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 *AMICI CURIAE* SCHOLARS OF FIRST AMENDMENT LAW IN SUPPORT OF RESPONDENT PHELPS

CHRISTINA WELLS
Enoch H. Crowder Professor of Law
UNIVERSITY OF MISSOURI SCHOOL OF LAW
321 Hulston Hall
Columbia, Missouri 65211

CHARLES F. SMITH
Counsel of Record
SLONE ISSELHARD
JESSICA FROGGE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, Illinois 60606-1720
(312) 407-0516
charles.smith@skadden.com

Counsel for Amici Curiae Scholars of First Amendment Law

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI*

Amici are professors of Constitutional Law who teach and write on the First Amendment, including Christina Wells, Alan Chen, Heidi Kitrosser, Ronald Krotoszynski, Lyrissa Lidsky, and Timothy Zick.[1] Amici respectfully file this brief in support of the protected speech in this case, which involves the constitutional rights of speakers to express unpopular and even contemptible opinions without fear of government sanctioned punishment. Allowing claims of invasion of privacy and intentional infliction of emotional distress against protesters who are speaking on matters of public concern would undermine the core protections of the First Amendment. Such claims chill public discourse by subjecting speakers to crushing tort liability whenever a message rises to an undefined level of offensiveness. Tort claims premised on subjective criteria such as offensiveness or outrageousness empower the majority to censor minority or unpopular ideas based upon arbitrary and unpredictable standards. The Court has carefully crafted its First Amendment doctrines to require external indicia of harm, more than mere offensiveness, to

[1] The parties in this case have consented to the filing of this one brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

protect against content based regulation of speech, and should continue in this tradition.

SUMMARY OF ARGUMENT

The offensive speech in this case falls squarely within the bounds of First Amendment protected speech. First, the Court has long protected offensive speech because it contributes to discourse on issues of public interest and because efforts to censor it often result from antipathy towards the speaker's message. Second, the Court has never found a captive audience in a public forum based purely on the content of speech. Abhorrence for the expression in this case does not justify creating a new dignity based privacy interest that would allow censorship of unwanted or offensive speech. Third, the First Amendment does not allow punishment of speech solely because of its emotional impact on the listener. For this reason, the Court requires external indicia of harm before finding speech unprotected. The Court should not permit an evasion of these objective requirements by allowing tort liability under theories of invasion of privacy or intentional infliction of emotional distress ("IIED") in this case. Permitting tort liability for offensive speech would chill public discourse by allowing massive damage awards based on subjective criteria. Categorizing the peaceful funeral protests in this case as unprotected speech contradicts the Court's existing

jurisprudence and undermines the very purpose of the First Amendment.

ARGUMENT

Funeral services are important and time-honored rites for family and friends of the deceased. But the interests of mourners in honoring their loved ones without disruption do not hinge on the outcome of this case. Speakers' rights to express themselves without fear of government sanctioned punishment for their unpopular opinions, on the other hand, do.

Mourners at a funeral already enjoy substantial protection from disruptions. Unwanted visitors, including speakers, can be excluded from funeral ceremonies held on private property or in public cemeteries. *See Hudgens v. NLRB*, 424 U.S. 507, 520 (1976); *see also* 38 U.S.C. § 2413(a)(2)(A)(ii) (regulating noisy and disruptive protestors near funeral ceremonies at national cemeteries). The government may impose reasonable regulations on raucous, noisy, and disruptive speech, and punish protestors who threaten mourners or incite imminent physical retaliation. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772 (1994); *Watts v. United States*, 394 U.S. 705 (1969); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972). And at least forty states and the federal government have enacted statutes that regulate funeral protests. *See* Christina E. Wells, *Privacy and Funeral Protests*,

87 N.C. L. Rev. 151, 158 n.37 (2008) (listing statutes). To the extent such laws are crafted within constitutional bounds, they are a better mechanism than tort liability for balancing the interests of mourners and speakers.[2]

In this case, the peaceful funeral protest fully complied with all the applicable laws and restrictions. While demonstrating near the funeral ceremony of Matthew Snyder, Reverend Phelps and other members of the Westboro Baptist Church ("the Phelps") engaged in an orderly demonstration on a public street. They abided by all official directives to remain a certain distance from the ceremony, a distance the parties agree was at least several hundred feet. *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009); Pet. Br. at 4; Br. in Opp'n to Writ of Cert. at 1 (U.S. Jan. 20, 2010). Mr. Snyder ("Snyder") did not see the content of the Phelps' signs during the ceremony, instead viewing them for the first time during a news broadcast later that day. 580 F.3d at 212. Similarly, Snyder found the Internet post, "The Burden of Marine Lance Cpl. Matthew Snyder," on the Phelps' website while running a Google search after the funeral. *Id*.

---

[2] Although many statutes attempt to conform to the Court's precedents, *see*, *e.g.*, 38 U.S.C. § 2413, other statutes suffer from significant constitutional infirmities. *See*, *e.g.*, *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007), *cert. denied*, 129 S. Ct. 2865 (2009) (No. 08-1244) (finding it unlikely at the preliminary injunction stage that Missouri statute was consistent with the First Amendment).

Any disruption of Snyder's mourning is based solely on the emotional impact of constitutionally protected speech. That is, Snyder's tort claims for IIED and invasion of privacy rest entirely on the offensive content of the protestors' message. A ruling that allows tort liability in this case would create new and expanded avenues for the majority to suppress speech it finds disrespectful and uncivil. The Court has never recognized such an interest in regulating speech. *See*, *e.g.*, *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("A 'dignity' standard, like the 'outrageousness' standard that we rejected in *Hustler*, is so inherently subjective that it would be inconsistent with 'our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.'") (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988)). Although Snyder's anguish was real, profound, and understandable, it is not actionable.

I. THE FIRST AMENDMENT PROHIBITS REGULATION OF SPEECH BASED SOLELY ON ITS OFFENSIVE MESSAGE

To promote the exchange of ideas in a free society, the First Amendment protects speech that espouses offensive or unpopular positions. The Court has long recognized that expression can "stir people to anger . . . strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). But a fundamental tenet of the

Court's jurisprudence is that the government may not curtail speech "simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716 (2000); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Boos*, 485 U.S. at 322; *Falwell*, 485 U.S. at 55-56; *Street v. New York*, 394 U.S. 576, 592 (1969); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

The Court's reasons for protecting offensive speech are two-fold. First, speech on matters of public concern retains its value even when delivered in an offensive manner. Indeed, "[t]he vitality of civil and political institutions in our society depends on free discussion. . . . Accordingly, a function of free speech under our system of government is to invite dispute." *Terminiello*, 337 U.S. at 4. Second, attempts to punish speech based on its content often censor unpopular expression. Unpopular speech is more likely to offend people than conventional wisdom. Thus, allowing indiscriminate punishment of offensive speech would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971).

This case implicates both of the Court's reasons for protecting offensive speech. Although the expression here was provocative, offensive, and disrespectful, that expression falls squarely within the realm of public discourse. The Phelps' online posting and signs, which bore messages including "Thank God for Dead Soldiers," "God Hates the USA," "God

Hates You," "Pope in Hell," and "Semper Fi Fags," expressed the Phelps' opinions on the wars in Iraq and Afghanistan and the validity of the Catholic faith, as well as their belief that the wars were the ultimate result of the American public's alleged willingness to embrace homosexuality. *Snyder*, 580 F.3d at 212. National news outlets cover these same topics, and citizens debate these very issues every day.[3]

Allowing tort liability in this case would create a liability scheme that equates the "intrusiveness" and "outrageousness" requirements of invasion of privacy and IIED with offensiveness. Such a scheme turns the First Amendment on its head by allowing punishment of speech based on its content. *See*, *e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional

[3] Media outlets regularly carry headlines about these controversial ideas. *See*, *e.g.*, Rod Nordland, *12 NATO Soldiers*, *7 From U.S.*, *are Killed in Afghanistan*, N.Y. Times, June 8, 2010, at A11; Monica Davey, *In Iowa*, *Other Issues Crowd out Gay Marriage*, N.Y. Times, June 8, 2010, at A16; Christopher Hitchens, *Bring the Pope to Justice*, Newsweek, Apr. 23, 2010; Charles McLean & P.W. Singer, *Don't Ask. Tell. Why the Military Should Soldier on with Repealing "Don't Ask*, *Don't Tell*," Newsweek, June 4, 2010; Peter Moskos, *Don't Ask*, *Don't Tell: Farewell to My Father's Idea*, Wash. Post, June 4, 2010, at A17; Maura Dolan, *Bid to Ban Gay Marriage Will Stay on Ballot*, *California Supreme Court Rules*, L.A. Times, July 17, 2008.

protection."). The Court, however, has never recognized an invasion of privacy claim premised purely on abhorrence of the speaker's message. Similarly, for IIED claims, the Court has refused to allow liability based purely on outrageousness standards because "outrageousness . . . has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Falwell*, 485 U.S. at 55. Eliminating protection for core political speech because it offends or disrespects others would eviscerate the First Amendment by allowing individuals to censor speech simply by filing a tort claim.

II. PEACEFUL FUNERAL PROTESTS HELD IN PUBLIC DO NOT CREATE A CAPTIVE AUDIENCE WITHOUT AN UNAVOIDABLE PHYSICAL OR AURAL INTRUSION

The Court's captive audience doctrine, which borrows heavily from the intrusion branch of privacy torts when balancing privacy interests and free speech rights, eschews regulation of speech based upon its offensive content. The Court generally recognizes a captive audience only in limited circumstances where the expression involves a physical or aural intrusion, or an intrusion into the home, that the individual cannot avoid. *See Madsen*, 512 U.S. 753; *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Frisby v. Schultz*, 487 U.S. 474 (1988). Accordingly, the Court also rejects attempts to curtail

speech based purely on its emotional or psychological impact. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975) (holding invalid a content based city ordinance barring certain movies because the offended viewer could readily avert his eyes); *see also* Wells, 87 N.C. L. Rev. at 155-56, 189-91 (describing how the Court's refusal to find a captive audience based on the psychological impact of speech parallels the common law's rejection of recovery for purely psychological invasions under the invasion of privacy tort).

Nothing in the facts of this case suggests that an intrusion of the type recognized by the Court ever occurred at the funeral ceremony. Rather, in the absence of any physical or aural intrusion on the ceremony, Snyder complains of a purely psychological intrusion from the emotional impact of a message that offended him. This Court should not extend the narrowly defined parameters of the captive audience doctrine to encompass intrusions from offensive speech, nor should it manufacture a privacy interest in being free from offensive messages while in public, even when in the vicinity of funeral ceremonies. To do so would transform an already amorphous, ill-defined, and malleable privacy interest into a tool of content based, or viewpoint based, discrimination.

A. Only Unavoidable Physical or Aural Intrusions Create a Captive Audience Due to the Limited Privacy Interest in Public

Speech receives maximum protection when exercised peacefully in a traditional public forum. *United States v. Grace*, 461 U.S. 171, 177 (1983); *Schenck*, 519 U.S. at 377. The Court has repeatedly recognized that individuals in public are often "subject to objectionable speech" and that the government can protect audiences in public spaces only after "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen*, 403 U.S. at 21. The Court's approach thus recognizes that "in public debate . . . citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Madsen*, 512 U.S. at 774 (citing *Boos*, 485 U.S. at 322).

In other words, individuals do not have any "right to be let alone" or to be free from unwanted messages in public. The Court has rejected the notion that audiences in public fora have a "generalized 'right to be left alone' on a public street or sidewalk." *Schenck*, 519 U.S. at 383. Even in *Hill v. Colorado*, a decision that has generated some confusion in the lower courts' funeral protest analysis,[4] the Court

[4] *See*, *e.g.*, *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 991 (E.D. Ky. 2006) ("[I]t is not clear whether the *Hill* Court justified the ordinance at issue by the state's interest in protecting

(Continued on following page)

expressly stated that its opinion did not create "a right to avoid unpopular speech in a public forum." 530 U.S. at 718 ("We . . . are not addressing whether there is such a 'right.' ").

Because individuals have a limited privacy interest in public, the Court has found only unavoidable physical or aural invasions sufficient to invoke the captive audience doctrine. Thus, the Court has upheld bans on aural intrusions by noisy and boisterous protestors, *see*, *e.g.*, *Madsen*, 512 U.S. 753, as well as physical intrusions from protestors who approached the audience so closely that it amounted to an invasion of personal space. *Hill*, 530 U.S. 703; *Schenck*, 519 U.S. 357.

In keeping with this limited privacy interest in public, the Court has also rejected attempts to base a captive audience rationale purely on the offensiveness of the protestors' message. For example, the *Madsen* Court refused to uphold an injunction banning images "observable" by persons within medical clinics because the only "plausible reason" such signs would disturb patients was if the patients

---

citizens from unwanted communications. . . ."); *see also Phelps-Roper v. Strickland*, 539 F.3d 356, 364 (6th Cir. 2008) (citing *Hill* for the proposition that "the right to avoid unwelcome speech has special force in the privacy of the home but can also be protected in confrontational settings"); *cf. Phelps-Roper v. Nixon*, 509 F.3d at 487 (holding that plaintiff had a fair chance of proving that the government has no compelling interest in protecting citizens from unwanted speech outside the home).

"found the expression contained in such images disagreeable." *Madsen*, 512 U.S. at 773. As the Court explained, patients could simply "pull the curtains" to avoid the unwanted messages. *See also Cohen*, 403 U.S. at 21 (refusing to permit criminal liability for the offensive message inscribed on a man's jacket because viewers in the public courthouse could look away); *Erznoznik*, 422 U.S. at 210-11 (striking down a law banning displays of public nudity at drive-in theaters in order to protect unsuspecting passersby because they could look away). In public, then, "the burden normally falls upon viewers to avoid further bombardment of [their] sensibilities simply by averting [their] eyes." *Id*. at 210-11 (quoting *Cohen*, 403 U.S. at 21).

An individual's emotional vulnerability does not change the nature of the intrusion required under the captive audience doctrine. For example, the *Hill* Court's discussion of the emotional and physical vulnerability of patients was not the basis for its ruling. *Hill*, 530 U.S. at 729. Rather, the Court upheld a small no-approach zone around persons entering medical clinics that prevented "potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range." *Id.* at 718 n.25. The emotional and physical harm at issue in *Hill* did not result from the perceived offensiveness of protestors' messages, but rather from the potentially harassing and intimidating nature of the protestors' physical intrusion

into a patient's personal space. *See also Madsen*, 512 U.S. at 772-73. In fact, the Court made clear that protestors were allowed to deliver their message as offensively as they wished as long as they remained eight feet away. *Hill*, 530 U.S. at 729-30.

Thus, under the Court's captive audience jurisprudence, an individual's privacy is only invaded where the individual is (1) in public; (2) encounters a physical or aural intrusion, not a psychological intrusion; and (3) cannot avoid the intrusion by moving or looking away. Nothing in the facts of this case suggests that the speech was so intrusive that mourners could not avoid it. The peaceful funeral protestors stood in a designated public area at least several hundred feet away from the ceremony, and the demonstration did not aurally or physically disrupt the funeral. Indeed, Snyder did not even see the message on the signs until after the ceremony, when he saw them on television. *Snyder*, 580 F.3d at 212. In other words, the basis for Snyder's claim rests entirely on the content of the protestors' message. Snyder complains only of the psychological intrusion from the content of the message and the mere presence of the protestors. These purely psychological intrusions do not create a captive audience in a public forum, even for emotionally vulnerable mourners at a funeral.

B. The Broader Privacy Interest Found in the Home Does Not Apply to Funeral Ceremonies Held in Public

In an effort to sidestep the physical or aural intrusion requirements of the Court's captive audience doctrine, Snyder and supporting amici urge the Court to expand the heightened privacy interest found in the home and apply it to funerals. For good reason, the Court has limited that heightened privacy interest to the home. Extending it to other circumstances, including funerals, would circumvent the Court's precedents prohibiting punishment of speech based upon its emotional impact and create a sweeping new exception to First Amendment protections.

1. A Broader Privacy Interest Exists Only in the Home

The Court has only recognized a heightened privacy interest to be free of unwanted speech in the home. *Frisby v. Schultz*, 487 U.S. at 484 (1988) ("Although in many locations, we expect individuals simply to avoid speech they do not want to hear, . . . the home is different."). Because of the unique privacy interest in the home, the Court has recognized unreasonable intrusions on residential privacy that would not be upheld in public fora. *See*, *e.g.*, *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970); *Pacifica*, 438 U.S. 726 (upholding laws controlling broadcasts or mailings of indecent content into the home). In *Frisby*, for example, the Court

upheld an ordinance prohibiting "targeted picketing" aimed at single residences, recognizing that such picketing was "inherently and offensively intru[sive] on residential privacy" because "the home becomes something less than a home." 487 U.S. at 486 (citation omitted).

The Court has refused to extend the heightened privacy interest and the attendant "inherently intrusive" rationale beyond the confines of the home. Later cases, such as *Madsen* and *Schenck*, rejected the notion that communications by protestors inherently intruded on the privacy of clinic patients. *Madsen*, 512 U.S. 753; *Schenck*, 519 U.S. 357. Rather, the Court required a physical or aural intrusion before engaging in the captive audience analysis. Nor did *Hill*'s discussion of the right to be free from unwanted speech in "confrontational settings" extend *Frisby*'s heightened privacy interest beyond the confines of the home. *Hill*, 530 U.S. at 717. Rather than assume speech was inherently intrusive as in *Frisby*, the *Hill* Court found speech unprotected because the speakers' physical intrusions into the patients' personal space amounted to harassment. *Hill*, 530 U.S. at 718 ("None of our decisions has minimized the enduring importance of 'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined."). Thus, the Court has not expanded the heightened privacy rationale of *Frisby* to speech that occurs in public spaces, even where confrontational protestors targeted and harassed vulnerable patients.

2. Extending the Residential Privacy Interest to Funeral Ceremonies Violates Free Speech Principles

A funeral ceremony held in a public place does not invoke the privacy interest found only within the home. In an effort to censor unwanted but otherwise unintrusive speech, Snyder asks this Court to create a privacy interest to be free from offensive messages while in public. *See*, *e.g.*, Pet. Br. at 53 (arguing for "a privacy interest in attending his son's funeral without disruption by unwanted protests"). As support for this argument, Snyder points to the heightened privacy interest identified in *Frisby* and attempts to analogize a funeral to the home. However, such an argument contorts the holding of *Frisby* beyond recognition. Even in *Frisby* the Court did not allow regulation of protests solely because of their offensive message. *Frisby*, 487 U.S. at 482-84 (noting that the statute was constitutional because protestors could still engage in generalized protests throughout the neighborhood). No right to be free from offensive messages exists, nor should the Court create one based on the misplaced analogy between a protest held in a public place hundreds of feet from a funeral ceremony and one held just outside a private home.

The only intrusions identified in this case are psychological intrusions stemming from the content of the protestors' message. In the absence of any physical or aural intrusion, Snyder argues that the "targeting" of his son's funeral, coupled with the solemn nature of a funeral and his unique vulnerability

during mourning, made the mere presence of protestors inherently intrusive, much like that of the protestors in *Frisby*. Pet. Br. at 46-55. But such an argument destroys the concept of inherent intrusiveness as a function of the unique nature of the home and allows for content based regulation of speech. Any claim of intrusion into privacy in this case must rest on a characterization of the Phelps' speech as inherently intrusive (1) because of the protestors' message or (2) because of the protestors' presence several hundred feet from the ceremony. Pet. Br. at 52-53. Either characterization is dangerous and risks compromising free speech protections.

First, recognizing that listeners can be captive to offensive messages conveyed from a physical distance would destroy the Court's doctrines protecting offensive speech. Such a finding disconnects the notion of captivity from any inquiry into whether the speech at issue poses an unavoidable physical or aural intrusion. Instead, it conflates intrusiveness with offensiveness and permits punishment of speech that society deems uncivil or disrespectful. But this Court has always rejected punishment of speech on such a basis. *Boos*, 485 U.S. at 322 (finding unconstitutional a law prohibiting the display of signs tending to bring foreign governments into public odium or disrepute); *Cohen*, 403 U.S. at 22-24 (rejecting the idea that states may censor their citizens to promote public morality or civility); *Johnson*, 491 U.S. at 415 (reasoning that the state cannot regulate flag burning in order to promote respect for the flag). Such attempts

to regulate speech ultimately allow "a single community to use the authority of the state to confine speech within its own notions of propriety." Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion*, *Democratic Deliberation*, *&* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 603, 632 (1990); *see also Terminiello*, 337 U.S. at 4-5.

Second, the claim that the protestors' presence was inherently intrusive merely masks what truly upset mourners: the protestors' offensive message. This case is entirely about the content of the protestors' speech. Snyder does not complain of intrusions from the presence of counter-protestors like the Patriot Guard Riders or others who expressed messages of support. Br. in Opp'n at 6-7. Snyder found the Phelps' protest intrusive not because of their presence but because they espoused ideas he found abhorrent and inconsistent with the solemnity of his son's funeral. A notion of inherent intrusiveness that allows for regulation of speech based upon the audience's hostile response violates the Court's longstanding precedents. *See Forsyth County*, 505 U.S. at 134-35 (rejecting as content based an escalating fee system for protestors needing greater police protection because "[t]hose wishing to express views unpopular with bottle throwers . . . may have to pay more for their permit"); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (reversing breach of peace convictions of civil rights protestors based on evidence "which showed no more than that the opinions which they were peaceably expressing were

sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection").

The Court's free speech jurisprudence does not and should not define privacy as freedom from offensive or uncivil speech. Instead, the Court should make explicit what has long been implicit: in a public forum, offensive speech that is not otherwise "independently proscribable" may not be regulated unless it involves physical or aural intrusions. *Madsen*, 512 U.S. at 774.

III. External Indicia of Harm Are Needed Before Compromising Free Speech Protections to Allow Tort Liability

As with the captive audience doctrine, the Court's low value speech categories require something beyond offensiveness before allowing regulation of speech. Attempts to liken tort liability for IIED and invasion of privacy to existing categories of unprotected speech contradict the Court's First Amendment jurisprudence. In this case, the Court is asked to allow tort liability for the emotional impact of the Phelps' speech. This runs counter to the Court's longstanding precedents that reject attempts to regulate speech based solely on its content.

A. Narrowly Drawn Low Value Speech Categories Guard Against Punishment of Unpopular or Offensive Speech

The Court has carefully crafted its low value speech doctrines to identify limited and narrow categories of speech capable of restriction.[5] This "has not been on the basis of a simple cost-benefit analysis." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010). Instead, the Court carefully limits the circumstances in which it compromises the protection of speech in order to prevent punishment of offensive messages. Thus, it finds speech unprotected only in narrow circumstances where the speech does not contribute to the exchange of ideas as evidenced by strong external indicia of harm following from such speech or from actions that are independently harmful, such as threats or lies. *Cf.* Daniel Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 Ind. L. J. 917, 930 (2009).

---

[5] Those categories include incitement to violence (of either illegal activity or retaliation), *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); fighting words, *Gooding*, 405 U.S. at 523; defamation, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); fraud, *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); true threats, *Virginia v. Black*, 538 U.S. 343 (2003), *Watts*, 394 U.S. 705; obscenity, *Miller v. California*, 413 U.S. 15 (1973); child pornography, *New York v. Ferber*, 458 U.S. 747 (1982); and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

In *Terminiello*, the Court noted that "provocative and challenging" speech was:

> protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

337 U.S. at 4-5. Accordingly, the Court's low value speech categories require some external indicia of harm prior to allowing regulation of speech. For example, the Court recognizes that the government can punish advocacy of unlawful action only if such advocacy is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447-48. The Court also permits officials to punish fighting words but only if they "have a direct tendency to cause acts of violence by the person to whom, individually" they are addressed. *Gooding*, 405 U.S. at 523. And the Court requires plaintiffs to show actual harm to reputation in order to recover damages for libel. *Gertz v. Robert Welch*, *Inc.*, 418 U.S. 323, 349 (1974) ("[T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.").

These carefully drawn standards are designed to preserve the "adequate breathing space" necessary for full exercise of First Amendment freedoms. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984) (describing the Court's review as designed "to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited"). In contrast, the comparatively amorphous common law requirements of IIED and the broad invasion of privacy standards advocated by Snyder infringe on First Amendment protections and chill constitutionally protected speech.

B. Common Law Standards that Impose Liability Based on the Emotional Impact of Speech Do Not Prevent Punishment of Constitutionally Protected Speech

The common law standards for IIED do not incorporate the external indicia of harm required by the Court. Liability based on common law standards for IIED would allow punishment of otherwise protected speech based solely on its emotional impact, i.e., because the message offends people. Similarly, recognizing Snyder's claim for a purely psychological invasion would erase the external indicium of harm in the common law standard for invasion of privacy by removing the requirement of a physical, spatial, or aural intrusion. Absent external indicia of harm, tort liability infringes on the First Amendment protection

of freedom of expression by allowing censorship of unpopular speech.

1. IIED

Nothing in the elements of IIED – intent, outrageous conduct, or severe emotional harm – prevents imposing liability simply because the listener finds the expression at issue offensive or outrageous. *Falwell*, 485 U.S. 46. Emotional harm (even if physically manifested) is not one of the external indicia of harm historically recognized as a basis for restricting free speech rights.

The *Falwell* Court's rejection of an IIED exception to the First Amendment is consistent with the Court's longstanding practice of finding speech unprotected only if there are clear external indicia of harm. In *Falwell*, the Court expressly recognized that the common law standards for IIED did not sufficiently protect free speech values.[6] The Court explained that the "outrageousness" standard for imposing liability was so subjective as to "run[ ] afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Falwell*,

---

[6] Similar to the claim at issue in *Falwell*, Maryland's IIED tort requires a showing of intentional or reckless behavior that is also extreme and outrageous and which causes severe emotional distress. *See Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986).

485 U.S. at 55. The Court also noted that this holds true even for speech motivated by hatred or ill-will. *Id.* at 53 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)) ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."). Thus, the Court has already recognized the inherent dangers of permitting liability under the subjective common law elements for IIED and has refused to do so for precisely those reasons.

2. Invasion of Privacy

The common law elements of invasion of privacy – intrusion into seclusion that is highly offensive to a reasonable person – generally protect against punishment of speech based on its emotional impact by recognizing only physical, spatial, or aural intrusions. *See*, *e.g.*, Restatement (Second) of Torts § 652B cmt. b (noting that intrusion requires physical intrusion into a place in which the plaintiff has secluded himself or "by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs"); *Schulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998) ("[P]laintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had

an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." (citing Restatement)); *Pospicil v. Buying Office*, *Inc.*, 71 F. Supp. 2d 1346, 1361 (N.D. Ga. 1999) (finding that state law did not support claim for intrusion into 'psychological sanctity' or an inner 'sphere of privacy' based on co-workers' offensive and vulgar comments).

However, Snyder and amici urge the Court to find an invasion of privacy because they find the Phelps' message abhorrent. Such an argument divorces the notion of "intrusion" from any concept of physical, spatial, or aural invasion as generally required at common law. 1 J. Thomas McCarthy, The Rights of Publicity & Privacy § 5:89 at 625 (2d ed. 2010) (noting that intrusion usually involves "some physical, not merely psychological" incursion into one's privacy, including invasion of space around a person via surveillance or stalking). That argument also conflates the first element of the tort, an intrusion, with the third element, that the intrusion be offensive to a reasonable person. In other words, Snyder argues that the Phelps' speech is intrusive *because* it is offensive to a reasonable person. As with allowing liability for offensive speech under IIED, that approach allows for punishment of the "emotive impact of speech" and amounts to regulation of speech based upon its message, a result that offends the most basic tenets of the First Amendment. *Johnson*, 491 U.S. at 412.

C. Free Speech Protections Require External Indicia of Harm for IIED or Invasion of Privacy Claims

Absent external indicia of harm, the approach Snyder advocates would subject offensive speech to tort liability simply because others have deemed the ideas to be false or pernicious. But the Court has recognized that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Gertz*, 418 U.S. at 339. The Court should not cast aside its longstanding precedents protecting offensive messages from censorship simply because Snyder and others find the Phelps' speech particularly loathsome. *United States v. Eichman*, 496 U.S. 310, 318-19 (1990). Instead, the Court should protect against infringement of First Amendment rights by establishing clear standards for tort recovery under IIED and invasion of privacy where the claim is based on the speech. Amici recommend the following standards: (1) that speech be independently proscribable or that that Court require a false statement of fact made with actual malice for recovery under IIED and (2) that the Court require a physical, spatial, or aural intrusion for recovery under invasion of privacy claims.

1. Recommended IIED Standard

As a threshold matter, IIED liability may attach when speech is already independently proscribable, i.e., when it falls into one of the Court's existing

categories of low value speech or involves speech that the Court has noted is otherwise unprotected. For example, if a speaker threatened another person, that expression could be subject to IIED liability. *See Black*, 538 U.S. 343. Or if an individual engaged in actionable sexual harassment in violation of existing discrimination law, such speech might be subject to IIED liability. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992).[7]

However, when speech otherwise contributes to public discourse, the Court should continue to apply the *Falwell* standard for recovery under IIED: a false statement of fact made with actual malice. Such a standard is necessary to protect against content based censorship of speech and is consistent with the Court's framework of unprotected speech. By permitting liability based on an independently harmful act – i.e., an intentional or reckless falsehood – rather than on the audience's subjective emotional reaction

[7] Courts allowing IIED liability for speech generally look for objective indicia of harm. Indeed, the IIED cases Snyder cites permit IIED liability only after a showing of external indicia of harm. *See*, *e.g.*, *Alaska v. Carpenter*, 171 P.3d 41, 63 (Alaska 2007) (finding that derogatory speech about a matter of public importance cannot be the sole basis for an IIED claim because speaking on "a topic of public interest . . . cannot be considered outrageous conduct" but that speech encouraging harassment was not protected speech and may be the basis for IIED liability); *Van Duyn v. Smith*, 527 N.E.2d 1005, 1011-12 (Ill. App. Ct. 1988) (dismissing *Falwell* concerns after finding defendant had committed other tortious acts, including following the plaintiff).

to the speech, this standard provides a remedy for IIED while continuing to protect against content based censorship of expression.

First, the Court should continue to require a false statement of fact as a threshold determination for permitting a claim of IIED against otherwise protected speech. For speech about individuals that touches on matters of public concern, a provably false statement of fact is the first hurdle to damages of any kind. *See Milkovich v. Loraine Journal Co.*, 497 U.S. 1, 19-20 (1990) (requiring that "statement on matters of public concern . . . be provable as false before there can be liability under state defamation law"); *Greenbelt Coop. Publ'g Ass'n*, *Inc. v. Bresler*, 398 U.S. 6, 12-13 (1970).

The Court has applied the false statement of fact standard to IIED because it is an historically recognized and measurable external indicium of harm that prevents censorship in public debate. Indeed, the *Falwell* Court imposed this objective falsity standard after expressly rejecting an outrageousness standard as too subjective to be an adequate measure for punishment of speech. *Falwell*, 485 U.S. at 54-56. The falsity requirement is thus not merely a defamation standard but also a practical test that provides a concrete method for identifying unprotected speech. *Id.* at 56; *Time*, *Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (imposing false statement of fact with actual malice standard on invasion of privacy action due to fictionalization of name and likeness).

Second, the Court should continue to require actual malice before allowing an IIED claim for otherwise protected speech. Such a standard provides citizens with clear grounds for an IIED remedy while still protecting speech on matters of public concern. The Fourth Circuit decided this case without applying an actual malice standard because it found that as a threshold matter there was no provably false statement of fact. The Court should make clear, however, that the actual malice standard also applies in IIED cases.

The actual malice standard ensures that IIED does not become a mechanism for censorship of unpopular speech. Although a falsity standard aids in differentiating unprotected speech from offensive speech, an actual malice standard is necessary to fully protect speech pertaining to public issues. "[E]rroneous statement is inevitable in free debate." *Sullivan*, 376 U.S. at 271. Simply requiring a provably false statement does not prevent punishment of speech based upon a jury's hostile response to speech that is particularly offensive or controversial. As the Court has noted, "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause [speakers] to 'steer . . . wider of the unlawful zone,' . . . and thus 'create the danger that the legitimate utterance will be penalized.'" *Time*, 385 U.S. at 389 (citation omitted). A negligence standard combined with an amorphous IIED standard is simply insufficient to protect against the

desire of outraged juries to punish speakers with whom they disagree.

By requiring a higher level of intent before exposing speakers to crushing tort liability, the actual malice standard is consistent with the Court's low value speech doctrine. *See*, *e.g.*, *Garrison*, 379 U.S. at 75 (distinguishing honest but "inaccurate" utterances from "calculated falsehood"). The Court has routinely required the higher intent standard of actual malice before allowing anything other than actual damages in libel cases. Even in cases involving private figure libel plaintiffs, the Court has required a showing of actual malice for awards of presumed and punitive damages, noting that such damages allow juries "to use their discretion selectively to punish expressions of unpopular views." *See*, *e.g.*, *Gertz*, 418 U.S. at 350. Unlike libel, IIED does not require an objectively identifiable harm to reputation; rather, it involves an amorphous emotional harm. Enabling a jury to assign damages for an emotional harm coupled with anything less than an actual malice standard allows the jury to do what they could otherwise accomplish with punitive damages: punish unpopular speech.

Falwell's false statement of fact with actual malice requirement is thus necessary to prevent content based censorship of any speech related to public discourse, not just speech related to public figures. *See also Milkovich*, 497 U.S. at 16 (recognizing that *Falwell* placed "limits on the *type* of speech which may be the subject of state [civil] actions") (original emphasis). As the *Falwell* Court

recognized, "[a]t the heart of the First Amendment is . . . the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Falwell*, 485 U.S. at 50. By requiring a false statement of fact made with actual malice, the Court will continue its long tradition of protecting speech on matters of public concern, even in cases where that speech might have certain adverse effects on citizens. *Time*, 385 U.S. 389-90; *Philadelphia Newspapers*, *Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (finding that the First Amendment protected defamatory yet unproveably false statement of fact on a matter of public concern, even when the statement in question caused reputational harm). Anything less risks chilling legitimate speech on issues of public concern.

2. Recommended Invasion of Privacy Standard

The Court should continue to require a physical, spatial, or aural intrusion for invasion of privacy claims. The privacy tort of intrusion generally rejects recovery for purely psychological invasions. *See* 1 McCarthy § 5:89 at 625. That approach brings these tort claims within the Court's framework of unprotected speech by requiring external indicia of harm such as physical, aural, or spatial invasions. *See*, *e.g.*, Restatement (Second) of Torts § 652B cmt. b. Consistent with its existing captive audience jurisprudence, *see supra* Part II. A, the Court should not create special exceptions for the emotional impact of offensive messages, no matter how offensive the

expression. Clear standards for speakers and courts alike are necessary because vague standards may be subject to arbitrary enforcement, or may perniciously chill protected expression. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Grayned*, 408 U.S. at 108-09. Objective indicia of harm, such as physical, spatial, and aural intrusions, provide a clear set of criteria for identifying the limited circumstances where First Amendment protections give way to liability.

IV. Carving Out Special Protection for Funerals Contradicts Free Speech Principles

The dignified and solemn nature of funerals does not justify a special exception from constitutional protections of speech. The Court has recognized that even revered symbols such as the flag are subject to speakers' rights to express their opinions without fear of retaliation:

> The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

Johnson, 491 U.S. at 417-18 (internal citation omitted). Approaching free expression analysis from

any other vantage assumes "sacred" activities get special treatment – an assumption the Court has rejected. Rather, the Court's jurisprudence "sketches a sphere of constitutional immunity that extends to speech about public subjects, like religious faith or political belief or prominent persons, even though such speech violates the most elementary civility rules against exaggeration or vilification or excesses and abuses." Post, 103 Harv. L. Rev. at 629-30 (citations omitted); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or matters of public opinion.").

Creating new, special protection for funerals begs the question of what other locations or events should likewise be free from First Amendment protection, and opens the door to censorship of otherwise protected speech in many circumstances. *Phelps-Roper v. Nixon*, 509 F.3d at 487 (8th Cir. 2007) (quoting *Olmer v. City of Lincoln*, 192 F.3d 1176, 1182 (8th Cir. 1999)) ("Allowing other locations, even churches, to claim the same level of constitutionally protected privacy [as in the home] would . . . permit government to prohibit too much speech and other communication."). If speech at funerals is carved out from the Constitution's protections, nothing prevents the argument that other important and dignified occasions such as graduations, weddings, bar mitzvahs – or, for that matter, Veterans Day ceremonies – should be free of

expression that offends others. Allowing society's standards of decency and civility to define exceptions to the First Amendment would eviscerate the constitutional protections of speech.

Recognizing tort liability for offensive speech, or creating a separate juridical category of tort liability for funeral protestors, would also allow actions against *any* protestors or speakers found to violate social norms, including the many other protestors at or near cemeteries and funerals. *See Legislative Hearing on H.R. 23*, *H.R. 601*, *H.R. 2188*, *H.R. 2963*, *H.R. 4843*, *H.R. 5037*, *and H.R. 5038*, *Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veteran's Affairs*, 109th Cong., 96-98 (2006) (Statement of John C. Metzler, Superintendent, Arlington National Cemetery) ("Because of our urban location in the heart of our Nation's Capital, Arlington National Cemetery frequently becomes a rallying point for groups wishing to express their opposing views and opinions particularly regarding our Nation's military policies."). Under these circumstances, large, discretionary damage awards in tort actions act like private fines levied by civil juries to punish speech that offends the majority. *See Gertz*, 418 U.S. at 349-50. The potential for crushing damages awards simply for engaging in political speech that others find contemptible would chill speakers and cast a "pall of fear and timidity . . . upon those who would give voice to public criticism." *Sullivan*, 376 U.S. at 278.

CONCLUSION

Decades ago the Court noted that:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell, 310 U.S. at 310. Amici law professors respectfully urge the Court to issue a ruling that

preserves its longstanding jurisprudence protecting the rights of individuals to "persuade others to [their] own point of view," offensive though their message may be. *Id.*

Respectfully submitted,

CHRISTINA WELLS
Enoch H. Crowder Professor of Law
UNIVERSITY OF MISSOURI SCHOOL OF LAW
321 Hulston Hall
Columbia, Missouri 65211

CHARLES F. SMITH
Counsel of Record
SLONE ISSELHARD
JESSICA FROGGE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, Illinois 60606-1720
(312) 407-0516
charles.smith@skadden.com

Counsel for Amici Curiae Scholars of First Amendment Law