

No. 09-751

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IN THE  
**Supreme Court of the United States**

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ALBERT SNYDER,

*Petitioner,*

*v.*

FRED W. PHELPS, SR., *et al.*,

*Respondents.*

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

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**BRIEF OF AMICUS CURIAE THE  
ANTI-DEFAMATION LEAGUE IN SUPPORT  
OF NEITHER PARTY**

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## INTEREST OF *AMICUS CURIAE*

The Anti-Defamation League (“ADL”) submits this brief as *amicus curiae* in support of neither petitioner nor respondents.<sup>1</sup> ADL seeks the Court’s indulgence as it offers a more extensive description of its interest in this case than is perhaps customary. ADL does so because an understanding of its unique combination of interests adds context to the substantive arguments that ADL advances here. This case implicates freedom of expression, religious liberty, and the state interest in providing redress to the victims of hate speech, all of which are matters of deep and longstanding concern to ADL.

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races. Its charter holds that it was founded “to stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike.” ADL fights anti-Semitism and all forms of hate and bigotry, defends democratic ideals, and protects the civil rights of all persons.

As a civil rights advocacy organization, ADL is committed to the preservation of our democratic freedoms and the constitutional rights that gird

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<sup>1</sup> ADL gave at least ten days’ notice of intention to file this brief to counsel of record for the parties. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than ADL or its counsel made a monetary contribution intended to fund its preparation or submission.

them, including the rights of freedom of thought and expression. ADL recognizes that these First Amendment protections extend to ideas that are intellectually indefensible and to speech that is morally obnoxious—such as the ideas that the respondents espouse, and the speech with which they express those ideas. Nevertheless, time and again ADL has advocated, in this Court and elsewhere, for robust protection for freedom of speech. ADL acknowledges the wisdom of Justice Holmes’s observation that “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate.” *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

At the same time, ADL recognizes that words can inflict pain and suffering upon the innocent and can even threaten the physical safety of targeted persons and groups. As ADL National Director Abraham Foxman observed earlier this year, “hate speech cannot be ignored. Words of hate, and the world’s disregard of that hate, paved the road to Auschwitz.”<sup>2</sup> ADL has a deep, indeed foundational, commitment to the idea that the world must never forget the monumental tragedies that were set in motion by hate speech, slurs, and propaganda.

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<sup>2</sup> *Thoughts on International Holocaust Day*, January 26, 2010, <http://cgis.jpost.com/Blogs/foxman/>.

ADL therefore has a long history of monitoring, exposing, and fighting against all forms of hate speech, as well as hate crimes. What is known historically as ADL's "First Case" was the lynching in 1915 of Leo Frank, a Jew, after his unjust conviction for murder and the commutation of his death sentence to life imprisonment, a lynching that was carried out by a mob spurred on by hate speech and rampant anti-Semitism. Today, ADL's struggle against hate speech extends to the new and emerging forms such speech has taken, such as extremist websites and cyber-bullying.<sup>3</sup> In this connection, ADL notes that it has for many years monitored and reported upon the activities of respondents and has been unflinching in its condemnation of their speech and conduct as anti-Semitic, as bigoted, and as homophobic.<sup>4</sup>

Finally, ADL is particularly concerned with protecting individuals from persecution or oppression because of their faith. ADL has therefore long championed religious liberty and opposed government entanglement in religious issues. For

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<sup>3</sup> This history includes the filing of *amicus curiae* briefs before this Court in cases involving hate speech and hate crimes, such as *Virginia v. Black*, 538 U.S. 343 (2003), *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>4</sup> See ADL's encyclopedic report *Extremism in America*, [http://www.adl.Org/learn/ext\\_us/](http://www.adl.Org/learn/ext_us/) (last visited April 14, 2010)(profiling the Westboro Baptist Church and condemning it as a "virulently homophobic, anti-Semitic hate group.")

decades, ADL has defended the principle, as expounded by this Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), that “no official, high or petty, can prescribe what shall be orthodox” in matters of religion and conscience.<sup>5</sup>

ADL’s distinctive history and mission endow it with a keen appreciation for the tensions that can arise between and among the cherished principles of free speech and religious liberty. ADL has a profound interest in ensuring that conflicts between these important rights and interests are appropriately mediated. And ADL therefore has a concomitant interest in ensuring that this Court does not embark upon a project of this delicacy and sensitivity unless the case before it provides a necessary and proper occasion for doing so. While welcoming this Court’s guidance as to how such conflicting interests should be resolved, and while deeply sympathetic to petitioner’s personal suffering, ADL submits this *amicus curiae* brief in order to urge this Court to recognize that this is *not* such a case.

#### SUMMARY OF ARGUMENT

The petition for a writ of certiorari poses three broadly framed questions for this Court’s review.

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<sup>5</sup> ADL has filed *amicus curiae* briefs with the Court in cases raising these issues, dating back to such seminal cases as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962).



Careful analysis reveals, however, that the undisputed facts of this case and the decision of the Court of Appeals do not actually raise the certified questions or require this Court to address them. Indeed, it is possible that, on closer examination, this Court may conclude that the writ was improvidently granted. But, however it affects the ultimate disposition of this case, the central point is that the facts at issue and the decision below offer an extremely poor vehicle for rendering the type of expansive ruling the petition for a writ of certiorari and the certified questions appear to invite.

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## ARGUMENT

THIS CASE DOES NOT PRESENT SQUARELY  
THE QUESTIONS SET OUT IN THE PETITION  
FOR WRIT OF CERTIORARI AND THIS  
CASE IS A POOR VEHICLE FOR ADDRESSING  
THOSE QUESTIONS

## A. The First Certified Question.

The first certified question is whether this Court's decision in "*Hustler Magazine, Inc. v. Falwell* appl[ies] to a private person versus another private person concerning a private matter." There are several fundamental flaws with this framing of the issue before the Court.

As an initial matter, it is simply inaccurate to characterize the communications here as pertaining to "a private matter." Respondents' communications were directed toward an issue of extraordinary public interest: the death of an American marine in the service of his country. The public interest in this issue is not changed by the fact that very few people—indeed, perhaps no one beyond the members of the Phelps family themselves—would agree with respondents' opinions on the subject.

Furthermore, the first certified question rests upon an erroneous portrayal of the decision below. In fact, this Court's decision in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), actually does very little work in the reasoning of the United States Court of Appeals for the Fourth Circuit. A careful review of its opinion, *Snyder v. Phelps*, 580 F.3d 206, 217-22 (4<sup>th</sup> Cir. 2009), shows that the Court of

Appeals cited *Hustler Magazine* only in passing, basing its decision instead on this Court's decisions regarding protection for hyperbolic speech in cases such as *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), *Letter Carriers v. Austin*, 418 U.S. 264 (1974), and *Greenbelt Coop. Publ'g Ass'n. v. Bresler*, 398 U.S. 6 (1970). It would be both odd and unnecessary for this Court to explore the contours of one of its decisions—particularly a decades-old decision addressing important First Amendment issues in a manner long thought to be settled law—in the context of a case that does not directly implicate that precedent.

These failings of the first certified question are not mere technicalities. To the contrary, they signal a fundamental problem with this Court's review of this case. As noted, this case does not squarely present the issues identified in the first certified question. But the more worrisome concern is that, in light of the undisputed facts, it does not appear that this case presents *any* issue that warrants this Court's energies and attention.

This likely explains why the petition struggles to identify the exact issue presented for review. At some points, the petition suggests that the issue is whether petitioner can maintain a claim for intentional infliction of emotional distress based on respondents "flaunting" of signs that were disrespectful to his son's memory and that disrupted the funeral. *Snyder v. Phelps*, No. 09-751, Petition for a Writ of Certiorari (hereinafter, "Petition") at 4. The undisputed facts, however, are that respondents' protest took place more than 1000 feet away from the

funeral, the funeral was conducted without incident, and petitioner was not contemporaneously aware of the “disrespectful” signs during the funeral, and saw them only later in the day when he watched a television news report. *Snyder v. Phelps*, 580 F.3d at 212.

In other passages, the petition suggests that the issue is whether petitioner can maintain a claim for intentional infliction of emotional distress based upon respondents’ mere presence at the funeral, which petitioner claims “created a negative and circus-like atmosphere.” Petition at 3. The undisputed facts contravene this framing of the issue as well. As the Fourth Circuit observed, the record shows that respondents complied with all local ordinances and police directions and conducted their protest in a peaceful manner. *Snyder v. Phelps*, 580 F.3d at 212.

The undisputed facts of this case thus make it a singularly poor vehicle for attempting to reconcile the tension that can exist between the right to freedom of expression protected by the First Amendment and the interest in emotional well-being protected by state tort law. That project should be reserved for a case that squarely presents the conflict and that requires the Court to engage in such a highly nuanced and complex analysis. This is not that case.

#### **B. The Second Certified Question.**

The second certified question is whether “the First Amendment’s freedom of speech tenet trump[s] the First Amendment’s freedom of religion and

peaceful assembly.” Again, ADL submits that the question rests on an erroneous view of the facts and the law and is not joined by this case.

With respect to the facts, the question implies that petitioner was deprived of his right freely to exercise his religion because he could not assemble with his loved ones and conduct a memorial service for his son. But, as discussed above, the undisputed facts show he did just that. There is no evidence that respondents’ speech—insensitive and deplorable as it may have been—prevented or interrupted the service.

With respect to the law, this case does not involve a conflict between constitutional doctrines, contrary to what the question implies. Respondents are not state actors; they are not constrained by principles of freedom of religion and assembly; and petitioner (correctly) did not base his claim against them on the premise that they violated his rights under the First Amendment. Rather, petitioner claimed that respondents were liable under state tort law. This Court should not venture into the byzantine complexity of trying to reconcile competing constitutional rights in a case that does not require such an exercise. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) (“[I]f it is not necessary to decide more, it is necessary not to decide more.”), quoting *PDK Labs., Inc., v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment).

### C. The Third Certified Question.

Finally, the third certified question is whether “an individual attending a family member’s funeral constitute[s] a captive audience who is entitled to state protection from unwanted communication.” This case does not provide an occasion for considering this question, either.

As noted earlier, the undisputed facts indicate that petitioner was not exposed to the “unwanted communication”—the statements made on respondents’ picket signs and website—while “attending a family member’s funeral.” *Supra* at 7-8. To the contrary, “it was established at trial that Snyder did not actually see the [picket] signs until he saw a television program later that day with footage of the Phelps family at his son’s funeral.” *Snyder v. Phelps*, 580 F.3d at 212.

This Court should not explore the complicated question of who qualifies as a member of a “captive audience”—and whether that status has any impact on the dimensions of First Amendment protections—in a case that does not require the Court to do so.

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## CONCLUSION

At some point, this Court will have occasion to identify and reconcile the tensions that can exist between freedom of expression, freedom of conscience, freedom of assembly, freedom of religion, and the governmental interest in providing civil remedies and criminal punishments against hate crimes and hate speech. In the proper case, this Court's wisdom and guidance regarding the reconciliation of these tensions may prove essential to the orderly functioning of our democracy. But this Court should navigate those narrow jurisprudential straits in a case that presents the tensions squarely, that provides a proper factual context for their exploration, and that leaves the Court with no alternative but to rule. With all due respect to petitioner and to the decision to grant *certiorari* here, ADL respectfully submits that *Snyder v. Phelps* is not that case.

Respectfully submitted,

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