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 *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY-ONE NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici, described in Appendix A, are twenty-two of the nation's leading news organizations – The Reporters Committee for Freedom of the Press, ALM Media, LLC, The American Society of News Editors, The Associated Press, The Association of American Publishers, Inc., Bloomberg L.P., The Citizen Media Law Project, Dow Jones & Company, Inc., The E.W. Scripps Company, The First Amendment Coalition, The First Amendment Project, The Hearst Corporation, The Media Institute, The National Press Club, The National Press Photographers Association, The New York Times Company, Newspaper Association of America, The Newspaper Guild – CWA, NPR, Inc., The Radio Television Digital News Association, The Society of Professional Journalists, and Tribune Company.

Amici write to make clear that far more is at stake in this case than the ability of the Westboro Baptist Church to protest near military funerals. This case concerns an issue critical to a wide range of speakers, including members of the news media: whether a plaintiff may recover for intrusion and intentional infliction of emotional distress where the harm is based upon the publication of controversial speech about matters of public concern. Because this Court has "consistently rejected the proposition that

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[1] Both parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

the institutional press has any constitutional privilege beyond that of other speakers," *Citizens United v. FEC*, 130 S.Ct. 876, 905 (2010) (citing cases), a ruling permitting such recovery threatens to expand dramatically the risk of liability for news media coverage and commentary.

Respondents were found liable for millions of dollars in damages for intrusion and intentional infliction of emotional distress based *solely* on their publication of offensive religious and political opinions – opinions which the Petitioner encountered *not* at his son's funeral, but only several hours later by watching news reports, and then weeks later after conducting an online search. *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009) ("*Synder II*"). Imposing tort liability for such speech will chill the activities of all who speak or publish on controversial issues.

Reporters, editorial boards, commentators, authors, and others in the press discuss both public and nonpublic figures in the course of their work. "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials." *Time Inc. v. Hill*, 385 U.S. 374, 388 (1967). Whether it consists of coverage of caustic and emotional debates, a scathing editorial cartoon, a letter to the editor, or an exposé revealing disturbing facts about an individual, the press often must go "beyond the bounds of good taste and conventional manners" in order to perform its constitutionally protected function. *Hustler Mag. v. Falwell*, 485 U.S. 46, 54 (1988) (citation omitted). It can do so *only* because the First Amendment protects

expression on matters of public concern, particularly where such statements cannot reasonably be interpreted as stating actual facts about an individual. *Id.* at 50; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

INTRODUCTION

Most reasonable people would consider the funeral protests conducted by members of the Westboro Baptist Church to be inexplicable and hateful. Without a doubt, the church's message of intolerance is deeply offensive to many, and especially so to gay Americans, Catholics, veterans, and the families of those who sacrificed their lives defending the United States. But to silence a fringe messenger because of the distastefulness of the message is antithetical to the First Amendment's most basic precepts.

Controversial issues stir public passions. The play *Inherit the Wind*, for example, portrays a community divided over the teaching of evolution in which the Reverend Jeremiah Brown publicly condemns his own daughter for refusing to ostracize the town's science teacher, and preaches at a young boy's funeral that the lad's soul is "damned, writhing in hellfire" because he died without being baptized.[2] To be sure, *Inherit the Wind* is a work of fiction, but *State of Tennessee v. Scopes* – the 1925 "Monkey

[2] Jerome Lawrence and Robert E. Lee, Inherit the Wind 66-67, 70 (Act II, Scene One; Act II, Scene Two) (Ballantine Books 2007) (1955).

Trial" that inspired it – was quite real, as are the strong emotions it still evokes.

According to the Petitioner, however, "extreme and outrageous statements," like Reverend Brown's fire and brimstone tirades, should lack First Amendment protection if they offend private persons. Those who propagate such views, Petitioner argues, should be subject to damage claims for intentional infliction of emotional distress and intrusion upon seclusion. Petitioner's Brief ("Pet. Br.") at 20. Although the Petitioner raised four separate questions for this Court to consider, this case really turns on one central issue: whether speech on a matter of public concern may be too offensive to merit First Amendment protection.

This case tests the mettle of even the most ardent free speech advocates because the underlying speech is so repugnant. However, the particular facts of this case should not be used to fashion a First Amendment exemption for offensive speech. No less a principle is at stake than the "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Hustler*, 485 U.S. at 56. As the Court of Appeals understood, "judges defending the Constitution 'must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.'" *Snyder II*, 580 F.3d at 226 (citation omitted). And so it is here.

SUMMARY OF ARGUMENT

The emotional debate surrounding this case has obscured four crucial facts: (1) though Petitioner and his supporting *amici* discuss time, place, and manner restrictions at length, it is undisputed that Respondents obeyed all laws and police instructions regarding the time, place and manner of their protest; (2) Petitioner describes himself as a "captive audience" while at his son's funeral, but it is undisputed that Petitioner encountered the statements underlying his claims only later through the media; (3) Petitioner identifies no state action to support the claim that the protest of the Westboro Baptist Church violated his First Amendment free exercise rights; and (4) the District Court ruled that Respondents' statements were "essentially… religious opinion" rather than statements of fact, a judgment which the Petitioner did not appeal.

Once these issues are clarified, it is evident that the district court verdict is based upon the *content* of Respondents' "religious opinion." There is thus no way Respondents could have avoided liability short of altering the content of their speech. The First Amendment does not permit such a Hobson's choice. To the contrary, it protects the "prized American privilege to speak one's mind, although not always with perfect good taste, on all public (issues)." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (citations omitted).

It may be tempting to search for exceptions to this rule when faced with speech as troubling as the church's funeral protest and "epic poem." But courts consistently have resisted this temptation no matter

how offensive or seemingly trivial the speech, like *Hustler Magazines's* parody depicting evangelist Jerry Falwell having sex with his mother in an outhouse or the spectacle of neo-Nazis marching among Holocaust survivors in Skokie, Illinois. We accept such excesses because they are inseparable from the First Amendment's essential purpose, for "[w]ithout the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched." *Rodriguez v. Maricopa County Community College Dist.*, 605 F.3d 703, 708 (9th Cir. 2010).

These First Amendment limitations apply to tort plaintiffs as well as to government regulators. One effect of these limitations is that a plaintiff may not recover for defamation, intentional infliction of emotional distress, or other speech-based torts unless the speech at issue contains false factual statements. This rule applies equally to public figures and private individuals where issues of public concern are involved. Otherwise, the use of rhetorical hyperbole in debate on public issues would be at the mercy of individual sensibilities and the First Amendment would no longer have the breathing space it needs to survive.

A ruling to the contrary in this case would have far-reaching effects on the media and other speakers, because the Westboro Baptist Church protests are not unique in any constitutionally meaningful sense. No intelligible standard could be devised based on the notion that the church's activities are especially

"outrageous." This Court has rejected just such a test because it does not provide a reasoned way to distinguish such expression as the Falwell incest cartoon from traditional political cartoons. *Hustler*, 485 U.S. at 55. Ultimately, such a test would be inherently subjective and arbitrary. "Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity," or of outrageousness. *Time, Inc.*, 385 U.S. at 406.

ARGUMENT

A. Petitioner Is Asking that the Law Silence the Westboro Baptist Church

This case is not about intrusion on privacy or the captive audience, and it is not about disrupting war veterans' funerals. As the Senate *amici* point out, the federal government and 46 states have enacted laws that regulate picketing in or near cemeteries during funerals, and those laws are not implicated by this case. Senate *Amicus* at 4, 10-12. Maryland law currently sets a buffer of 100 feet between a funeral and any demonstration. Md. Code Ann., Crim. Law § 10-205(c). In this case the seven Westboro Baptist Church demonstrators complied with all police instructions and were 1,000 feet away from the Snyder funeral.[3]

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[3] *Snyder II*, 580 F.3d at 212 ("It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church."). *See id.* at 230 (Shedd, J., concurring) ("The Phelps never intruded upon a private place because their protest

Petitioner's claims that the demonstration intruded upon seclusion or created a "captive audience" are particularly difficult to fathom on this record. It is undisputed that Petitioner did not see the demonstrators until several hours *after* the funeral, when he watched a televised news report. *Snyder II*, 580 F.3d at 212. Petitioner's argument is also predicated on his exposure to the so-called "Epic" published on the church's website, which the Petitioner searched for and read, several weeks after the funeral. *Id.* Such remote viewing, both temporally and geographically, has little to do with this Court's captive audience jurisprudence, which requires a showing that "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971).

This case is unlike any of this Court's captive audience decisions, in which unwilling listeners sought refuge from unwanted speech in the home, on public transportation, or when seeking medical services. None of those cases sought to shield a litigant from possible exposure to a message from a secondary source – such as a newscast or a website – but instead provided a limited buffer in specialized and confined settings.

Equally as important, none of the captive audience cases involved civil liability for speech. To the contrary, all imposed only limited time, place,

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occurred at all times in a public place that was designated by the police and located approximately 1,000 feet from the funeral.").

and manner restrictions that preserved adequate alternative channels to deliver the speaker's message. *See*, *e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 483-484 (1988) (ban on residential picketing prohibited only targeting a particular house, leaving protesters free to march through the neighborhood, proselytize door-to-door, distribute literature, or send mail); *Hill v. Colorado*, 530 U.S. 703, 726-727 (2000) (eight-foot buffer between speaker and audience outside abortion clinic placed "no limitation on the number of speakers or the noise level, including the use of amplification equipment," and allowed the speaker "to communicate at a 'normal conversational distance'"); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (restriction on political advertising applied only inside cars of city transit system). At the same time, this Court has not hesitated to invalidate captive audience restrictions that limit the ability to communicate. *E.g.*, *Scheck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997) (fifteen-foot "floating buffer zone" violates the First Amendment).

Here, any question of intrusion or captive audience is addressed fully by federal and state laws that regulate picketing near cemeteries during funerals, and those provisions are not at issue in this case. However, the Petitioner seeks not to move the Westboro Baptist Church's speech to an acceptable distance, but to silence it altogether. He asks this Court to approve a tort remedy to shield him from any possible exposure to the church's message in news reports or online, not just at the time and location of the funeral.

Listeners' emotional reactions to speech, however, cannot serve as a justification for censorship. This Court has made clear that citizens "must tolerate insulting, and even outrageous, speech in order to provide 'adequate 'breathing space' to the freedoms protected by the First Amendment.'" *Boos v. Barry*, 485 U.S. 312, 322 (1985). *See also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) ("however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications"); *Collin v. Smith*, 578 F.2d 1197, 1206-07 (7th Cir. 1978).

Additionally, the decision below did not "subordinate Mr. Snyder's First Amendment rights of free exercise and peaceful assembly to the Phelpses' free speech rights," as Petitioner maintains. Pet. Br. 55. The Free Exercise Clause protects only against government actions that impede religious observance, not against criticism by private speakers. *See United Brotherhood of Carpenters and Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 830-831 (1983). *See also Noah v. AOL Time-Warner, Inc.*, 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (alleged termination of Internet service account because of pro-Islamic statements raised no First Amendment claim because the Constitution "does not protect against actions taken by private entities").

Moreover, it cannot be overlooked that, as strange and hateful as the Westboro Baptist Church's message may be, it is an expression of that group's religious beliefs as well. Asking the government to intervene because one sect criticizes

another religion is deeply at odds with the Establishment Clause of the First Amendment. The Framers of the Constitution "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). As a consequence, "the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citation omitted). *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-547 (1993). Such neutrality must be observed in this case.

B. The First Amendment Does Not Permit the Offensiveness of Speech to Trump Freedom of Expression

"Under the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). But, according to the Petitioner, an idea can be too *offensive* to receive constitutional protection.

Petitioner argues that the Fourth Circuit should be reversed because "even matters of 'public concern' lose some of their protection when interjected into the context of a private funeral." Pet. Br. 40. Some *amici* go even further, and assert that the Westboro Baptist Church does not merit First Amendment protection *at all*, in that its message is "completely without any 'redeeming social importance,'" Veterans of Foreign Wars Brief at 17, and because "[t]he Phelpses are not war protesters; they are zealots who

target private citizens for harassment and psychological attack, exploiting those citizens' private grief and unbearable suffering to gain public attention and notoriety for the Phelpses' causes." Brief for Kansas, *et al.* at 6.

Petitioner's and *amici's* feelings may be understandable, but the remedy they seek lacks constitutional support. "The right to provoke, offend and shock lies at the core of the First Amendment," *Rodriguez*, 605 F.3d at 708, and the idea that a tort action may be based on the emotive impact of an idea cannot be reconciled with our historic commitment to free expression. *See*, *e.g.*, *United States v. Marcavage*, ___ F.3d ___, 2010 WL 2384839 at *12 (3d Cir. June 16, 2010) ("No matter one's personal feelings about abortion, the images are jarring, their shock value unmistakable. Presumably, that was the point.").

A key function of free speech is to invite dispute, and it "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). "[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995). "There is no room under our Constitution for a more restrictive view." *Terminiello*, 337 U.S. at 4. *See Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

It is not easy to live up to such principles when expression is deeply disturbing, as it is here. Yet our

First Amendment jurisprudence recognizes that these protections will not long endure if we abandon them when the message is unusually repellant, or the target of the speech especially sympathetic. Thus, members of a neo-Nazi organization were permitted to march in Skokie, Illinois, where over half the population at the time was Jewish and five to seven thousand residents were survivors of concentration camps. *Village of Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 610 (1978). *See National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977). The Illinois Supreme Court recognized that the sight of swastikas and German-style uniforms was abhorrent to Jewish citizens and especially to the survivors of Nazi persecution, but still held that the First Amendment would not permit restricting the demonstration. The court explained:

> [T]he unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in "restricted" areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he choose to speak where persuasion is needed most.

Village of Skokie, 69 Ill. 2d at 618 (citation omitted).

From such difficult cases emerge constitutional protections that can weather the tests of time and turmoil. This Court has emphasized that "[t]he

history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly." *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 826 (2000). Higher values could not otherwise be preserved, for "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Claims that the Westboro Baptist Church falls outside this free speech tradition, and that its members should not be mistaken for "Vietnam War protesters, Jehovah's Witnesses, or Hare Krishnas," Brief for Kansas, *et al.* at 6, present a perplexing problem. By what calculus could it be determined that the church is more offensive than neo-Nazis or less "serious" than a lone anti-war protester whose jacket bears the slogan "Fuck the Draft"? *E.g.*, *Cohen*, 403 U.S. at 16. What test could be applied to find that its vituperative message falls beneath the dignity of the First Amendment? If the answer is that the church is especially outrageous and offensive, the response fails to provide either an intelligible standard or a justification for censorship. "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Found.*, 438 U.S. 726, 745-746 (1978).

The Constitution does not take sides in political or religious disputes, and it does not permit the government to prescribe which ideas are worthy and

which are not. The First Amendment protects firebrand priests and Vatican critics alike. *Teminiello*, 337 U.S. at 4; *Cantwell v. Connecticut*, 310 U.S. 296 (1940). It protects militant civil rights activists and white supremacists equally. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). It likewise shields those who speak for or against a woman's right to terminate a pregnancy. *Hill*, 530 U.S. at 703; *Bigelow v. Virginia*, 421 U.S. 809 (1975). And it protects those who would burn American flags or crosses as a form of protest, just as it does those who display them with pride. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 408-10 (1989). Simply put, "the government must remain neutral in the marketplace of ideas." *Hustler*, 485 U.S. at 56 (quoting *Pacifica*, 438 U.S. at 745-746).

It may well be that the Westboro Baptist Church's contributions to public discourse are negligible, but that is not the test for First Amendment protection. The government cannot justify regulation on the assumption that "the speech is not very important." *Playboy Ent. Group*, 529 U.S. at 826. Indeed, the Court just reaffirmed that speech cannot be censored on the ground that it lacks redeeming social importance. *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010). In doing so, it acknowledged that "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *Id.* at 1591 (emphasis in original).

More importantly, it misses the point to ask whether speech has sufficient "merit" to warrant First Amendment protection. *See* Brief for Kansas, *et al.* at 6. Even stupid or hateful ideas may contribute greatly to the marketplace of ideas by providing a "clearer perception and livelier impression of truth, produced by its collision with error." John Stuart Mill, On Liberty, Ch. II (1859).

The Westboro Baptist Church evidently seeks to persuade those who see its demonstrations of the rightness and necessity of its views. But most who witness its virulent homophobia are likely to be repulsed, and to wonder what could produce such callousness and intolerance. Few are likely to accept the church's odd theory of divine retribution, and people instead may ask what type of supreme being could slaughter the innocent over a political dispute. And its anti-American message may well rekindle a sense of patriotism among those who see the church's crude denunciations of the United States. All such reactions are set loose in the marketplace of ideas by the church's harsh protests, even without the aid of the counter-demonstrations that invariably accompany their appearances.

Accordingly, the Fourth Circuit got it right when it held that the First Amendment necessarily protects the church's protest activities.

C. Petitioner's Proposed Application of Tort Liability Would Undermine Basic First Amendment Values

The Petitioner has no greater ability to restrict the church's activities through the

mechanism of private tort claims than the government would through the direct regulation of expression. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Although the First Amendment is not an absolute shield against civil liability, it provides broad protection for offensive or outrageous expression. This Court set the correct standard in *Hustler*, 485 U.S. at 56, and it is equally applicable in this case.

In *Hustler*, the Court held that the First Amendment barred a claim for intentional infliction of emotional distress brought by the Reverend Jerry Falwell in response to a parody advertisement describing a "drunken incestuous rendezvous with [Falwell's] mother in an outhouse." *Id.* at 48. It found:

> [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . 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 (citation omitted). The Court rejected the proposition that "so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false." *Id.* at 53.

Petitioner's argument that *Hustler* is confined to "the special status of those who intentionally enter the public arena" reads the decision far too narrowly. Pet. Br. 28. *Hustler* did not just provide heightened protection for speech that involves public figures. To the contrary, its logic extends to all matters of public concern, at least as far as it prevents liability for opinion, hyperbole, or other statements that do not assert actual or provable facts. The Eighth Circuit has explained that "expressions of opinion are protected whether the subject of the comment is a private or public figure" in rejecting a plaintiff's emotional distress claim. *Deupree v. Iliff*, 860 F.2d 300, 304-05 (8th Cir. 1988) (internal citations omitted). The plaintiff in that case was a schoolteacher rather than a high-profile minister. *See also Channel 4 KGBT v. Briggs*, 759 S.W.2d 939, 942 (Tex. 1988) (under *Hustler*, "the same protections which the first amendment affords defendants from libel claims also protect them from intentional infliction of emotional distress claims").

This principle is essential to prevent would-be plaintiffs from evading constitutional proscriptions merely by recasting failed defamation actions as emotional distress or other claims.[4] The First

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[4] The district court below awarded summary judgment to the Respondents on the defamation claim, finding that their speech was "essentially ... religious opinion" and "would not realistically tend to expose Snyder to public hatred or scorn." *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572-73 (D. Md. 2008) ("*Snyder I*"). Petitioner did not appeal this decision. *Snyder II,* 580 F.3d at 213 n.3. Similarly, the libel claim in *Hustler* was unsuccessful because the jury found that the ad parody could not "reasonably be understood as describing actual facts about

Amendment does not permit speech constitutionally shielded from defamation liability to give rise to other types of liability based purely on the content of the speech. *See*, *e.g.*, *Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1193 n.2 (9th Cir. 1989) ("An emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action.") (quoting *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893 n.4 (9th Cir.1988)); *see also* Hon. Robert D. Sack, *et al.*, Sack on Defamation § 13.6.1 (2010) ("Protected speech is protected speech, irrespective of the label given it by the plaintiff").

This high level of First Amendment protection for speech about matters of public concern – even where the plaintiffs are not public figures – is consistent with decades of Supreme Court precedent.

For example, the Court rejected a private figure's suit under a New York right of publicity statute on the grounds that "the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Time, Inc.*, 385 U.S. at 387-88. It likewise ruled that a state may not "extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the

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[respondent] or actual events in which [he] participated." *Hustler*, 485 U.S. at 49.

prosecution of the crime." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 471 (1975). It declared unconstitutional a statute forbidding newspapers to publish the name of any youth charged as a juvenile offender, finding that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). And it applied the same rationale to the publication of the identity of a rape victim. *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

In each of these cases, the Court found that a private figure's interests, while important, nonetheless must yield to the interest of unfettered discussion in matters of public concern. And the cases make clear that speech relates to a matter of public concern if it deals with political, religious, scientific, or social questions, *even if* the speech refers to a private person or is offensive to that person. *See*, *e.g.*, *Florida Star*, 491 U.S. at 536-37 (speech concerned "a matter of public significance" where "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities"); *Daily Mail*, 443 U.S. at 103.

Petitioner's reading of *Hustler* would swallow the rule, even as to the facts of *Hustler* itself. It would permit Jerry Falwell's mother (if living) or wife to sue for intentional infliction of emotional

distress where he could not, since they were not public figures. *See Hustler*, 485 U.S. at 48 (noting that the parody portrayed Falwell's mother "as drunk and immoral"). This narrow view of *Hustler* also would undermine First Amendment protection for public debate generally, because such discourse often sparks unvarnished speech likely to offend private citizens. *See*, *e.g.*, *Milkovich*, 497 U.S. at 20 (protection must be assured for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual") (citation omitted); *Old Dominion Branch No. 496, National Ass'n. of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284 (1974) (citation omitted) ("the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth"); *Greenbelt Cooperative Pub. Ass'n. v. Bresler*, 398 U.S. 6, 14 (1970) ("rhetorical hyperbole" and "vigorous epithet" is constitutionally protected).

The hate-filled rants of the Westboro Baptist Church unquestionably are extreme and unpleasant, but that hardly puts them beyond the realm of public debate. In certain respects, the church's blunt speech on such issues as gay rights, America's involvement in foreign wars, the Catholic Church abuse scandals, and many aspects of the "culture war," does not set it far apart from the pronouncements of some other prominent clerics. For example, evangelists Jerry Falwell and Pat Robertson explained the terrorist attacks of 9/11 as God's punishment for the secularization of America by "the pagans, and the abortionists, and the feminists, and the gays and the lesbians," and singled out People for the American Way and the

ACLU for special culpability. *See*, *e.g.*, John F. Harris, *God Gave U.S. 'What We Deserve,' Falwell Says*, Wash. Post, Sep. 14, 2001, at C03.

Natural disasters frequently inspire politically-tinged assertions of divine retribution. One evangelist declared Hurricane Katrina to be God's punishment for "the national sin of abortion," while orthodox Rabbi Ovadia Yosef deemed it to be payback for President Bush's support of the August 2005 withdrawal of Jewish settlers from Gaza.[5] Al-Qaeda in Iraq, for its part, claimed that "God attacked America and the prayers of the oppressed were answered." And Minister Louis Farrakhan described Katrina as "God's way of punishing America for its warmongering and racism." *See* Dyson, Come Hell or High Water at 178-202. Whatever contributions such apocalyptic visionaries may or may not make to public understanding, it is clear the First Amendment would not permit them to be removed from the debate.

This conclusion is unaltered by the extent to which a private individual's name might become linked to a matter of public controversy. In *Frazier v. Boomsma*, 2008 WL 3982985 (D. Ariz. Aug. 20, 2008) (not reported in F. Supp. 2d), the court

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5 *See*, *e.g.*, Alan Cooperman, *Some Say Natural Catastrophe Was "Divine Judgment,"* Houston Chron., Sept. 5, 2005; Michael Eric Dyson, Come Hell or High Water: Hurricane Katrina and the Color of Disaster 178-202 (Basic Civitas 2006) (2006) ("Come Hell or High Water"). *See also* Editorial, *Miniskirts and major quakes; An Iranian cleric's peculiar linkage of 'loose' women and natural disasters fits a pattern*, L.A. Times, Apr. 23, 2010, at A24.

enjoined enforcement of a state law that prohibited using the name of a deceased soldier in selling T-shirts that protested the Iraq war. The court explained that "[s]uperimposing 'Bush Lied-They Died' over the names of fallen soldiers obviously critiques the initiation and administration of the war in Iraq, among the most debated issues in current American politics." *Id.* at *3. While it is not difficult to imagine that a grieving parent who supports the war might be outraged that his son or daughter's name could be used for such a purpose, the First Amendment would not permit such expression to be the basis of an emotional distress tort.

The same may be said of author Ann Coulter's recent attack on four widows of victims of the 9/11 terrorist attacks in her book, Godless: The Church of Liberalism. Dubbing the widows "The Witches of East Brunswick," Coulter wrote, "I've never seen people enjoying their husbands' deaths so much." She also asked: "[H]ow do we know their husbands weren't planning to divorce these harpies? Now that their shelf life is dwindling, they'd better hurry up and appear in *Playboy*."[6] Whether such writings contribute more (or less) to public discourse than does the Westboro Baptist Church may be debatable, but both are protected equally by the First Amendment.

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[6] Ann Coulter, Godless: The Church of Liberalism 103, 112 (Three Rivers Press 2007) (2006). *See also* Raymond Hernandez, *Clinton Calls Comments On Widows Mean-Spirited*, N.Y. Times, June 8, 2006, at B1.

The fact that the church has chosen public fora in the vicinity of military funerals as its preferred venue does not place its speech beyond the pale. And it is false to suggest that heavily penalizing such speech will have no significant adverse effect on the public forum. In this respect, the State *amici's* assertion that "[c]ondemning the Phelpses' conduct here will not open the door to wide-ranging tort liability, because *no one else in the history of this country* has utilized their tactics," is factually incorrect. Brief for Kansas, *et al.* at 4 (emphasis in original).

Historically, funerals have been a common venue for protests for speakers from across the political spectrum. *See*, *e.g.*, Candace J. Samolinski, *Gun Foe Attending Funeral As Protest*, Tampa Tribune, June 6, 2003, at 1. For example, anti-police protests have occurred at the funerals of those killed by police officers. *See*, *e.g.*, *Violent Protests Erupt After Funeral; Police In Riot Gear And Angry Mourners Faced Off After Services For A Black Man Shot By Undercover New York City Officers*, Orlando Sentinel, Mar. 26, 2000, at A4. Funerals also have been the site of labor protests. In Chicago in 1999 and 2000, local Teamsters, unhappy with a non-union funeral home, picketed local funerals that were facilitated by the non-union home. *See*, *e.g.*, Molly Sullivan, *Funeral pickets return; Mourners call union 'disrespectful'*, Chicago Sun-Times, Mar. 10, 2000, at 1.

Such protests may take place at funerals of the famous as well as the more obscure. For example, demonstrators upset with Justice

Brennan's views on abortion picketed his funeral. *See*, *e.g.*, Richard Carelli, *Brennan Bid Final 'So Long, Pal' Government Elite Pay Respects at Justice's Last Farewell*, The (Baltimore) Daily Record, July 30, 1997, at 13. By the same token, anti-abortion protestors have appeared at funerals of lesser-known figures, such as slain abortion provider Dr. John Bayard Britton. *See*, *e.g.*, Laura Griffin, *'We can't even bury our dead in peace,'* St. Petersburg Times, Aug. 4, 1994, at 1B. However tasteless such demonstrations may be, the First Amendment protects them subject to reasonable time, place, and manner restrictions.

Whether based on the location of the Westboro Baptist Church protests, the use of inflammatory language, or the church's claim to know the contents of God's mind, it is difficult to understand how its speech could be punished as "outrageous" without censoring a wide range of other expression on controversial subjects. As this Court reasoned in *Hustler*, "[i]f it were possible by laying down a principled standard to separate" the Falwell incest cartoon from traditional political cartoons, "public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one." *Hustler*, 485 U.S. at 55. The same is true here.

The outcome sought by the Petitioner would subject a wide variety of speech to the heckler's veto, where any private individual can claim to have been targeted with offensive and outrageous speech. For example, the publication of a letter to the editor

calling for a holy war against Muslims in connection with the Iraq war, *Citizen Pub. Co. v. Miller*, 115 P.3d 107 (Ariz. 2005), or caustic anti-immigrant speech increasingly common in the public discourse, could give rise to emotional distress claims. *See*, *e.g.*, Anti-Defamation League, *Immigrants Targeted: Extremist Rhetoric Moves into the Mainstream*, www.adl.org/civil_rights/anti_immigrant/rhetoric.asp. Other religious expression that arouses a passionate response could include publishing cartoons depicting the prophet Mohammed. *See*, *e.g.*, Evan Perez, *Two Charged in Plot on Danish Paper*, Wall St. J., Oct. 28, 2009, at A13.

Permitting such claims most certainly will invite discriminatory application. "'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler*, 485 U.S. at 55.

The single characteristic separating Westboro Baptist Church demonstrations from any number of other political protests is their viewpoint. It is doubtful, for example, whether the jury would have considered the church's protest "outrageous" if it had been aimed at the funeral of a domestic pro-Taliban fighter rather than a member of the United States armed forces. Such subjectivity is understandable, and probably inevitable. But it illustrates precisely why courts must be wary of imposing liability for the *content* of non-defamatory speech.

CONCLUSION

William Jennings Bryan, the three-time presidential candidate who served as a special prosecutor in *State of Tennessee v. Scopes*, died five days after the trial ended. Reporting on the event, H.L. Mencken, who was not known for his gentle prose, described Bryan as "a walking malignancy" whose eyes were "blazing points of hatred," and he opined that the motivating force of the trial, "[e]vangelical Christianity, as everyone knows, is founded upon hate." H.L. Mencken, *Bryan*, The (Baltimore) Evening Sun, July 27, 1925 (reprinted in A Religious Orgy in Tennessee 103-109). Bryan's widow, who was not a public figure, understandably would have been devastated and outraged at such a description, published to the world as she was mourning the death of her husband.

Petitioner's theory of the First Amendment would allow Bryan's widow to collect ruinous damages from Mencken and *The Evening Sun* for intentional infliction of emotional distress for such callous insensitivity during a time of bereavement. If this Court agrees, it is not just those on the periphery of serious public discourse who will be affected. Debate on controversial issues necessarily will be dampened, as will the ability to report on such matters, and First Amendment protections developed over decades will be lost. Accordingly, *amici* respectfully ask this Court to affirm the decision of the Fourth Circuit.

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APPENDIX A

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

ALM Media, LLC publishes over thirty national and regional magazines and newspapers, including *The American Lawyer*, the *New York Law Journal*, *Corporate Counsel*, and the *National Law Journal* as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's *The Recorder*, for example, has been published in Northern California since 1877; the *New York Law Journal* was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media. ALM Media, LLC is privately owned, and no publicly held corporation owns 10 percent or more of its stock.

With some 500 members, The American Society of News Editors (ASNE) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders.

Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Associated Press (AP) is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

The Association of American Publishers, Inc. (AAP) is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of

more than 1500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over 450 newspapers worldwide with a combined circulation of 80 million people, in more than 160 countries. Bloomberg News operates cable and satellite television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station which syndicates reports to more than 840 radio stations worldwide; Bloomberg Markets and Bloomberg BusinessWeek Magazines; and Bloomberg.com which receives 3.5 million individual user visits each month.

The Citizen Media Law Project (CMLP) provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution. CMLP has previously appeared as an *amicus* on legal issues of importance to the media, including in *Bank Julius Baer & Co. v. Wikileaks.org*, No. 08CV824 (N.D. Cal. Feb. 26, 2008), *Maxon v. Ottawa Publishing Co.*, No. 2008-

MR-125 (Ill. App. Ct. Mar. 24, 2009), *The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, No. 2009-0262 (N.H. June 30, 2009), and *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 10-1372-CV (2d Cir. June 21, 2010).

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's portfolio includes: 10 TV stations; daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

The First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press, and open-government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing

democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The First Amendment Project is a nonprofit organization based in Oakland, California, dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and owns and operates twenty-nine television and two radio broadcast stations.

The Media Institute is an independent, nonprofit research organization located in Arlington, Va. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as an *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

The National Press Club is a membership organization dedicated to promoting excellence in journalism and protecting the First Amendment

guarantees of freedom of speech and of press. Founded in 1908, it is the nation's largest journalism association.

The National Press Photographers Association is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism. Our members often shoot compelling and sometimes disturbing visual images related to matters of public concern. For the Court to now shoot the messengers bearing such news by exempting those images from First Amendment protection is a matter of grave concern to our Association.

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key priorities is to

advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

NPR, Inc. is an award winning producer and distributor of noncommercial news programming. A privately supported, not for profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

The Radio Television Digital News Association (RTDNA) is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio,

television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. On the publishing side, Tribune publishes eight daily newspapers -- *Chicago Tribune*, *Hartford Courant*, *Los Angeles Times*, *Orlando Sentinel* (Central Florida), *The* (Baltimore) *Sun*, *The Daily Press* (Hampton Roads, Virginia) *The Morning Call* (Allentown, Pa.), and *South Florida Sun-Sentinel*. Tribune Company is a privately held company.