No. 09-751

IN THE
# Supreme Court of the United States

ALBERT SNYDER,
*Petitioner,*
v.
FRED W. PHELPS, SR. ET AL.,
*Respondents.*

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

## BRIEF OF SENATORS HARRY REID, MITCH MCCONNELL, AND 40 OTHER MEMBERS OF THE U.S. SENATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

WALTER DELLINGER
*Counsel of Record*
JONATHAN D. HACKER
JUSTIN FLORENCE
BABAK SIAVOSHY
LAUREN N. STRAUSS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
wdellinger@omm.com

*Attorneys for Amici Curiae*

# TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**Statutes**



**Legislative History**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**



**Restatements**



**Other Authorities**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## BRIEF OF SENATORS HARRY REID, MITCH MCCONNELL, AND 40 OTHER MEMBERS OF THE U.S. SENATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

*Amici curiae* respectfully submit this brief in support of petitioner.[1]

## INTERESTS OF *AMICI CURIAE*

*Amici* are Senate Majority Leader Harry Reid, Senate Minority Leader Mitch McConnell, and Senators John Barrasso, Robert F. Bennett, Barbara Boxer, Sherrod Brown, Sam Brownback, Richard Burr, Roland W. Burris, Benjamin L. Cardin, Thomas R. Carper, Robert P. Casey, Jr., Susan M. Collins, Kent Conrad, Mike Crapo, Byron L. Dorgan, Dianne Feinstein, Al Franken, Kirsten E. Gillibrand, Chuck Grassley, Mike Johanns, Tim Johnson, John Kerry, Amy Klobuchar, George S. LeMieux, Blanche L. Lincoln, Claire McCaskill, Jeff Merkley, Barbara A. Mikulski, Patty Murray, Bill Nelson, Jack Reed, James E. Risch, Pat Roberts, John D. Rockefeller IV, Charles E. Schumer, Arlen Specter, Debbie Stabenow, Mark Udall, David Vitter, Sheldon Whitehouse, and Ron Wyden.

As national leaders, *amici* support the members of our armed forces, our veterans who have served

---

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties received timely notice of *amici*'s intent to file this brief. All parties have consented to its filing, and letters reflecting their consent have been filed with the Clerk.

their country, and our families who have lost loved ones in the line of duty. "There is no greater calling than to defend our nation in the armed services," and "we must never forget the contributions" that the members of our armed forces "have made to protect our way of life." Harry Reid, Statement on National Security, http://reid.senate.gov/issues/defense.cfm (last visited May 27, 2010).

As Members of Congress, *amici* are entrusted by the American people to support the military service members charged with the defense of our nation and to ensure that those slain in service are lain to rest with dignity, solemnity, and respect. Military service members have fought to protect the freedoms and rights enshrined by the United States Constitution and enjoyed by the American people, including protections of public expression. *Amici* believe that it is their role as Members of Congress to provide for the safety and superiority of the United States military and the well-being of its personnel and their families, consistent with the rights and freedoms they fight to protect.

Congress has a long tradition of supporting the families of fallen soldiers. It has provided a number of financial and other tangible benefits to families of soldiers killed in war. *See, e.g.*, 10 U.S.C. §§ 1475-1480 (immediate cash payments); 38 U.S.C. §§ 1965 et seq. (enrollment in the Servicemembers' Group Life Insurance program, which provides a lump sum payment in the event of death); 10 U.S.C. §§ 1447 et seq. (guarantees of long-term income through the Veterans Affairs Dependency and Indemnity Compensation and the Survivor Benefit Plan); 37 U.S.C. § 403(*l*) (housing benefits); 10 U.S.C. §§ 1071 et seq. (health care benefits); and 38 U.S.C. ch. 35 (educa-

tional assistance programs). Federal laws also provide families of deceased service members with ceremonial burial honors, including the funeral director's services, the preparation and transportation of the deceased, the folding and presentation of a United States flag to the veteran's family, and the playing of Taps, at no cost to the family. 10 U.S.C. §§ 1491(c), 1482(a). And Congress recently enacted laws to regulate the time, place, and manner of demonstrations on federal cemeteries and at military funerals, reflecting Congress's strong interest in preserving the sanctity and privacy of these funerals. *See* 38 U.S.C. § 2413(a)(1); 18 U.S.C. § 1388.

*Amici* file this brief because they believe that the law should continue to protect, as it long has, the rights of all private persons—including the families of fallen soldiers—to mourn their loved ones at a peaceful and solemn funeral.

## STATEMENT

A jury found that respondents deprived the parents of Marine Lance Corporal Matthew A. Snyder of a peaceful and solemn opportunity to bury their son. Matthew Snyder was killed in Iraq in 2006 in the line of duty. His family organized a private funeral for him at St. John's Catholic Church in his hometown of Westminster, Maryland. Members of the Westboro Baptist Church in Topeka, Kansas, including the church's pastor Fred W. Phelps and his daughters, learned of the time and place of Matthew's funeral and planned a protest there, as they have done at other funerals of fallen soldiers around the country. The demonstrators displayed signs with messages such as "Semper fi fags" and "Thank God for dead soldiers" and then created a web video

about Matthew's funeral memorializing their protest. Petitioner, Matthew's father Albert Snyder, sued the Phelps family and their church and won a jury verdict on three state torts: intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The U.S. Court of Appeals for the Fourth Circuit overturned the jury verdict, concluding that the First Amendment protected respondents' speech and conduct from any state law tort liability. This Court granted a petition for certiorari.

## SUMMARY OF ARGUMENT

In our nation, as in nearly every culture and religious tradition, proper burials play a crucial role in helping the bereaved mourn the dead. The disruption of a funeral interferes with the necessary emotional process of grieving, and thus can inflict severe psychological and even physical distress on the bereaved. In recognition of the vulnerability of mourners, American courts have long recognized a "right" to a decent burial.

In recent years, Congress and forty-six state legislatures have enacted laws to minimize picketing and other forms of disruptive activity in or near cemeteries during a funeral. Those laws are not challenged here, but they evidence the significant governmental interest in protecting the dignity of private funerals. These content-neutral, narrowly-tailored laws permit families to ensure that their rites remain private and solemn, and do not become a vehicle for the expression of disruptive or contrary views by some other person.

State tort laws supplement these funeral picketing regulations in deterring harmful conduct at private funerals and protecting the rights of mourners

to express their own private messages of grief and tribute. In this case, a jury found respondents liable for three Maryland torts, including intentional infliction of emotional distress ("IIED") and invasion of privacy by intrusion upon seclusion. The court of appeals incorrectly assumed that those torts protect essentially the same broad interests as defamation claims, and thus must be subject to the same specific constitutional limitations that constrain defamation claims against public figures. But the torts are not the same. As applied here, the IIED and intrusion upon seclusion torts narrowly protect against willful efforts to invade a private grieving ceremony and to inflict harms on those involved. The right to speak freely about matters of public concern does not encompass insults and verbal abuse intended to invade a private memorial ceremony and injure its participants. Respondents were and are free to convey their repugnant message in virtually any public manner they choose. But they were not free to hijack petitioners' private funeral as a vehicle for expression of their own hate.

*Amici* are fully committed 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." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Statutes and common-law torts that protect the rights of private families to mourn their dead in their own way do not undermine that principle. This Court should reject the court of appeals' contrary assumption.

## ARGUMENT

### A. Solemn And Dignified Funerals Play A Significant Role In American Life And Law

1. "Burial rites or their counterparts have been respected in almost all civilizations from time immemorial." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167-70 (2004). Ordered and dignified funeral rites play a special role in nearly all religious traditions. *See* Lewis R. Aiken, *Dying, Death, and Bereavement* 125-50 (2001). And "[t]here is no group, however primitive at one extreme or civilized at the other, which left freely to itself and within its means does not dispose of the bodies of its members with ceremony." Robert W. Habenstein & William M. Lamers, *Funeral Customs the World Over* 757 (1963). These funeral rituals in every society serve to "reinvoke past emotion, to bind the individual to his own past experience, and to bring the members of the group together in a shared experience." Margaret Mead, *Twentieth Century Faith, Hope and Survival* 124-27 (1972), *quoted in* Roy Vaughn Nichols, *Acute Grief, Disposal, Funerals and Consequences*, *in Grief and the Meaning of the Funeral* 39 (Otto S. Margolis et al. eds., 1975).

Funerals help families and communities cope with their loss and celebrate the life of the deceased in several ways. "They are a sign of the respect a society shows for the deceased and for the surviving family members." *Favish*, 541 U.S. at 168. They "affir[m] the power of human society to transcend the death of an individual and conquer death itself." Stella Mary O'Gorman, *Death & Dying in Contemporary Society: An Evaluation of Current Attitudes and*

*Rituals*, 27 J. Advanced Nursing 1127, 1132 (1998). They help to "move us from chaos and disorder to meaning and order [and] help frame our loved one's death into a larger picture." Christine S. Davis, *A Funeral Liturgy: Death Rituals as Symbolic Communication,* 13 J. Loss & Trauma 406, 414 (2008). And they have "the effect of drawing a social support network close to the bereaved family shortly after the loss has occurred, [which] can be extremely helpful in the facilitation of grief." J. William Worden, *Grief Counseling and Grief Therapy: A Handbook for the Mental Health Practitioner* 79 (3d ed. 2003).

When funerals and burial rites are disrupted, it interferes with the family's process of grieving and healing. The death of a loved one places great strains on the bereaved, affecting their emotions, often their finances, and even their physical health. *See, e.g.*, Margaret Stroebe et al., *Health Outcomes of Bereavement*, 370 Lancet 1960 (2007) (reviewing recent studies and concluding that there is an increased risk of mortality and physical and psychological ill-health in the bereaved). And families of young men and women killed in combat are particularly vulnerable to emotional distress. *See* Worden, *supra*, at 40 (noting complications in the grieving process caused by sudden deaths, avoidable deaths, and violent deaths).

2. In respect for the deceased and their mourners, American courts have repeatedly described a "right" to a peaceful funeral. "There is a right to a decent burial, and that right is guarded by the law." 22A Am. Jur. 2d *Dead Bodies* § 13. As the Wisconsin Supreme Court explained: "We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and un-

obstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency; certainly none where the law need less hesitate to impose upon a willful violator responsibility for the uttermost consequences of his act." *Koerber v. Patek*, 102 N.W. 40, 43 (Wis. 1905); *see also Holland v. Metalious*, 198 A.2d 654, 656 (N.H. 1964) ("The right to 'decent' burial is one which has long been recognized at common law, and in which the public as well as the individual has an interest"); *King v. Elrod*, 268 S.W.2d 103, 105 (Tenn. 1953) ("It is universally recognized that the sentiment of mankind, the right to decent burial is well guarded by the law, and relatives of a deceased are entitled to insist upon legal protection for any disturbance or violation of this right." (citation omitted)).

The right to a decent burial manifests itself in the law in different ways. One is the existence of a special category within the common law tort of negligent infliction of emotional distress for interference with proper burials. "An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability" in only two limited contexts, one of which developed out of conduct related to death and burials. Restatement (Third) Torts § 46 (Tentative Draft No. 5 2007). That principle arose as an "exception[] to the general rule that an actor is not liable for negligent conduct that causes only emotional harm." *Id.* cmt b. Because actions related to burials are "fraught with the risk of emotional disturbance," "courts have imposed liability on hospitals and funeral homes" for negligent actions with respect to dead bodies and mourners. *Id.*; *see, e.g.*, *Hoard v. Shawnee Mission Med. Ctr.*, 662 P.2d 1214,

1220 (Kan. 1983); *Brown v. Matthews Mortuary*, 801 P.2d 37, 43-44 (Idaho 1990); *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692, 696-97 (Ind. Ct. App. 2002). "What all these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." W. Page Keeton, *Prosser and Keeton on Torts* § 54 (5th ed. 1984). These cases permit tort liability without intentional conduct or bodily harm because the bereaved are particularly susceptible to severe emotional distress. *See Quesada v. Oak Hill Improvement Co.*, 261 Cal. Rptr. 769, 778 (Cal. Ct. App. 1989) ("Few among us who have felt the sting of death cannot appreciate the grief of those bereaved by the loss"); *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949) ("[t]he tenderest feelings of the human heart center around the remains of the dead").

This Court's FOIA jurisprudence provides another example of the weight accorded to a family's interest in private grieving. In *Favish*, this Court held that the term "personal privacy" in FOIA Exemption 7(C) "recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images." 541 U.S. at 170. In reaching this conclusion, the Court observed that the family's privacy interest in this context has "dee[p] roots" in the common law tradition. Pursuant to this tradition, "[f]amily 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." *Id.* at 168.

### B. The Federal Government And Most States Have Enacted Statutes To Protect Mourners From Disruptive Protests At Private Funerals

Reflecting the strong public interest in preserving the solemnity of private funerals, in recent years the federal government and forty-six states have enacted laws that regulate picketing and other forms of disruptive activity on or near cemeteries during a funeral. *See* Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 Kan. L. Rev. 575, 579-83, 614 (2007) (collecting cites); Conn. Ann. Stat. § 53a-183c; N.H. Rev. Stat. Ann. § 644:2-b. These constitutional time, place, and manner regulations protect private families while leaving open ample alternative channels for public protest and political debate. Although respondents do not challenge the constitutionality of those statutes, the laws demonstrate the significance of the governmental interest in protecting the dignity of private funerals, and *amici* urge the Court to ensure that its resolution of this case casts no doubt on the validity of these laws.

1. Congress has recently enacted two different statutes to protect funeral attendees from unwanted disruptions. The first, the Respect for America's Fallen Heroes Act, prohibits demonstrations on cemeteries under control of the National Cemetery Administration and at Arlington National Cemetery without the approval of the superintendent or director of the cemetery. 38 U.S.C. § 2413(a)(1). In addition, for an hour before and after a funeral or memorial service, the Act prohibits demonstrations that are either (1) within 150 feet of a road or route of ingress or egress from the property and include an individual "willfully making or assisting in the making

of any noise or diversion" that disturbs the peace or good order of the funeral, service or ceremony or (2) within 300 feet of the cemetery and impede access to or egress from the cemetery. *Id.* § 2413(a)(2). A second statute, the Respect for the Funerals of Fallen Heroes Act, extends these time and place restrictions to any activity, not just demonstrations, that disturbs or impedes access to "any funeral of a member or former member of the Armed Forces," including those at cemeteries not under federal control. 18 U.S.C. § 1388. Persons who violate these regulations are subjected to fine, imprisonment for not more than one year, or both. *Id.* §§ 1387, 1388(b).

Congress also enacted a "sense of Congress" provision recommending that "each State should enact legislation to restrict demonstrations near any military funeral." Pub. L. No. 109-228, § 4, 120 Stat. 387, 389 (2006). With that encouragement, many states enacted similar laws regulating disruptive activities near the funeral of any individual. Like the federal law, most of these state statutes prohibit protesting and other demonstrations within a certain distance from the funeral for a period of time, usually one hour, before and after the ceremony. *See* McAllister*, supra*, at 580. The protected "buffer" zones around the funeral vary in distance from 100 to 1000 feet, though most laws cover distances between 300 and 500 feet. *Id.* A few states protect funeral attendees by prohibiting activities that disturb the peace without delineating a specific protected buffer zone, and several other states include provisions prohibiting both disruptions of the peace and certain activity within a buffer zone. *Id.* at 580-81.

The statute in Maryland—the state in which petitioner's son's funeral occurred—is illustrative of

both types of statutory restrictions. Maryland prohibits a person from engaging in "picketing activity within 100 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession." Md. Code. Ann., Crim. Law § 10-205(c). The Maryland law also restricts individuals from "address[ing] speech to a person attending a funeral, burial, memorial service or funeral procession that is likely to incite or produce an imminent breach of the peace." *Id.* § 10-205(b).

2. These funeral picketing statutes were carefully crafted to respect and comply with the First Amendment.[2] Laws governing the time, place, and

---

[2] The original bill was amended in light of constitutional concerns, *see* S. 4187, 109th Cong. (2006); 152 Cong. Rec. S5129 (daily ed. May 24, 2006) (statement of Senator Craig introducing amended version of bill), and the legislative history is replete with discussion of how the law is constitutional, *see, e.g.*, *Hearing on H.R. 5037 Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veteran's Affairs* ("H.R. 5037 Hearing"), 109th Cong. 7-8 (2006) (statement by Representative Chabot of Ohio on constitutionality of restrictions, which are content-neutral); 152 Cong. Rec. H2199, H2202 (daily ed. May 9, 2006) (statement of Representative Buyer of Indiana on constitutionality of the time, place and manner restrictions); H.R. 5037 Hearing at 122-23 (testimony of Prof. David Forte at Cleveland-Marshal College of Law, Cleveland State University on constitutional authority of federal government to regulate cemeteries); 152 Cong. Rec. S5129 (statement by Senator Craig of Idaho, noting that the drafters of the House bill "went to great lengths to carefully craft the [] legislation to preserve the dignity of military funerals while at the same time balancing first amendment rights"); 152 Cong. Rec. H9198, 9199 (daily ed. Dec. 8, 2006) (statement of Rep. Cannon of Utah explaining that the "bill is modeled after an ordinance upheld

manner of speech—even in a public forum—are permissible so long as the restrictions: (a) serve a significant governmental interest; (b) are narrowly tailored; and (c) "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The funeral picketing statutes satisfy these criteria.[3]

a. The funeral protection laws are content neutral; that is, the statutes do not discriminate based on the subject of the speech or viewpoint of the speaker. Instead, these laws prohibit all speech within a certain time and distance from the funeral, or prohibit all speech that is likely to cause a disruption or incite a breach of peace. This Court has found similarly phrased laws to be content neutral, *see, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108, 113 (1972) (finding that a law prohibiting "noise or diversion which disturbs or tends to disturb the peace or good order" did not "permit punishment for

---

by the Supreme Court as a constitutional time, place, and manner restriction").

[3] The requirement for superintendent or director approval for demonstrations on property controlled by the National Cemetery Administration and Arlington National Cemetery is facially valid under a different doctrine. These cemetery lands are nonpublic fora. *See Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1319-22 (Fed. Cir. 2002); *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2865 (2009); *cf. Greer v. Spock*, 424 U.S. 828, 831 (1976) (military bases are nonpublic fora). Government may exercise discretion to regulate speech on nonpublic fora so long as the regulations are reasonable and viewpoint neutral. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). That is plainly the case here.

the expression of an unpopular point of view"), and courts of appeals have specifically classified funeral picketing laws as content-neutral, *see Nixon*, 545 F.3d at 690-91 (Missouri); *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008) (Kansas).

b. The restrictions on picketing near cemeteries and funerals further an important governmental interest. As described above, *supra* Section A, states have an important interest in safeguarding the ability of a captive audience of grieving families to participate in funerals in a peaceful and solemn manner. This Court has recognized the state's strong interest in protecting citizens from unwanted communication in similar circumstances. In *Frisby v. Shultz*, the Court upheld a ban on residential picketing in order to protect "residential privacy." 487 U.S. 474, 482-84 (1988). Emphasizing the captive audience within a home and the long-standing right of privacy enjoyed by citizens within their own walls, this Court reasoned that "[a]lthough in many locations[] we expect individuals simply to avoid speech they do not want to hear, the home is different." *Id.* (citation omitted). This Court has extended that reasoning to protect individuals entering a health care facility, because it has long recognized the interest of protecting "unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (quotation omitted). Regulations on speech near the medical facilities were reasonable in light of the "particularly vulnerable physical and emotional conditions" of those entering the facilities. *Id.* at 729.

Like individuals in their home or those entering a medical facility, private individuals attending a fu-

neral become "unwilling listeners" subject to a "degree of captivity" that "makes it impractical" to avoid exposure. A funeral almost by definition occurs at a specific place and time, and cannot simply be relocated to avoid unwanted intrusions. In addition, the bereaved at a funeral are physically and emotionally vulnerable. If a funeral is disrupted, the cathartic effect of the ceremony on the family may be irretrievably lost. There is no opportunity for a "do-over."

c. The funeral protection laws are narrowly tailored and leave open alternative channels of communication. In *Hill v. Colorado,* this Court explained that "[w]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." 530 U.S. at 726. *Frisby* similarly upheld a restriction on residential picketing because it still allowed for demonstrations that targeted a broader audience than a single home. 487 U.S. at 483; *id.* at 486-88 ("A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.").

The funeral protection laws address only that speech that disrupts a funeral. The statutes only prohibit speech for a limited period of time—from an hour before to an hour after the funeral or service. The laws thus simply allow funeral participants to conduct their ceremony without disruption; they do not preclude the ability of non-participants to express their messages in a different time, place, and manner. In that respect, these laws are even narrower than those upheld in *Frisby* and *Hill,* which

applied at all times, even when a person was not home or the medical facility was not open. Similarly, the buffer zones in the funeral protection laws only restrict speech in designated areas in which the speech could disrupt the funeral. To the extent that the buffer zones in some state funeral protection laws are larger than those that have been previously upheld, that difference reflects the characteristics of the place and activity the government seeks to protect. *See Hill*, 530 U.S. at 728 (explaining that in determining whether a restriction is narrowly tailored, "[w]e must, of course, take account of the place to which the regulations apply"). Funerals are often held out of doors at a burial plot and involve large number of attendees, requiring a correspondingly larger buffer zone than those necessary to protect single individuals entering and remaining inside a facility. *See Strickland*, 539 F.3d at 371.

Because the statutes are narrowly tailored to protect funerals, they leave open ample alternative channels for demonstrations. Demonstrators may express their message whenever and wherever they wish, outside the limited temporal and geographic boundaries set by the statutes.

The funeral protection laws, in short, do not infringe speech rights; they instead protect long-recognized rights of private mourners to a peaceful memorial service. This Court should not address respondents' challenge to the tort verdict below in any way that calls into question these widespread and important statutory protections for the rights of families burying their loved ones.

### C. The Court Of Appeals Erred In Treating Emotional Distress And Intrusion On Seclusion Torts, As Applied To A Private Funeral, As Equivalent To Defamation Claims Against Public Figures

The statutory funeral protections described above are not the only constitutional means by which states may protect the rights of private mourners at private funerals. State tort laws also protect families at funerals from willful efforts to intrude upon the private ceremony and to inflict harm on their participants. In this case, respondents were held liable for three torts: intentional infliction of emotional distress ("IIED"); invasion of privacy by intrusion upon seclusion; and a civil conspiracy claim based on these two.

The court of appeals vacated the jury verdict because it concluded that respondents' conduct was categorically protected from liability under any tort. In so doing, the court assumed that the specific constitutional constraints articulated by this Court for *defamation* claims applied to the distinct torts of IIED and intrusion upon seclusion, even when brought by a private figure. The Fourth Circuit's analysis misconstrues the nature of the latter torts and the important governmental interests underlying them. When IIED and intrusion upon seclusion claims are asserted by private plaintiffs—and especially when they arise out of the funeral context long accorded special protection in U.S. jurisprudence—they should not be treated the same for constitutional purposes as defamation claims asserted by public figures.

1. This Court's decisions in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), establish that constitutional constraints developed for one state tort cannot be assumed to automatically apply to others, and that the constraints applicable to claims by public figures and officials are not necessarily applicable to private plaintiffs.

In *Falwell*, this Court examined the extent to which the First Amendment limits IIED claims brought by public figures or officials based on offensive media publications directed at them. The Court previously had identified First Amendment limitations on *defamation* claims against public figures, but the Court expressly rejected a "blind application" of defamation standards to IIED claims. 485 U.S. at 56. The Court instead looked to the specific elements and purposes of the IIED tort. *Id.* "Generally speaking," the Court explained, "the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.'" 485 U.S. at 53. In "the area of public debate about public figures," however, the Court concluded that the IIED tort had to yield to the interests in public debate protected by the First Amendment. *Id.*[4]

[4] It was central to the result in *Falwell* that the plaintiff was a public figure. The Court explained that robust political debate "is bound to produce speech that is critical of those who hold public office or … public figures." *Id.* at 51. The Court thus rejected the view "that a State's interest in protecting *public figures* from emotional distress is sufficient to deny First

In *Time*, the Court likewise emphasized that the *Sullivan* requirements for defamation claims do not automatically apply to a cause of action based on a statutory "right of privacy." 385 U.S. at 390 (rejecting a "blind application" of *Sullivan*). The *Sullivan* principles were a "guide," but the Court carefully considered whether and how those principles apply in the "discrete context" of the right of privacy statute. *Id.* at 390-91. And it confirmed the public figure/private figure distinction drawn in *Falwell*, noting that "a different test might be required in a statutory action by a public official, as opposed to a libel action by a public official or a statutory action by a private individual." *Id.* at 391.

*Gertz* further confirms that First Amendment restrictions on a tort depend heavily on whether the plaintiff is a private or public figure. There, the Court declined to extend the *Sullivan* actual malice standard to private plaintiffs, because "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." 418 U.S. at 343. The Constitution places lesser restrictions on private plaintiff tort claims for two reasons. First, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 418 U.S. at 344. Thus, "[p]rivate individuals are … more vulnerable to injury, and the state interest in protecting them is

---

Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the *public figure* involved." *Id.* (emphases added).

correspondingly greater." *Id.* Second, "[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs." *Id.* "[N]o such assumption is justified with respect to a private individual," who "relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345. In light of these distinctions, the Court "conclude[d] that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Id.* at 345-46.

2. The court of appeals in this case overlooked the lessons of *Falwell*, *Time*, and *Gertz*. The jury found respondents liable for the torts of IIED and intrusion upon seclusion because of respondents' outrageous and inexcusable disruption of petitioners' solemn family memorial service. In reversing that judgment, the Fourth Circuit simply assumed that constitutional constraints applicable to cases involving *defamation* and *public* figures applied equally to *IIED* and *intrusion on privacy* claims brought by *private* plaintiffs. In the Fourth Circuit's view, the First Amendment limitations prescribed by *Sullivan* apply fully "regardless of the specific tort being employed," whenever "a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech." *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009). The court described *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)—a defamation case—as a "crucial precedent" holding categorically that all speech is actionable only if it is "susceptible of being proved true or

false." Accordingly, the court held that respondents' abusive verbal conduct could be the subject of tort liability only if it could "reasonably be interpreted as stating actual facts about an individual." 580 F.3d at 218-19. Because respondents' insults did not satisfy that standard, the court concluded, no tort liability could lie. *Id.* at 226.

The court of appeals erred in failing to consider the distinct state interest underlying the torts at issue. And it erred in ignoring the fact that the petitioner is a private individual. The court instead proceeded with the "blind application" of First Amendment limitations this Court has repeatedly condemned. A proper approach to evaluating respondents' speech claim requires careful examination of the interests served by the torts at issue compared to the infringement, if any, on legitimate speech interests asserted by respondents.

3. Viewed properly, the requirements of *Sullivan* and *Milkovich* for defamation claims brought by public figures do not apply to the private plaintiff torts at issue here. Those torts serve different state interests than defamation. They have different elements, govern different activity, and are farther removed from the purposes of the First Amendment, particularly when brought by a private plaintiff.

a. The first tort for which the jury found respondent liable was invasion of privacy by intrusion upon seclusion. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) Torts § 652B

(1977). While defamation serves a state's interest in protecting an individual's good name, intrusion protects an individual's privacy. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 197 (1890) ("The principle on which the law of defamation rests, covers, however, a radically different class of effects from those" of intrusion and related torts). The intrusion tort reflects the state's strong interest in safeguarding the privacy of private families at private funerals. *Supra* Section B (describing statutes that reflect the strong state interest in protecting funerals). When families bury loved ones—including soldiers killed in battle—in a private funeral, they expect a reasonable level of privacy and tranquility, and the state has a strong interest in protecting that expectation.

The First Amendment limitations on defamation claims make little sense for this tort. In contrast to defamation, intrusion is not directed at speech or publication as such. Rather, "[t]he intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined." Restatement (Second) Torts § 652B cmt. b. Because the tort is not targeted at speech specifically, this Court has never held that the First Amendment limits application of the tort, even when verbal conduct is at issue. And when the victim is a private party, the First Amendment interest in facilitating debate on matters of public concerns is especially attenuated, as *Falwell*, *Time*, and *Gertz* recognize. *See supra* at 18-20. In this narrow circumstance, that interest may yield before the strong state interest in protecting the privacy of families mourning their dead against

intrusion by those who would celebrate or mock their loss.

b. The second tort for which the jury found respondent liable—IIED—exists to deter and remedy severe emotional distress. *See* Restatement (Second) Torts § 46 (tort available for "extreme and outrageous conduct" that "intentionally or recklessly causes severe emotional distress"). The elements of IIED are particularly amenable to suits based on conduct at a funeral. A graveside mourner is easily susceptible to "severe emotional distress." In addition, the tort's outrage element depends on "the actor's knowledge that the other is peculiarly susceptible to emotional distress," *id.* cmt. f, which is likely to be the case when the act targets a mourner at a funeral. For these reasons, successful emotional distress cases are often based on occurrences at funerals. *See* Restatement (Third) Torts §§ 45, 46 (citing numerous emotional distress cases in the funeral setting).

IIED differs significantly from defamation, especially when the plaintiff is a private person. Whereas the falsity of the speech is the first element of a defamation claim, *see* Restatement (Second) Torts § 588, falsity has nothing to do with IIED. Just the opposite. IIED requires that the speech be outrageous, which can occur whether or not it is true, but is most likely to occur when it is extreme and hyperbolic. The Fourth Circuit turned this standard on its head—holding that the speech was protected *precisely because* it had the characteristics that make it actionable under IIED.

Further, as explained with respect to the intrusion on privacy tort, the First Amendment interest

in public debate has little salience in the context of verbal abuse directed at a private person. Unlike a public official, a private individual has not consciously entered an arena where outrageous attacks are an expected if regrettable weapon. And unlike a public figure, a private plaintiff has no recourse to the public stage to fight back. Accordingly, while the restrictions set forth in *Sullivan* and *Milkovich* are reasonable and necessary to protect the "breathing space" required by the First Amendment for a public figure who seeks the limelight, those constitutional limitations serve no similar purpose when applied to a private IIED plaintiff.

c. The court of appeals failed to consider the important state interests underlying the torts at issue here, particularly when they are brought by private plaintiffs. The point is not that these torts are categorically immune from First Amendment analysis, or that certain limitations are not appropriate if and when necessary to provide "breathing space" for public debate. In fact, the elements of the torts themselves can be construed to avoid infringement of legitimate First Amendment interests. *See Snyder*, 580 F.3d at 227 (Shedd, J., concurring). But whatever speech interest exists in insulting, verbally abusive conduct ought not take categorical precedence over the strong state interest in deterring offensive and disruptive conduct at private family funerals, and in protecting the fundamental legal rights of families to bury and memorialize their loved ones in peace.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

WALTER DELLINGER
*Counsel of Record*
JONATHAN D. HACKER
JUSTIN FLORENCE
BABAK SIAVOSHY*
LAUREN N. STRAUSS**
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
wdellinger@omm.com

*admitted only in California; supervised by principals of the firm
**admitted only in Pennsylvania; supervised by principals of the firm

*Attorneys for Amici Curiae*

May 28, 2010