

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, WESTBORO BAPTIST
CHURCH, INC.,
Respondents.

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

**BRIEF FOR THE VETERANS OF FOREIGN WARS
OF THE UNITED STATES
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

LAWRENCE M. MAHER
THE VETERANS OF
FOREIGN WARS OF THE
UNITED STATES
406 West 34th Street
Kansas City, MO 64111
(816) 968-1140

TIMOTHY J. NIEMAN
Counsel of Record
TNieman@Rhoads-Sinon.com
DEAN H. DUSINBERRE
RHOADS & SINON LLP
One South Market Square, 12th
Floor
Harrisburg, Pa 17108-1146
(717) 233-5731

TABLE OF CONTENTS

Table of Authorities..... ii

Interest of Amicus Curiae.....1

Introduction and Summary of Argument.....2

Argument.....5

 I. Mourners Attending a Military
 Funeral are Captive Audiences5

 II. The First Amendment has Never
 Provided an Unconditional and
 Indefeasible Immunity from Tort
 Liability.....11

 III. Offensive Speech Targeting
 Families During Military
 Funerals Should Not Be
 Protected By The First
 Amendment.....13

 A. The Value of Respondents’
 Speech is Minimal.16

 B. The Harm Significantly
 Outweighs Any Free Speech
 Value.....18

Conclusion22

TABLE OF AUTHORITIES

| | Page(s) |
|--|---------------|
| CASES: | |
| <i>Bonnell v. Lorenzo</i> , 241 F.3d 800 (6th Cir. 2001)..... | 7 |
| <i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)..... | 14 |
| <i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)..... | 11 |
| <i>Brown v. Hartlage</i> , 456 U.S. 45 (1982)..... | 14 |
| <i>Brown v. Lutheran Church</i> , 23 Pa. 495 (1854) | 8 |
| <i>Cantrell v. Forest City Publ'g Co.</i> , 419 U.S. 245 (1974)..... | 15 |
| <i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)..... | 6 |
| <i>Chaplinsky v. State of New Hampshire</i> , 315 U.S. 568 (1942)..... | 6, 14, 15, 17 |
| <i>Cohen v. California</i> , 403 U.S. 15 (1971)..... | 10 |
| <i>Dun & Broadstreet v. Greenmoss Builders</i> , 472 U.S. 749 (1985)..... | 11, 16 |
| <i>E.E.O.C. v. Preferred Mgmt. Corp.</i> , 216 F.Supp.2d 763 (S.D. Ind. 2002) | 7 |

| | |
|---|------------|
| <i>Engquist v. Or. Dep't of Agric.</i> , 553 U.S. 591, 128 S. Ct. 2146 (2008)..... | 17 |
| <i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975)..... | 6, 10 |
| <i>Families Achieving Independence & Respect v. Neb. Dep't of Soc. Servs.</i> , 111 F.3d 1408 (8th Cir. 1997)..... | 7 |
| <i>Frisby v. Schultz</i> , 487 U.S. 474 (1988)..... | 7, 9, 16 |
| <i>Gertz v. Welch</i> , 418 U.S. 323 (1974)..... | 11, 12, 15 |
| <i>Giboney v. Empire Storage & Ice Co.</i> , 336 U.S. 490 (1949)..... | 14 |
| <i>Gregory v. Chicago</i> , 394 U.S. 111 (1969)..... | 8 |
| <i>Harris v. Forklift Sys., Inc.</i> , 510 U.S. 17 (1993)..... | 15 |
| <i>Heffron v. Int'l Soc'y for Krishna Consciousness</i> , 452 U.S. 640 (1981)..... | 13 |
| <i>Hill v. Colorado</i> , 530 U.S. 703 (2000)..... | 6, 8 |
| <i>Howell v. New York Post Co.</i> , 81 N.Y.2d 115 (1993) | 12 |
| <i>Hustler v. Falwell</i> , 485 U.S. 46 (1988)..... | 11 |

| | |
|--|--------------|
| <i>Int'l Soc'y For Krishna Consciousness v. Rochford,</i> 585 F.2d 263 (7th Cir. 1978)..... | 7 |
| <i>Landmark Commc'ns, Inc. v. Virginia,</i> 435 U.S. 829 (1978)..... | 17 |
| <i>Lehman v. City of Shaker Heights,</i> 418 U.S. 298 (1974)..... | 7 |
| <i>Madsen v. Women's Health Ctr., Inc.,</i> 512 U.S. 753 (1994)..... | 7 |
| <i>Make the Road by Walking, Inc. v. Turner,</i> 378 F.3d 133 (2d. Cir. 2004) | 7 |
| <i>McQueary v. Stumbo,</i> 453 F.Supp.2d 975 (E.D. Ky. 2006)..... | 9 |
| <i>Milkovich v. Lorain Journal Co.,</i> 497 U.S. 1 (1990)..... | 11 |
| <i>Miller v. California,</i> 413 U.S. 15 (1972)..... | 13, 18 |
| <i>Mills v. Alabama,</i> 384 U.S. 214 (1966)..... | 17 |
| <i>Morse v. Frederick,</i> 551 U.S. 393 (2007)..... | 17 |
| <i>Nat'l Archives & Records Admin. v. Favish,</i> 541 U.S. 157 (2004)..... | 8, 9, 20, 21 |
| <i>New York Times Co. v. Sullivan,</i> 376 U.S. 254 (1964)..... | 11, 15 |

| | |
|---|------|
| <i>NLRB v. Baptist Hosp., Inc.</i> , 442 U.S. 773 (1979)..... | 8 |
| <i>Nurre v. Whitehead</i> , 580 F.3d 1087 (9th Cir. 2009)..... | 7 |
| <i>Phelps-Roper v. Strickland</i> , 539 F.3d 356 (6th Cir. 2008)..... | 20 |
| <i>Phelps-Roper v. Taft</i> , 523 F.Supp.2d 612 (N.D. Ohio 2007) | 20 |
| <i>Roth v. United States</i> , 354 U.S. 476 (1957)..... | 13 |
| <i>Rowan v. United States Post Office Dep't</i> , 397 U.S. 728 (1970)..... | 7, 8 |
| <i>Saxe v. St. College Area Sch. Dist.</i> , 240 F.3d 200 (3d Cir. 2001) | 15 |
| <i>Snyder v. Phelps</i> , 533 F.Supp.2d 567 (D.C. Md. 2008) | 11 |
| <i>Snyder v. Phelps</i> , 580 F.3d 206 (4th Cir. 2009)..... | 18 |
| <i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967)..... | 15 |
| <i>United States v. Williams</i> , 553 U.S. 285 (2008)..... | 14 |
| <i>Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)..... | 14 |

Vietnam Veterans Against the War v. Morton,
506 F.2d 53 (D.C. Cir. 1974)..... 13

Virginia v. Black,
538 U.S. 343 (2003)..... 17

Watson v. Jones,
80 U.S. (13 Wall.) 679 (1871)..... 22

White House Vigil for ERA Comm. v. Clark,
746 F.2d 1518 (D.C. Cir. 1984)..... 13

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I..... 13

STATUTES:

10 U.S.C. § 1491..... 21

18 U.S.C. § 1388..... 19

36 U.S.C. § 230101..... 1

36 U.S.C. § 230102..... 1, 21, 22

38 U.S.C. § 2403..... 9

38 U.S.C. § 2413..... 19

Ala. Code § 13a-11-17 (2007)..... 19

Ark. Code Ann. § 5-71-230 (2007)..... 19

Colo. Rev. Stat. § 13-21- 126 (2007)..... 19

Del. Code Ann. Tit. 11, § 1303 (2007)..... 19

Fla. Stat. § 871.01 (2007)..... 19

| | |
|--|--------|
| Ga. Code Ann. § 16-11-34.2 (2007) | 19 |
| Idaho Code Ann. § 18-6409 (2008)..... | 19 |
| 720 Ill. Comp. Stat. Ann. 5/26-6 (2008)..... | 19, 20 |
| Ind. Code Ann. § 35-45-1-3 (2008) | 20 |
| Iowa Code Ann. § 723.5 (2008) | 20 |
| Kan. Stat. Ann. § 21-4015 (2007) | 20 |
| Ky. Rev. Stat. Ann. §§ 525.145, .155 (2007)..... | 20 |
| La. Rev. Stat. Ann. § 14:103 (2008)..... | 20 |
| Mass. Ann. Laws Chapter 272, § 42a (2007)..... | 20 |
| Md. Code Ann. Crim. Law § 10-205 (2007) | 20 |
| Me. Rev. Stat. Ann. Tit. 17a, § 501-A (2007) | 20 |
| Mich. Comp. Laws Ann. §§ 123.1112-13 (2007) | 20 |
| Minn. Stat. Ann. § 609.501 (2008)..... | 20 |
| Miss. Code Ann. § 97-35-18 (2007) | 20 |
| Mo. Ann. Stat. § 578.501 (2008) | 20 |
| Mont. Code Ann. § 45-8-116 (2007) | 20 |
| N.C. Gen. Stat. § 14- 288.4 (2007) | 20 |
| N.D. Cent. Code § 12.1-31-01.1 (2007) | 20 |
| Neb. Rev. Stat. § 28-1320-01 (2007) | 20 |
| N.H. Rev. Stat. Ann. § 644:2-B (2007)..... | 20 |

| | |
|--|----|
| N.J. Stat. Ann. § 2c:33-8.1 (2008)..... | 20 |
| N.M. Stat. Ann. § 30-20b-1-5 (2007)..... | 20 |
| N.Y. Penal Law § 240.21 (McKinney 2000) | 20 |
| Ohio Rev. Code Ann. § 3767.30 (2008) | 20 |
| Okla. Stat. Tit. 21, § 1380 (2007)..... | 20 |
| 18 Pa. Cons. Stat. Ann. § 7517 (2008) | 20 |
| S.C. Code Ann. § 16-17-525 (2007) | 20 |
| S.D. Codified Laws §§ 22-13-17 (2007)..... | 20 |
| Tenn. Code Ann. § 39-17-317 (2007) | 20 |
| Tex. Penal Code Ann. §§ 42.055, 42.04 (2008) | 20 |
| Utah Code Ann. § 76-9-108 (2007) | 20 |
| Va. Code Ann. § 18.2-415 (2008)..... | 20 |
| Vt. Stat. Ann. Tit. 13, § 3771 (2007)..... | 20 |
| Wash. Rev. Code Ann. § 9a.84.030 (2008)..... | 20 |
| Wis. Stat. Ann. §§ 947.01, 947.011 (2007)..... | 20 |
| Wyo. Stat. Ann. § 6-6-105 (2007)..... | 20 |
| OTHER AUTHORITIES: | |
| 152 CONG. REC. S5129 (daily ed. May 24, 2006) | 22 |
| Abraham Lincoln, <i>Gettysburg Address</i> (November 19, 1863)..... | 9 |

| | |
|---|----|
| Abraham Lincoln, <i>Second Inaugural Address</i> (March 4, 1865) | 19 |
| DEPARTMENT OF DEFENSE DIRECTIVE 1300.15 (Jan. 11, 2001)..... | 21 |
| DEPARTMENT OF DEFENSE, DEFENSE MANPOWER DATA CENTER, “U.S. Active Duty Military Deaths,” http://siadapp.dmdc.osd.mil/ personnel/ CASUALTY/death_Rates.pdf (last visited May 26, 2010)..... | 2 |
| Jeff Martin, <i>Buglers for Military Funerals are in Short Supply</i> , USA TODAY, Nov. 11, 2009, http://www.usatoday.com/news/ military/2009-11-11-buglers_N.htm (last visited May 26, 2010)..... | 2 |
| William J. Brennan, Jr., <i>The Supreme Court and the Meiklejohn Interpretation of the First Amendment</i> , 79 HARV. L. REV. 1 (1966)..... | 17 |

INTEREST OF AMICUS CURIAE¹

The Veterans of Foreign Wars of the United States (“VFW”) is a federally chartered corporation, comprised of over 1.6 million men and women who have honorably served in our armed forces in conflicts on foreign soil. 36 U.S.C. § 230101. Founded in 1899, the VFW has a longstanding history of protecting the rights and honoring the service of America’s veterans. As set forth in its Congressional Charter, the purposes of the VFW are educational, fraternal, patriotic, historical, charitable, and educational. 36 U.S.C. § 230102. One of its fundamental purposes is “to preserve and strengthen comradeship among its members; to assist worthy comrades; to perpetuate the memory and history of our dead, and to assist their widows and orphans.” 36 U.S.C. § 230102 (1) – (3).

Fulfilling these promises and purposes, VFW members frequently assist in honoring their fallen comrades by participating in veteran funerals. Whether it is by providing honor guards, folding and presenting the flag, serving as pallbearers, or simply offering condolences to family, VFW members play a key role in ensuring that a veteran’s final farewell is cloaked with the dignity and respect that should be

¹ Counsel for both parties have consented in writing to the filing of this brief, and their consents have been filed with the Clerk of this Court. 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 *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

shown to a patriot. Quite simply, the VFW helps fulfill our national obligation to demonstrate America's gratitude to those who, in times of both war and peace, have faithfully and honorably defended our country.

In 2009 alone, more than 1,500 brave men and women made the ultimate sacrifice in active defense of our Nation.² Moreover, approximately 1,800 veterans die daily, cumulating in over 656,000 deaths per year.³ Each of these deaths is a time of mourning, when family members and the Nation may demonstrate sincere gratitude and solemn respect for the sacrifice and service of the deceased. Instead, Respondents seek to turn this moment of personal grieving into a public opportunity to viciously attack the deceased's family, beliefs, and values. Accordingly, this case is of significant concern to the VFW and its members, who seek to preserve the sanctity, dignity, and privacy of veterans' funerals.

INTRODUCTION AND SUMMARY OF ARGUMENT

“On behalf of the President of the United States, the Commandant of the Marine Corps, and a grateful nation,

² DEPARTMENT OF DEFENSE, DEFENSE MANPOWER DATA CENTER, “U.S. Active Duty Military Deaths,” http://siadapp.dmdc.osd.mil/personnel/CASUALTY/death_Rates.pdf (last visited May 26, 2010).

³ Jeff Martin, *Buglers for Military Funerals are in Short Supply*, USA TODAY, Nov. 11, 2009, http://www.usatoday.com/news/military/2009-11-11-buglers_N.htm (last visited May 26, 2010) (quoting Jo Schuda, Department of Veterans Affairs).

please accept this flag as a symbol of our appreciation for your loved one's service to Country and Corps.”

So spoke the Marine who presented a folded American flag to the family of Lance Corporal Matthew A. Snyder, a twenty year old Marine who was killed during his service in Iraq. The Marine’s message is clear – America, as a Nation, is eternally grateful for those who have paid the ultimate price while protecting our freedoms. To the grieving family, these are words of comfort and solace. Regretfully, this was not the only message the Snyder family received as they lay their son, an American hero, to rest.

“Thank God for IEDs.”

“Thank God for Dead Soldiers.”

“God Hates You.”

“You’re Going to Hell.”

These were the Respondents’ messages to Mathew Snyder’s family at his funeral. Sadly, Respondents’ hateful messages and venomous personal attacks did not end with their funeral protests. Shortly after Matthew’s funeral, the Respondents continued their torment of Petitioner and his family by posting an “epic” on its website, www.godhatesfags.com, entitled “The Burden of Marine Lance Cpl. Matthew Snyder.” In this “epic,” Respondents made caustic accusations toward Matthew’s parents, alleging they “taught Matthew to defy his creator,” “raised him for the devil,” and “taught him that God was a liar.” Respondents also asserted “God rose up Matthew for

the very purpose of striking him down.” (Vol. XV at 3791).⁴

In a time of profound grief and emotional vulnerability, these personal attacks are an affront of the most egregious kind. Although under the First Amendment Respondents are free to express their religious beliefs and messages that others find unpatriotic, offensive, and reprehensible, the First Amendment does not permit Respondents to launch personal attacks targeted at private individuals during a time of mourning.

When examining First Amendment protection of speech, this Court has long balanced the freedom to speak against the targeted individual’s right to privacy. Where offensive speech intrudes upon an unwilling audience’s privacy in an intolerable manner, States are permitted to protect the privacy interests of these captive audiences.

Moreover, the First Amendment has never guaranteed the right to communicate one’s views at all times and places or in any manner that may be desired. Indeed, numerous judicial exceptions to First Amendment protection exist. Where the speech is of little value and the potential harm is great, First Amendment protection is limited. Simply put, the First Amendment does not provide an unconditional and infeasible immunity from tort liability.

Here, Respondents have repeatedly invaded the privacy of Albert Snyder, Lance Corporal Snyder’s

⁴ Reference is to the Appendix Submitted to the Court of Appeals.

father, and his family in a manner that cannot be described as anything other than intolerable. This Court's jurisprudence does not permit Respondents to use the First Amendment as a shield from liability for the intentional cruelty they inflicted upon the Snyder family. Moreover, Respondents' speech is of little, if any, value. Conversely, the harm they inflicted upon a grieving family and the memory and service of a member of our Armed Forces is substantial and irreparable. Because grieving military families are unable to avoid such personal and vicious attacks as perpetrated by Respondents during the private burial of a loved one, protecting military funeral attendees from offensive speech is a natural extension of this Court's prior precedent.

Accordingly, the VFW respectfully requests that this Honorable Court reverse the holding of the Court of Appeals for the Fourth Circuit and permit imposition of tort liability where the vicious, personal attacks of Respondents have intentionally inflicted severe emotional distress and intruded upon Petitioner's right to privacy in an intolerable manner. The families of our servicemen and women who have died in defense of our Nation deserve as much.

ARGUMENT

I. MOURNERS ATTENDING A MILITARY FUNERAL ARE CAPTIVE AUDIENCES

Central to the case before the Court is the balance between a grieving family's right to privacy – "to be let alone" – and the Respondents' freedom of

speech.⁵ When examining First Amendment protections, this Court has long considered the privacy rights of unwilling listeners. Specifically, this Court has permitted States to protect an individual's privacy rights from offensive speech where it is so intrusive that the unwilling audience cannot avoid it. This protection is commonly referred to as the "captive audience doctrine." While not requiring captivity in the sense that a person is restrained from leaving, courts have applied this doctrine to protect individuals who have been subjected to intrusive speech while in their homes, hospitals and medical clinics, as well as in such public venues as transportation facilities, high school graduation ceremonies, job centers and welfare offices, and even workplaces. Here, it would be a natural extension of the captive audience doctrine and this Court's precedent to apply it to funeral attendees who become unwilling targets of intrusive speech.

Captive, unwilling listeners have a recognizable privacy interest in avoiding unwanted communication 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) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)). This Court has historically afforded "captive audience" protection to

⁵ Respondents' speech warrants little, if any, First Amendment protection. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

those settings where an individual seeks comfort or refuge, such as a person's home, *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), or a hospital, *Hill*, 530 U.S. at 715; *accord Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (prohibiting targeted picketing of hospital or clinic because patient is "captive" resident due to medical circumstances).⁶

Courts have historically protected the home because it is "the last citadel of the tired, the weary,

⁶ This Court has protected captive audiences in other circumstances not traditionally considered places of refuge, such as passengers traveling on public transportation. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (Blackmun, J., plurality opinion) (finding public transportation audience is captive audience). Other courts have broadly offered protection to captive audiences from unwanted speech. *See Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009) (applying captive audience doctrine to high school graduation ceremony); *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 149 (2d Cir. 2004) ("Welfare claimants are a captive audience in the Job Center waiting rooms."); *Bonnell v. Lorenzo*, 241 F.3d 800, 821 (6th Cir. 2001) (applying captive audience doctrine to college classroom); *Families Achieving Independence & Respect v. Neb. Dep't of Soc. Servs.*, 111 F.3d 1408, 1421 (8th Cir. 1997) (en banc) (finding clients waiting at Department of Social Services for receipt of welfare assistance are "virtually captive audience"); *Int'l Soc'y For Krishna Consciousness v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978) (holding bar on distribution of religious literature in secured concourses where travelers are captive audience permissible); *E.E.O.C. v. Preferred Mgmt. Corp.*, 216 F.Supp.2d 763, 809 (S.D. Ind. 2002) (noting "those subjected to unwelcome speech in the work place are 'captive audiences,' who enjoy some protection against otherwise protected speech.").

and the sick," *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring). Quite simply, there is no further place of retreat. *Rowan*, 397 U.S. at 736. Also, as places of refuge, hospitals are "where human ailments are treated, *where patients and relatives alike often are under emotional strain and worry*, where pleasing and comforting patients are principal facets of the day's activity, and *where the patient and [her] family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.*" *Hill*, 530 U.S. at 728-29 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783 (1979)) (quotation omitted) (emphasis added). People entering medical facilities are "often in particularly vulnerable physical and emotional conditions," thus warranting protection from unwanted communications. *Id.* Accordingly, the Court found the State's regulation of speech in these places of refuge to be constitutional. *Id.* at 734-35.

Funerals, like homes and hospitals, are places of refuge. As with private residences, funerals are a forum for intimate gatherings of families and friends. They are a sanctuary and place of retreat, the last citadel of sorrow and grief. The sanctity of cemeteries, and by extension funerals, has long been recognized. "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 (2004) (citations omitted). Indeed, there is a belief "the resting-place of the dead [is] hallowed ground." *Brown v. Lutheran Church*, 23 Pa. 495, 500 (1854). Congress has specifically found national cemeteries, in which our Nation's brave soldiers are buried, to be "national shrines as a

tribute to our gallant dead.” 38 U.S.C. § 2403(c).⁷ Arguably, there is no time when the right to be let alone may be more deserving of protection than during the mourning of a fallen hero who has perished in defense of our Nation.

Surviving family of the deceased, “like medical patients entering a medical facility, . . . are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event.” *McQueary v. Stumbo*, 453 F.Supp.2d 975, 992 (E.D. Ky. 2006); *cf. Favish*, 541 U.S. at 168 (“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.”). Quite simply, the actions of Respondents force the families of the deceased to choose between memorializing their loved ones and encountering personal, vicious, and hateful speech.⁸

⁷ See also Abraham Lincoln, *Gettysburg Address* (November 19, 1863) (“[W]e can not dedicate . . . we can not consecrate . . . we can not hallow this ground. *The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract.* The world will little note, nor long remember what we say here, but it can never forget what they did here.”) (emphasis added).

⁸ In addition to the personal attacks, it is the very presence of protestors, independently of their words, that is disruptive. *Frisby*, 487 U.S. at 498 (Stevens, J., dissenting) (“Picketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantive message conveyed.”).

Nothing in our Constitution compels grieving family members to suffer so.

The right of a family to be let alone during a loved one's funeral supersedes any First Amendment protection afforded to Respondents' speech. The First Amendment does not require the grieving family to endure offensive speech of a personally abusive nature that encroaches upon the sacred time of grieving for and mourning the loss of their son or daughter. In this case, Snyder's substantial privacy interest in attending his son's funeral has been invaded and outweighs Respondents' First Amendment right to speak in an intolerably indecent manner. *Erznoznik*, 422 U.S. at 209-10 ("The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.") (quotation omitted).

Here, there is no question that Respondents speech was intolerably intrusive:

"Thank God for Dead Soldiers;"
 "Thank God for IEDs;"
 "Semper Fi Fags;"
 "You're Going to Hell;"
 "God Hates You;"
 "Pope in Hell;"
 "Don't Pray for the USA."

No one could have possibly regarded Respondents' words as anything other than a "direct personal insult." *See Cohen v. California*, 403 U.S. 15, 20 (1971). Accordingly, as Snyder, in order to mourn his son, was an unwilling audience to Respondents'

invasion of his privacy, the State has the right to provide protection to him in the form of tort liability.

II. THE FIRST AMENDMENT HAS NEVER PROVIDED AN UNCONDITIONAL AND INDEFEASIBLE IMMUNITY FROM TORT LIABILITY

This Court has long recognized that the First Amendment provides “no special immunity from the application of general laws,” nor does it grant any special privilege “to invade the rights and liberties of others.” *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972). Simply put, the First Amendment does not provide an “unconditional and indefeasible immunity from liability” in tort law. *Gertz v. Welch*, 418 U.S. 323, 341 (1974). Indeed, as correctly noted by the District Court, the “First Amendment does not afford absolute protection to individuals committing acts directed at other private individuals.” *Snyder v. Phelps*, 533 F.Supp.2d 567, 570 (D.C. Md. 2008).

In a tort action, First Amendment protection of speech must be balanced against the State’s legitimate interest in protecting its citizens from wrongful injury. *Gertz*, 418 U.S. at 347; *see also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (permitting recovery for defamation under certain circumstances); *Dun & Broadstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (plurality opinion) (same); *Hustler v. Falwell*, 485 U.S. 46 (1988) (permitting recovery for intentional infliction of emotional distress under certain circumstances); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (permitting recovery for defamation under certain circumstances). Accordingly, States “retain substantial latitude” in providing tort remedies to

their citizens. *Gertz*, 418 U.S. at 345-46. A State's interest in protecting its citizens from injury is particularly strong for the tort of intentional infliction of emotional distress, where the injury from the tort is "as limitless as the human capacity for cruelty." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993).

Here, the need for State protection and availability of a civil remedy is clear. This is not a case of a public figure seeking recovery for damage to his reputation. Nor is this a case of imposing liability for speech of a public concern. Rather, this is a case of a private citizen – a grieving father – who seeks recovery for the intolerable intrusion of Respondents during his son's funeral. Respondents have egregiously intruded upon the Snyder family's final moments with their deceased son. The hateful messages, which personally attacked Lance Corporal Snyder's family have inflicted severe emotional distress. The jury had no trouble finding that Albert Snyder was injured by the Respondents' reprehensible conduct. If Albert Snyder, a grieving father of an American hero, cannot seek remedy from Respondents for the emotional torment Respondents viciously imposed upon him, what purpose do our laws serve? Respondents cannot use the First Amendment as both a weapon of hate and then use it as a shield of false righteousness. Such use would be a perversion of everything America stands for.

III. OFFENSIVE SPEECH TARGETING FAMILIES
DURING MILITARY FUNERALS SHOULD
NOT BE PROTECTED BY THE FIRST
AMENDMENT

“Congress shall make no law . . . abridging the freedom of speech, or of the press. . .” U.S. Const. amend. I. Notwithstanding this seemingly absolute prohibition, “the unconditional phrasing of the First Amendment was not intended to protect every utterance.” *Roth v. United States*, 354 U.S. 476, 483 (1957); *see also Miller v. California*, 413 U.S. 15, 23 (1972) (“The First and Fourteenth Amendments have never been treated as absolutes.”). The “First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.” *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (citations omitted).⁹

Accordingly, this Court has created numerous judicial exceptions to First Amendment protection, which reflect a willingness to protect the legitimate and compelling interests of the State and its citizens. Obscenity,¹⁰ fighting words,¹¹ and speech that

⁹ “It does not guarantee media attention,” as Respondents seek here. *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1538 (D.C. Cir. 1984); *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53, 58 (D.C. Cir. 1974) (“What the litigant’s press agent seeks and what the public interest requires differ widely. Although every man is entitled to make his remonstrance, no man is entitled to make such a remonstrance that it will be carried on all three television networks.”)

¹⁰ *Miller v. California*, 413 U.S. 15, 23 (1973). (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”)

incites unlawful activity¹² have historically been categorically denied protection under the First Amendment. Untruthful or misleading commercial speech are similarly unprotected.¹³ Additionally, the Court has found speech relating to certain criminal activities unworthy of protection.¹⁴ Moreover, in the

-
- ¹¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (classifying “fighting’ words” as speech where “punishment of which have never been thought to raise any Constitutional problem”)
- ¹² *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (noting State may “forbid or proscribe advocacy of the use of force or of law violation [only] where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or to produce such action”).
- ¹³ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976) (“The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”),
- ¹⁴ Specifically, the First Amendment does not protect conspiracy, *United States v. Williams*, 553 U.S. 285, 298 (2008) (referring to conspiracy as subject to a “long established criminal” proscription and “undeserving of First Amendment protection”); offers to engage in illegal transactions, *Williams*, 553 U.S. at 297 (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”); solicitation, *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (“[W]hile a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited”); and antitrust violations. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (Rejecting argument that “the constitutional freedom for speech and press extends its immunity to speech or writing used as an

civil context, the Court has never interpreted the First Amendment to permit “unconditional and infeasible immunity from liability.” *Gertz*, 418 U.S. at 341; *see e.g., Sullivan*, 376 U.S. at 279-80 (noting defamatory speech is actionable for public figures if “statement was made with ‘actual malice’”); *Cantrell v. Forest City Publ’g Co.*, 419 U.S. 245 (1974) (finding speech that portrays plaintiff in false light actionable); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (same).¹⁵ Thus, in actuality, there is a significant portion of speech that is not afforded First Amendment protection.

Although the Court has not articulated a single, unified theory for delimiting the scope of First Amendment protection, the Court repeatedly has considered two factors in determining if speech is protected: the harm that the speech causes and the value of the speech. *See Chaplinsky*, 315 U.S. at 571-72 (noting balance between speech value and social interests). Examination of these two factors reveals

integral part of conduct in violation of a valid criminal statute”).

15 Indeed, sexual harassment may even be considered speech unworthy of First Amendment protection. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (assigning weight to derogatory comments made to plaintiff, without discussing any limitations imposed by the First Amendment despite the fact that parties had briefed the issue, in setting standards for hostile-work-environment claim under Title VII); *but see Saxe v. St. College Area Sch. Dist.*, 240 F.3d 200, 209-10 (3d Cir. 2001) (finding “we have found no categorical rule that divests ‘harassing’ speech, as defined by federal anti-discrimination statutes, of First Amendment protection,” and referring to “the very real tension between anti-harassment laws and the Constitution’s guarantee of freedom of speech.”)

that, similar to obscenities and other unprotected speech, Respondents' vicious personal attacks upon grieving military families is unworthy of First Amendment protection. Accordingly, recognition of a judicial exception that permits imposition of tort liability for such reprehensible conduct is not only warranted, but appropriate in protecting the welfare of our servicemen and women and their families

A. The Value of Respondents' Speech is Minimal.

This Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc.*, 472 U.S. at 758. Of particularly little value is speech of protesters who "do not seek to disseminate a message to the general public, but to intrude upon the targeted [individual], and to do so in an especially offensive way." *Frisby*, 487 U.S. at 486. As explained in *Chaplinsky*:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly*

outweighed by the social interest in order and morality.

315 U.S. at 571-72 (emphasis added). The crux of speech's value lies in its contribution to either the pursuit of truth or the exchange of ideas. *See, e.g., Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 128 S. Ct. 2146, 2152 (2008) (finding "speech on matters of public concern" represents "the core of First Amendment protection"); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003))); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (internal quotation marks omitted)).

Here, the intolerably vicious and personal attacks of Respondent are completely without any "redeeming social importance."¹⁶

"Fag troops;"

"You're going to hell;"

"God hates you;"

¹⁶ William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 5-6 (1966) ("[I]mplicit in the history of the first amendment is the rejection of speech that is utterly without redeeming social importance"). Further, even if the speech had any societal value, it was directed at mourners who were without power to change United States policy.

“Semper fi fags;”
“Thank God for IEDs;”
“Thank God for dead soldiers.”

Noticeably absent from these abhorrent messages is the exposition of political ideas. Rather, the messages specifically target the family of a deceased Marine. Moreover, with all due respect to the Court of Appeals for the Fourth Circuit, these messages are not “loose, figurative, or hyperbolic language.” *Snyder v. Phelps*, 580 F.3d 206, 223 (4th Cir. 2009). They are arrows aimed to cause maximum injury. Respondents believe every message displayed on the signs – the messages are literal, not rhetorical. Such messages, similar to obscenities, have little, if any, free speech value. They are intended to hurt. Indeed, “[t]o equate the free and robust exchange of ideas and political debate” with Respondents personal attacks “*demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.*” *Miller*, 413 U.S. at 34 (emphasis added)

B. The Harm Significantly Outweighs Any Free Speech Value.

The extreme psychological and emotional harm incurred by Snyder and his family as a result of Respondent’s egregious intrusions are self-evident. Moreover, Respondents speech attacks them at the time when and in the place where they would say their final farewell to their loved one and our Nation’s final farewell to its fallen hero. Collectively and individually, these harms outweigh the infinitesimal value of Respondents’ speech.

We ask the men and women who serve in our Armed Forces to put their lives at risk to defend the very rights at issue before the Court in this case. We ask them to put themselves at risk so that we can argue here for the appropriate balancing of these rights according to the rule of law. Lance Corporal Snyder gave us everything he had to give. What is it that we are to give to him and his grieving family?

The least we can give is common decency. From the earliest of times, human beings have sanctified funerals and burials. Human beings have always recognized and respected this. Indeed, the grossest abominations in human history have been the moments when human life and human death have been most grossly disrespected.

There is arguably no American more worthy of respect, dignity, honor and decency than a man or woman who has sacrificed his or her life in service to our Country. There is no group more deserving of our comfort and compassion than his or her family. We are obligated “to care for him who shall have borne the battle, and for his widow, and his orphan,” for his father and family. Abraham Lincoln, *Second Inaugural Address* (March 4, 1865). If there is not room for this in the Constitution, then for what purpose is it to be defended?

This fundamental right of human dignity has been recognized across the United States.¹⁷

¹⁷ See 38 U.S.C. § 2413; 18 U.S.C. § 1388; Ala. Code § 13A-11-17 (2007); Ark. Code Ann. § 5-71-230 (2007); Colo. Rev. Stat. § 13-21-126 (2007); Del. Code Ann. tit. 11, § 1303 (2007); Fla. Stat. § 871.01 (2007); Ga. Code Ann. § 16-11-34.2 (2007); Idaho Code Ann. § 18-6409 (2008); 720 Ill. Comp.

Congress and forty-one state legislatures have enacted statutes that send one unmistakable and united message, that “[u]nwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual surely infringes upon the recognized right of survivors to mourn the deceased.” *Phelps-Roper v. Strickland*, 539 F.3d 356, 366 (6th Cir. 2008). This is in keeping with the historical truth that funerals are “well-established cultural tradition[s],” which signify “the respect society shows for the deceased and for the surviving family members.” *Favish*, 541 U.S. at 168; accord, *Phelps-Roper v. Taft*, 523 F.Supp.2d 612, 619 (N.D. Ohio 2007) (asserting state has “a significant interest in protecting its citizens from disruption during the

Stat. Ann. 5/26-6 (2008); Ind. Code Ann. § 35-45-1-3 (2008); Iowa Code Ann. § 723.5 (2008); Kan. Stat. Ann. § 21-4015 (2007); Ky. Rev. Stat. Ann. §§ 525.145, .145 (2007); La. Rev. Stat. Ann. § 14:103 (2008); Me. Rev. Stat. Ann. tit. 17A, § 501-A (2007); Md. Code Ann. Crim. Law § 10-205 (2007); Mass. Ann. Laws ch. 272, § 42A (2007); Mich. Comp. Laws Ann. §§ 123.1112-13 (2007); Minn. Stat. Ann. § 609.501 (2008); Miss. Code Ann. § 97-35-18 (2007); Mo. Ann. Stat. § 578.501 (2008); Mont. Code Ann. § 45-8-116 (2007); Neb. Rev. Stat. §§ 28-1320-01 to 1320.03 (2007); N.H. Rev. Stat. Ann. § 644:2-b (2007); N.J. Stat. Ann. § 2C:33-8.1 (2008); N.M. Stat. Ann. § 30-20B-1-5 (2007); N.Y. Penal Law § 240.21 (McKinney 2000); N.C. Gen. Stat. § 14- 288.4 (2007); N.D. Cent. Code § 12.1-31-01.1 (2007); Ohio Rev. Code Ann. § 3767.30 (2008); Okla. Stat. tit. 21, § 1380 (2007); 18 Pa. Cons. Stat. Ann. § 7517 (2008); S.C. Code Ann. § 16-17-525 (2007); S.D. Codified Laws §§ 22-13-17 to 22-13-20 (2007); Tenn. Code Ann. § 39-17-317 (2007); Tex. Penal Code Ann. §§ 42.055, 42.04 (2008); Utah Code Ann. § 76-9-108 (2007); Vt. Stat. Ann. tit. 13, § 3771 (2007); Va. Code Ann. § 18.2-415 (2008); Wash. Rev. Code Ann. § 9A.84.030 (2008); Wis. Stat. Ann. §§ 947.01, 947.011 (2007); Wyo. Stat. Ann. § 6-6-105 (2007).

events associated with a funeral or burial service.”). Funerals reflect the “interests decent people have for those whom they have lost.” *Favish*, 541 U.S. at 168.¹⁸

Where a soldier is young, such as twenty year old Lance Corporal Matthew Snyder, the tragedy of a premature death makes the funeral a particularly painful experience. Military rituals underscore sacrifice, service and duty and may help the bereaved to begin to find an acceptable explanation of why the loss occurred. Indeed, the solemnity of a military funeral helps provide “a deep and lasting healing to family members and loved ones.” Expert Report of Chaplain Callis (Pet. Supp. App. at 173a).¹⁹ As George Washington cautioned over 200 years ago, “[t]he willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive veterans of earlier wars were treated and appreciated by this country.” George Washington (1789).

The VFW has a Congressional mandate “to perpetuate the memory and history of our dead, and to assist their widows and orphans.” 36 U.S.C.

¹⁸ Congress has specifically recognized the importance of dignity and sanctity in burying our soldiers. Federal law now mandates providing military honors detail for a veteran’s funeral upon request of the family. 10 U.S.C. § 1491(a); *accord*, DEPARTMENT OF DEFENSE DIRECTIVE 1300.15 (Jan. 11, 2001). A military funeral is the “ceremonial paying of respect and the final demonstration of the country’s gratitude to those who, in times of war and peace, have faithfully defended our Nation.” *Id.* at E2.1.5.

¹⁹ References are to the Petitioner’s Supplemental Appendix Submitted to the Court of Appeals.

§ 230102. This mandate cannot be fulfilled if the First Amendment is to be perverted in the hateful and despicable manner argued for by Respondents. Surely, Respondents are entitled to their opinions, and even to express them, but not over the graves and in the faces of the grieving families of our servicemen and women.

CONCLUSION

No family experiencing the anguish and heartache of losing a loved one should be deprived of a solemn and dignified funeral uninterrupted by protesters, police, counter-protestors, and potential riots. This is particularly true for military families who have lost a loved one who made the ultimate sacrifice in defending the very rights at issue in this case.

Although “[w]e may never understand what compels a small group of small minded and mean hearted people to harass a family in mourning,” we cannot permit Respondents to hide behind the First Amendment to avoid responsibility for the pain they have inflicted. 152 CONG. REC. S5129 (daily ed. May 24, 2006) (statement of Sen. Frist); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871) (stating religious freedom includes right to express and disseminate religious doctrine “*which does not violate the laws of morality and infringe personal rights*”) (emphasis added). Respondents have perverted the very right Lance Corporal Snyder died to defend.

Since 2001, over 5,000 of our servicemen and women have died while defending our Nation and the principles at issue in this case during a time of

war.²⁰ Each and every one of them and their families deserve, and have earned, a dignified and honorable funeral. We owe them at least that much. They are not strangers, they are our brothers, sisters, mothers, fathers, husbands, sons, daughters, neighbors and friends. They defend us in times of war and peace and they serve us and the World in times of need. Many, such as Lance Corporal Snyder, make the ultimate sacrifice on our behalf.

A grieving family's last memory should not and cannot be permitted to be a memory forever tainted and cheapened by Respondents' hate: "Thank God for Dead Soldiers" or "You're Going to Hell." There is no greater love than that a man lay down his life for his friends. We have a solemn duty and obligation to those who have done so for our Country and to their families. We must honor them, we must maintain their dignity, and we must preserve their memory. The failure to do so will cause not only irreparable harm to Albert Snyder and his family, but to everything this Nation stands for and all who have served in our Armed Forces to make it so.

For the foregoing reasons, *Amicus Curiae*, Veterans of Foreign Wars of the United States, respectfully requests that this Honorable Court

²⁰ Daily, approximately 1,800 veterans of our Armed Forces, pass away, cumulating to an annual total of over 656,000. The passing of a veteran should be marked as a solemn affair and not as an opportunity for Respondents' to torment the deceased's family and friends. The service and sacrifice of all our veterans and of all our current members of the Armed Forces demands respect, honor, and dignity during this time of bereavement.

reverse the decision of the Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

TIMOTHY J. NIEMAN
Counsel of Record

DEAN H. DUSINBERRE
RHOADS & SINON LLP

LAWRENCE M. MAHER
THE VETERANS OF FOREIGN WARS
OF THE UNITED STATES

MAY 28, 2010