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 AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?

2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?

3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over its 25 year history.[2] Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens. One of the purposes of The Rutherford Institute is to preserve the most basic freedoms our nation affords its citizens—in this case, the constitutional right to engage in free speech and protest.

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[1] No counsel for either 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, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] The Rutherford Institute has filed *amicus curiae* briefs with this Court in numerous First Amendment cases, such as *Crawford v. Marion County Election Bd.*, 533 U.S. 181 (2008), *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009), and *Christian Legal Society v. Martinez*, No. 08-1371, 2010 WL 2555187 (U.S. Jun. 28, 2010).

STATEMENT

Amicus incorporates by reference the statement of facts set forth in the response of Respondents Fred W. Phelps, *et al.* to the Petition for Certiorari.

SUMMARY OF ARGUMENT

The Petitioner, Albert Snyder, asks this Court to sustain a civil jury verdict rendering judgment against the Respondents' offensive protest on a public street near his son's funeral service because, he argues, the "captive audience" doctrine grants him protection from the Respondents' "unwanted communication." However, just as government cannot "lodge broad discretion in a public official" to exercise indiscriminate licensing powers over speech-related activities,[3] it likewise should not cede to a civil jury the power to make selective judgments on whether public protest on issues of national public importance and concern may be sanctioned because of emotional harm upon its listeners. No matter how distasteful or pernicious the speech, the potential use of a jury "as [an] instrument[ ] for selectively suppressing some points of view" is fraught with capriciousness, and too steep a price for society in matters involving public protest.[4] As this Court has indicated "[i]f there is a bedrock principle underlying

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[3] *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 97 (1972).

[4] *Id.*

the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[5] This principle applies no less to the prohibitive chilling effect of civil jury judgments on public protest in a traditional public forum. This Court should, therefore, decline Mr. Snyder's request for an exception to the time-honored "privilege of a citizen of the United States to use[ ] the streets and parks for communication of views on national questions. . . ."[6] Mr. Snyder's proposed expansion of the captive audience doctrine as an exception to constitutional protections afforded Respondents' political speech is not only entirely inappropriate, it threatens potentially devastating consequences for the continued vitality of free speech in the United States, and should be rejected in this Court's adjudication of this case.

ARGUMENT

Albert Snyder's request that this Court sustain the jury verdict against the Respondents' anti-social protest near his son's funeral service is based on his view that the funeral and funeral environs constitutes a "captive audience" which—he contends—entitles him to "state protection" from the Respondents' "unwanted communication." Even if protest at a funeral might in some circumstances

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[5] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[6] *Hague v. CIO*, 307 U.S. 496, 515-516 (1939).

conceivably fall under the captive audience doctrine,[7] the factual context of this case provides absolutely no basis for application of that exception to the traditional First Amendment protections afforded to Respondents' speech. Mr. Snyder's claim to the contrary should, therefore, be rejected.

I. THE RESPONDENTS' PROTEST TOOK PLACE IN A TRADITIONAL PUBLIC FORUM AND DID NOT DISRUPT OR INTERFERE WITH THE FUNERAL OF MR. SNYDER'S SON.

This Court has previously recognized that the only place where one enjoys a right to be free of unwanted expression occurring in a traditional public forum is within the privacy of one's home. This is because "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[8] Unlike other areas, the home is unique in the privacy right that it affords its inhabitants. In contrast, amidst the hustle and bustle of the public parks, streets and sidewalks, where the right of free speech is historically at its zenith, the right of

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[7] *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992) (finding Establishment Clause liability where a student attending a graduation ceremony has no realistic choice but to attend and listen).

[8] *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Frisby v. Schultz*, 487 U.S. 474 (1988).

privacy afforded citizens is at its nadir. The Fourth Circuit's refusal to allow a constitutional exception for non-disruptive, peaceful—but nevertheless offensive—protest on a public street near the funeral of a fallen serviceman demonstrates an appropriate commitment to longstanding First Amendment principles. As this Court has previously noted:

> The 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. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.[9]

In the present case, the Respondents continue the historic American tradition of public protest on a matter of public concern in the most open forum—on a public street where the announced funeral and the activities of others participating in the event were part of a milieu of public expression. Moreover, the Respondents' protest near the church was entirely peaceful,

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[9] *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). In the interest of preserving the vitality of Free Speech, it has often been stated that, in public, "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (alteration in original) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

was conducted in full compliance with all time, place, and manner restrictions imposed by local authorities, and was not directed in its substance to the serviceman in question, or his family.[10]

A. The Petitioner's Claim That The Funeral Was A Private Affair Is Belied By The Fact That The Petitioner Advertised The Funeral.

The Petitioner argues that his son's funeral was a private affair and should be afforded favored privacy status under the law. In doing so, not only is Mr. Snyder asking this Court, in effect, to legislate new law regarding social conventions, he requests the Court to promulgate a new standard of privacy applicable to free speech occurring on public streets near funerals—a function better suited to the legislative branch. Mr. Snyder's claim of privacy is, however, inconsistent with the fact that he took out several advertisements in the local media announcing the details of the funeral, including its time and location.[11] Moreover, he participated in detailed media interviews about his fallen son and "[t]he media . . . were given a place to set up just off the grounds of the church, and were present before,

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[10] Brief of Respondents in Opposition to Petition for Writ of Cert. at 6, *Snyder v. Phelps*, No. 09-751 (U.S. Jan. 20, 2010).

[11] *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009).

during and after the funeral[.]"[12] All 1,200 seats of the church were full, strangers attended, and nobody was blocked from entrance to the funeral.[13] As such, it would be logically inconsistent, and judicially imprudent, to uphold Mr. Snyder's claim that the funeral was a strictly private affair, in the context of his announcing, promoting, and making it accessible to the world. This doctrinal incoherence would be particularly acute given the prevailing expression of public patriotism at funerals for military personnel killed in Afghanistan and Iraq, the many other public protests against the actions of our government taken in those countries, and the well-known ongoing program of protests of the Respondents near funerals of military personnel killed in such actions[14] Mr. Snyder's open announcement of the details of the funeral, and the area arranged for media coverage of the event, was akin to an invitation for those who support or oppose the war to appear at or near the event for expressive purposes. Thus, whether it was those waiving American flags in patriotic support of Mr. Snyder's son and the war

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[12] Brief of Respondents in Opposition to Petition for Writ of Certiorari, *supra* note 10, at 4.

[13] *Id.* at 8.

[14] The Westboro Baptist Church's protests have spanned nearly twenty years, beginning in 1991. To date, the Respondents have appeared at about 600 funerals. Krista Gesaman, *Free (Hate) Speech*, Newsweek, Mar. 17, 2010, www.newsweek.com/2010/03/16/free-hate-speech.html.

he helped prosecute, or those like Respondents with grievances about the war and the society sponsoring the war, it can hardly be said that there was any reasonable expectation of privacy on the streets outside the funeral, or that those involved in that portion of the funeral that occurred on the public streets and sidewalks were a "captive audience."

B. Even If The Petitioner Is Deemed to Have A Right Of Privacy, The Respondents' Protest Took Place In A Traditional Public Forum, Was On A Matter Of Public Importance, Went Unnoticed By The Petitioner, And Did Not Interfere With The Funeral.

Whatever society's views on the messages that the Respondents preach, it cannot be doubted that the Respondents are sincere, that their message—about the tolerance of homosexuality in society—is of public concern, and, in their view, is of critical importance to the future of the United States. Such "speech concerning public affairs is more than self-expression; it is the essence of self-government."[15] Just as decades ago the vitriolically anti-Catholic messages broadcast by Jehovah's Witnesses on the streets and sidewalks of heavily Catholic neighborhoods of New Haven were recognized as being constitutionally protected, so too, the message of the Respondents is no less entitled to

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15 *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

constitutional protection.[16] The First Amendment was not enacted to protect the ears of the majority who disagree with a message, but the tongues of the minority who wish to be heard.[17]

The protest in this case is yet another example of uninhibited, robust public debate on controversial issues of public importance[18] and part of the

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[16] *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it").

[17] "It is . . .well established that speech may not be prohibited because it concerns subjects offending our sensibilities." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 245 (2002). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978); Jeffrey Shulman, *When Is Religious Speech Outrageous?:* Snyder v. Phelps *and the Limits of Religious Advocacy*, 114 PENN ST. L. REV. PENN STATIM 13 (2010) ("The most common of legal commonplaces is that the First Amendment protects speech that some people—perhaps most people—will find offensive. Indeed, the protection of offensive speech is one of the great hallmarks of our constitutional order, the stamp that establishes the genuineness and the generosity of our freedoms, including a longstanding tradition of religious liberty.").

[18] Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, __ CARDOZO L. REV. DE NOVO ___ (forthcoming 2010). It is not just the Respondents who see their speech as being of public importance. "Respondents' communications were directed toward an issue of extraordinary public interest: the death of an American marine in the service of his country." Brief for The Anti-Defamation League as Amicus Curiae in Support of Neither Party at 6, *Snyder v. Phelps*, No. 09-751.

"equality in status in the field of ideas" that exists in this country.[19] The Respondents' viewed their protest as a matter of critical public concern because

> [w]hen Mathew Snyder enlisted in the Marines in October, 2003, the United States had been at war in Iraq for seven months, and the whole world was talking about the war. At the same time, the nation was occupied with the question of homosexuals in the military; and with the issue of the ongoing sex-abuse scandal in the Catholic Church. Not to mention the ongoing debate in this nation in the churches, the legislative halls, the schools, and every other major institution or public forum, about the morals and conduct of America.[20]

The linkage between public morals and the judgment of God is not always apparent to the citizenry of a nation, and is obviously perceived differently by individuals, interests groups, the electorate and public officials, but there can be no question that it is a matter of legitimate public concern. Witness the more eloquent linkage drawn by Abraham Lincoln in

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[19] *Mosley*, 408 U.S. at 96.

[20] Brief of Respondents in Opposition to Petition for Writ of Certiorari, *supra* note 10, at 2.

his Second Inaugural Address between the morality of slavery and the War Between the States:

> If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away.[21]

If, as Mr. Snyder demands, this Court were to allow juries to impose civil "liability for supposedly outrageous speech . . . then all this speech could thus lead to liability, university disciplinary sanctions, or in principle even criminal punishment (should a state choose to criminalize it)."[22] However pernicious one may find the Respondents' speech, and however much sympathy one may have for Mr. Snyder as the father of a fallen service member, this

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[21] President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

[22] Volokh, *supra* note 18.

Court should remember that "we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas."[23]

From the argument presented by Mr. Snyder, one would assume that the Respondents were protesting directly outside the church so as to disturb, interrupt or interfere with the funeral service, or deviating from the traditional manner in which fundamental free speech is delivered; or, that somehow because of the nature of their speech—or, perhaps even because it may arguably detract from the service of fighting men and women in Afghanistan or Iraq, that the content of Respondents' speech should be excluded from the protections of the Constitution. On the contrary, the Respondents protested on a public street—*the* quintessential traditional public forum—and did not disrupt or interfere with the funeral. Not only did they protest peacefully, their protest was approximately 1,000 feet away from the entrance to the church, and they were not observed by the attendees.[24] During the funeral procession, the Respondents were "hundreds of feet" away from Mr. Snyder.[25] Indeed, the Petitioner was not even aware at the time the

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[23] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

[24] *Snyder*, 580 F.3d at 212.

[25] Brief of Respondents in Opposition to Petition for Writ of Certiorari, *supra* note 10, at 7.

funeral occurred that the protest was underway.[26] Moreover, the Respondents left when the funeral started. This absence of intrusion was confirmed by the fact that the officiating priest was not aware of any protesting by the Respondents and he did not hear anyone mention any picketing.[27] Furthermore, Mr. Snyder did not see the signs and there is no evidence in the record that any other attendees saw the signs.[28] Consequently, these protests "neither physically nor aurally invade[d] a funeral ceremony; nor [did] their protests amount to the kind of harassing behavior required to constitute an "invasion" at common law."[29]

Justice Douglas, concurring in an extension of the "captive audience" doctrine to public transit advertising, reiterated long ago that protests on our nation's public streets "for communication of views on national questions . . . must not, in the guise of

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[26] *Snyder*, 580 F.3d at 212 ("Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral.").

[27] Brief of Appellant at 4, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009).

[28] *See* note 26, *supra*.

[29] Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 184 (2008).

regulation, be abridged or denied."[30] From the views he expressed, it is quite apparent that the critical ingredients for a captive audience are lacking here, namely, that on the public streets, the Respondents possessed the "right to express [their] views to those who wish to listen," and second, that the Respondents did not "force [their] message upon an audience incapable of declining to receive it."[31] Moreover, this analysis properly accounts for the fact that there are countervailing rights at issue. The privacy right that Mr. Snyder seeks to extend to his son's funeral as part of what he perceives to be a captive audience, cannot supersede the rights of citizens to speak and hear messages on matters of legitimate public concern except where an audience is otherwise coerced to listen. In other words, Mr. Snyder's request is "substantially limited by the rights of others."[32]

Even if this Court is tempted to follow the approach of the Sixth Circuit, which held that "[i]ndividuals mourning the loss of a loved one share a privacy right similar to individuals in their homes

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[30] *Lehman v. City of Shaker Heights et al.*, 418 U.S. 298, 305 (1974) (Douglas, J., concurring) (quoting *Hague,* 307 U.S. at 515-16).

[31] *Id.* at 307.

[32] *Pub. Utils. Comm'n of the District of Columbia v. Pollak*, 343 U.S. 451, 464 (1952).

or individuals entering a medical facility[,]"[33] the present case does not allow for a verdict for the Petitioner because, as the Fourth Circuit noted, the record did not support any finding that Mr. Snyder's privacy rights were infringed by the protest.[34] The only disruption that apparently took place was a minor incident when a man in a truck shouted at the protestors.[35] None of the facts of the case, therefore, justify any deviation for the principle that, "as a general matter, . . . in public debate our citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."[36] Given the absence of noise or intrusion from the Respondents' protests, this is not a case where the audience of funeral attendees, "ha[d] no choice but to sit and listen, or perhaps to sit and try not to listen."[37] Nor did it result in the type of coercive situation that a person "had no real alternative to

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[33] *Phelps-Roper v. Strickland*, 539 F.3d 356, 364-65 (6th Cir. 2008) (citing *Hill v. Colorado*, 530 U.S. 703 (2000)).

[34] *Snyder*, 580 F.3d at 230 (Shedd, J., concurring).

[35] Reply Br. For Appellant at 2, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) citing Joint App., Vol. VIII, 2287.

[36] *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

[37] *Lehman*, 418 U.S. at 307 (Douglas, J., concurring).

avoid."[38] Even if the funeral setting were to be contrasted to the abortion clinic setting, legitimate time, place, or manner restrictions are only permissible in order to ensure the patient has access to the clinic and to curb noise that may be heard *inside* the clinic.[39] Here, the Respondents neither impeded access to the church, nor did they create any noise that could be heard within the church once the funeral had started.

Almost exclusively because of the protests of the Respondents, the vast majority of the States and the federal government have enacted statutes that limit the ability of the Respondents to protest at funerals.[40] The Respondents, both at this funeral and at the other funerals they have picketed, fully complied with these restrictions.[41] The primary

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[38] *Weisman*, 505 U.S. at 598.

[39] *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 754 (1994).

[40] To date, at least forty States and the federal government have enacted statutes imposing time, place, and manner requirements concerning funeral protests. Devin Dwyer, *States Line Up Against Funeral Hecklers in Supreme Court Brief*, ABC News, May 31, 2010, abcnews.go.com/Politics/Supreme_Court/states-file-supreme-court-fred-phelps-westboro-baptist/story?id=10770402&page=1

[41] The Fourth Circuit observed that the record shows that the Respondents complied with all local ordinances and police

[Footnote continued on next page]

purpose of these statutes—which is the proper province of the legislative branch—is that they restrict "disruption" of funerals.[42] The facts in this case show no disruption—the Respondents were in full compliance with the applicable time, place, and manner laws—so the real question posed by this case is whether such protests can essentially be cut off altogether, even where there is no showing of disruption, and whether the judiciary should assume to itself the power to do so. Permitting a jury to delve into these questions as a roaming censor of what should and should not be permitted offensive speech, and then to render verdicts reflecting the jury's judgment, would do just that.

C. The Jury Should Not Have Been Permitted To Determine Liability Or Damages.

This Court has previously recognized the danger presented when juries are allowed to determine liability for speech that offends majority sensibilities. In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984) (citations omitted), the Court noted that juries are "unlikely to be neutral with respect to the content of speech and hold[] a real danger of becoming an instrument for

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[Footnote continued from previous page]
directions and the protest passed off in a peaceful manner. *Snyder*, 580 F.3d at 212.

42 *See generally* Wells, *supra* note 29, at 177 (discussing various state statutes that limit the ability of persons to disrupt funerals).

the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." Any imposition of liability in such circumstances would be doubly concerning in cases such as this because "liability easily ends up turning on how much juries condemn the speaker's viewpoint."[43] In the present case, the distaste of the jury for the speech of the Respondents was obviously a considerable factor, as shown by the level of damages awarded to the Petitioner.[44] No doubt the politically explosive power of this distaste is reflected in the briefs *amici curiae* filed in support of Mr. Snyder by the two political leaders of the U. S. Senate (along with 40 other Senators), 48 of the 50 State Attorneys General, the Veterans of Foreign Wars and the American Legion, among others. The decision of the jury proved that "[c]ivil action judgments 'reflect social conventions and tend to reflect what the majority believes' to be acceptable behavior."[45]

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[43] Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/chain 1194479521.shtml (Nov. 7, 2007).

[44] The jury awarded the Petitioner a total of $10.9 million, of which $2.9 million was compensatory damages and $8 million was punitive damages. The punitive damages were later reduced by the district court. *Snyder*, 580 F.3d at 212.

[45] Volokh, *supra* note 18 (quoting Chelsea Brown, *Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 232 n. 144 (citation omitted)).

However, under the First Amendment, political currency, the popularity of a message, or even concepts of "acceptable behavior" are not, and should not, be the yardsticks by which constitutional protections are determined.

If the decision of the Court of Appeals for the Fourth Circuit is reversed, there is a grave risk that "[m]any statements might be labeled 'outrageous' by some judge, jury, university administrator, or other government actor."[46] On the contrary, "such speech is an important part of the public debate. It should not be punished with multi-million dollar liability. . . . And it should not be deterred by the risk of such liability[.]"[47] Furthermore, given the vagueness of the "outrageousness" standard, such potential liability "'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[48] It is undeniably the role of the trial courts to act as gatekeepers when a plaintiff requests a jury impose liability for presumptively protected expression—a role that is indispensible in protecting the guarantees of the First Amendment.

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[46] *Id.*

[47] *Id.*

[48] *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972))(alteration in original).

II. THE CAPTIVE AUDIENCE DOCTRINE REPRESENTS A NARROW EXCEPTION TO THE FIRST AMENDMENT'S FREEDOM OF SPEECH GUARANTEE, AND SHOULD NOT BE EXPANDED FURTHER.

This Court has previously held that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech," but has nonetheless refused to uphold bans on the unwanted speech.[49] This is because "[t]he captive audience idea indeed finds its source in the idea of protecting people within their homes."[50] Consequently, courts have been "notoriously reluctant to apply the captive audience rationale outside the home."[51] For example, the Eighth Circuit has observed that "the home is different, and, in our view, unique. Allowing other locations, *even churches*, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication."[52]

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[49] *Cohen*, 403 U.S. at 21 (1971).

[50] Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 KAN. L. REV. 575, 588 (2007).

[51] *Id.*

[52] *Olmer v. Lincoln*, 192 F.3d 1176, 1182 (8th Cir. 1999) (emphasis added).

Outside of the home, this Court has explained that the "recognizable privacy interest in avoiding unwanted communications varies widely in different settings. It is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' it."[53] Therefore, the captive audience doctrine is only appropriate in those very narrow circumstances where highly confined spaces,[54] or "substantial privacy interests are being invaded in an essentially intolerable manner"[55] or where individuals may not simply "avert their eyes" to the message they find objectionable.[56] Here, the Respondents protest on the public streets may be avoided by simple aversion of the eyes. Nothing else was required to block out the Respondents' message as they protested, marching and displaying placards. There was not even any need to plug one's ears to avoid the message.

Mr. Snyder concedes that the captive audience doctrine "depends principally on two factors: whether a sufficient privacy interest of the listener is at stake to warrant protection and whether the speaker's

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53 *Hill*, 530 U.S. at 716 (quoting *Cohen*, 403 U.S. at 21-22).

54 *Lehman*, 418 U.S. at 307 (Douglas, J., concurring); *cf. Lee v. Weisman*, 505 U.S. 577 (1992).

55 *Cohen*, 403 U.S. at 21.

56 *Id.*

conduct interferes with the listener's privacy in an intolerable manner."[57] How then can he claim a "substantial privacy interest" in a funeral that he himself advertised to the world? And how can it be claimed that the funeral was "invaded in an essentially intolerable manner" when the protest occurred well outside the venue, when the attendees were unaware that the protests were occurring and when the protests concluded *before* the funeral began? The occasions where captive audiences in the public domain are genuinely found are incredibly rare, as shown by this Court's previous holdings,[58] and this is not one of them

Mr. Snyder would, in essence, have this Court generate yet another new right, *i.e.*, a "civility-based privacy interest."[59] Such "[a] civility-based privacy interest is firmly grounded in communicative impact—regulating speech because of the audience's response to it—and allows government officials to

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[57] Brief for the Petitioner at 48, *Snyder v. Phelps*, No. 09-751 (U.S. Jan. 20, 2010).

[58] *See, e.g., Weisman*, 505 U.S. 577 (1992) (finding that students were effectively unable to boycott their graduation ceremony). Likewise, funeral attendees who cannot hear protests at some distant location are not the equivalent of the streetcar riders who are captive to the messages displayed on the streetcar, *See generally Lehman*, 418 U.S. 298 (1974) (holding that riders on a streetcar were "captive" to placard advertisements on the streetcar).

[59] Wells, *supra* note 29, at 155.

restrict speech that offends us."[60] If the Court were to accept Mr. Snyder's argument that attendees at funerals are "captive" to the messages of others expressed on public streets near the funeral venue—even when, as here, the attendees are not even aware of the messages of the Respondents—then there is a high risk that countless other situations will likewise warrant protection from the captive audience doctrine because, "captive audiences are present pretty much anywhere[.]"[61] Protests against same-sex marriage at weddings, school policies at graduation ceremonies, racism at church meetings, offensive T-shirts at political events, and abortion at counseling centers, to name but a few, could all likewise trigger liability. In all such instances, an individual could claim to be "captive" in the sense that he or she is obliged to attend the event and that in doing so may be subjected to a message displayed by another attendee. If the funeral context can satisfy the captive audience requirements, what else can? Such ambiguities create a chilling effect on speech, as citizens, unsure whether their message may be targeted and that they could be legally liable, instead suppress that message rather than run the

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60 *Id.* at 158.

61 Eugene Volokh, *RE: Reversal of intentional infliction of emotional distress/intrusion upon seclusion verdict against Phelpsians for hostile picketing 1000 feet away from funeral*, Sept. 26, 2009, http://www.mail-archive.com/xonlawprof@lists.ucla.edu/msg17935.html (last visited June 20, 2010).

gauntlet of potential liability. The consequential threats to free speech from such a loose standard, not just in this case but in an array of other areas, would constitute a grave injury to the protections provided by the First Amendment.[62]

Whatever desire there may be on the part of society to silence the Respondents' message, and "[a]s distasteful as the church's language might be to others, its message is the heart—and . . . the soul—of the [Westboro Baptist] church."[63] While "[t]he instinct to regulate or punish is powerful and understandable[,]"[64] it is the responsibility of judges to protect the equality of ideas in the public square. This is no less a part of "administer[ing] justice without respect to persons, and do[ing] equal right to the poor and to the rich, . . . under the Constitution

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62 *See, e.g.*, Eugene Volokh, *The Phelpsians' Speech, the Mohammed Cartoons, and the Slippery Slope*, The Volokh Conspiracy, March 8, 2010, http://volokh.com/2010/03/08/the-phelpsians-speech-the-mohammed-cartoons-and-the-slippery-slope-2/ (last visited June 30, 2010) (arguing that allowing the restriction of the Phelpsians speech "would lead to the restriction of much more valuable speech[]" and that "it's better to protect the Phelpsians' speech, appalling as it is, than to allow its restriction—because by allowing the restriction, we'd be giving a powerful extra tool to those who would restrict a great deal of other speech.").

63 Shulman, *supra* note 17, at 17.

64 Wells, *supra* note 29, at 153.

and laws of the United States,"[65] even if that means courts "must share [a] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people."[66] This is just such a case.[67]

CONCLUSION

For the foregoing reasons, the judgment of the Courts of Appeals for the Fourth Circuit should be affirmed.

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65 28 U.S.C. § 453 (2010).

66 *Kopf v. Skyrm*, 993 F.2d 374, 380 (4th Cir. 1993).

67 The rejection of the Petitioner's request to establish liability for peaceful protesting near military funerals would not give the Respondents *carte blanche* to engage in whatever protests they wish. Protestors will continue to be bound by time, place, and manner requirements. Moreover, they may be held liable for the torts of trespass and/or defamation if their actions so warrant. In this case, however, the protests were clearly within the bounds of the relevant time, place, and manner restrictions and fully protected speech on matters of public debate.

Respectfully submitted,

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