

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 Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

—◆—
BRIEF FOR RESPONDENTS

—◆—
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QUESTIONS PRESENTED

1. Whether Petitioner's claim for intentional infliction of emotional distress must fail because it is based on speech by Westboro Baptist Church that was on public issues, and was not false statements of fact (and because Petitioner is not a private figure).
2. Whether Petitioner's claim for intentional infliction of emotional distress must fail because WBC's loose, figurative, hyperbolic speech, which no reasonable reader could interpret as stating actual facts, is public-issue speech (and because Petitioner is not a private figure).
3. Whether Petitioner's invasion of privacy claim must fail because he was not a member of a captive audience, and even if he was, Westboro Baptist Church's speech occurred well outside any zone of privacy the Court might ever recognize in a public funeral.
4. Whether Petitioner's invasion of privacy claim must fail because Westboro Baptist Church did not interfere with or disrupt the public funeral of his son, so it is not necessary to weigh Westboro Baptist Church's right to engage in religious speech on public right-of-ways against any privacy right the Court might find in a public funeral.

RULE 29.6 STATEMENT

Westboro Baptist Church, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock (it has no stock).

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were Albert Snyder, Westboro Baptist Church, Fred W. Phelps, Sr. (pastor), Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis (members; daughters of pastor).

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INTRODUCTION

This case is about a little church in Topeka, Kansas (Westboro Baptist Church [WBC]), engaging in public speech on a public right-of-way, about issues of vital public interest and importance, over a thousand feet from a public funeral paid for by public funds with public law enforcement overseeing the event, with a large presence of public media who published details about the funeral and deceased soldier before and after the funeral.

The father took offense at the church's words and sued claiming defamation, intentional infliction of emotional distress and invasion of privacy. An inflamed jury awarded nearly \$11 million dollars, mostly punitive damages. The church appealed, and the Fourth Circuit set aside the verdict, finding the speech was loose, figurative hyperbolic speech on public issues, which would not cause a reasonable person to believe actual facts were asserted.

Petitioner is asking the Court to find he is a private figure entitled to damages on a subjective claim of outrage over words not proven false; and to find he was a captive audience and thus his privacy was invaded by picketers a thousand feet away whom he never saw or heard.



STATEMENT OF THE CASE

Facts:

“Appendix” refers to the Fourth Circuit Appendix. All Internet materials cited were visited in June 2010.

On March 19, 2003, President George W. Bush declared war in Iraq; the first American casualties occurred by March 22, 2003. By September 11, 2006 – five years after enemies of America crashed planes into the World Trade Center and Pentagon killing thousands – the United States deaths in Iraq surpassed the 9/11 toll. By June 21, 2010, 4,408 American soldiers were dead from the Iraq war. On October 7, 2001, the War in Afghanistan began, and June 2010 marked the most deadly and 104th month of that war, making it the longest war in the history of the United States.

These have been the most reported wars in American history. Photos of the wounded and dead soldiers, and their returning bodies, have been topics of enormous controversy, ending in President Barack Obama lifting a ban on media access to Dover Air Force Base, and directing that costs for families to travel to Dover for the public ritual be paid by the government, in early 2009. Today, 75% of the families choose to have media present, and two-thirds with funerals at Arlington National Cemetery opt for media. As the bodies leave Dover, and travel home, media coverage of the soldiers’ lives, deaths, funerals, burials and memorials is constant and intense.

Meanwhile, in May 1990, WBC, a small non-denominational independent Bible-believing flock in Topeka, Kansas (since 1955), began a modest street-preaching ministry because of notorious homosexual activity in the bushes at a nearby public park. This ministry met instant resistance from the entire religious community, and politicians and officials at every level; with time, WBC became known nationally for anti-sin picketing. Homosexuality is addressed (as a front-burner issue), as is fornication, adultery, murder, greed, idolatry and pride. When 9/11 happened, WBC was convinced it resulted from this nation's sin, and reflected God's wrath on the land. They also believe God led the nation into wars as further punishment, and that the soldiers are dying because of America's sin and proud refusal to repent, mourn for its sins, and obey God.

At times before the wars, WBC members picketed funerals which were widely publicized, high-profile, or when the death was used to publicly promote sin. One such was the funeral of Matthew Shepard in Wyoming, which received international media attention, and where various groups were present outside the church engaged in expressive activity during the funeral. Because no one was saying his lifestyle was wrong (just as the murderers were wrong), WBC participated in that public event with that message. The purpose of picketing in connection with funerals is to use an available public platform, when the living contemplate death, to

deliver the message that there is a consequence for sin.¹

As detailed at Issue III, when soldiers die in the Iraq and Afghanistan wars, their funerals are highly publicized events, with extensive media coverage of their lives, deaths and funerals. The funerals are heavily attended by the public, military, government officials/office-holders and politicians; often held in venues other than churches or funeral homes (high schools, civic centers); with large crowds outside, waving flags, playing bagpipes, sometimes marching, sometimes holding signs, all covered by the media. The media is a constant presence, and everyone is talking about the dead soldiers. Most families participate, though a minority decline media contact and have private funerals. Various messages and symbols are published in direct connection with these funerals, except the message that the soldiers are dying for

¹ Petitioner says at p. 9 of his brief that “in all of recorded history the Phelps are the only individuals who have chosen to protest at funerals,” citing an expert witness at trial with expertise in grief counseling, not history or picketing. The witness said “as far as I know, it never was done.” In fact, others have picketed funerals. Another expert witness, when asked if any funerals he had attended had been protested, said: “By all means. I mean, for goodness sake, in the Vietnam era, the Caissons going to Arlington.” (Appendix, Vol. X, 2573.) Also, anti-abortion picketers picketed the funeral of the late Associate Supreme Court Justice Lewis F. Powell, Jr., in sight of the funeral-goers. Rea, F.T., “How Free Are We to Express Hate?” 6/21/2010, available at <http://www2.richmond.com/content/2010/jun/21/how-free-are-we-express-hate/>.

the nation's sins, which WBC publishes believing it is an important part of the debate.

Against this national backdrop, Petitioner's son was killed in Iraq on March 3, 2006, in a vehicle crash (Appendix, Vol. VII, 2064 & Vol. VIII, 2137; Vol. XIII, 3667-3671). After his son's death, Petitioner talked to the media about his life, death, and funeral (Appendix, Vol. II, 375-381; Vol. VIII, 2150-2151; Vol. IX, 2334, 2358). Petitioner published an array of details about his son, including the divorce of his parents and the fact he attended the Roman Catholic Church and his funeral was being held at his home parish. (Appendix, Vol. II, at 367-381.) Petitioner also described publicly how upset he was about the war, and told that he contacted the late Congressman John Murtha. Petitioner gave interviews to more than one media immediately after his son's death, before the funeral. And, immediately after the funeral (being dissatisfied with how the funeral was covered), Petitioner contacted the media to complain, which led to more detailed coverage of his son's life, death and funeral. (Appendix, Vol. II, at 389-392, 406.)

Funeral notices were published in multiple newspapers (including the *Baltimore Sun*) and on the funeral home's Website, which included the specific date, time and location of the funeral. (Supplemental Joint Appendix, at 2-7; Exhibit 6 admitted 10/24/07; Appendix, Vol. VIII, 2158-2162; Vol. XV, 3763-3768.) Although his brief at p. 3 says he desired to have a private funeral, Petitioner did not avail himself of the option every family has, of having a private instead of a public funeral, which is done by describing the

funeral as “private,” when announced, and withholding the specific date, time and location.²

Scores of bikers/veterans (Patriot Guard Riders [PGR]) exercised their speech rights by attending the funeral, and engaged in protest activity immediately outside the church, on the road leading up to the church, and southwest of the church on the campus/property, between the seven WBC picketers and the school on campus. Students from this school exercised their speech rights and joined the PGR with picket signs. (Supplemental Joint Appendix, 9, 10, 11, 13.)

Media was expected at the funeral (Appendix, Vol. VIII, 2140, 2150-2151), and sought but did not receive permission to come onto the church campus (Appendix, Vol. VII, 2081; Vol. VIII, 2251). They stayed after WBC left, filming the funeral procession (Appendix, Vol. X, 2649; Vol. XV, 3808, and DVD with footage of this funeral appearing on 20/20).

The funeral was held March 10, 2006 (Appendix, Vol. XV, 3770). The priest who was the main celebrant

² “The funeral may be either private for family members only or open to the public. If the hours and location are printed in the newspaper notice, it is a sign that all visitors are welcome.” Pilato, Donna, “The Etiquette of Funerals and Mourning Rituals,” *About.com Guide*, available at <http://entertaining.about.com/cs/etiquette/a/funeraletiquett.htm>. A family can opt out of a public funeral by announcing the funeral is private, e.g., Wikipedia, “Funeral,” http://en.wikipedia.org/wiki/Funeral#Private_service, see *Ross v. Forest Lawn Memorial Park*, 153 Cal.App.3d 988, (Ct.App.Calif. 1984) (right of disposition of body included right to make funeral private); *Rader v. Davis*, 154 Iowa 306, (1912) (right to make funeral private).

was not aware of any picketing; heard no one speak of picketers; saw no disruption of the funeral; and centered the congregation on the funeral (Appendix, Vol. X, 2635-2643). The priest responsible for coordination of logistics picked a place for WBC to stand on a public right-of-way and routed traffic away from them; and arranged for the blinds in the school to be closed, so the children in the school were “completely blocked.” (Appendix, Vol. VIII, 2239-2265).

The funeral was held at St. John’s Catholic Church (Appendix, Vol. IX, 2497-2499; Vol. XV, 3757 and 3758). Seven WBC picketers stood over a thousand feet from the church. The route used by those going to the funeral did not pass the corner where they stood. The turn-in corner for those going into the funeral, including Petitioner, was east of the corner where the WBC picketers stood, and the block between is a substantial hill. Though Petitioner says he saw the tops of some signs, but no content, this would have been physically impossible. A professionally-made video (Supplemental Joint Appendix, last page), and aerial photos of the scene (Supplemental Joint Appendix 1 and 12), reflect that it was physically impossible for anyone going to the funeral to see WBC’s picketers (Appendix, Vol. IX, 2475-2491; Vol. XV, 3796 and DVD, Joint Supplemental Appendix, last page [Ex. 19, admitted 10/25/07]; Vol. VIII, 2218-2219, 2294; Vol. IX, 2366, 2495).

WBC did not enter the church or approach anyone going to the church. No one going to the funeral

saw them, including Petitioner. Petitioner did not hear them; and, they were gone when he left the church (Appendix, Vol. VII, 2081; Vol. VIII, 2165, 2167-2168.)

WBC contacted law enforcement to advise they would be picketing, for peace-keeping (Appendix, Vol. VIII, 2267-2268; Vol. XV, 3776). Police personnel identified the location where WBC stood (Appendix, Vol. VIII, 2272-2273; Vol. VIII, 2285-2286), and there was no violence or yelling (Appendix, Vol. VIII, 2286-2287; 2293). WBC left when the funeral started (Appendix, Vol. VIII, 2289-2290, 2294; Vol. IX, 2371; Vol. XV, 3777). WBC does not engage in civil disobedience, and obeys the law, McAllister, Stephen R., "Funeral Picketing Laws and Speech," 55 *Kansas Law Review* 575, 578 (2007).

WBC's signs said, "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're Going to Hell," "Fag Troops," "Thank God for Dead Soldiers," "Thank God for IEDs," and "Priests Rape Boys" (Appendix, Vol. VI, 1588-1589; Vol. XV, 3784-3787; Phelps, Vol. VIII, 2232).³

³ Petitioner continues to suggest WBC's "Matt in Hell" sign was at the funeral, knowing this is untrue, arguing people seeing the sign would be unable to discern it applied to Matthew Shepard, not Matthew Snyder. The sign has a picture of Matthew Shepard. Every sign present at this picket was clearly and repeatedly identified in this record; it did not include the "Matt in Hell" sign. That said, WBC has the right to use the

(Continued on following page)

All 1200 seats of the church were full (Appendix, Vol. VIII, 2164; Vol. VIII, 2257-2258). The service was a beautiful military ceremony full of pageantry with Marine pallbearers, a moving tribute (Appendix, Vol. VII, 2081; Vol. VIII, 2168-2172; Vol. X, 2651-2652). Funeral-goers walked through a tunnel of flags, and passed supporters on the path from the church to the cemetery honoring Petitioner's son (Appendix, Vol. VII, 2080-2082; Vol. VIII, 2168-2172; Vol. X, 2651-2653; Vol. XV, 3759-3762). There was no interruption or disruption of the funeral. Petitioner received an outpouring of support, including hundreds of supportive e-mails, calls and cards, and other community support. (Appendix, Snyder, Vol. VII, 2069, 2084; Vol. VIII, 2173-2174; Fisher, Vol. X, 2661-2662.)

Members of the press had a designated spot off church grounds; Petitioner did not see or hear them (Appendix, Snyder, Vol. VIII, 2174; Maas, Vol. VIII, 2272). After the funeral Petitioner talked to the media further about his son, his death, and his funeral (Appendix, Snyder, Vol. VIII, 2151-2154.)

After the funeral, Petitioner saw news stories that included signs and comments by WBC (Appendix, Vol. VII, 2072-2074, 2085-2087; Vol. VIII, 2112). Over a month after the funeral WBC posted an epic about the picket on its Website. It was not sent to Petitioner or anyone else; nothing was done to draw

sign, and cannot be civilly penalized because someone claims to understand the sign different than what it says, depicts, and means.

attention to it. Petitioner was surfing the Web one day, looking for more praise about his son, when he found the epic and chose to read it (Appendix, Vol. VII, 2062, 2083, 2176-2179; Vol. IX, 2407-2408; Vol. XV, 3788).

Petitioner claimed depression and worsened pre-existing diabetes was caused partly by WBC (Vol. VII, 1958-2032). An endocrinologist and psychologist said the death of Petitioner's son was the cause of his depression and flare up of his diabetes (which by trial was well controlled), and that event was so significant and had so much impact, it was not possible to quantify any increase in depression or diabetes symptoms due to WBC's words (Appendix, Vol. X, 2551-2582; Vol. XI, 2746-2797).

WBC members act out of a love for God, the Bible, and their fellow citizens. Their words are seemingly harsh and graphic, because of the crisis they perceive to exist, and because of the reality of the woes coming upon the nation. They are sincere in these beliefs, and study the Scriptures and expositors daily. (Appendix, Vol. VIII, 2190-2191, 2195-2201, 2211-2212, 2215-2217, 2222-2235; Vol. IX, 2328-2355, 2409-2411, 2417-2418, 2421-2434, 2450-2537; and Vol. X, 2547-2550, 2663-3681). An expert in religious history, who personally disagrees with WBC, testified that WBC's religious practices, and preaching about hell to sinners everywhere, including by picketing, is well established in history (Appendix, Vol. X, 2584-2634).

During trial Petitioner turned to WBC members and said, “don’t tell me it’s love,” (Vol. VII, 2073); “their hatred makes me sick,” hatred “towards everybody really,” (Vol. VIII, 2112); the soldiers in Iraq are “not fighting for hate speech,” (Vol. VIII, 2115). He said WBC was “passing judgment on all priests,” with “Priests Rape Boys” (Vol. VIII, 2115); should get out if they don’t like the country (Vol. VIII, 2116); he prays for their children (Vol. VIII, 2119); he was upset that children were holding signs (Vol. VIII, 2120); the epic contains “more of their Bible hatred,” and WBC members don’t talk about what God does good (Vol. VIII, 2131-2132); he disagrees this is the United States of Sodom (Vol. VIII, 2136); it is upsetting that anybody would say God killed anyone (Vol. VIII, 2137); and, he doesn’t remember anything in the Bible saying to hate (Vol. VIII, 2154-2155).⁴

⁴ At pp. 6, 36 of his brief, Petitioner suggests WBC’s picketing is the product of Pastor Phelps seeking revenge because of the conduct of some Marines. This goes against the evidence, including Pastor Phelps’ testimony. In one description of many of the condition of things in the nation and military causing WBC to picket, Pastor Phelps described a group of marines assaulting some of the WBC members and simulating anal sex, as an example of where things have gone morally wrong in this nation, not a description of an event for which revenge is sought. (Appendix, Vol. VIII, 2226-2227.) Similarly, at p. 6 of his brief, Petitioner complains of Phelps-Davis comment in opening about a “bug” being planted in his head. What she *said*: “The evidence will show we sincerely believe if any of the parents, preachers or leaders of this nation would listen to the little bug in their head that our signs and words may plant, maybe, just maybe some of the thousands of soldiers dying will stop dying.” (Appendix, Vol.

(Continued on following page)

Counsel for Petitioner struck similar themes, referring to WBC's publications as "disgusting" videos and Webpage; the "circus" defendants brought to Maryland; a "71-person cult" harassing people all over the country; the "nonsense" of a Bible story and WBC's interpretation of the Bible; that WBC shouldn't go all over the country telling people they're going to hell and irreversibly doomed (Appendix, Vol. XI, 2919-2920, 2923, 2926, 2932). Counsel complained of WBC's children holding signs and flags, mocked WBC's use of the term "earth dweller," and criticized all the signs at the picket (Appendix, Vol. XI, 2929, 2930-2931, 2935-2936). During closing argument on punitive damages, counsel argued for a finding of malice because WBC said they are prophets, seers, and swords in the hand of God, who claimed to know God's will; because their picket signs use the word "hate;" because WBC would not apologize for the message; because of "manic looks" on the children's faces in the sign movies; and because WBC celebrates the death of soldiers (Appendix, Vol. XII, 1131-1133).

Proceedings Below:

Petitioner sued for defamation, invasion of privacy through publication of private facts, invasion of privacy through intrusion upon seclusion, and intentional infliction of emotional distress (IIED).

VII, 1956.) This quibbling about WBC's words underscores that this case is about viewpoint.

Summary judgment was granted on defamation, because WBC's speech was religious opinion, and Petitioner had no loss of reputation (Appendix, Vol. V, 1214-1219); and, on invasion of privacy by publishing private facts, because no private facts were published (Vol. V, 1224-1227).

Summary judgment was denied on the IIED claim and intrusion upon seclusion based on the content of three signs, "God Hates You," "You're Going to Hell," and "God Hates Fags" (Vol. V, 1255, 1273), saying the "key factor" was that they could be "interpreted" as targeting Petitioner (Vol. V, 1274-1279, 1298-1300). The court said "Don't Pray for the USA" and "Pope in Hell" were protected (Vol. V, 1259-1261, 1299), though these signs along with all of the signs and all of the religious words of WBC were put in front of the jury to serve as a basis for liability.⁵

The trial court ruled pretrial that the time frame for liability was the immediate aftermath of the funeral, a few days. Then when reminded by WBC the epic was written over a month later, the trial judge instantly extended the time period to the date of the epic. (Appendix, Vol. V, 1355-1359).

During trial, the jury was instructed at the outset that speech which is "'vulgar,' 'offensive,' and 'shocking,' is not entitled to absolute constitutional

⁵ "The finding against petitioner was a general one. It did not specify the testimony upon which it rested." *Thornhill v. Alabama*, 310 U.S. 88, 96, (1940).

protection under all circumstances,”⁶ (Appendix, Vol. VII, 1916-1917). The jury was also allowed to determine whether the speech was private or public (Instruction No. 21, Appendix, Vol. XII, 3113-3114), and not instructed on actual malice (Instruction No. 28, Appendix, Vol. XII, 3121).

The jury returned a verdict of \$2.9 in compensatory damages and \$8 million in punitive damages (Appendix, Vol. XII, 3136, 3140). The trial court denied post-trial motions, but remitted the verdict to \$5.1 million, saying: “A reasonable jury could find, however, that when Snyder turned on the television to see if there was footage of his son’s funeral, he did not ‘choose’ to see close-ups of the Defendants’ signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion,” *Snyder v. Westboro Baptist Church*, 533 *F.Supp.* 567, 581 (*D.Md.* 2008). The trial court also said in upholding the damages award: “Plaintiff also testified as to the permanency of the emotional injury. He testified that ‘I think about the sign [Thank God for Dead Soldiers] every day of my life. . . . I see that sign when I lay in bed at nights,’” 533 *F.Supp.* at 589.

⁶ This language comes from the Court’s opinion in *FCC v. Pacifica Foundation*, 438 *U.S.* 726 (1978), pertaining to whether the FCC could regulate broadcast speech. Although Petitioner saw the signs and heard the words over the TV, he did not sue the TV station. So FCC regulations of uniquely-positioned broadcast speech are not applicable in this case.

Fourth Circuit Decision:

The Fourth Circuit reversed, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), saying although there is no categorical constitutional defense for statements of opinion, there are two *types* of speech for which tort liability may not attach under the Constitution (noting there is no suggestion WBC's speech falls into an unprotected category), 580 F.3d at 218 & footnote 12. "First . . . statements on matters of public concern that fail to contain a 'provably false factual connotation,'" 580 F.3d at 219. "Second, rhetorical statements employing 'loose, figurative, or hyperbolic language,'" 580 F.3d at 220.

Per *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) the court said it was obligated to assess how an objective, reasonable reader would understand challenged statements by focusing on the plain language and the context and general tenor of its message, 580 F.3d at 219.

The court held that the district court fatally erred by allowing the jury to decide whether the speech was public or private, and therefore at a minimum a new trial could be necessary, 580 F.3d at 221, unless after their review WBC prevailed as a matter of law on the whole record, 580 F.3d at 221-222.

Analyzing the language of the signs, the court said they involved matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the

political and moral conduct of the United States and its citizens, *580 F.3d at 222-223*. (As discussed at Issue III below, WBC believes their speech addresses additional topics of public concern which are the war and dying soldiers.) Also, the court said no reasonable reader could interpret the signs as asserting actual and objectively verifiable facts about Snyder or his son. And, the statements were further protected because they did not assert provable facts about an individual, and they clearly contain imaginative and hyperbolic rhetoric intended to spark debate, *580 F.3d at 223*. Looking closer at the signs “God Hates You” and “You’re Going to Hell,” the court concluded they also contained no asserted provable facts and contained strong elements of rhetorical hyperbole and figurative expressions. *580 F.3d at 224*. “A distasteful protest sign regarding hotly debated matters of public concern, such as homosexuality or religion, is not the medium through which a reasonable reader would expect a speaker to communicate objectively verifiable facts,” *580 F.3d at 224*.

A similar conclusion was reached after examining the content and style of the epic, because it could not be divorced from the general context of the funeral protest, and was primarily concerned with WBC’s strongly held views on matters of public concern, so a reasonable reader would understand its contents to be primarily focused on the more general message to which the protests are directed. Noting the epic was a recap of the protest and was distributed through WBC’s website, the court said it would not lead the

reasonable reader to expect actual facts about Snyder or his son to be asserted therein, because it was “the work of a hysterical protestor rather than an objective reporter of facts,” *580 F.3d at 225*.

Finally, the court said that its decision did not prevent states from placing reasonable and content-neutral time, place, and manner restrictions to “protect the sanctity of solemn occasions such as funerals and memorials,” *580 F.3d at 226*; and *see 580 F.3d at 218 & footnote 10*.

The majority opinion said WBC did not challenge the sufficiency of the evidence on appeal, *580 F.3d at 216-218*. However a concurring opinion held that Petitioner failed to prove his case by sufficient evidence, *580 F.3d at 227*, saying there was no intrusion; because WBC was in a public place 1,000 feet away, and never confronted Snyder who never saw them; and the funeral was not disrupted. *580 F.3d at 230*. And, WBC posting the epic on the church Internet was not intrusion, because WBC did not bring it to Petitioner’s attention, who learned of it surfing the Internet and chose to read it. *580 F.3d at 231*. Also, that the protest was not outrageous because it was in a public area and did not disrupt the funeral. Finally, the epic which the district court found to be non-defamatory as a matter of law was not sufficient to support a finding of extreme and outrageous conduct, *580 F.3d at 232*.



SUMMARY OF THE ARGUMENT

Petitioner's claim for intentional infliction of emotional distress must fail because WBC's speech was public speech, and was not proven false. The Court has historically treated false and not-proven-false speech differently, giving more protection to speech not proven false. The *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) case requires that any speech on public matters that is targeted by the tort of IIED must be shown false and uttered with actual malice. The effort to prove falsity failed in this case, and the jury was not instructed on actual malice, nor is there any evidence of actual malice. The Constitution is imperiled if a subjective claim of outrage can be used to penalize into silence speech that does not make false statements of fact, uttered in public arenas on public issues.

Petitioner made himself a limited purpose public figure when he spoke with the media extensively immediately after his son's death and when he sought out the media for more coverage immediately after his son's funeral. And he has made expansive use of the media and been wildly successful in persuading the entire country that his son is a hero and WBC is a villain whose words should be utterly disregarded, thereby enjoying all the benefits of a public figure.

The content, form and context show WBC's speech is public and thus protected. For an additional reason WBC's words are protected, which is because of the *type* of words. They are hyperbolic, figurative,

loose, hysterical opinion. By their content, form and context, no reasonable reader could conclude they contain provable facts, but rather are clearly opinion, spoken about facts available equally to everyone.

Petitioner's invasion of privacy claim must fail because he was not a member of a captive audience. Funerals, generally, are public events (unless specifically designated as private). This is especially true with soldiers' funerals. So the nature of the event does not make Petitioner a captive audience. Nor do WBC's actions and modus operandi when picketing, because they did not block, interfere or confront, and they were out of sight and sound. No privacy interest should be allowed based on a mourning bubble, especially when the claim is based on words not proven false, because of the unworkable subjective nature of such a zone of privacy.

Finally, it is not necessary to balance interests in this case, and such a claim poses false alternatives in this case. All parties' rights were fully protected; Petitioner was able to assemble and engage in religious rituals; WBC's speech had no impact on his ability to do so. The Court should decline the invitation to do any unnecessary balancing of rights in this case.



ARGUMENT

I. PETITIONER'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS MUST FAIL BECAUSE IT IS BASED ON SPEECH BY WESTBORO BAPTIST CHURCH THAT WAS ON PUBLIC ISSUES, AND WAS NOT FALSE STATEMENTS OF FACT (AND BECAUSE PETITIONER IS NOT A PRIVATE FIGURE).

The law of this case is that the words of WBC are not false statements of fact, because Petitioner lost on his defamation claim, and did not appeal. Petitioner asks the Court to find that he is a private figure, and therefore his IIED claims should be allowed to stand against not-false speech. He wants exemption from the requirement of *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988), that falsity and actual malice be shown to sustain an IIED claim against public speech.

Legal precedent establishes that false speech should be treated differently from not-proven-false speech. In *Schenck v. United States*, 249 U.S. 47, 52 (1919), the Court noted: "The most stringent protection of free speech would not protect a man in ***falsely shouting fire*** in a theatre and causing a panic" (emphasis added). (If the theatre was on fire, it would be cruel and possibly unlawful *not* to shout "fire.") As early as *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964), the Court established that the Constitution

can tolerate sanctions against calculated falsehoods, but not honest utterances even if inaccurate.

Since at least *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court has wrestled with how to balance states' interests in protecting their citizens from harm by tortious conduct against the right of all citizens to engage in robust public debate.⁷ The question in each case is whether the balance will discourage publishers from exercising constitutional guarantees. Finding the right balance is not mindless matrix-driven algorithm; it's an application of core constitutional principles to a given situation.

The theme that emerges from the cases is that the bedrock of the *First Amendment's* protection of speech is preserving the ability of citizens to engage in wide-open, robust, uninhibited speech on public matters. (Experience teaches this protection is *most necessary* when the words are *least popular* or *most offensive*.)

Thus, in *New York Times*, while holding defamation claims by public officials can only be sustained on a showing of actual malice, the Court said:

⁷ The Fourth Circuit's concurring opinion held Petitioner's evidence was insufficient to establish tort liability, because his own acts exposed him to words he did not like, and no disruption of the funeral occurred. WBC believes this issue has been preserved, and the evidence is insufficient, and so asserts here. There is not a pressing concern here about protecting Petitioner from tortious conduct.

The general proposition that freedom of expression **upon public questions** is secured by the *First Amendment* has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” . . .

Thus we consider this case against the background of a profound national commitment to the principle that debate on **public issues** should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . The present advertisement . . . **on one of the major public issues of our time (racism)**, would seem clearly to qualify for the constitutional protection.

376 U.S. at 269-273; emphasis added.

In *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967), a family that had been the victim of a crime alleged Life Magazine falsely reported that a new play portrayed their experience. The Court reversed and remanded a judgment against the publisher, saying that constitutional guarantees of free speech and press meant the publisher was entitled to an instruction that there could be no liability without a finding of knowing or reckless falsity.

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press

from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

385 U.S. at 389.

In *Curtis Pub. Co. v. Butts*, *388 U.S. 130 (1967)*, the Court dealt with two cases involving public *figures* who claimed they were libeled. Deciding in cases involving public figures a higher standard was necessary, so recovery could only be had upon a showing of highly unreasonable conduct that constituted an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers, the Court again emphasized the importance of protecting speech on public issues:

We fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases, but **in all libel actions arising from a publication concerning public issues.**

388 U.S. at 147; emphasis added. And at footnote 19: “Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures **or matters of public interest**,” *388 U.S. at 155*; emphasis added.

In *Rosenbloom v. Metromedia, Inc.*, *403 U.S. 29 (1971)*, the Court in a plurality opinion said that in a

case involving a “private individual,” involving speech on a matter of public or general concern, the actual malice standard applied. “We honor the commitment to robust debate on public issues which is embodied in the *First Amendment*, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous,” 403 U.S. at 43-44.

Three years later in *Gertz v. Welch*, 418 U.S. 323 (1974), the Court pulled back from *Rosenbloom* some, holding that the *First Amendment* protection afforded news media against defamation suits by public persons is not to be extended to *defamation suits* by private individuals, even though the defamatory statements concern an issue of public or general interest, *so long as* liability is not imposed without fault, and recovery is limited to actual damages, not punitive. (For many reasons, punity damages are completely unsustainable in this case.)

We begin with the common ground. Under the *First Amendment* there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. . . .

* * *

. . . In our continuing effort to define the proper accommodation between these competing concerns, we have been especially

anxious to assure to the freedoms of speech and press that “breathing space” essential to their fruitful exercise. . . .

418 U.S. at 339. The Court cited the ability of public officials and figures “usually” to access channels of effective communication to counteract false statements, and that they have assumed a role in the forefront of public controversies or government; *and* that it would be difficult for state and federal judges to “decide on an *ad hoc* basis which publications address issues of ‘general or public interest,’” *418 U.S. at 344-345.*

In *Farmer v. United Brotherhood*, *430 U.S. 290 (1977)* the Court signaled using IIED to inhibit robust debate would be disfavored. Finding that the National Labor Relations Act did not preempt state law, the Court cautioned:

. . . . The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be common-place in various labor contexts.

430 U.S. at 305-306.

The Court resolved the *Gertz* concern about lack of criteria to determine if speech is public or private, by its decision in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, *472 U.S. 749 (1985)*. There a credit reporting company made a false credit report about another private company. The Court said the actual

malice standard did not apply, because the speech did not involve an issue of public concern. Noting the “special concern [for speech on public issues] is no mystery,” the Court said: “It is speech on ‘matters of public concern’ that is ‘at the heart of the *First Amendment’s* protection,” 472 U.S. at 758-759. “[T]he Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of *First Amendment* values,’ . . . [i]n contrast, speech on matters of purely private concern is of *less First Amendment* concern,” and “the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent,” 472 U.S. at 759. “While such speech is not totally unprotected by the *First Amendment*, . . . its protections are less stringent,” 472 U.S. at 760.

On how to determine if speech is public, the Court said: “[W]e have held that ‘[w]hether . . . speech addresses a matter of public concern must be determined by [the expression’s] content, form, and context . . . as revealed by the whole record,’” 472 U.S. at 761.

Then in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), the Court held that a private figure seeking damages in a defamation action against a newspaper had to prove that a statement of public concern was false. In other words, the private plaintiff could no longer avail himself of the common-law presumption that defamatory speech is false when the speech is on a matter of public concern. The Court said:

One can discern in these decisions two forces that may reshape the common-law landscape to conform to the *First Amendment*. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are . . . less forbidding. . . .

475 U.S. at 775.

The outcome of *Falwell* given the above cases should have come as no surprise; and it should be equally clear that this outcome should be the same whether a plaintiff claims private status or public figure status, when the topic of the speech is matters of public interest, and when the sole theory is IIED and the claimed wrong is only words.

In rejecting liability based on words that “could not reasonably have been interpreted as stating actual facts,” about a public figure, *485 U.S. at 48*, the Court said:

At the heart of the *First Amendment* is the recognition of the fundamental importance of

the free flow of ideas and opinions on matters of public interest and concern. “The freedom to speak one’s mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole. . . .” We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The *First Amendment* recognizes no such thing as a “false” idea. . . .

485 *U.S. at 51*. Falwell argued 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. The Court rejected this position: “But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the *First Amendment*. . . . Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of law, we think the *First Amendment* prohibits such a result in the area of public debate about public figures.” 485 *U.S. at 50*.

After discussing historical examples of the use of the cartoon parody (historical examples of preachers speaking about hell and sin include from the Bible, Noah, Jeremiah, John the Baptist, John the Beloved, and Christ, and American theologian Jonathan Edwards), the Court said:

“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’ taste or views, or perhaps on the basis of their dislike of a particular expression. An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. . . .

485 U.S. at 55-56. So the Court concluded that a public figure or public official could not recover for the tort of IIED by reason of publications without proving falsity and actual malice.

Petitioner would have us overlook all these powerful principles about protecting public speech, and uphold a multi-million dollar verdict for not-proven-false speech, on the subjective standard of “outrageousness,” without any showing of falsity or fault, simply because he claims he is a private figure.

The speech at issue in this case was public in every sense. It was about publicly-funded funerals of publicly-funded soldiers dying in an extremely public war, because (in WBC’s opinion) of very-public policies of sin, including homosexuality, divorce, remarriage, and Roman Catholic priests molesting children. The content of the speech is religious commentary on current events of significant import, with numerous statements (on signs and by epic) about God, his wrath and other attributes, this nation’s sins, and its

consequences (including on the battlefield). The form of the speech is quintessential public speech, using picket signs on public right-of-ways; interviews with the media; and commentary on the Internet. The context of the speech is a longstanding war of worldwide renown; one of thousands of public funerals for dead soldiers; commenting on information published in the media; part of a dialogue in which hundreds (and thousands) are participating (whether about the funeral that day or the funerals of soldiers in total), in proximity of a church that is part of the Roman Catholic organization; about the practices of the military (and consequences for those practices) which then and now occupy front pages and airwaves daily.

No speech could be more public than this speech. To cast aside the longstanding body of law about the importance of giving public speech breathing room; and to ignore the concerns this Court raised about letting liability attach for *not-proven-false words* on a subjective standard; all because Petitioner claims he's a private figure, stands all these constitutional principles on their heads.⁸

⁸ Petitioner relies on a few state court cases to suggest private individuals should not be covered by *Falwell*; reviewing them reveals they do not support his position. In *Esposito-Hilder v. SFX Broadcasting, Inc.*, 665 N.Y.S.2d 697 (1997), the court upheld a case moving forward where disc jockeys of a competitor radio station used their "Ugliest Bride" contest to name and vilify plaintiff. The court noted "the unique factual circumstances presented," 665 N.Y.S.2d at 699, where the conduct involved no matter of public interest or concern, *and* the parties

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Petitioner’s brief “spills considerable ink,” *Christian Legal Society v. Martinez*, 2010 U.S. LEXIS 5367 at 26-27 & footnote 6 (U.S. June 28, 2010) trying to persuade that WBC has a hateful motive, endeavoring to strengthen the IIED claim. But the Court has rejected the idea of punishing speech on public issues because it is characterized as uttered with ill-will. “Debate 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,” *BE&K Construction Co. v. National Labor Relations Board*, 536 U.S. 516, 534 (2002). See also *NAACP v. Claiborne*, *supra*, 458 U.S. 886 (1982) (speech on the public issue of racism protected even if speaker likely foresaw sustained economic injury merchants would sustain from boycott). WBC is motivated to warn people not to go to hell, and of the consequences of national policies of sin. And WBC did this warning

were business competitors. Further, *State v. Carpenter*, 171 P.3d 41 (Alaska 2007) involved a plaintiff who complained about the language of a talk show host, who then encouraged people to call, fax and harass plaintiff in her home. Her claim was “not based on the truth or falsity of . . . words . . . [or] harm to her reputation,” and thus no heightened protection, 171 P.3d at 56. In *Van Duyn v. Smith*, 173 Ill.App.3d 523 (1988) an abortion doctor sued an anti-abortion protester for *unprotected* acts of following her in her car, confronting her physically and preventing her ingress and egress, for which the court reversed the trial court’s dismissal, see 173 Ill.App.3d at 533-534. None involve IIED claims for words (“defamation-based claims,” see *Chapman v. Journal Concepts, Inc.*, 528 F.Supp.2d 1081 [D.Haw. 2007]), on matters of public interest, see *Bass v. Harville Hendrix*, 931 F.Supp. 523 (S.D.Tex. 1996).

through public speech in public arenas about public matters.

Finally, the Court should reject Petitioner's claim that he is a private figure. When Petitioner made the decision to speak to the media on the matter of his son's death, revealing various details about his son's life, death and funeral, and his own anti-war views; he thrust himself into an ongoing controversy about war and dying soldiers. When he published the specific date, time and location of his son's funeral, he ensured the funeral itself was public. When he *sought out* the media immediately after his son's funeral (before the epic was written) to further shape the coverage of his son's life, death and funeral, he availed himself of access to the media to shape and impact the outcome of the issues of his son's death and funeral and WBC's picketing of his funeral. See *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir. 1980), cert. denied, 449 U.S. 898 (1980).

Further, Petitioner has all the benefits of a public figure. He has enjoyed massive national and even international favorable media about his efforts to silence WBC and about his son's heroism. He was able to get the full community rallied around him for the funeral, so that for 15 miles the streets were lined with well-wishers doing a communal salute. He has also been able through a sophisticated public relations campaign, to raise funds and cause literally thousands of people to reinforce him and give him public support.

Unlike the plaintiff in *Wolston v. Reader's Digest*, 443 U.S. 157, 167 (1979) who never discussed the matter with the press, Petitioner voluntarily spoke with the media multiple times and initiated contact with them. Unlike the plaintiff in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), Petitioner was not pulled involuntarily into the public discussion; he actively and voluntarily participated, under no compulsion of any kind. Similar to the plaintiff in *Grass v. News Group Publications, Inc.*, 570 F.Supp. 178, 181 (S.D.N.Y. 1983), Petitioner scanned the Internet monitoring words about his son as part of his interaction with the media. Similar to the plaintiff in *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C.Cir. 2003), where one of the first two women combat pilots talked to the media knowing her role was controversial, Petitioner talked to and sought the media knowing the wars and dying soldiers were controversial.

II. PETITIONER'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS MUST FAIL BECAUSE WBC'S LOOSE, FIGURATIVE, HYPERBOLIC SPEECH, WHICH NO REASONABLE READER COULD INTERPRET AS STATING ACTUAL FACTS, IS PUBLIC-ISSUE SPEECH (AND BECAUSE PETITIONER IS NOT A PRIVATE FIGURE).

Petitioner seeks exemption from the holding in *Milkovich* claiming he is a private figure or WBC's public speech targeted him; his IIED claims are different from his defamation claims; and WBC came

to the funeral uninvited. For the reasons discussed at Issue I above, Petitioner is not a private figure.

Speech on public issues tops the hierarchy of public commentary. There is no credible effort to establish that WBC's speech was not on public issues, beyond saying it targeted Petitioner and his son, as if somehow WBC is obligated to remain silent about the soldiers and their families in this public debate, while everyone else is talking about them. There is nothing unlawful about targeting speech to or about a person. Indeed, a speaker is entitled to reach his or her "target audience" with a message, if otherwise lawfully done. (As discussed at Issue III and footnote 10, the "target" or "focus" that states can reasonably limit as to time, place and manner, pertains to proximity targeting, not content-targeting.)

It is indefensible to say the IIED claim is any different from the failed-defamation claim. All of the claims in this case are about the words uttered by WBC. The trial court record is permeated with criticism about the words; the injury alleged to have been inflicted is because of the words (e.g., Petitioner says he sees the *words* at night lying in his bed). The IIED claim is based on the content of the signs and words to the media as seen by Petitioner in the news, and the content of the epic as seen by Petitioner on the Internet.

As to the claim that *Milkovich* should not apply because WBC came uninvited to the funeral with the intention of disrupting the religious ritual, as

discussed at Issue IV, WBC did not attend the funeral; did not have an intention of disrupting, and did not disrupt; the religious rituals were all completely fulfilled and fulfilling. (Having said that, it is reasonable to add that once Petitioner invited the public to the funeral, the invitation included WBC members.) By being out of sight and sound of Petitioner and all those attending the funeral, it was impossible for WBC to have disrupted the religious ritual. And WBC does not require an invitation to be on a public right-of-way peacefully picketing.

After *Falwell*, which forecast that speech which could not reasonably be taken to state facts about a person is protected, the Court issued its decision in *Milkovich*. “We have also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions,” 497 U.S. at 16. This includes words that are no more than rhetorical hyperbole, or vigorous epithet; and words which could not reasonably have been interpreted as stating actual facts, used in a loose, figurative sense, 497 U.S. at 17. While rejecting the notion that *Gertz* requires a “wholesale defamation exemption for anything that might be labeled ‘opinion,’” 497 U.S. at 18, the Court said “*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection,” 497 U.S. at 20.

Petitioner complains that adding the element of falsity to an IIED claim causes a plaintiff to lose

protection from entire categories of expressive conduct, saying the speaker can ensure constitutional immunity by uttering statements so outrageous that they fail to contain a provably false factual connotation. (Brief for Petitioner, pp. 42-43.) But doing so is consistent with the protection of the *First Amendment*, and Petitioner lacks grace complaining about it given that his claims of falsity *failed*. This complaint utterly ignores the constitutionally-appropriate concern the Court raised in *Falwell*, that a subjective standard of “outrageousness,” could render *speech* tortious, even on public matters. Letting liability attach to not-proven-false words on public issues because a person subjectively claims to be “outraged” – when that same person has articulated in plain words how much he loathes the religious viewpoint of the speaker – would simply rip the *First Amendment* to useless shreds.

The words on WBC’s signs and in their epic – as the Fourth Circuit noted – have the tone of a hysterical protester. WBC is passionately trying to warn people about hell; the *nature* of that message is hysterical protest. Further, the nature of the communication shows that it is commentary on information that is equally available to everyone (such as the “don’t ask/don’t tell” military policy; the scandal of sex abuse in the Roman Catholic church; the details of Petitioner’s divorce; etc.). The signs and epic contain language that plainly shows it is religious commentary, purposefully hyperbolic. In *Gardner v. Martino*, 563 F.3d 981 (9th Cir. 2009), plaintiffs sued after a

customer called a national syndicated radio talk show to complain about a product, and in the course of the discussion the talk show host responded, saying plaintiffs were lying to the customer, and that the company plaintiff “sucks.” The court considered the nature of the show, that it had drama, hyperbolic language, an opinionated and arrogant host, and heated controversy, *563 F.3d at 988*. The court also said concerning the “lying” statement, that no reasonable listener could consider the statements to imply an assertion of objective facts rather than “an interpretation of the facts equally available to Martino and the listener,” *id.* Similarly, here, WBC’s speech is in a format showing it is religious commentary; and its content shows it is an expression of strong religious opinion, interpreting and expressing religious opinions on facts equally available to the listener.

III. PETITIONER’S INVASION OF PRIVACY CLAIM MUST FAIL BECAUSE HE WAS NOT A MEMBER OF A CAPTIVE AUDIENCE, AND EVEN IF HE WAS, WESTBORO BAPTIST CHURCH’S SPEECH OCCURRED WELL OUTSIDE ANY ZONE OF PRIVACY THE COURT MIGHT EVER RECOGNIZE IN A PUBLIC FUNERAL.

Petitioner says he was a captive audience at his son’s funeral. This position rests on the notion that funerals are customarily private. The opposite is true. Funerals are not historically or by nature private events, but are most commonly held in the presence

of and for the public. This holds true for funerals in general; for soldiers' funerals; and for the funeral of Petitioner's son. A family member can opt for a private funeral; but the norm is a public funeral.

Also, there was no proximity between WBC and Petitioner that created a captive audience. So whether because of where he was and/or what he was doing; or because of what WBC members did; Petitioner was not a captive audience. Even if going into a public funeral as a mourner placed Petitioner into the status of a captive audience, WBC was far outside any zone of privacy around him during or after the funeral. The flaw in Petitioner's position is he wants to equate his disagreement with words – no matter where, when, how, or in what form he saw them – with captive audience status. The Court's opinions will not support this conclusion.

The Court has recognized a captive audience as a physical or aural concept, such as employees during working hours forced to listen to denunciations of a union, *NLRB v. United Steelworkers of America*, 357 U.S. 357, 368 (1958); or people in hearing of sound trucks with loud and raucous noises on city streets, *Ginsberg v. New York*, 390 U.S. 629 (1968), Stewart, J., concurring, citing *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949). The Court found a captive audience in the home, saying the right of a mailer stops at the outer boundary of every person's domain, in *Rowan v. United States Post Office*, 397 U.S. 728, 738 (1970). The notion that commuters are a captive audience on a transit system caused the Court to uphold a city

policy of not permitting political advertising on its transit vehicles in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-303 (1974). In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court found an ordinance prohibiting showing films with nudity in a drive-in movie theater when the screen is visible from a public street or place invalid, saying selective restrictions by the government to shield the public from some kinds of speech on the ground that they are more offensive than others, have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure, 422 U.S. at 209. “The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes,” 422 U.S. at 212.

In *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), the Court found that the state public service commissioner’s order barring utilities from including inserts discussing controversial public policy issues violated the *First Amendment*. “The customers of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket,” 447 U.S. at 541-542. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), the Court held that a federal ban on unsolicited mailings advertising contraceptives violated the *First Amendment* for similar reasons.

It matters whether a law regulates communications for their ideas or for their style. Governmental suppression of a specific point of view strikes at the core of *First Amendment* values. In contrast, regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment.

463 U.S. at 83-84, Stevens, J., concurring.

In upholding New York's guidelines for sound-amplification equipment, in *Ward v. Rock Against Racism*, *491 U.S. 781, 798 (1989)*, the Court affirmed that citizens can be protected from unwelcome excessive noise. And in *United States v. Kokinda*, *497 U.S. 720 (1990)*, the Court upheld a prohibition against in-person solicitation of funds on a government-owned sidewalk adjoining the post office because it was directly confrontational and intimidating, *497 U.S. at 734*.

Against this framework, the Court addressed captive audiences in several cases involving "the currently disfavored class of antiabortion protesters," *Lawson v. Murray*, *515 U.S. 1110, 1116 (1995)*, Scalia, J., concurring in denial of a petition for a writ of certiorari. The Court upheld a ban on picketing "before or about" a residence, noting the unique nature of the home, because of the impact on domestic tranquility with the resident knowing a stranger is lurking just outside. The Court noted that if the resident used his or her home as a place of business

or for a public meeting the outcome would be different, *Frisby v. Schultz*, 487 U.S. 474, 487-488 (1988). (Using a church or cemetery for a quiet private funeral is very different from using it for a loud, splashy, noisy, patriotic pep rally.) In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), the Court upheld an injunction with a 36-foot buffer zone on a public street after instances of blocking and interfering with public access to the clinic, and physical abuse of persons entering or leaving the clinic. Picketers impeded access by congregating on the paved portion of the street directly in front of the clinic, by slowing down vehicles turning in by marching in front of the driveway, and by groups from a handful to 400 singing, chanting and using loudspeakers and bullhorns. 512 U.S. at 758. The Court invalidated the 36-foot zone in other directions where no obstruction or interference had occurred, 512 U.S. at 772. The Court upheld a limited noise restriction so patients at the clinic would not have to undertake Herculean efforts to escape the cacophony of political protests, *id.*

The same, however, cannot be said for the "images observable" provision. . . . The only plausible reason a patient would be bothered by "images observable" inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic.

This provision of the injunction violates the *First Amendment*.

512 U.S. at 773. The Court invalidated a 300-foot no-approach buffer as too broad to address picketers stalking or shadowing patients or clinic staff. And the Court invalidated a 300-foot zone around residences, *512 U.S. at 776*.

Six years later in *Hill v. Colorado*, *530 U.S. 703*, (2000), the Court upheld a Colorado state statute making it unlawful within 100 feet of a health care facility to knowingly approach within 8 feet of another person, without that person's consent, to engage in picketing, counseling, or related expressive activity. The law was passed in response to abortion picketers impeding access to clinics, and having face-to-face encounters with people coming and going at the clinics, described by at least one witness as "standing in your face screaming at you," *530 U.S. at 710*.

. . . . None of our decisions has minimized the enduring importance of "a right to be free" from **persistent "importunity, following and dogging"** after an offer to communicate has been declined. While the freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." . . . It is that right, as well

as the right of “**passage without obstruction,**” that the Colorado statute legitimately seeks to protect. . . .

* * *

[W]hether there is a “right” to avoid unwelcome expression is not before us in this case. The purpose of the Colorado statute is not to protect a potential listener from hearing a particular message. It is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) **by physically approaching an individual at close range, i.e., within eight feet.** . . .

530 U.S. at 717-718 & footnote 25; emphasis added.

The law requires proximity for a person to be captive or intruded-upon. There is no reason this should be any different as to a funeral, private or public.

While it is reasonable to view noisy, disruptive, and harassing protests as invasive, peaceful protest laws restrict all protests regardless of whether they are noisy or disruptive. They prohibit activities such as a small group of people or a lone protestor quietly holding signs or distributing leaflets near a church or cemetery. Such protestors neither physically nor aurally invade a funeral ceremony; nor do their protests amount to the harassing behavior required to constitute an “invasion” at common law.

Peaceful protests, therefore, are not an intrusion when they are conducted immediately outside of the church or cemetery, much less if protestors stand 500 feet away.

Wells, *infra* note 19, at 183-184.

When federal courts have reviewed funeral picketing laws, they have not afforded the broad privacy interest Petitioner asserts, and have disallowed laws broadly designed to remove words out of sight of funeral-goers. E.g., *Lowden v. County of Clare*, 2010 U.S. Dist. LEXIS 28993 (E.D.Mich. March 26, 2010) (privacy interests not sufficient for provision against “adversely affect[ing]” funerals or 500-foot ban in every direction from funeral procession on public streets);⁹ *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008) (preliminary injunction required against ban of pickets “in front of or about” funerals; no compelling interests in protecting individuals from unwanted speech outside of the residential context); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (300-foot restriction reasonable to protect funeral attendees because conceivable picketers can still communicate their message to funeral attendees);¹⁰ *McQueary*

⁹ Remember, the only place Petitioner claims he saw signs’ tips was during the procession from the funeral home to church, which took place on public streets.

¹⁰ If this law is applied to prohibit picketers getting their message to their intended audience, 300 feet may not be sufficiently narrowly tailored, because the law permits speakers reaching their intended audience, and any alternative to that is not ample. E.g., *Million Youth March, Inc. v. Safir*, 18 F.Supp.2d

(Continued on following page)

v. Stumbo, 453 F.Supp.2d 975 (E.D.Ky. 2006) (300-foot buffer zone not sufficiently tailored; provision barring visual and auditory displays overbroad, even assuming family privacy interest). Also note that Maryland's funeral picketing law fixes a distance of 100 feet, see Md.Code 10-205.

Petitioner relies on *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004) to ask this Court, for the first time, to grant a privacy right in a funeral.¹¹ *Favish* was about four photographs of a deceased. If the family had turned them over to *The New York Times* the outcome would have been different. (If a pro-abortion rally was conducted at an abortion clinic, it would get different treatment related to anti-abortion picketers.) And, if the photograph had been of a deceased soldier in times of war the outcome would have been different, because photographs of soldiers, dead or alive, are public.

334 (S.D.N.Y. 1998); *Dr. Martin Luther King, Jr. Movement, Inc. v. Chicago*, 419 F.Supp. 667 (N.D.Ill. 1976).

¹¹ If the Court does recognize, for the first time, a privacy interest in a funeral (that was public and where picketers were over a thousand feet away out on the public right-of-way out of sight and sound), the verdict should still not stand on a newly-announced rule of law. *Morse v. Frederick*, 351 U.S. 393, 409 (2007). Also see *Miller v. California*, 413 U.S. 15 (1973) (“[W]hen constitutional rights are concerned – we should not allow men to go to prison or be fined when they had no ‘fair warning,’” 418 U.S. at 42).

The saga of photographs of the returning flag-draped tin caskets to Dover Air Force Base illustrates this point. In the past, the Department of Defense (DOD) restricted media access, citing families' privacy interests, and obligations to travel to Dover, which was upheld when several media and veterans' organizations challenged it in *JB Pictures, Inc. v. Department of Defense*, 86 F.3d 236 (D.C.Cir. 1996). See, MacNair, Scot A., "Is There a Right to View the Dead at Dover? *JB Pictures v. Department of Defense: Limits on the Media's Right to Gather Information*," 4 *Vill. Sports & Ent. L.J.* 387 (1997). Though "the image of caskets arriving at Dover became a staple of the nightly news," during the Vietnam War, the ban at Dover continued into the Iraq and Afghanistan wars. Zoroya, Gregg, "Return of U.S. war dead kept solemn, secret," *USA Today*, December 31, 2003, available at http://www.usatoday.com/news/nation/2003-12-31-casket-usat_x.htm.

But this changed. In 2005 the DOD was sued for denying images of memorial and arrival ceremonies based on privacy interests of soldiers and their families.¹² In April, 2005, the Pentagon released hundreds of previously secret images of casualties returning to honor guard ceremonies, "confirming that images of

¹² *Begleiter v. Department of Defense*, Case No. 1:04-cv-01697 (EGS), Complaint, Doc. No. 1, filed 10/04/04, paragraph 23; Answer, Doc. No. 2, filed 11/10/04, paragraph 23.

their flag-draped coffins are rightfully part of the public record,”¹³ resolving the case.

In February 2009, President Barack Obama announced he was revisiting the ban, and veterans and families were in favor. (E.g., family members and veterans called in to National Public Radio, during an interview with *Newsweek Magazine’s* National Security Correspondent John Barry [who advocated for a Canada-like 100-mile heroes’ highway for a “communal salute,” instead of lifting the ban], all advocating removal of the ban.¹⁴ On February 26, 2009, President Obama lifted the ban, to the praise of veterans groups, families and the public.¹⁵ President Obama left the choice of media coverage to the families, and in March the Defense Department announced it would pay for families of fallen soldiers to travel to Dover to be present for the return of their

¹³ “Return of the Fallen: Pentagon Releases Hundreds More War Casualty Homecoming Images,” National Security Archive Electronic Briefing Book No. 152, April 28, 2005, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm>.

¹⁴ “Rethinking Media Coverage of Fallen Troops,” National Public Radio, February 17, 2009, available at <http://www.npr.org/templates/transcript/transcript.php?storyid=100778246>.)

¹⁵ Harper, Jennifer, “Pentagon relaxes casket photo ban,” *The Washington Times*, February 27, 2009, available at <http://www.washingtontimes.com/news/2009/feb/27/us-relaxes-media-ban-on-casket-photos/>. “Pentagon ends photo ban on war dead return,” *boston.com*, February 26, 2009, available at http://www.boston.com/news/politics/politicalintelligence/2009/02/pentagon_report.html.

deceased family member.¹⁶ By October 2009, 75 percent of the families wanted the media present (60 percent all media; another 15 percent wanted only the DOD media present).¹⁷

Photographs of injured and dead from war beyond the caskets at Dover are also public. In September, 2000, the DOD directed “open and independent reporting of U.S. military operations,” through media pools and permitting journalists to ride on military vehicles and aircraft when possible. *Flynt v. Rumsfeld*, 355 F.3d 697, 699-700 (D.C.Cir. 2004). This set the stage for unprecedented media access to the Iraq and Afghanistan wars. “The stationing of over five-hundred journalists within military units during Operation Iraqi Freedom represents the most recent round in this relationship and the largest expansion of the century-old practice of embedding,” making it “the most covered war in history,” Smith, Kevin, “SURVEY OF BOOK: The Media at the Tip of the Spear: Embedded: The Media at War in Iraq. By Bill Katovskyn and Timothy Carlson,” 102 *Mich. L.Rev.* 1329, 1331 (May, 2004). The embedding of reporters results in publication of images of the war dead. Such

¹⁶ Seelye, Katharine Q., “Pentagon Will Help Families Travel to Dover,” *The New York Times*, March 19, 2010, available at <http://thelede.blogs.nytimes.com/2009/03/18/pentagon-will-help-families/>.

¹⁷ Davenport, Christian, “With ban over, who should cover the fallen at Dover?” *The Washington Post*, October 24, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/23/ar2009102301828.html>.

photographs have been published in this country, including dead and injured American soldiers, dead and injured soldiers of other nations, and dead and injured civilians, in the midst of ongoing public debate about how much should be published and whether American reporters are more willing to publish the war dead of other nations than of Americans.¹⁸

Applying *Favish* to photographs of dead soldiers would lead to a different outcome. In *Showler v. Harper's Magazine Foundation*, 222 Fed.Appx. 755, 2007 U.S.App. LEXIS 7025 (10th Cir. 2007), cert. denied, 552 U.S. 825 (2007), the father and grandfather of a member of the Oklahoma National Guard killed in Iraq, sued a photojournalist and publisher for publishing a photo of the deceased soldier as he lay in his coffin during his funeral, claiming invasion of privacy and IIED. The Tenth Circuit Court of Appeals upheld an order granting summary judgment, in spite of *Favish*, because the event and photograph were

¹⁸ Robertson, Lori, "Images of War," *American Journalism Review*, October/November 2004, available at http://www.ajr.org/article_printable.asp?id=3759; Kamber, Michael and Arbango, Tim, "4,000 U.S. Deaths, and a Handful of Images," *The New York Times*, July 26, 2008, available at <http://www.nytimes.com/2008/07/26/world/middleeast/26censor.html>; Moran, Rick, "NY Times Complains: 'Not enough dead soldiers,'" *American Thinker*, July 26, 2008, available at http://www.americanthinker.com/printpage?url=http://www.americanthinker.com/blog/2008/07/ny_times_complains_not_enough.html; Arnow, Pat, "Where Have All the Bodies Gone?" *Fairness & Accuracy in Reporting*, July/August 2005, available at <http://www.fair.org/index.php?page=2625>.

public, with the soldier's open-coffin exposed to 1200 people, in a public funeral in the local high school.

We agree with Defendants that Plaintiffs opened up the funeral scene to the public eye and cannot, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo. The local newspaper notified the public in advance of the time and place of Sgt. Brinlee's funeral, and it was held in a high school gymnasium to accommodate the large crowd expected to attend. Governor Henry spoke at the funeral, which was attended by 1200 people. Most attendees exited the funeral by first filing past Sgt. Brinlee's open casket. Numerous area newspapers published stories about Sgt. Brinlee's death and funeral. These facts belie the notion that the Turnley Photo revealed information that was private and summary judgment was appropriate on this claim.

222 Fed.Appx. at 764-765.

Going beyond photographs, in *Favish* this Court said family members have the right to direct and control disposition of the body of the deceased, *541 U.S. at 167*. The Court also said family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own. In quoting from *Schuyler v. Curtis*, *147 N.Y. 434, 447, 42*

N.E.22, 25 (1895), the Court referred to the right of the living against improper interference with the character or memory of a deceased relative.

The question is whether this language establishes a privacy right in a funeral under the facts and circumstances of this case. This language indicates a possible privacy right in disposition of the body. As discussed at footnote 2, *supra*, the right to dispose of the body also includes the right to have a private funeral. The right to decide whether to cremate the body; open the casket; have the body at the funeral; bury the body at a specific location; etc., does not equal a privacy right in a funeral. The purpose of the funeral is not disposition of the body. This body-disposition right may include the right to have a private funeral, and in that event a privacy interest could be found. But by no process of logic does the body-disposition right lead to a per se privacy interest in a funeral, no matter how public. Thus, if the funeral in this case was public, it cannot be said to be an event in which Petitioner would have a privacy right.

The only other privacy right articulated by the Court was the right to have a good memory of the deceased. Establishing a privacy right in a funeral (private or public) on the basis of the interest of a surviving family member in cherished memories would be grossly under inclusive. Many things could impact how a person remembers a deceased loved one above and beyond whether or how a funeral is conducted. A rule of law giving a privacy right at the

expense of words, which are not proven as false, because of a subjective claim of outrage, would implicate all of the concerns this Court has raised, as discussed above, about breathing room for free speech. (This is an entirely different scenario than, for instance, dragging a dead body through the streets, as referenced by the Court in *Favish*. That scenario is a non-speech example of protecting the memory of the deceased.) Attaching liability to words is particularly constitutionally-dangerous where, as here, the impact is to force a dissenting religious group in a little church to show what society deems “respect” for the deceased, when the church does not doctrinally agree.¹⁹ The Amicus Brief for Veterans of Foreign

¹⁹ A subculture is “a cultural group within a larger culture, often having beliefs or interests at variance with those of the larger culture,” *Compact Oxford English Dictionary*, available at http://www.askoxford.com/concise_oed/subculture?view=uk. Fundamentalists who believe the Bible became characterized as a religious subculture, and then mainstreamed, Sheler, Jeffery L., “Nearer My God To Thee,” *U.S. News & World Report*, Vol. 136, No. 15, May 3, 2004, p. 58(7). WBC has been identified as a religious subculture, “Social control and the Westboro Baptist Church: Fuel to the fire?” Powell-Williams, Todd. Proquest Dissertations And Theses 2008. Section 0209, Part 0318 267 pages; [Ph.D. dissertation]. United States – Illinois: Southern Illinois University at Carbondale; 2008. Publication Number: AAT 3342317, available at <http://proquest.umi.com/pqdlink?Ver=1&Exp=06-29-2015&FMT=7&DID=1674089181&RQT=309&attempt=1&cfc=1>, and has not mainstreamed. “[A]lthough privacy and free speech law in the United States embrace notions of human dignity, they do not recognize a concept of dignity that requires an outward showing of respect enforced through law,” Wells, Christina E., “Privacy and Funeral Protests,” *87 N.C.L. Rev.* 151, 182 (December 2008).

Wars, at p. 2, states as its mission having the entire Nation mourning for dead soldiers. WBC does not desire to join the nation in this public mourning, but should not be penalized for declining when joining the public debate about dying soldiers and their funerals, that is taking place in direct connection with their funerals (by subject matter and by location/platform).

Liability in this case would, essentially, carve out a category of speech based on viewpoint, and strip it of constitutional protection, simply because society dislikes (or deems valueless or unnecessary) speaking ill of the dead (especially if the dead is a soldier). “As a free-floating test for *First Amendment* coverage, [that proposal] is startling and dangerous. The *First Amendment’s* guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social cost and benefits. . . .” *United States v. Stevens*, 2010 U.S. LEXIS 3478 at 17-18 (U.S. April 20, 2010). This is what Petitioner seeks – treating speech that speaks ill of the military-dead or is subjectively deemed outrageous to mourners of the military-dead as unprotected. The Court should decline to carve out such a “novel” exception that is “highly manipulable,” 2010 U.S. LEXIS 3478 at 21. If the *First Amendment* will not protect the dissenting views of a religious subculture, there is little point in this Republic, which purports to have a rule of law codified chiefly in the *First Amendment* that protects the minority from majority or mob rule.

The privacy right the trial court recognized was found in Petitioner’s mourning, witnessed by the trial

court saying when denying post-trial motions that Petitioner's privacy was invaded when he saw news stories about the picket; and by the trial court setting the time frame for liability-exposure from the funeral up to the day of the epic. This broad privacy zone goes well beyond the funeral, and any alleged invasion is premised exclusively on words and viewpoint. Permitting words to serve as the basis for attaching liability for invasion of privacy into a subjectively-defined and vague mourning privacy bubble is utterly out of bounds under the *First Amendment*, especially when the only intrusion claimed are not-proven-false words on public issues in public places. The right claimed in *Schuyler* was to not have the memory of the deceased degraded. Entertaining a claim of degraded memory on not-proven-false words would run afoul of the *Falwell* rule, that the *First Amendment* disallows tort liability attaching without falsity and fault on a subjective claim of outrage. That should be true whether the words were about the living or the dead. Plus not a single exhibit, witness, or fact supports the slightest hint of degradation to the memory of Matthew Snyder. WBC is roundly despised and vilified, and not a single soul has indicated having a lower regard for Petitioner or his son by virtue of WBC's words – indeed the *opposite* is true (the more attention this case has gotten, the more heroism has been attributed to Matthew Snyder and his father). The rule of law proposed would choke and stifle important free speech rights, and is unwarranted on the facts of this case. See Volokh, "Freedom of Speech and the Intentional Infliction of Emotional Distress Tort," forthcoming *Cardozo L. Rev. de * novo*,

Summer 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628319.

The request here is to carve out this speech-exception for words, premised upon a claim that funerals are private. Again, funerals are not historically or by nature private events, but are most commonly held in the presence of and for the public.²⁰ The public viewing of the dead has become “a desired moment for many Americans over the course of the nineteenth century,”²¹ though it was believed by many to be a pagan practice.²² With time, objection faded,

²⁰ Ashenburg, Katherine, *The Mourner's Dance: What we do When People Die*, North Point Press: New York, 2002, at 54-57. And see, “Early Funeral Customs,” *DeathCare(.com)*, available at <http://www.deathcare.com/2009/early-funeral-customs.html>.

²¹ See Laderman, Gary, *Rest in Peace: A Cultural History of Death and the Funeral Home in Twentieth-Century America*, Oxford University Press: New York, 2003, at 514. See “Funeral Industry,” *Encyclopedia of Death and Dying*, available at <http://www.deathreference.com/En-Gh/Funeral-Industry.html>, at p. 3

²² There are examples in the Scriptures of the dead being “subjected to anti-ideal treatments,” which form WBC’s belief against worshipping the dead. See Stavrakopoulou, Francesca, “Gog’s Grave and the Use and Abuse of Corpses in Ezekiel 39:11-20,” *Journal of Biblical Literature* 129, No. 1 (2010), pp. 67(17), at p. 69 (“To this list of illustrations of the ‘anti-ideal’ in Ezekiel might also be added 24:16-24 in which the prophet obeys the divine command not to perform mourning rituals in response to the death of his wife . . . ”). Also see Leviticus 10:1-6 (When Aaron’s sons, Nadab and Abihu, were immediately struck dead for offering strange fire, God said to pick them up by their coats and carry them out of the camp. “Uncover not your heads, neither rend your clothes; lest ye die,” v. 6.) And Numbers 6

(Continued on following page)

and public funerals became a mainstay, with increasing memorialization online today.²³

We are a nation of public mourners, witnessed by the reaction to the deaths of Senator Robert Byrd (where President Obama spoke at his funeral), Michael Jackson, Heath Ledger, Princess Diana, Elvis Presley, Pope John Paul II, Presidents Ronald Reagan, John F. Kennedy and Abraham Lincoln, as a few examples. Spontaneous shrines are commonplace,²⁴ and public memorials threaten to take over public protest space on the Washington Mall.²⁵

Soldiers' deaths prompt intense public reaction. "While national publications and Web sites continue to report the rising death toll of U.S. soldiers in Iraq as mere numbers . . . , it's a different story for small-town newspapers when the bodies come home for the funerals and memorials that follow. Here, the task of reporting details that go well beyond name, rank, and cause of death becomes a crucial responsibility. 'If

(Nazarite forbidden to touch dead bodies). "Jesus said . . . Let the dead bury their dead . . . ," Luke 9:60.

²³ DeVries, Brian and Rutherford, Judy, "Memorializing Loved Ones on the World Wide Web," *OMEGA: Journal of Death and Dying*, Vol. 49, No. 1, 2004, p. 5(21).

²⁴ James, Caryn, "Good Grief: The Appeal of Public Sorrow," *The New York Times*, June 10, 2004, available at <http://www.nytimes.com/2004/06/10/arts/critic-s-notebook-good-grief-the-appeal-of-public-sorrow.html>.

²⁵ Benton-Short, Lisa, "Politics, Public Space, and Memorials: The Brawl on the Mall," *Urban Geography*, Vol. 27, No. 4, May 16 – June 30, 2006.

there's a [local] fatality in Iraq for any reason, it's usually front-page news,'” Moore, Sonya, “Bringing the war home,” *Editor & Publisher*, Vol. 137, No. 3, March 2004, p. 5(2).

Thousands of stories have been written about soldiers' funerals; and they have become high profile events, with thousands inside and out with flags and signs, lining streets, highways, sidewalks, and front-door steps, everyone commenting on the soldier, his death, the funeral, and the war.²⁶ Media coverage of soldiers' funerals at Arlington National Cemetery has also been in the news; nearly two-thirds of the families opt for media coverage.²⁷

Petitioner's son's funeral was a public event. He was able to go to and leave the funeral without any slightest disruption or interference. He was not captive, to the event or to the WBC. WBC was out of

²⁶ As a few recent example see DiNapoli, Jessica, “Hundreds mourn Shelter Island fallen soldier,” *27east*, June 15, 2010, available at http://www.27east.com/story_detail.cfm?id=283611&town=Shelter%20Island&n=Hundreds%20mourn%20Shelter%20Island%20fallen%20soldier; Kusmer, Ken, “Soldier was ‘free spirit,’ champion wrestler,” *The Associated Press*, October 27, 2009, available at <http://militarytimes.com/valor/army-sgt-dale-r-griffin/4350697/>; Barber, Rex, “Laid to rest: Airman White honored by military in ceremony at VA,” *Johnson City Press*, June 25, 2010, available at <http://www.johnsoncitypress.com/News/article.php?ID=78056>.

²⁷ See McMichael, William H., “Media access to funerals allegedly discouraged,” *ArmyTimes*, August 11, 2008, available at http://www.armytimes.com/news/2008/08/mlitary_arlington-media_coverage_080408p/.

sight and sound; maintained a very reasonable distance; acted peacefully and engaged in no disruption or intrusion. Petitioner is not entitled to assert a privacy claim, because there was no intrusion. This is the wrong case to decide whether there is a privacy interest in a funeral.

IV. PETITIONER'S INVASION OF PRIVACY CLAIM MUST FAIL BECAUSE WESTBORO BAPTIST CHURCH DID NOT INTERFERE WITH OR DISRUPT THE PUBLIC FUNERAL OF HIS SON IN ANY MANNER, SO IT IS NOT NECESSARY TO WEIGH WESTBORO BAPTIST CHURCH'S RIGHT TO ENGAGE IN RELIGIOUS SPEECH AGAINST ANY RIGHT THE COURT MIGHT EVER FIND TO AN UNDISRUPTED PUBLIC FUNERAL.

Petitioner presents the Court with false alternatives, saying his right to conduct his son's funeral should outweigh WBC's right to engage in religious speech. Whatever right Petitioner had to assemble and engage in religious rituals was fully protected and completely unfettered. WBC, a non-government entity, cannot interfere with Petitioner's constitutional rights. The Constitution is a document that binds the government. Perhaps if the government had declined to ensure the peace was kept on March 10, 2006, Petitioner would have a complaint against the government for interfering with his right to assemble and engage in religious ritual. (In fact the police had

a modest presence, preventing any threat to the peace. Petitioner has complained about that fact throughout this case.)

The constitutional rights of these parties peacefully co-existed on March 10, 2006, and all days before and after. WBC did not attempt in any slightest measure to stop Petitioner from assembling or engaging in religious worship or ritual. There was no intrusion of any kind into the service or church by WBC. Well beyond what any federal or state statute, in Maryland or otherwise required, WBC regulated its time, place and manner of picketing, reasonably, and ensured it did not disrupt any planned activity, ingress/egress, or tranquility.

Cases like *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 132 L.Ed.2d 487 (1995), establishing that a speaker has a right to be free from state interference and autonomy to choose what not to say, might translate in our scenario to a requirement that law enforcement stop someone from going into the church in a disruptive manner, and that seems reasonable. What is *not* reasonable is to suggest that Petitioner's right to go into the church building and participate in a religious ritual somehow clashes with or must be balanced against WBC's right to be out on a public easement over a thousand feet away engaging in religious speech on public issues. See *Coalition v. Kempthorne*, 537 F.Supp.2d 183, 204-205 (D.C.D.C. 2008) (court rejected government's argument that groups could be barred from demonstrating on Pennsylvania Avenue

during Inauguration to protect rights of groups or individuals obtaining permits from intrusion or interference, because Inauguration is a public event, and groups wanted to protest on public sidewalks, not physically intrude into another's event to interject their own convictions or beliefs).



CONCLUSION

This verdict cannot be reinstated without upsetting the Constitution and existing jurisprudence dramatically. Petitioner and the Amicus Brief for the Senators propose a rule of law that treats speech subjectively characterized as “outrageous,” *worse* than false speech. That is the *opposite* of what this Court's cases instruct. Constitutional protection is given to words when they are claimed to be false. Here, the effort to prove falsity failed. These words deserve *more* protection than words proven false.

The content, form and context show that WBC's speech was public-issue speech, highly disliked, and needing protection. A massive public discussion is underway in this nation – about the wars; the soldiers; their deaths; and their funerals. *Everyone* is using the occasion of the soldiers' deaths to comment, about the policies of this nation. WBC joined that discussion, on the same sidewalks where others were standing engaged in the discussion; and in the same airwaves that are thick with the discussion. They offered a viewpoint that everyone hates, with a pure

motive of warning people of the consequence of sin (now and hereafter), using the same public platform, and the only basis for the verdict based on these words was angry disagreement with viewpoint.

Funerals are not private in any culture. Least of all are soldiers' funerals private – they are the essence of public in every feature. Any family that wants to preserve the privacy of the funeral, can declare it private, and decline to talk to the media, without any limit on their ability to mourn and have a funeral. There is no sound legal basis for outlawing (by penalty) words about dead soldiers and their funerals and families, in the context of the public discussion about war and dying.

No harm occurred to Petitioner that the law should compensate. The death of his son was tragic and sorrowful, and WBC's goal is to prevent more of them. Shutting up words about funerals or in connection with funerals will not take away that sorrow. It will, however, demonstrate to the world that this Republic can survive crush video, pornography, racial speech, burning flags, and vulgar speech of every kind – but cannot survive words about the sins of this nation.

WBC stayed well within the bounds of the law, self-regulating while engaging in public speech not proven false. WBC did not make anyone captive to their words; and public funerals for dying soldiers do not create captive audiences. The fact the speech was hyperbolic, figurative, and hysterical is why it should

be protected. Its content, form and context reflect it is opinion about current events and the essence of the kind of robust speech on critical public issues for which the *First Amendment* was written. One writer has suggested there is enough support against WBC's speech that a funeral picketing amendment to the Constitution might be in reach. McAllister, *supra*, at 579. The Senators and Attorneys General joining by amicus briefs supports this suggestion. If the nation wants to thusly amend the Constitution, so be it; but the *current* Constitution does not allow this verdict to stand. The Fourth Circuit's decision to set aside the verdict should be affirmed.

Respectfully submitted,

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