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No. 09-751

In The
Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

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

Respondents.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g., Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1999); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. FEC*, 540 U.S. 93 (2003). It has also appeared before this Court resisting specious free speech claims. *E.g.*, *City of Pleasant Grove v. Summum*, 129 S. Ct. 1125 (2009).

This case is of special interest to the ACLJ both because it has potentially grave importance for the free speech jurisprudence governing classic First Amendment protest activities, and because this case requires considerable winnowing of First Amendment wheat from erroneous chaff.

The Reverend Fred Phelps and his followers present a sorry caricature of Christianity. Their gospel of hate and their deliberately cruel and exploitative tactics merit universal condemnation. Accordingly, the Phelpses' antics provide an understandable temptation to shave First Amendment doctrines in the interest of

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[1]The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

punishing extraordinarily distasteful speakers.

On the other hand, the Fourth Circuit, in its analysis of this case, pursued an erroneous line of reasoning, thereby in its own way damaging the integrity of First Amendment law. Petitioner Snyder, meanwhile, serves up his own platter of misguided legal arguments.

The ACLJ therefore files this brief in support of neither party in an effort to guide this Court around the constitutional potholes to a doctrinally sound decision.

STATEMENT OF THE CASE

Background

Marine Lance Corporal Matthew Snyder died while serving in Iraq. *Snyder v. Phelps,* 533 F. Supp. 2d 567, 571 (D. Md. 2008).

Cpl. Snyder's funeral was held in Westminster, Maryland. *Id.* There were supportive demonstrations from children attending a neighboring Catholic school and also from a group called the Patriot Guard Riders, a collection of motorcycle riders formed to outshine the protesters from the Westboro Baptist Church (WBC). Opp. at 6-7.

The WBC protesters, including Rev. Fred Phelps and two of his daughters, Shirley Phelps-Roper and Rebekah Phelps-Davis, had learned of Cpl. Snyder's funeral and had issued a press release announcing their intent to protest. 533 F. Supp. 2d at 571. At the protest, the WBC group carried various inflammatory signs attacking the U.S., the Marines, homosexuals, and the Catholic Church. *Id.* at 572.

Petitioner Albert Snyder, Cpl. Snyder's father,

attended the funeral with his daughters. Opp. at 7. The WBC protesters were hundreds of feet away. *Id.* at 7, 9; Pet'r Br. at 4. Albert Snyder apparently did not see them at all (except perhaps the tops of their signs), 533 F. Supp. 2d at 572, 584, and the protesters, after having been there some 30 minutes, left before the funeral began, Opp. at 6. Snyder did see the protesters on TV later that day and became quite upset. 533 F. Supp. 2d at 572, 584.

The WBC thereafter posted on its website an "epic" naming Cpl. Snyder that consisted, *inter alia*, of an anti-Catholic and anti-divorce rant. *Snyder v. Phelps*, 580 F.3d 206, 225 (4th Cir. 2009); Pet'r Br. at 7-8. (Snyder is Catholic and is divorced from Cpl. Snyder's mother.) Snyder came across the "epic" when Googling his son, read the epic, and became further outraged. 533 F. Supp. 2d at 572.

District Court Proceedings

Snyder sued WBC, Phelps, and the two daughters who had joined Phelps at the funeral protest. *Id.* at 571-72. He brought five state-law claims in federal court under diversity jurisdiction: defamation, publicity given to private life, intentional infliction of emotional distress (IIED), intrusion upon seclusion, and civil conspiracy. *Id.* at 572. The district court dismissed the defamation and publicity claims on summary judgment, *id.*, and Snyder has not appealed that ruling, 580 F.3d at 213 n.3. The remaining claims -- IIED, intrusion, and conspiracy -- went to the jury. 533 F. Supp. 2d at 573. The district court instructed the jury, over the Phelpses' objection, as follows:

> You must balance the Defendants' expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. . . . [Y]ou . . . must determine whether the Defendants' actions were directed specifically at the Snyder family. If you do so determine, you must then determine whether those actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.

580 F.3d at 215 (quoting jury instruction).

The district court also refused to limit the jury's consideration to certain specific signs. *Id.* at 215 n.5.

The jury returned a verdict for plaintiffs on all three remaining tort claims, awarding $2.9 million in compensatory damages and $8 million in punitive damages. 533 F. Supp. 2d at 573. The district court remitted the punitive damages to $2.1 million, yielding a total award of $5 million, but otherwise declined to disturb the verdict. *Id.* at 597.

Decision on Appeal

The Fourth Circuit reversed.

As an initial matter, the court held that the district court erred by allowing the jury to decide the legal issue of the scope of the First Amendment (in the instruction quoted above). 580 F.3d at 221. That meant the Phelpses were at least entitled to a new trial. *Id.*

Next, the court held that a new trial was unnecessary because the speech in question was protected under the First Amendment. The court held that the signs and "epic" all involved a matter of public concern and consisted of rhetorical hyperbole, not statements with provably false factual connotations. *Id*. at 222-26.

Two judges formed the majority. Judge Shedd concurred in the result, stating that he would reverse on the grounds that Snyder failed to provide sufficient evidence to satisfy the elements of the relevant torts. *Id*. at 227.

Snyder's Petition for Certiorari

Snyder petitioned for certiorari, raising the following three questions:

> 1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?
> 2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?
> 3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

Pet. at i.

This Court granted review.

Petitioner has now dramatically rewritten the Questions Presented. Pet'r Br. at i. However, under this Court's Rules, petitioner "may not raise additional questions or change the substance of the questions

0already presented," S. Ct. R. 24.1(a). Accordingly, amicus addresses the questions as presented in the petition.

SUMMARY OF ARGUMENT

The Fourth Circuit erred by imposing a constitutional requirement that the speech at issue here be provably false in order to be subject to tort liability. Such a requirement makes sense in defamation cases, or in cases -- like *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) -- brought over false assertions. But there is no more warrant for constitutionally imposing such a requirement as a general matter in intentional infliction or intrusion suits than there would be to do so with other categories of unprotected speech, such as threats or fighting words. The decision below must therefore be vacated and the case remanded.

The Fourth Circuit was correct, however, to overturn the judgment of the district court on the basis of unconstitutionally faulty jury instructions. The district court left it to the jury to decide the scope of the First Amendment in this case. But the reach of the First Amendment is a matter of law (or mixed law and fact), not pure fact. At a minimum, then, this case has to be retried with proper limiting instructions.

This Court should reject petitioner Snyder's proposed constitutional analysis. His focus on the applicability of *Falwell* (Question 1)[2] is largely beside

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[2]The references here are to the three Questions Presented in the Petition for Certiorari, not to the four, expanded, Questions set forth in the Brief for Petitioners. *See* S. Ct. R. 24.1(a).

the point. The flaw in the decision below was its categorical importation of a *falsity* requirement from defamation law, not a failure properly to calibrate that misplaced requirement. Snyder's effort to pit the Phelpses' constitutional rights against his own constitutional rights (Question 2) founders upon the absence of state action. Private demonstrators like the Phelpses by definition cannot infringe Snyder's *constitutional* rights to free exercise or assembly. And the First Amendment precludes Snyder's invitation to expand the "captive audience" doctrine (Question 3) to swallow up orderly protests in public fora.

The tort of intrusion upon seclusion cannot proceed in this case consistent with the right to free speech. Any "intrusion" here is no more than the mental effect of confrontational messages voiced in a public place.

In theory, a tort of intentional infliction of emotional distress might be predicated upon personally directed speech consisting of sheer, malicious rejoicing in the death or suffering of a loved one. The jury here, however, did not proceed under so limited a theory of liability; hence, the jury verdict and judgment in this case cannot stand.

This Court should vacate the decision below and remand with directions to vacate the district court judgment and send the case back for retrial with proper limiting instructions.

ARGUMENT

The decision below recognized that

> judges defending the Constitution must sometimes share their foxhole with scoundrels of every sort, but to abandon the post because of the poor

> company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.

580 F.3d at 226 (internal quotation and editing marks and citation omitted). The main danger with this case is that ugly facts may invite bad law. And in fact, both the decision below, and the petition for certiorari and opening brief challenging that decision, reflect faulty constitutional analysis.

I. THE FOURTH CIRCUIT ERRED BY IMPOSING A FALSITY REQUIREMENT WHERE FALSITY IS NOT AN ELEMENT OF THE RELEVANT TORT OR THE CLAIM PRESENTED.

The decision below contained a significant point of doctrinal confusion. The court of appeals kept returning to the need to prove falsity and the concomitant need to distinguish between false accusations and overheated rhetoric. 580 F.3d at 218-26. But in this case the defamation claim was eliminated on summary judgment, and Snyder did not appeal that ruling. *Id.* at 213 & n.3. Falsity is not an element of any claim remaining on appeal. Consequently, the Fourth Circuit's analysis was largely off point. Falsity is not an element of the torts of intentional infliction of emotional distress (IIED) or intrusion upon seclusion. Nor should it be. One can sometimes inflict more emotional distress with the truth than with falsity -- for example, by rejoicing obnoxiously and intrusively over the death or grievous mistreatment of someone's loved one. The tort of

intrusion upon privacy likewise has nothing to do with truth or falsity.

This is not a novel concept under the First Amendment. A threat, for example, need not be false to fall into the category of unprotected speech. (If anything, a *sincere* threat is worse.) Nor need the contents of a taunt that rises to the level of "fighting words" be false to be unprotected. (Again, the *truth* may actually hurt more -- and be more likely to prompt a fight.) Likewise, neither an intentional infliction of distress nor an intrusion upon seclusion necessarily must entail an element of provable falsity to be constitutionally unprotected.

The Fourth Circuit presumably went astray because it misread this Court's decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In *Falwell*, this Court did indeed require a showing of falsity, under the "actual malice" standard, for an IIED claim to pass constitutional muster. *Id.* at 56. But in *Falwell*, the tortious injury asserted flowed precisely from the falsity of the speech in question. Rev. Falwell's claim was not that Hustler had revealed some damaging secret, but rather that it had *told an extremely distressing lie* about Falwell. Naturally, then, falsity was a central factor, even if not, strictly speaking, an element of the tort. Accordingly, it made sense for the Court to require a provably false statement for "publications such as this," *id.*, *viz.*, "the publication of a caricature," *id.* at 57.

The facts of *Falwell*, however, do not exhaust the universe of intentional infliction claims. If anything, the exploitation of *truth* to inflict emotional harm -- rejoicing maliciously in the death or suffering of another, for example -- can hurt far worse than some

vile but ultimately untrue accusation. In such cases it makes no sense to require a provably false statement of facts. To do so would in effect constitutionally abolish the tort of intentional infliction of emotional distress by means of speech (or at least render it wholly redundant of the tort of defamation).

The Fourth Circuit therefore asked the wrong question when it asked if there were provably false statements of fact. That portion of the decision below must be vacated.

II. THE FOURTH CIRCUIT CORRECTLY REQUIRED, AT A MINIMUM, A RETRIAL.

Importantly, the court below was plainly correct in overturning the district court's judgment on the basis of faulty jury instructions. With its directions to the jury, *supra* p. 4, the district court authorized *the jury* to determine the meaning of the First Amendment and to draw the line between protected and unprotected speech. The scope of the First Amendment, however, is a question of law (or mixed law and fact), not pure fact. *Hurley v. Irish-American GLIB*, 515 U.S. 557, 567-68 (1995). The jury should not have been left to its own devices. Accordingly, the liability and damage verdicts must at a minimum be vacated, and the matter sent back for retrial with proper limiting instructions.[3]

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[3]The district court also should have instructed the jury as to which particular communications it could consider as possibly tortious. The court should have excluded from consideration particular statements of the protesters that constitute protected speech as a matter of law. Otherwise, there would be an unacceptable risk that the jury might predicate liability and

The remaining question, then, as the Fourth Circuit correctly observed, is whether even a retrial is precluded as a matter of law. The answer here may be "no," but not for the reasons petitioner offers.

III. THE CONSTITUTIONAL ANALYSIS WHICH PETITIONER PROPOSES IS DEEPLY FLAWED.

While the Fourth Circuit went astray in its constitutional analysis, petitioner Snyder commits his own set of constitutional errors. On each of the questions Snyder proposes, he gets it wrong.

A. Question 1: *Falwell*

Snyder's *petition for certiorari* entirely misses the point about *Falwell*. He does not take issue with the defamation line of cases applying as such, but rather argues that *Falwell* supplies the wrong standard of proof in private-on-private lawsuits. Pet. at 5-9. The fundamental flaw with Snyder's position is that the Fourth Circuit did not rely upon the *standard of proof* but rather on the *absence of provably factually false assertions*. So Snyder's Question 1, while academically interesting, is not apposite to this case. Moreover, since falsity is not an element of Snyder's remaining tort claims, the *Falwell* question is doubly irrelevant. *Supra* § I. This court should therefore dismiss the writ, as improvidently granted, as to Question 1.

Snyder's *merits brief*, by contrast, does show an

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damages upon a particularly offensive, but constitutionally protected, message.

understanding of the Fourth Circuit's misstep in transplanting a falsity requirement from *Falwell* to this case. Pet'r Br. at 41-45. To the extent this Court permits Snyder to amend or enlarge Question 1 to encompass this issue, then, the judgment below should be vacated for the reasons set forth above, *supra* § I.

B. Question 2: Rights trumping rights

Snyder's Question 2 reflects a basic misunderstanding of the concept of state action.

A civil damages award against the Phelpses represents state action arguably infringing the First Amendment. But the Phelpses' protest itself represents private action that by definition cannot infringe any constitutional right to freedom of religion or assembly. The Phelpses, as private actors, simply cannot violate any of Snyder's constitutional rights under the First Amendment. Thus, while consideration of Snyder's competing *interests* in emotional tranquility and privacy might shape the limits of the Phelpses' constitutional free speech rights, it is doctrinally incorrect to say (*e.g.*, Pet'r Br. at 55-56) that the Phelpses' actions infringed upon Snyder's constitutional rights. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) (noting requirement of state action for virtually all constitutional violations). For this reason, Snyder cannot (and did not) sue the Phelpses under the Free Exercise Clause or the Freedom of Assembly Clause, and likewise the Phelpses cannot sue Snyder (also a private actor) under the Free Speech Clause. The only relevant constitutional question is what limits apply to state action like the imposition of civil liability.

(Amicus addresses this question below. *Infra* § IV.)

Snyder's Question 2 also poses a severe threat to free speech. He invites the courts to take on the authority to "balance" free speech against the audience's desires. If speech can be balanced away to prevent offense to one's observance of religious rituals, then the anti-Mormon protesters (whether Christian or homosexual) can have their rights "balanced" away. Moreover, pro-lifers can have their rights "balanced" away to prevent offense to one's pursuit of "reproductive rights," citizens on either side of the same-sex marriage debate can have their liberty "balanced" away to avoid giving offense to their opponents, and members of controversial student clubs can have their equal access rights "balanced" away to avoid offending the sensitivities of objecting adults or fellow students.

C. Question 3: Captive audience

Snyder's Question 3 is perhaps the most disturbing, as he seeks to expand the concept of a "captive audience" to justify crushing civil liability upon protesters who were essentially out of sight, on public rights of way, and demonstrating in compliance with police directives. The threat such a rule poses to "unwanted" demonstrators is obvious. Applying "captive audience" ideas in this case is especially unwarranted, where the "exposure" in question came via voluntary TV watching and Internet searching. The Court should reject Snyder's argument out of hand.

In particular, this Court should place no reliance whatsoever upon the misguided and unfortunate decision in *Hill v. Colorado*, 530 U.S. 703 (2000), a

decision that was wrong when decided and will remain destructive of the First Amendment until it is overruled. *See* Amicus Brief of the American Center for Law and Justice, *McCullen v. Coakley*, No. 09-592 (U.S. Jan. 4, 2010) (cert. stage); Amicus Brief of Constitutional Law Professors, *id*. To extend the "captive audience" doctrine to restrict or penalize demonstrations in a public forum outside an enclosed building used for an assembly -- religious or otherwise -- would be to hold the First Amendment hostage to audience sensibilities.

IV. RESPECT FOR A ROBUST FIRST AMENDMENT RIGHT TO FREE SPEECH REQUIRES FIRM LIMITS ON SPEECH-BASED TORTS.

There are two state law torts at issue here: intentional infliction of emotional distress (IIED) and intrusion upon seclusion. (The civil conspiracy tort has no independent force, but rather piggybacks on these two.) The intrusion tort cannot be supported in this case consistent with the First Amendment. The IIED tort may be viable here but must at a minimum be retried subject to proper limiting instructions.

A. The Intrusion Tort Is Unconstitutional As Applied to Otherwise Lawful Speech In a Traditional Public Forum.

Free speech receives maximum protection when exercised peacefully in a traditional public forum. *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460

U.S. 37, 45 (1983). The idea that such speech could be subjected to potentially limitless tort liability because it disturbs the atmosphere in an adjoining location is wholly incompatible with constitutional protection for that speech. Indeed, the very point of public demonstrations is often to unsettle the mood in adjacent sites. Labor pickets rattle the operations of the business inside. *Thornhill v. Alabama,* 310 U.S. 88 (1940). Embassy protests disturb the peace of mind of embassy staff and officials. *Boos v. Barry,* 485 U.S. 312 (1988). Civil rights rallies upset the occupants of the neighboring government offices, *Edwards v. South Carolina*, 372 U.S. 229 (1963), businesses, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and homes, *Gregory v. City of Chicago*, 394 U.S. 111 (1969), targeted by the demonstrators. Such protests may well "rain *on* the parades" of others, but they do not elbow their way disruptively *into* such events. The "intrusion," in other words, comes exclusively from the confrontational *message*. This is entirely different from, say, invading a church service, crashing a party, disrupting a family cook-out, etc.

Here, Snyder bases his "intrusion on seclusion tort" exclusively upon an orderly demonstration held on a public street.[4] While this particular demonstration embodied an extreme lack of charity, it

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[4]Snyder implicitly abandons any reliance upon the Phelpses' website posting -- the "epic" -- as an intrusion. *See* Pet. Br. at 20, 46-55 (relying exclusively upon the "funeral picketing" as the basis for the tort). He does so wisely: to regard a web page on the Internet as an "intrusion upon seclusion" would be not just ludicrous but unimaginably chilling to Internet free speech. (This is not, by contrast, a case of unsolicited emails or pop-ups being forced upon a person or group.)

did not physically invade (or even disrupt with loud noises or intrusive lights) the funeral service itself. That service, after all, was held inside a building. The impact of the protest upon that event was no more -- and, under the circumstances, probably less -- than the impact upon countless other events subjected to protests. Hence, the First Amendment precludes an "intrusion upon seclusion" claim here.

It bears mention that, at the same time the Phelpses were demonstrating, the Patriot Guard Riders and local school children were engaged in demonstrations supportive of Snyder. The key difference was the viewpoint and tastefulness of the respective groups. Thus, had police arrested or obstructed one and not the other, it would have been a blatantly viewpoint based restriction on speech. Selectively to treat one group's message as an "intrusion upon seclusion," then, would be to import this same viewpoint bias through a side door.

B. An Intentional Infliction Claim Based Upon Speech Cannot Proceed Absent a Showing of Intentional *Maliciousness,* Not Just Intentional *Disturbance.*

Free speech is often designed precisely to distress the audience. As this Court has long recognized,

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or *even stirs people to anger*. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and

> have *profound unsettling effects* as it presses for acceptance of an idea.

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (emphasis added). Indeed, the battle for our national independence and the struggle for civil rights likely would have suffered greatly had not citizens been able to provoke, in their fellow Americans, profound discontent with the status quo. In short, there is a crucial place under the First Amendment for speech that "inflicts emotional distress."

The Phelpses' hateful message is "at best a distant cousin" of the free speech described above, "and a rather poor relation at that." *Falwell*, 485 U.S. at 55. But unless all aggressive advocacy is to be left exposed as a target for tort suits, a "principled standard," *id.*, is necessary to distinguish protected (albeit unpleasant) provocation from unprotected torts.

It is thus constitutionally insufficient to assert that speech is designed to distress the listener. A physician may need to distress a patient to get that patient to begin a serious weight loss program, or to quit smoking, or to take the prescribed medications. A civil rights activist might need to distress a black pastor to get him and his church involved in a local issue. A concerned parent might need to distress other parents to get them to stand up against some threat to their collective children. In each such case, the speaker could be alleged to have intentionally inflicted emotional distress; yet all such speech is plainly protected under the First Amendment.

Nor is it constitutionally sufficient that the audience is a "private figure" as opposed to a "public figure." As the preceding illustrations show, the

"private" status of the audience does not negate the value of the free speech.

Nor is it an adequate protection to require the tortious conduct to be "outrageous."

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. 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.

Falwell, 485 U.S. at 55.

At a minimum, then, for the IIED tort to be consistent with First Amendment protection for free speech, it must -- in addition to satisfying the required state law elements -- be reserved for instances of gratuitous maliciousness.

The requirement of *gratuitousness* plays an important role. Short of illegal harassment, the First Amendment protects speech, even vitriolic speech, designed to shame or browbeat people into legitimate action. *NAACP v. Claiborne Hardware*, 458 U.S. at 910-11, 926. (By contrast, speech designed to induce *unlawful* action, such as intentionally or recklessly harrying a teenager into committing suicide, would fall outside the scope of the First Amendment.)

The requirement of *maliciousness* plays an important, related role. Where the speech in question is delivered, not for the purpose of inducing legitimate action, but rather for the pure satisfaction of inflicting

pain, the claim of First Amendment protection approaches its nadir. "Congratulations on the rape of your daughter," "Hooray for your diagnosis of AIDS," "I'm so glad your son died in the 9/11 attacks" -- such expressions of *Schadenfreude*, when intentionally, personally directed to afflicted victims or their immediate family members, would seem to have little or no claim to constitutional protection.[5]

It may well be that under a properly limited theory of liability, the Phelpses could be held liable for their celebratory picketing of a funeral. The district court, however, gave no such limiting instruction, leaving it instead to the jury to draw its own constitutional lines. The verdict therefore cannot stand in its present form.

The decision below should be vacated and the case remanded for retrial with proper instructions confining the jury to the determination of facts, not law, and limiting any potential liability to matters not protected by the First Amendment.

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[5]Amicus does not address the question whether even this requirement would be inadequate where the plaintiff is a "public figure." *Cf. Falwell*, 485 U.S. at 56.

CONCLUSION

This Court should vacate the decision of the Fourth Circuit and remand for further proceedings.

Respectfully submitted,

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