985), Brennan, J., and Marshall, J., dissenting from denial of certiorari.)

Emotive rhetoric about how mean respondents are changes nothing. Indeed, this Court said in *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 517, 122 S.Ct. 2390, 2401, 153 L.Ed.2d 499 (2002), that in First Amendment contexts, "we have found it problematic to regulate some demonstrably false expression based on the presence of ill will," because "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred." In holding that the NLRB was not permitted to impose liability on an employer for filing a losing retaliatory lawsuit, this Court noted that it disallowed the use of an ill motive to create liability for speech in the realm of public debate about public figures in *Falwell*, *ibid.* So characterizing respondents' purpose, in spite of their testimony to the contrary, as hateful or mean or any such thing, is as legally meaningless as saying respondents have cooties. The topics on which respondents spoke, the form of the speech, and the context, all demonstrate that they were participating in national debate on critical public issues, in the

exact same arena, on the exact same platform, in connection with the exact same deaths and funerals, as many other Americans, including petitioner, regardless of how dissenting their view may be.

As a matter of law the trial court found that the statements were not false. This Court has said that speech of public concern that is true as a matter of law is not speech that can be punished, simply by calling it intentional infliction of emotional distress. Petitioner cannot claim the speech here is false, because the trial court found it was not, and a private-figure plaintiff cannot recover without such a showing, per *Philadelphia Newspapers* and *Falwell.*

Also, as a matter of law, the Fourth Circuit was correct in finding that the language of respondents is not language which can be verified as true or false. As the Fourth Circuit noted, when a person talks of God and related topics, there is no possible way for any human to verify the truth or falsity of these views, which are based on faith. "The statement 'Thank God,' whether taken as an imperative phrase or an exclamatory expression, is similarly incapable of objective verification," and, "By employing God, the strong verb 'hate,' and graphic references to terrorist attacks, the Defendants use the sort of 'loose, figurative, or hyperbolic language' that seriously negates any impression that the speaker is asserting actual facts about an individual," *Phelps v. Snyder, supra,* 580 F.3d 206, 2009 U.S.App. LEXIS 21173 at 41. No one questions the right of those attending or speaking about the deaths and funerals of soldiers and others to say, "He's in heaven," or "God bless

him," with or without any information to substantiate such a statement. Yet petitioner wishes to call into question the right of these respondents to say, "He's in hell," and "God has cursed him," as they read the published details of his body being blown to pieces by an IED, or otherwise being killed a young age like petitioner's son. Neither can be proven by objective facts; and both viewpoints should receive equal protection. The rule of law about hyperbolic and objectively unverifiable language being protected is well-established, and does not need to be revisited simply because the dissenting viewpoint is at issue here.

It is not necessary for this Court to review this case to establish the legal principle that speech on public issues is protected speech, and it was no mistake in this case to apply the Court's reasoning in *Falwell* and related cases to the facts of this case. An award for intentional infliction of emotional distress and invasion of privacy on these facts, even if there were in fact a basis for saying the conduct and words were outrageous, or even if in fact there were any type of an invasion, cannot stand under this Court's precedent, given the public nature of the speech and the type of language involved.

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER FUNERAL GOERS ARE A CAPTIVE AUDIENCE OR HAVE THE RIGHT TO AVOID UNWANTED COMMUNICATION

Whether or not this Court would recognize a privacy interest in people going to a funeral, whether the family of the deceased or otherwise, may be a question this Court has to decide some day. But this is not the case where that has to be decided.

First, even if the Court found a privacy interest in a funeral comparable to that in a residence or abortion clinic, as this language by the Court in *Frisby v. Shultz,* 487 U.S. 474, 488, 108 S.Ct. 2495,2504, 101 L.Ed.2d 420 (1988) suggests, if you use the home for a union meeting, that union meeting is not private:

> Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance-to, for example, a particular resident's use of his or her home as a place of business or public meeting, or to picketers present at a particular home by invitation of the resident-may present somewhat different questions. Initially, the ordinance by its own terms may not apply in such circumstances, since the ordinance's goal is the protection of residential privacy ... and since it speaks only of a "residence or dwelling," not a place of business .... Cf. *Carey, supra,* 447 U.S., at 457, 100 S.Ct., at 2288

> (quoting an antipicketing ordinance expressly rendered inapplicable by use of home as a place of business or to hold a public meeting).

Similarly, if you use a church for a public free-for-all, inviting the community at large, the media, and school-children picketers and veteran biker picketers, and have your priest write a letter to the editor about the funeral immediately thereafter, you cannot claim privacy in that event. So even if respondents were not speaking on issues of public concern as addressed in Section I above, this funeral was not a private event. The fact is, no one considered the event private, and no one considers the soldiers' funerals in general private. Politicians, clergy, citizens, the military and the media, all see them as public platforms for public commentary. It is only when the unpopular message respondents publish joins the fray that talk of privacy ensues.

Second, even if the speech was not on public issues, and the funeral was private, *these* funeral goers did not receive *any* communication from respondents. Petitioner watching something on television later, or seeing it in a newspaper the next day, is not communication to a captive audience by these respondents. This would be a wholly inappropriate case to address the issue of whether funeral goers are a captive audience who should be shielded from unwanted communication. There is not a single piece of evidence in this record showing that a single person going into the funeral at issue in this case saw, heard, or was aware of respondents' presence, let alone that they received unwanted

communication from them as they went in to the funeral.

Even if these funeral goers were entitled to be free from unwanted communication, that cannot, as a matter of constitutional law, mean any time, any place, just because they do not like the words. This Court has spoken rarely of being free from unwanted communication, and then only in the narrow context of a specifically-defined privacy interest, such as being able to avoid being physically confronted within eight feet of approach within a 100-foot zone as a person is going into an abortion clinic about to undergo a medical procedure, *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), or in the privacy of the home, *Rowan* v. *Post Office Dept.,* 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L. Ed. 2d 736 (1970), and its immediate surroundings, *Frisby* v. *Schultz, supra*, 487 U.S. at 485. Whatever the scope may be of privacy rights, or the right to avoid unwanted communication, within the context of a funeral of any kind, such a right is not implicated in any degree under the facts of this case.

III. THERE IS NO SPLIT IN THE CIRCUITS RELEVANT TO THIS CASE, BECAUSE THIS CASE IS NOT ABOUT WHETHER LAWS LIMITING THE TIME, PLACE AND MANNER OF FUNERAL PICKETS ARE CONSTITUTIONAL

There may be a split in the circuits brewing about how far a law can go in putting limits on peaceful non-disruptive picketing in proximity to a funeral,

memorial service, or funeral procession. See *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) and *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008), cert. denied, *Nixon v. Phelps-Roper*, 129 S.Ct. 2865, 174 L.Ed.2d 578, 2009 U.S. LEXIS 4769 (U.S., 2009).

However, whatever the Circuit Courts end up holding about the various laws that are under review, as to the distance, time periods, floating buffers, and nature of expressive activity prohibited or limited, none of those rulings, or any review by this Court of those rulings, pertain to the issues in this case. This Court has never approved of an imposed distance of over 1,000 feet based on any privacy interest. Further, it is unlikely that the Court would uphold laws that on their face or as applied result in the picketers being put completely out of sight and sound of their target audience. It may be worth noting in passing, that if Osama bin Laden was killed, and his funeral date, time and location published, it is doubtful anyone would question the right of the families of the 911 victims to protest in proximity to his funeral. Nor would it be fitting to deny the same right to those who supported his views and activities. As long as both groups engaged in non-disruptive peaceful picketing, that funeral would be an appropriate forum for expressive activity.

The day may come when this Court has occasion to review the parameters of privacy interests in funerals, and to address the implications of the very public nature of the funerals being held in connection with soldiers' funerals in this country. But that day is not now, and that review is not

relevant to this case. As the Fourth Circuit twice said in its opinion, "The district court properly distinguished these proceedings, where the Defendants contend that the First Amendment immunizes them from tort liability, from other decisions ... addressing the constitutionality of statutory prohibitions affecting funeral picketing," *Phelps v. Snyder, supra,* 580 F.3d 206, 2009 U.S.App. LEXIS 21173 at 23-24, footnote 10; and, after holding that liability could not attach to respondents' words in this case without violating the constitution, "[n]onetheless, the various states and localities, as well as grieving families, may yet protect the sanctity of solemn occasions such as funerals and memorials. Indeed, governmental bodies are entitled to place reasonable and content-neutral time, place, and manner restrictions on activities that are otherwise constitutionally protected," *id.* at 49.

Review of this case would be inappropriate on the basis of a suggestion that there is a split in the circuits over the issues raised by this action.

CONCLUSION

This case is not appropriate for review, because it presents no novel or new issues for this Court, and does not pertain to a division among the Circuit Courts or between the Fourth Circuit and this Court. Rather, the Fourth Circuit relied upon well-settled legal principles from this Court's opinions in setting aside a runaway verdict which was based solely on words found to be true as a matter of law, on speech of vital and substantial public interest issues, uttered in a traditional public forum, well removed from the funeral, outside of sight or sound of the funeral-goers, and only tested by litigation because of petitioner's visceral disagreement with content. The jury should have never been given this case, and the oversized verdict for true words demonstrates that fact. The Fourth Circuit carefully reviewed the full record, and found that from the content, form and context, the words were public interest words, and properly protected them from tort liability, imposed simply because they were considered unpleasant. No privacy interests are implicated by the facts of this case, and this is not an appropriate venue to address what measure of privacy interest may exist in highly publicized soldiers' funerals, used often by many as public platforms. Petitioner seeks a rule of law that would punish into silence respondents' message because he disagrees with it so strongly; that is not a good reason for this Court to review this case, because such an outcome would require completely uprooting long and well-established constitutional law.

Respectfully submitted,

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