No. 09-751

In The Morris Tyler
Moot Court Of Appeals
At Yale Law School

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 for the Respondents

Tanya Abrams
Mark H. Hatch-Miller
Counsel for the Respondents
127 Wall Street
New Haven, CT 06511
(203) 432-4992

QUESTIONS PRESENTED[1]

1. Whether a private civil judgment against the Westboro Baptist Church and its members for holding a public protest expressing their religious and political beliefs near a military funeral violates the Free Speech Clause of the First Amendment.

2. Whether a private civil judgment against the Westboro Baptist Church and its members for publishing an online report about the protest that included offensive but non-defamatory statements about a private figure violates the Free Speech Clause of the First Amendment.

[1] Petitioner is Albert Snyder. Respondents are Fred W. Phelps, Sr.; Westboro Baptist Church, Inc.; Rebekah A. Phelps-Davis; and Shirley L. Phelps-Roper.

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JURISDICTION

The court of appeals entered judgment on September 24, 2009. The petition for a writ of certiorari was filed on December 23, 2009, and granted on March 8, 2010. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

Respondent Westboro Baptist Church is a church incorporated under Kansas law; Respondent Fred W. Phelps, Sr. is its founder and pastor, and Respondents Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper are his daughters. Jt. App. 9, 45. Respondents believe that American soldiers are dying in Iraq because God is punishing the United States for tolerating homosexuality. *Id*. at 46. They also hold strongly anti-Catholic views. See *id.* at 4. In 2006, Respondents travelled to Maryland and notified local law enforcement of their plans to hold a demonstration near a Catholic church on the day of a funeral for a soldier killed in Iraq. *Id.* at 46. They then complied with local ordinances and with law enforcement directions and held a protest expressing their beliefs at a location approximately one thousand feet away from the church. *Ibid.* Respondents later published an online report that described the protest and criticized Petitioner, the soldier's father, for raising his son as a Catholic, divorcing, and allowing his son to serve in the military. *Ibid.* Petitioner sued Respondents in the Maryland federal district court

asserting Maryland common law tort claims, and the district court awarded Petitioner $5 million in compensatory and punitive damages. The court of appeals reversed on First Amendment grounds. Jt. App. 78.

1. Petitioner's son died in Iraq on March 3, 2006. *Id.* at 45. Petitioner selected St. John's Catholic Church in Westminster, Maryland as the site for his son's funeral. *Ibid.* The local newspaper published an announcement that the funeral would be held there on March 10, 2006. *Ibid.* The newspaper also published an obituary for Petitioner's son; it mentioned that Petitioner was divorced, and that he had raised his son as a Roman Catholic. *Id.* at 47.

Respondents regularly hold protests outside of funerals to express their belief that God is taking revenge on America for condoning homosexuality. *Id*. at 211. When Respondents learned about the funeral, they travelled to Maryland and informed the local police that they planned to protest outside of the church before the funeral. *Id.* at 46. Respondents complied with all applicable local ordinances and instructions from the police, and maintained a distance of approximately one thousand feet from the church. *Ibid*. At the protest, Respondents held signs that read: "God Hates the USA," "America is doomed," "Pope in hell," "Fag troops," "You're going to hell," "God hates you," "Semper fi fags," and "Thank God for dead soldiers." *Ibid.*

Although Petitioner attended the funeral, he could not see the protest. Respondents stood at a distance of one thousand feet from the church, and a counter-protest blocked Petitioner's view of Respondents and their signs. See *id.* at 7.[2] Petitioner saw the protest for the first time when he watched a television new report about the funeral later on that day. *Id.* at 46.

[2] The record contains just one cryptic reference to the counter-protest. See Jt. App. 7 ("Interestingly, the biker chicks were a non starter. They were reduced to flipping their bloody middle fingers and sniping from a distance."). A contemporary news report confirms that Respondents were not the only demonstrators present outside the funeral: "To help shield the family from the protesters, a group of motorcyclists called the Patriot Guard Riders - who show up any time Westboro members plan to picket a military funeral - stood shoulder to shoulder in the church parking lot, waving American flags. They were there as a human buffer to protect the family . . . ." Gina Davis, *At Carroll Funeral, A National Protest*, Balt. Sun, Mar. 11 2006, at 1A.

After Respondents returned to Kansas, they published a report describing the protest on a public website maintained by the church. Jt. App. 46. The report consisted of approximately seven pages of text—more than half of which comprised direct Bible quotations—accompanied by three photographs of the protest. *See id.* at 1-7. The relevant portion of the report read:

> Twenty years ago, little Matthew Snyder came into the world. He had a calling; he had a vital roll [sic] in these last of the last days. God created him and loaned/entrusted him to Albert and Julie Snyder. He required a standard when He delivered the lad to them, to teach him among other things to fear God and to keep His commandments. God expected them to GIVE THAT CHILD BACK in thanksgiving to Him for the blessings of the opportunity and privilege they received from God, to raise that child. . . . God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver. In thanks to God for the comfort the child could bring you, you had a DUTY to PREPARE that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil. You taught him that God was a liar. At Matthew 19:4-6 the Lord Jesus Christ said: . . . ["]For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain shall be one flesh? . . . What therefore God hath joined together, let not man put asunder.["] Albert and Julie RIPPED that body apart and taught Matthew to defy his creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolator. . . . [A]fter all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?

Id. at 3-4. The report also contained a passage criticizing Maryland for preparing to outlaw funeral protests: "[T]he Maryland Legislature (THINK: TALIBAN) is setting about to pass a law attempting to shred the First Amendment. . . . Maybe the Maryland Legislature can pass a law abolishing hell and preventing God from killing any more of their young men." *Id.* at 7. Petitioner found the website by searching for his son's name on Google. *Id.* at 46.

2. In June 2006, Petitioner filed a complaint in the Maryland federal district court under the court's diversity jurisdiction. *Ibid.* The complaint asserted five claims under Maryland tort law: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of

emotional distress, and civil conspiracy. See Jt. App. 5-10. On October 15, 2007, the district court granted Respondents' motion for summary judgment on the defamation and publicity given to private life claims. *Id.* at 46. On the defamation claim, the court held that Petitioner had not met the burden of proving that Respondents' communications were defamatory, because the content of Respondents' online message was essentially an expression of "religious opinion [that] would not realistically tend to expose [Petitioner] to public hatred or scorn." *Id.* at 46-47. On the publicity given to private life claim, the court held that "no private information was made public by" Respondents because the facts that Petitioner "was divorced and that his son was Catholic" had been published in the newspaper, and that the "publication of th[at] information would not be highly offensive to a reasonable person." *Id.* at 47. However, the court held that the intrusion, emotional distress, and conspiracy claims raised genuine issues of fact to be determined by a jury. *Ibid*.

At trial, Respondents argued that the Free Speech Clause of the First Amendment prohibited a tort judgment based on the protest and the report. *Id.* at 81.[3] Instead of deciding that legal question on its own, the district court instructed the jury to decide whether the First Amendment permitted tort liability based on non-defamatory speech. *Id.* at 88. Over Respondents' objection, the court instructed the jury as follows:

> Speech that is vulgar, offensive, and shocking . . . is not entitled to absolute constitutional protection under all circumstances. . . . When speech gives rise to tort liability, the level of First Amendment protection varies depending on the nature and subject matter of the speech. . . . *You must balance* the defendants' expression of religious belief with another citizens' right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. . . . [Y]ou . . . must determine whether the Defendants' actions were directed specifically at the Snyder family. If you do so determine, you must then determine whether those actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.

[3] Respondents asserted a Free Exercise Clause defense below, see Jt. App. 52, but no longer rely on that argument.

Jt. App. 81-82 (emphasis added). The jury awarded Petitioner $10.9 million in compensatory and punitive damages; the district court later reduced the award to $5 million. *Id.* at 71, 82.

The district court denied Respondents' post-trial motions for judgment as a matter of law, judgment notwithstanding the verdict, reconsideration and rehearing, new trial, and relief from judgment. *Id.* at 71. Addressing Respondents' First Amendment argument, the court reasoned that the Supreme Court "has long recognized that 'not all speech is of equal First Amendment importance.'" *Id.* at 50 (quoting *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)). The court relied on *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and other cases for the proposition that "the First Amendment interest in particular speech must be balanced against a state's interest in protecting its residents from tortious injury." Jt. App. 51. The court concluded that the First Amendment permitted tort liability based on Respondents' expression because Petitioner was a private figure and the funeral was a private event. *Ibid.*

3. The Fourth Circuit reversed. *Id.* at 78. The court held that even "[a]ssuming that the district court otherwise applied the proper legal standard to its analysis of the Defendants' First Amendment contention, it fatally erred by allowing the jury to decide relevant legal issues," and that "[t]he district court . . . [further] erred when it utilized an incorrect legal standard." *Id.* at 88-89. The court reasoned that the district court's conclusion that Petitioner was a private figure did not resolve the First Amendment question. *Id.* at 89. The court reasoned that the district court should have gone further and applied the line of this Court's precedents "specifically concerned with the constitutional protections afforded to certain *types* of speech, and that does not depend upon the public or private status of the speech's target." *Ibid.* (citing *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 16 (1990); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 50 (1988)).

The court of appeals reasoned that the pertinent issue was "whether [Respondents'] statements could reasonably be interpreted as asserting 'actual facts' about an individual, or whether they instead merely contained rhetorical hyperbole." Jt. App. 89 (quoting *Milkovich*, 497 U.S. at 20). The court concluded that none of the signs Respondents held at the demonstration could "reasonably be interpreted as stating actual facts about any individual," and that "a reasonable reader would understand [the online message] to contain rhetorical hyperbole, and not actual, provable facts about [Petitioner] and his son." *Id.* at 91. One member of the court of appeals panel concurred in the judgment on the ground that the evidence was insufficient to support a verdict for Petitioner under Maryland tort law. *Id.* at 94.

SUMMARY OF ARGUMENT

This case is not about whether the States can protect the privacy interests of funeral attendees. Petitioner and Respondents agree that they can. The dispute here is about whether the First Amendment permits the States to impose *tort liability* for holding a public demonstration near a funeral, and for publishing an offensive online report that contains no defamatory falsehoods. It does not.

I. A. Respondents' public demonstration was protected speech. No discernable conduct distinct from the speech itself took place at the demonstration. Neither was the protest "low-value" speech deserving of categorical exception from constitutional protection. Petitioner insists that the act of protesting near a funeral is itself sufficient to transform speech into proscribable conduct or render it without constitutional value. That assertion is contrary to precedent, and would create a dangerous standard by which any speech might be deprived of protection whenever its content was disagreeable to majority views.

B. The captive audience doctrine does not rescue Petitioner's argument. The doctrine permits *time, place, and manner restrictions* and *injunctions* in order to reconcile privacy interests and free speech rights. But time, place, and manner restrictions were already in place at the funeral, and they protected Petitioner's privacy interests adequately. The restrictions kept Respondents one thousand feet away, so far that Petitioner never actually saw the protest in person. Yet Petitioner asserts that the captive audience doctrine permits the additional remedy of tort damages. The First Amendment cannot tolerate such novel use of tort liability; it would provide no notice to citizens regarding permissible activity, would chill protected expression, and would likely result in discriminatory application of state tort laws against groups and individuals who hold unpopular views.

II. A. Respondents' online report about the protest is also protected from state tort liability. The report contained no provably false statements of fact about Petitioner. Instead, it related undisputed facts about him that had already been published in a newspaper obituary, and normative judgments about matters of public concern including divorce, religion, and military service. Because the report did not include any false statements of fact, the Court's precedents regarding private figure defamation claims are of little relevance here.

B. Petitioner insists that the First Amendment permits each State to use its own tort laws to regulate offensive, but non-defamatory speech about private figures on the Internet. But speech about matters of public concern does not fall outside the protection of the First Amendment merely because it causes offense or outrage to a private figure. Further, and fundamentally, state tort law is an impermissible means to regulate the content of an interstate—indeed, global—medium for public discourse. Offensiveness is a nebulous concept, and permitting juries in fifty different States to regulate online speech by divergent standards would

provide no meaningful guidance for online speakers, who could be subject to liability in virtually any State. In such a situation, an online speaker could avoid tort liability only by adhering to the standards of the most easily offended community in the nation. The First Amendment will not bear the sanitization of cyberspace to protect people from offense; it protects Respondents' online report in order to preserve the Internet as a medium for robust debate on all manner of public concerns.

ARGUMENT

The States cannot make actionable through the common law what the Constitution protects as essential to our liberty. The First Amendment ensures the right to freely express views on public matters, even if they offend. See *Virginia* v. *Black*, 538 U.S. 343, 357 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."). Set against the Constitution's commitment to free speech, the recent vintage of the two tort claims asserted here comes into stark relief. Only in the past several decades have intentional infliction of emotional distress and intrusion upon seclusion entered the nation's legal vocabulary. These two relatively new causes of actions, though designed to protect legitimate interests, are marshaled here not against conduct or against unprotected speech such as libel or fighting words, but rather against expressions of unpopular religious and political beliefs.

Where a plaintiff alleges tortious injury resulting from speech about matters of public concern, the First Amendment obliges the Court "to 'make an independent examination of the whole record' . . . to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 284-86 (1964)). The record here

shows that Respondents' public protest and online report expressed deeply held religious and political beliefs and merit full constitutional protection, notwithstanding their references to a private figure.[4]

I. THE FIRST AMENDMENT PROHIBITS A TORT JUDGMENT AGAINST RESPONDENTS FOR HOLDING A PUBLIC PROTEST NEAR A MILITARY FUNERAL.

Public protest through picketing is among the most traditional means of free expression. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972) ("[P]eaceful demonstrations in public places are protected by the First Amendment."). Petitioner's contention that Respondents can be subjected to tort liability for holding a protest that complied fully with local ordinances and police instructions contravenes both precedent and the principles underlying the First Amendment.

First, Petitioner resurrects the argument, laid to rest in *Cohen* v. *California*, 403 U.S. 15 (1971), that the protest at issue here was not speech at all, but became proscribable conduct by virtue of its offensive content and means of expression. But speech about matters of public concern retains constitutional protection even when expressed in offensive terms. See *Cohen*,

[4] As an alternative to resolving the constitutional question presented in this case, the Court should dismiss the writ of certiorari as improvidently granted. There is still a dispute in this case regarding a significant legal question passed on by the court of appeals, but not encompassed by the writ. The court of appeals could have avoided the First Amendment issue altogether by considering the argument raised in an amicus brief that, as a matter of Maryland tort law, there was insufficient evidence to support the jury verdict. Jt. App. 94 (Shedd, J., concurring) (citing *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.")). This Court has suggested that the courts of appeal have the power to consider an issue raised by an amicus, but ignored by the parties, in order to foreclose the possibility that litigants will agree to present particular legal issues in an attempt to obtain an advisory opinion. *U.S. National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 447 (1993). The only judge on the panel below to consider the amicus argument concluded that Petitioner did not introduce sufficient evidence of "outrageousness" to support a finding of liability under Maryland tort law. Jt. App. 95 (Shedd, J., concurring). Because of that outstanding issue, this case is a poor vehicle for resolving the First Amendment controversy here, and there is good reason for the Court to dismiss the writ as improvidently granted. See, *e.g.*, *Ysursa* v. *Pocatello Educ. Assn't*, 129 S. Ct. 1093 (2009) (Souter, J., dissenting) ("The upshot is that if we decide the case as it comes to us we will shut our eyes to a substantial, if not the substantial, issue raised by the facts. . . . This is a good description of a case that should not be in this Court as a vehicle to refine First Amendment doctrine.").

403 U.S. at 18 (rejecting the artificial mischaracterization of the mere "fact of communication" as conduct based on its "asserted offensiveness"). Furthermore, Respondents' speech, distasteful as it was, contributed to public discourse about important religious and political matters. Unlike "fighting words" or libel, offensive speech does not warrant categorical exception from the First Amendment's protection.

Second, Petitioner posits a state interest in protecting captive audiences so expansive that it justifies imposing the enormous burden of tort liability. But this Court has rejected far less burdensome measures to protect captive audiences from offensive speech. See, *e.g.*, *Schenck* v. *Pro-Choice Network Of Western New York*, 519 U.S. 357, 377 (1997) (striking down an injunction requiring protestors to stay fifteen feet away from people and vehicles entering and leaving abortion clinics). Petitioner cannot avail himself of the captive audience doctrine because he in fact did not even witness Respondents' protest in person. Even if he could, the captive audience doctrine cannot justify the imposition of tort liability, which raises an intolerable risk of content-based discrimination and chilling effects on protected speech. Appropriate time, place, and manner restrictions and properly tailored injunctions, not tort liability, are the constitutionally permissible means to reconcile privacy interests and the right to free speech.

A. Offensive Speech About Matters Of Public Concern At A Public Protest Enjoys Full Constitutional Protection.

The court of appeals correctly recognized that Respondents' protest signs expressed political and religious views regarding matters of public concern, and were thus fully protected by the First Amendment. Jt. App. 89-90 ("As a threshold matter, as utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct

of the United States and its citizens."). This Court has repeatedly held that speech about matters of public concern that shocks, offends, and arouses strong feelings is constitutionally protected in the context of a public protest. See, *e.g.*, *Cohen*, 403 U.S. at 26.

When Respondents held a demonstration to express their beliefs, they exercised the same rights that this Court protected in *Cantwell* v. *Connecticut*. 310 U.S. 296, 296 (1940). In that case, the Court recognized that the petitioner's expression of religious beliefs on a public street enjoyed full constitutional protection, even though the speech "highly offended" those who heard it. *Id.* at 309. The petitioner in *Cantwell* attacked "all organized religious systems as instruments of Satan and injurious to man" and "single[d] out the Roman Catholic Church" for particularly vitriolic abuse. *Ibid.* Respondents' signs expressed virtually the same message. Respondents' expression of their beliefs that Catholicism is a corrupt institution and that God is punishing the United States for tolerating homosexuals in the military is entitled to the same constitutional protection.

If in the seventy years since *Cantwell* the terms employed by religious and political minorities to express unpopular beliefs have grown more venomous, that fact does not detract from the constitutional value of religious and political expression. Strongly expressed beliefs do not lose their constitutional value just because a majority takes offense at them. See *id.* at 310 ("In the realm of religious faith, and . . . political belief . . . the tenets of one man may seem the rankest error to his neighbor"); see also *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of . . . protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").

1. The Protest Was Protected Speech, Not Proscribable Conduct.

Petitioner strains to explain why a protest on public streets ceases to be speech by virtue of its proximity to a funeral. Public demonstrations are quintessential examples of both freedom of speech and freedom of assembly. See *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). The fact that Respondents held their demonstration on public streets in the vicinity of a funeral does not make those streets any less public. See *Frisby* v. *Schultz*, 487 U.S. 474, 481 (1988) ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.").

Contrary to Petitioner's suggestion, no conduct took place during the public protest at issue in this case that would distinguish it from other protected public demonstrations. The Court has repeatedly rejected attempts to recast expression that takes place in a public place as unprotected conduct. For example, in *Cohen*, the Court reversed the petitioner's conviction under a California statute proscribing "tumultuous or offensive conduct" where the only "conduct" to speak of was the defendant's expressive activity of wearing a jacket with the words "Fuck the Draft" written on it while inside a courthouse. 403 U.S. at 16. Like the statute at issue in *Cohen*, the Maryland tort claims at issue in this case turn on conduct. The district court instructed the jury that liability for intentional infliction of emotional distress requires a finding that "the *conduct* was extreme and outrageous," and intrusion upon seclusion requires proof the conduct "intru[ded] or pr[ied] upon" a private matter. Jt. App. 82. But Respondents did not engage in any conduct or intrusion distinct from the very "fact of communication" and the "asserted

offensiveness of the words" employed. *Cohen*, 403 U.S. at 18. Even highly offensive "symbolic conduct" such as cross burning qualifies as protected "expression," absent a "true threat" of violence. *Black*, 538 U.S. at 359, 360 n.2.

To be sure, States have an interest in preserving public order during public demonstrations, and Maryland torts proscribing outrageous conduct might be available to punish disorderly conduct during a demonstration. But Respondents' demonstration did not disturb the peace. Petitioner concedes that Respondents complied with all local ordinances and police directions during the demonstration. Jt. App. 79. This Court's decisions approving of picketing regulations to help to preserve public order, see, *e.g.*, *Walker* v. *Birmingham*, 388 U.S. 307, 316 (1967), are thus of no moment here. The States' legitimate interest in preserving public order reaches only disruptive acts that are distinct from speech. See, *e.g.*, *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966) (upholding conviction for trespass because student demonstrators entered jail grounds and refused to leave). That interest does not justify regulation of public demonstrations simply because the *message conveyed* is somehow disruptive.

Although the States' interest in regulating conduct may justify incidental limitations on otherwise protected speech, see, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367 (1968) (upholding conviction for burning draft card), imposing tort liability for holding a public protest near a funeral is not an incidental limitation on the right to public expression. Petitioner cannot suggest that the States have a specific interest in forbidding any individual from standing and holding signs while one thousand feet away from a funeral. That the Constitution would not countenance such a broad interest is plain from this Court's decisions striking down measures establishing far smaller zones around locations where individuals possess privacy interests no less weighty than those of Petitioner here. See, e.g., *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 771-

75 (1994) (striking down provision enjoining protestors from picketing within three hundred foot buffer zone around abortion clinic and around residences of clinic staff). The Court has narrowly construed other measures to allow protesters, though prohibited from standing "solely in front of a particular residence," to engage in "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses." *Frisby*, 487 U.S. at 483.

Instead, Petitioner relies on a general state interest in protecting citizens from emotional distress and intrusion into privacy at funerals. Even if those general interests are substantial, the Maryland torts at issue here provide no basis for distinguishing between offensive, intrusive, or outrageous *conduct* and offensive, intrusive, or outrageous speech *content*. Cf. *Cohen*, 403 U.S. at 18 (rejecting the argument that walking through a courthouse wearing a jacket with an offensive message written on it is "separately identifiable conduct . . . intended . . . to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing [the] ability to express [oneself]."). The Court has taken pains in past cases to ensure that tort recovery is distinctly based on harmful conduct, rather than on protected speech. In *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), where a private business alleged tortious injury by a civil rights boycott, the Court held: "[W]hile the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." *Id.* at 918. Respondents committed no disruptive acts, but only communicated sincere religious beliefs in a manner that caused offense. The Constitution prohibits Petitioner from recovering a tort judgment based on their offensive message.

2. Because Offensive Speech Has Constitutional Value, There Are No Grounds For A New Categorical Exception.

Offensive speech does not fall within one of the narrow categories of speech not entitled to constitutional protection; nor does it share the attributes that make those categories excepted. The Court has recognized categorical exceptions from First Amendment protection for obscenity, see, *e.g.*, *Roth* v. *United States*, 354 U.S. 476 (1957); defamation, see, *e.g.*, *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952); and fighting words, see, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. at 571-72 (1942). This Court has been extremely hesitant to expand those narrow exceptions. See, *e.g.*, *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (refusing to characterize as "fighting words" provocative speech absent threat of "imminent disorder"); *Gooding* v. *Wilson*, 405 U.S. 518, 527 (1972) (striking down statute that "makes it a 'breach of peace' merely to speak words offensive to some who hear them"). The established exceptions are unprotected because they 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." *Chaplinsky*, 315 U.S. at 572.

In stark contrast, the Court has recognized that public speech that offends plays an important role in public discourse. Offensive speech can indeed be "a step to truth." See *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949) (Free speech "may indeed best serve its high purpose when it . . . stirs people to anger. Speech is often provocative and challenging. It may . . . have profound unsettling effects as it presses for acceptance of an idea."). The visceral impact of offensive, hyperbolic speech can help to amplify a speaker's message. See *Cohen*, 403 U.S. at 26 ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.").

Respondents' speech has sparked vigorous public debate about the religious and political ideas it communicated and has prompted counter-protests expressing opposing views. See, *e.g.,* Gina Davis, *At Carroll Funeral, A National Protest*, Balt. Sun, Mar. 11 2006, at 1A (describing a group of motorcyclists called the Patriot Guard Riders "who show up any time Westboro members plan to picket a military funeral" and at Petitioner's son's funeral "stood shoulder to shoulder in the church parking lot, waving American flags"). This case demonstrates that the "marketplace of ideas" is working just fine. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Analogies to workplace harassment law undercut, rather than bolster, Petitioner's characterization of the protest as a form of low-value speech. Generally, harassing speech is not about matters of public concern. It is wholly private speech and as such is less vigorously protected by the First Amendment. See *Dun & Bradstreet*, 472 U.S. at 759-60 (recognizing the lesser constitutional value of speech about purely private matters). But even harassing speech that could be interpreted as touching on public matters cannot be proscribed simply because it offends people who are targeted in the workplace. See, *e.g.*, *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment."); *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("[M]ere utterance of an . . . epithet which engenders offensive feelings in a employee does not sufficiently affect the conditions of employment to implicate Title VII.") (internal quotation marks omitted); J.M. Balkin, *Free Speech and Hostile Environments*, 99 Colum. L. Rev. 2295, 2308 (1999) ("It would be a great mistake to understand hostile environment doctrine . . . as a set of rules designed to preserve civility . . . or to prevent offense."). Workplace harassment is proscribable not because

it is offensive, but because it reinforces social structures that materially and economically disadvantage women and minorities. Offensiveness alone, even directed at a specific audience, is a wholly insufficient basis for a new categorical exception to the First Amendment.

B. The Captive Audience Doctrine Does Not Permit Tort Recovery.

To the extent that the Court has recognized a captive audience exception to free speech protection, it has limited both the types of privacy interests the exception encompasses, and the types of regulations that the exception permits. Petitioner advocates an expansion of the doctrine along both dimensions, to a point at which the exception would virtually swallow the general rule of free expression.

The Court has never used the simple observation that a party is in some sense "captive" as a free pass to prohibit or otherwise burden free speech. The Court has shown special solicitude for privacy interests in the home. See, *e.g.*, *Rowan* v. *U.S. Post Office Dept.*, 397 U.S. 728, 738 (1970) ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another."). But the First Amendment constrains permissible regulation even when unwanted speech intrudes into the home. In *Rowan* itself, the Court upheld only the right of a homeowner *upon receipt of offensive material* to inform the post office that *further material* from the sender should not be delivered. See also *Martin* v. *City of Struthers*, 319 U.S. 141 (1943) (striking down a ban on door-to-door solicitation). The Court's notable observation in *Rowan* that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound," *id.* at 738, reinforces the notion that some intrusion is an inevitable concomitant of modern life.

The narrow circumstances of indecency and sexually provocative speech have been found to justify some regulation of speech outside the home when unwilling audiences are subjected to the speech. See, *e.g.*, *Ginzburg* v. *United States*, 383 U.S. 463 (1966). The Court's observation in *Ginzburg* that regulation is permissible where the speaker seeks to "force public confrontation with the potentially offensive aspects of the work," *id.*, at 470, was directed specifically at obscenity, not any and all offensive speech. See *ibid.* ("Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.").

Despite the limits of the captive audience doctrine, Petitioner urges the Court to employ the doctrine to justify awarding five million dollars in tort damages based on a protest held on public streets, approximately one thousand feet from his son's funeral—a protest that he did not even witness in person. See Jt. App. 46. Respondents do not dispute Petitioner's obvious privacy interest in the solemn occasion of a funeral, but Petitioner's argument stretches the notion of captivity far beyond any plausible limits.

More fundamentally, Petitioner's argument ignores the distinct features of tort liability that render it an unconstitutional means of protecting unwilling audiences from speech. The Court has never applied the captive audience doctrine to permit tort liability based on protected speech, and for good reason. Unlike a general ordinance or injunction, tort liability operates ex post to impose damages for holding a public demonstration, without providing any notice to the speakers of what is or is not permissible. A recitation of the common law elements for intentional infliction of emotional distress does not inform one where to stand with one's poster if one wishes to express an unpopular view in public without incurring massive civil liability.

Petitioner's approach, which treats tort liability as if it were just some kind of time, place, and manner restriction, is thus fatally flawed.

1. Petitioner Was Not A Captive Audience To A Protest That He Saw Only On A Television News Report.

Even setting aside the special features of tort liability that require heightened scrutiny, Petitioner was not captive in the sense that permits regulation of protected speech. The court of appeals correctly recognized that Respondents "never intruded upon a private place because their protest occurred at all times in a public place that was designated by the police and located approximately 1,000 feet from the funeral." Jt. App. 97. The general directive that "the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes," *Cohen*, 403 U.S. at 21, was therefore not even implicated because Respondents did not interrupt the funeral service and Petitioner did not see Respondents' signs during the protest. Jt. App. 79, 97.

Because Petitioner neither saw nor heard the protest, he must resort to asserting that his knowledge that the protest was underway, and that the funeral procession was re-routed to avoid it, made the protest intrusive and caused him severe emotional distress. *Id.* at 99. Petitioner essentially posits a type of "psychic captivity" to Respondents' speech. See Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 Hastings Const. L.Q. 85, 90 (1991). The idea of "psychic captivity" runs counter to this Court's admonishment that States can constitutionally forbid speech only when "substantial privacy interests are being invaded in an essentially intolerable manner," lest the States "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 403 U.S. at 21. The State's interest in protecting Petitioner's privacy does not extend to speech that Petitioner did not see or hear.

Petitioner's viewing of a television news program that included footage of the protest does not implicate any privacy interest sufficient to permit tort liability. Petitioner's reliance on *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), in this regard is wholly misplaced. The *Pacifica* Court held that the FCC could impose fines for broadcasting indecent speech over the airwaves. *Id.* at 750. "[O]f all the forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 748. The decision stands only for the narrow proposition that time, place, and manner restrictions on the airwaves are a permissible way of preventing unsupervised children from being exposed to indecent speech. See *id.* at 763 (Brennan, J., dissenting) (noting that the "majority apparently believes that the FCC's disapproval of Pacifica Radio's afternoon broadcast of Carlin's 'Dirty Words' recording is a permissible time, place, and manner regulation."). Even assuming *Pacifica* supports a captive audience exception permitting tort liability, rather than just time, place, and manner restrictions, Petitioner cannot explain why his claim is asserted against Respondents, rather than against the television news station responsible for broadcasting the footage of the protest into his home.

2. Even If Petitioner Was A Captive Audience, The Doctrine Does Not Permit Tort Liability In This Case.

Even if Petitioner could be considered a captive audience to Respondents' protest by virtue of knowing it was occurring and later seeing a television news program about it, the Court has applied the captive audience exception only to uphold time, place, and manner restrictions or carefully tailored injunctions—never tort liability. That distinction is critical: time, place, and manner restrictions and injunctions are well-established means of reconciling speech rights with competing government and private interests in the use of public spaces. They provide notice to all parties about where and how they may exercise their free speech rights consistent with privacy interests and the interests of public order. See *Osborne* v. *Ohio*, 495 U.S. 103, 115

(1990) (recognizing the requirement that general statutes provide "fair warning"); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968) (recognizing that there is "no place within the area of basic freedoms guaranteed by the First Amendment" for injunctions issued "ex parte, without notice" to defendants). Even these measures must be carefully tailored in order to pass constitutional muster. See *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Madsen*, 393 U.S. at 765-66.

Regulating speech in public places through the tort system carries many more First Amendment dangers than regulation through generally applicable ordinances or injunctions. This Court has recognized that speech regulations that target specific individuals require a higher level of scrutiny than that applied to general statutes. See *Madsen*, 512 U.S. at 764 (noting the "obvious differences" between general ordinances and injunctions since the latter "carry greater risks of censorship and discriminatory application than do general ordinances"). Even more so than injunctions, tort liability invites unpredictable, discriminatory application.

Because of the distinctively problematic features of tort liability, the Court has been extremely cautious about permitting plaintiffs to recover tort damages for activities associated with protected speech. See *Claiborne Hardware*, 458 U.S. at 926-27 (where a party sought to "impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment," the Court "approach[ed] th[e] suggested basis of liability *with extreme care.*") (emphasis added). The Court has recognized that "when sanctionable conduct occurs in the context of constitutionally protected activity . . . '*precision of regulation*' is demanded." *Id.* at 916 (quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963)) (emphasis added). The Court should reject tort liability here for three reasons.

First, tort liability for speech such as Respondents' inevitably turns on its content. In the context of time, place, and manner restrictions, this Court has held that "content-based [speech] regulations are presumptively invalid." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). Tort liability would raise even deeper problems than content-based time, place, and manner restrictions or content-based injunctions. See Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 Colum. L. Rev. 1749, 1766 (1985) ("The problem with deciding, in the absence of actual notice, whether the speaker must have known that the recipient did not want to be exposed to particular ideas lies in the fact that the trier of fact will likely make such a decision based on its perception of the abhorrence of the idea."). A tort judgment against Respondents would inescapably stand as a judgment that their political and religious views are intolerable, and the First Amendment does not permit the States to make such judgments. See *Pacifica*, 438 U.S. at 745-46 ("[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.").

Second, permitting tort liability based on offensive speech at a public protest that targets a captive audience would inevitably chill protected expression. There is no way to ensure that the States would only impose liability on the "worst offenders" and leave all others to speak freely. Permitting a tort judgment against Respondents would dissuade others with unpopular views from exercising their free speech rights because the prospect of unpredictable liability would loom in the background. See *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 664 (2003) (Stevens, J., concurring) (noting that even the possibility of expensive litigation causes chilling effects). As the Court has repeatedly indicated, "in public debate our own 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* v. *Berry*, 485 U.S. 312, 322 (1988)).

Third, a tort judgment is simply not necessary here because time, place, and manner restrictions protected Petitioner's privacy interests to the extent constitutionally permissible. The applicable ordinances and police directions kept Respondents one thousand feet away. This is well beyond constitutional requirements as measured by other cases in which this Court struck down injunctions against offensive protesters. See, *e.g.*, *Madsen*, 512 U.S. at 753, 771-75 (striking down a three hundred foot buffer zone); *Schenck*, 519 U.S. at 377 (striking down a fifteen foot "floating" buffer zone); see also Stephen McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. Kan. L. Rev. 575, 601 (2007) (noting that "buffer zones of 300 feet and greater" appear "constitutionally suspect" in light of *Madsen* and other cases).

The degree of intrusion suffered in those cases was no less severe than in this one. In *Madsen*, an abortion clinic was subjected to targeted "raucous" picketing "with protesters approaching the workers . . . shouting at passers-by, contacting . . . neighbors, and providing literature identifying the clinic employee as a 'baby killer.'" Brief for Respondents, *Madsen*, 1994 WL 114658 at *26. Clinic workers received direct threats and "one Clinic worker was identified by name and told by a protester that 'I pray God strikes you dead now.'" *Ibid.* Patients manifested "increased blood pressure, greater tension and increased risk of medical complications" and workers experienced "feelings of intimidation and anxiety, which led some workers and the doctor to quit working for the Clinic altogether." *Ibid.* Notwithstanding this frankly offensive speech, the Court struck down a three hundred foot buffer zone around the residences of clinic staff and would affirm only a 36-foot buffer zone around the clinic itself.

Madsen, 512 U.S. at 753, 771-75. Can it be said that a one-thousand-foot buffer zone around a funeral, a zone that succeeded in preventing him from ever seeing the protest, failed to protect Petitioner's privacy interest such that he may now recover damages for distress and intrusion? If the Court is prepared to allow such damages, then one wonders why it scrutinized injunctions so closely in past cases. If those subjected to picketing can sue for emotional distress and intrusion, then injunctions, as well as general time, place, and manner restrictions, will soon be irrelevant, replaced by an ad hoc system of million-dollar tort suits that effectively dissuade all but the most courageous and well-resourced speakers from expressing unpopular views. The public discourse would surely suffer from such a result.

The precision that the Court demands from injunctions implicitly tolerates a certain degree of offense, a certain degree of injury even, in exchange for robust public discourse. In the famous case of an unsuccessful attempt to enjoin the American Nazi Party from marching through a village with a large Jewish population, including many Holocaust survivors, the Seventh Circuit noted "[i]t would be grossly insensitive to deny, as we do not, that the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village's residents." See *Collin* v. *Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978), cert. denied, *Smith* v. *Collin*, 439 U.S. 916 (1978). Nonetheless, the court explained its decision in words that are equally relevant in this case: "The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises." See *Collin*, 578 F.2d at 1210.

Petitioner's situation is no different. Petitioner never saw Respondents' protest. His sole exposure was to news coverage that he could easily turn off. If this modest degree of

intrusion into Petitioner's privacy overwhelms the right to freedom of speech, that right has no substance. The First Amendment is not so ephemeral; it prohibits tort liability based on Respondents' protected speech at the protest.

II. THE FIRST AMENDMENT PROHIBITS A TORT JUDGMENT AGAINST RESPONDENTS FOR PUBLISHING A REPORT ABOUT THE PROTEST ON THE INTERNET.

The Internet is a vast, democratic, and international medium that provides virtually unlimited, low-cost capacity for mass communication; its contents are "as diverse as human thought." *Reno* v. *ACLU*, 521 U.S. 844, 868-70 (1997). Because of the Internet's unique role in democratizing free speech, the First Amendment requires particularly close scrutiny of federal statutory restrictions on online speech. See, *e.g.*, *id.* at 877-78 (striking down a provision of the Communications Decency Act because its "'community standards' criterion . . . mean[t] that any communication available to a nation wide audience w[ould] be judged by the standards of the community most likely to be offended by the message"). The States can no more run roughshod over free expression on the Internet than the federal government. See *McIntyre* v. *Ohio Election Commission*, 514 U.S. 334, 336 n.1 (1995) ("The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States."). Petitioner's argument that state tort law can be used to punish online publication of offensive, outrageous, or intrusive statements about private figures must therefore fail, for two reasons.

First, Respondents' online report was protected speech. The report contained no provably false facts. See *Milkovich*, 497 U.S. at 19 ("[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law . . . ."). Thus, *Gertz*, 418 U.S. at 323, and the other defamation cases invoked by Petitioner have no relevance here. The report was also about matters of public concern: the religious implications of divorce, of

being a member of the Roman Catholic Church, and of serving in the United States military. Respondents' speech thus falls within the core of the First Amendment's protection for free expression. See *Connick* v. *Myers*, 461 U.S. 138, 154 (1983) (reasoning that the First Amendment's primary aim is the protection of speech on matters of public concern).

Second, the First Amendment does not permit the States to punish an online publication about matters of public concern merely because it is offensive. The Constitution protects expression of "free thought—not free thought for those who agree with us but freedom for the thought we hate." *United States* v. *Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting). Applying the state tort laws at issue in this case to online publications would impermissibly impose civility norms on public discourse. See *Reno*, 521 U.S. at 871 (disapproving statutory restriction on online speech that was "patently offensive" according to "contemporary community standards"); see also Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine *v.* Falwell, 103 Harv. L. Rev. 601, 624 (1990) ("[T]he *Falwell* opinion prohibits . . . [state tort law] from enforcing, in the absence of a knowingly false assertion of fact . . . norms which define civility . . . ."). And even if online speech could be regulated because of its offensive character, this Court's precedents require the use of the least restrictive means available to regulate the content of speech on the Internet. See *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004) ("*Ashcroft II*") (requiring the federal government to use the least restrictive means available to regulate speech on the Internet). Tort liability does not satisfy that requirement.

A. Non-Defamatory Online Publications About Matters Of Public Concern Enjoy Full Constitutional Protection.

Instead of defending the application of state tort laws to non-defamatory Internet publications, Petitioner revives his contention that the First Amendment does not protect

Respondents' online report because it included false statements of fact about Petitioner. See, *e.g.*, *Milkovich*, 497 U.S. at 19 (reasoning that false statements of fact can be regulated because they contribute little to the marketplace of ideas). The court of appeals properly rejected that argument. See Jt. App. 92-93. Petitioner also argues, contrary to the text of the report, see Jt. App. 1-7, that the report was of "less[er] First Amendment concern" because it was about "purely private" matters. *Dun & Bradstreet*, 472 U.S. at 759.

1. The Online Report Did Not Contain Provably False Statements Of Fact.

Both of the courts below correctly held that Respondents' online report included no false statements of fact, Jt. App. 46-47, 91-92, and thus could not be punished as defamatory. The only portion of the report that included demonstrably true or false statements about the Petitioner consisted of undisputed facts about Petitioner that had already been published in a local newspaper—that Petitioner is divorced, raised his son as a Catholic, and allowed his son to join the military. The rest of Respondents' online report contained unverifiable assertions of moral and religious judgment based on those facts.

This Court's decision in *Milkovich* supports the lower courts' determinations that Respondents' online report contained no provably false statements of fact. In *Milkovich*, the Court reaffirmed the principle that false statements of fact can be punished consistent with the First Amendment because they contribute little of value to the "marketplace of ideas." 497 U.S. at 19 (quoting *Abrams*, 250 U.S. at 630 (1919) (Holmes, J., dissenting)). The Court offered a helpful example to illustrate the difference between false statements of fact, and statements that do not contain "provably false factual connotations": "[U]nlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable." *Milkovich*, 497 U.S. at

19-20. Unlike the first statement in that example, the second essentially consists of a value judgment about Marxist and Leninist ideologies—and that judgment cannot possibly be verified as either true or false. The second statement falls within the core of First Amendment protection because value judgments are ideas, and the Constitution prohibits state action that interferes with "free trade in ideas." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

The online report at issue in this case contained only a few isolated statements that could plausibly be read as stating facts about Petitioner and his family. Nearly two-thirds of the message consisted of long, uninterrupted quotations from the Bible. See Jt. App. 1-7. One long passage of the report simply repeated undisputed facts about Petitioner and his family that Respondents read in a local newspaper obituary. *Id.* at 5 ("[Petitioner's son] was a marine. . . . His mother lives in Westminster, Pennsylvania. He was a leader among his fifteen cousins."). But Petitioner contends that eight statements, culled from two paragraphs of the report, were verifiably false: that Petitioner "did just the opposite" of "prepar[ing his] child to serve the Lord his God," and instead "raised him for the devil;" that he "taught [his son] that God was a liar;" that by divorcing, Petitioner and his wife "ripped . . . apart" their shared "body" and violated the Biblical command that "[w]hat . . . God hath joined together, let not man put asunder"; that Petitioner "taught [his son] to deny his Creator, to divorce, and to commit adultery;" that he "taught [his son] how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity;" that Petitioner "condemned [his] own soul[]" by giving money to "the Roman Catholic monster;" that "in supporting satanic Catholicism, [Petitioner] taught [his son] to be an idolator;" and that Petitioner "sent [his son] to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life." Jt. App. 4 (quoting *Matthew* 19:4-6).

Although those eight statements were distasteful and mean-spirited, they nonetheless contained only unverifiable normative judgments, not provably false facts. In determining whether the speech at issue in *Milkovich* contained provably false facts, the Court considered the "general tenor" of the whole newspaper article, and whether the statements about the petitioner were couched in "loose, figurative, or hyperbolic language which would negate the impression" that the writer was communicating actual facts. 497 U.S. at 21. Read in context, the eight statements Petitioner points to in the report were all unverifiable statements about the moral implications of the undisputed facts that Petitioner is divorced, raised his child as a Roman Catholic, and allowed his child to join the military. See Jt. App. 5. No reasonable reader of the report would misunderstand the hyperbolic, figurative language of the report as asserting facts.

Petitioner obviously—and understandably—disagrees with Respondents' interpretation of the moral and religious implications of those undisputed facts. Cf. *Cantwell*, 310 U.S. at 310 ("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."). But the statements cannot be distinguished from the Court's hypothetical statements in *Milkovich* about the "abysmal ignorance" of believing in Marxism. 497 U.S. at 20. Where, as here, speech causes offense to those who disagree with the message, "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. at 357, 377 (1927) (Brandeis, J., concurring).

2. The Online Report Discussed Matters Of Public Concern.

"[T]he First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide open.'" *Boos*, 485 U.S. at 318 (quoting *New York Times*, 376 U.S. at 270). The Court has consistently held that "the First Amendment's *primary aim* is the *full protection* of speech upon issues of public concern."

Connick, 461 U.S. at 154 (emphasis added); see also *R.A.V.*, 505 U.S. at 421 (1992) (Stevens, J., concurring in judgment) (reasoning that speech about matters of interest to the general public "receives greater protection than speech about other topics"). The First Amendment requires careful scrutiny of all restrictions on speech about matters of public concern, even when a restriction serves a legitimate government purpose such as protecting privacy. See, *e.g.*, *Bartnicki* v. *Vopper*, 532 U.S. 514, 533-34 (2001) ("In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance.").

The dispositive factor here is not, as the district court erroneously concluded, whether the funeral for Petitioner's son was a public event or whether Petitioner is a public figure. See Jt. App. 51. The online report contained statements of opinion not about the funeral itself, but about Respondents' beliefs about divorce, homosexuality, Catholicism, and the United States military. As the report's title—"The Burden of Marine Lance Cpl. Matthew A. Snyder: The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!," *id.* at 1—indicates, the online report communicated "[Respondents'] strongly held [religious] views on matters of public concern." Jt. App. 92. A matter is of public concern if it is "something that is a subject of legitimate news interest . . . and of value and concern to the public at the time of publication." *City of San Diego* v. *Roe*, 543 U.S. 77, 83-84 (2004). Whether speech is about a matter public concern depends on its "content, form, and context . . . as revealed by the whole record." *Dun & Bradstreet*, 472 U.S. at 762. Although the line between matters of public concern and matters of private concern is sometimes hazy, see *Bartnicki*, 532 U.S. at 542 (Rehnquist, J., dissenting) (referring to public concern as an "amorphous concept," and criticizing the Court for failing to define it), it is not in this case.

Examined as a whole, the online report was about matters of great public significance and news interest at the time it was published, including the War in Iraq, the sexual abuse scandal in the Catholic Church, and the impact of divorce on children. See Jt. App. 4. While the views Respondents expressed about those matters were somewhat peculiar, there were few issues of greater public import in March 2006 than the deaths of individual American soldiers in Iraq, see *e.g.*, *Names of the Dead*, N.Y. Times, Mar. 8, 2006 at A16 ("The Department of Defense has identified 2,295 American service members who have died since the start of the Iraq war. It confirmed the death[] of the following American[] this week: SNYDER, Matthew A., 20, Lance Cpl., Marines . . . ."); and sexual abuse allegations against Catholic priests. See, *e.g.*, Susan Milligan, *Abuse Cost Churches Nearly $467M in '05*, Boston Globe, Mar. 31, 2006 at A1; Jean Guccione, *Deal Reached in Franciscan Sex Abuse Suits*, L.A. Times, Mar. 14, 2006, at 3.

On the whole, then, despite its distasteful elements, the online report undoubtedly contributed to public debate on issues relevant to self-government. See Alexander Miekeljohn, *Free Speech and its Relation to Self-Government* 27 (1948) ("When a question of policy is 'before the house,' free men choose to meet it not with their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval."). The Constitution's special protection for speech on matters of public concern does not fall away simply because a discussion about a public matter like a war includes identifying information about private persons—here an individual soldier and his family—and mentions events that are not open to the general public. Cf. *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967) ("Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of

this exposure is an essential incident of life in a society which places a primary value on freedom of speech . . . .").

But even if the online report was essentially "about" the military funeral, Petitioner is mistaken to identify all speech about military funerals as "purely private" speech. The Court has most often used the term "purely private" to refer to private commercial information; for example, in *Dun & Bradstreet*, the "purely private" information published was information about the financial liabilities of a small construction company. 472 U.S. at 751. In contrast, the Court held in *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986), that speculation about a private figure's possible mafia ties was speech about a matter of public concern. *Id.* at 774-75. Speech about the funeral of an American soldier killed in combat, even when the funeral itself is private, has the same constitutional significance as speech about organized crime. Thus, although Petitioner and his son were private figures and the funeral was a private event in the sense that it was not open to the public, the report Respondents published discussing the funeral, and connecting it to the larger issues of war, religion, and American social mores was speech about matters of public concern.

B. State Tort Law Cannot Regulate Offensive Speech On The Internet.

The States cannot impose tort liability to punish online speech about matters of public concern solely on the ground that it contains offensive, outrageous, or intrusive statements about a private figure. The First Amendment generally forbids the States from punishing speech because of its offensive content. See, *e.g.*, *Hustler*, 485 U.S. at 46 (permitting a public figure to recover emotional distress damages only if he could also establish that the speech was defamatory); see also *Cohen*, 403 U.S. at 24-24 ("To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These

are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."). Erroneous statements are inevitable in debates about matters of public concern. See *Time, Inc.*, 385 U.S. at 374. It is no less true that offensive and outrageous comments, even about private figures, are the inevitable results of impassioned debate about public matters such as religion and politics.

Respondents' online report did not fall into any recognized exception to First Amendment protection. It did not contain false statements of fact, and Petitioner has never asserted that it contained obscene or fighting words. Jt. App. 85. Petitioner can therefore only prevail if the Court holds that offensive, outrageous, or intrusive statements about private figures published on the Internet "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," *Chaplinsky*, 315 U.S. at 572, and creates a new, categorical First Amendment exception in this case. Only under the most extreme circumstances has the Court announced that entire categories of speech have so little First Amendment value—that is, that they contribute so little to public discourse—that they can be regulated based on their content. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 756 (1982) (recognizing that the government must have greater than ordinary leeway to regulate child pornography); see also *supra* I.A.2. Nothing about the online report at issue in this case should take Respondents' expression outside the bounds of First Amendment protection.

The Maryland torts of intentional infliction of emotional distress and intrusion upon seclusion require a jury to find that the defendant acted with intent to cause harm. See Jt. App. 54, 95-96. But the First Amendment does not permit the States to regulate speech based on the speaker's bad motivation alone. See *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.").

The key reason that the district court found Respondents liable below was that the content of the online report was "outrageous" and "offensive." While the States have a legitimate interest in protecting citizens' privacy and dignity, see *Hustler*, 485 U.S. at 53 ("Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the *conduct* in question is sufficiently 'outrageous.'") (emphasis added), *speech* on matters of public concern does not fall outside the First Amendment's protection merely because it is "extreme and outrageous" or "highly offensive." Jt. App. 54, 95-96. The emotional distress tort's "extreme and outrageous" standard permits juries to engage in "freewheeling and unfettered condemnation of antisocial conduct," Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress As a Weapon Against "Other People's Faiths,"* 34 Wm. & Mary L. Rev. 579, 593 (1993); and the "highly offensive" standard for intrusion upon seclusion liability is no different.

But even if offensive speech could be regulated consistent with the First Amendment, state tort law is not a permissible means for regulating offensive speech on the Internet. The First Amendment requires the use of the least restrictive means available to regulate the content of online speech. Cf. *Ashcroft II*, 542 U.S. at 660 (upholding an injunction against a content-based speech prohibition in the Child Online Protection Act when the "Government . . . failed . . . to rebut the . . . contention that there [were] plausible, less restrictive alternatives to the statute"). It

is hard to imagine a more imprecise means for regulating the global Internet than imposing state tort liability for every offensive posting.

1. The Reasoning of Hustler*, Rather Than* Gertz*, Controls This Case.*

Petitioner's argument that intentional infliction of emotional distress or intrusion upon seclusion liability can result from publishing non-defamatory speech about matters of public concern online if it includes offensive, outrageous, or intrusive statements about a private figure finds no support in the Court's First Amendment precedents. And because Respondents' online report included no false statements of fact about Petitioner, "blind application" of doctrines from the defamation context makes little sense here. See *Hustler*, 485 U.S. at 56 (quoting *Time, Inc.*, 385 U.S. at 390).

The decision below did not extend the prophylactic rule of *New York Times* v. *Sullivan* to private figure plaintiffs, see 376 U.S. at 279-80, and Respondents in no way ask the Court to extend that rule. The actual malice standard makes it more difficult for public officials to recover *defamation* damages because of the "profound national commitment to the principle that debate on public issues be uninhibited." *Id.* at 280, 270. That standard ensures "breathing space" so that speakers can discuss public officials without fearing defamation liability. *New York Times*, 367 U.S. at 271-72 (quoting *Button*, 371 U.S. at 433). The Court extended the *New York Times* rule to public figures in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 155 (1967). In *Gertz*, the Court clarified regarding defamation that the Constitution does not require equal breathing space around discussions about private figures. See 418 U.S. at 344-45.

But while defamatory speech automatically falls outside the First Amendment's direct protection, see *id.* at 340 ("[T]here is no constitutional value in false facts."), offensive speech does not. See *Black*, 538 U.S. at 358 (reasoning that the Constitution protects "ideas that the

overwhelming majority of people might find distasteful or discomforting"). No extension of prophylactic protection is therefore required for offensive non-defamatory statements about a private figure—such statements have First Amendment value and are fully protected. It is simply wrong to assume, as Petitioner apparently does, that because Petitioner is a private figure the instant case must automatically stand to *Hustler*—which requires public figure plaintiffs to prove the defendant spoke with "actual malice" with regard to truth before recovering intentional infliction of emotional distress, 485 U.S. at 56—as the less protective *Gertz* decision stands to the more protective *New York Times* decision.

The Court cannot thus simply import the *Gertz* rule that a private-figure plaintiff must show that the defendant acted with "fault" before imposing tort liability for publishing online speech about a matter of public concern. See *Gertz*, 418 U. S. 347-348. In the defamation context, the "fault" requirement is that a plaintiff must show that the defendant spoke with negligent disregard for the truth. *Ibid.* But unlike the tort of defamation, the intentional infliction of emotional distress and intrusion upon seclusion torts already require the plaintiff to show that the defendant acted with intent—the intent to act outrageously and to cause emotional harm. See Jt. App. 95-96, 98. Requiring an emotional distress or intrusion upon seclusion plaintiff to show that the defendant spoke with some level of "fault" would thus not in any way limit state tort law. The only meaningful limit possible would be a requirement that the speaker acted with negligent disregard for *the truth*, as in *Hustler*. 485 U.S. at 56. Because Respondents' online report did not contain false statements of fact, such a rule would not permit Petitioner to recover any damages for either intentional infliction of emotional distress or intrusion upon seclusion based on the online publication at issue in this case.

In *Hustler*, the Court held that the First Amendment does not permit a plaintiff to recover emotional distress damages based on speech unless he can also prove that the speech at issue falls into an "exception . . . to general First Amendment principles." 485 U.S. at 56. The *Hustler* rule prohibits Petitioner from making an end run around the strict requirements of defamation law here by asserting alternative speech-based tort claims such as intentional infliction of emotional distress and intrusion upon seclusion.

Although the plaintiff in *Hustler* was a public figure, see *id.* at 53, there is no principled reason for a different result here, where the plaintiff is a private figure, and the speech at issue was published on the Internet. Public figures suffer emotional harm from speech to the same extent that private figures do. And unlike in the defamation context, neither public figures nor private figures can repair those harms by responding with more speech. See *Gertz*, 418 U.S. at 344-45. Furthermore, in the special context of the Internet, private figures and public figures have equal access to the channels of online communication, and can respond to offensive speech by condemning it. *Ibid.*; cf. *Citizens United* v. *FEC*, 130 S. Ct. 876, 905-906 (2010) ("With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred."). The assumption of risk rationale for distinguishing between public and private figures, see *Milkovich*, 497 U.S. at 15; *Gertz*, 418 U.S. at 344-45, is also inapt in the Internet speech context. An inevitable cost to pay for democratizing the means of publication is that private figures are more exposed than in previous eras to public criticism.[5]

[5] Respondents are aware of only one other federal court of appeals case that considered whether a private figure plaintiff who cannot recover for defamation can still recover for intentional infliction of emotional distress based on the same publication. In that case, the First Circuit reached the same conclusion as the court of appeals in this case. See *Yohe* v. *Nugent*, 321 F.3d 35, 44-45 (1st Cir. 2003) (rejecting an emotional distress claim premised on the same facts as an unsuccessful defamation claim). At least one state high court has reached the very same conclusion. See *Citizen Publishing Co.* v. *Miller*, 115 P.3d 107, 517 (Ariz. 2005) ("When speech is about a matter of public concern, state tort law alone cannot place the speech outside the protection of the First Amendment.").

2. Even If Offensive Online Speech Can Be Regulated, The First Amendment Requires Regulatory Precision That Tort Law Does Not Provide.

The Court has been extremely cautious about permitting broadly sweeping regulation of online speech in recent First Amendment cases. The Court has consistently recognized the unique role of the Internet as an accessible, democratic medium for speech on matters of public concern. See, *e.g.*, *Citizens United*, 130 S. Ct. at 905-906 ("With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred."). All of the Court's previous First Amendment cases involving Internet speech have been pornography and obscenity cases. See *United States* v. *Williams*, 553 U.S. 285 (2008); *City of San Diego*, 543 U.S. at 77; *Ashcroft II*, 542 U.S. at 656; *United States* v. *American Library Association, Inc.*, 539 U.S. 194 (2003); *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002) ("*Ashcroft I*"); *Reno*, 521 U.S. at 844. The Court has held even in the obscenity context, where the federal government clearly has a legitimate interest in protecting children from sexually indecent materials, that such a legitimate government interest is insufficient to justify unnecessarily broad tactics to suppress speech addressed to adults. *Reno*, 521 U.S. at 875.

The Court should be particularly hesitant before permitting the application of state tort law to punish offensive online speech in this case. Petitioner seeks to apply Maryland tort law to punish online speech, but it is not even clear that the State of Maryland claims an interest in protecting its citizens from such speech. The federal district court below interpreted two Maryland tort law prohibitions on offensive, outrageous, and intrusive conduct to prohibit the publication of offensive, outrageous, or intrusive speech about a private individual on the Internet. See Jt. App. 54-55. But the district court did not rely on—and Respondents are not

aware of—a single case in which a Maryland court has imposed either emotional distress or intrusion upon seclusion liability for publishing speech on the Internet. Even in defamation cases, Maryland's courts have been exceedingly cautious about interfering with freedom of speech on the Internet. See *Independent Newspapers, Inc.* v. *Brodie*, 966 A.2d 432, 441-42, 451 (Md. 2009) (recognizing the Internet's special capacity for democratizing public discourse, and holding that a defamation plaintiff cannot compel the identification of an anonymous online speaker without first establishing facts sufficient to defeat a summary judgment motion). Petitioner therefore finds himself in the unusual position of asserting that the State of Maryland has an interest in proscribing abusive Internet speech targeted at private citizens that is sufficiently strong to overcome the First Amendment, despite the fact that no branch of the Maryland government has ever, apparently, taken steps to assert that interest on its own.

Tort liability is a particularly problematic, and wildly overbroad, way to regulate offensive online speech. Offensiveness is a nebulous concept, and permitting juries in fifty different States to regulate online speech based on its offensiveness would provide no meaningful guidance for online speakers, who could become subject to liability in virtually any State. In such a situation, an online speaker could avoid tort liability only by adhering to the standards of the most easily offended community in the Nation. Cf. *Reno*, 521 U.S. at 877-78 (striking down statutory restriction on online speech because its "'community standards' criterion . . . mean[t] that any communication available to a nation wide audience w[ould] be judged by the standards of the community most likely to be offended by the message").

Thus, even if the States have a legitimate interest in protecting citizens from harms caused by non-defamatory speech on the Internet, the tort system is an inappropriate tool to effectuate that interest. There might indeed be other viable options available for protecting

private citizens from online speech, perhaps through legislation. See, *e.g.*, Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 Yale L.J. Pocket Part 42 (2007) (proposing a federal notice-and-takedown scheme for harassing online speech, similar to that used for copyright infringement under the Digital Millennium Copyright Act). The States, along with the federal government, may continue to explore other ways to protect private citizens from harm, even though they cannot consistent with the First Amendment use tort law to punish non-defamatory online speech.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

Tanya Abrams

Mark H. Hatch-Miller

Counsel for the Respondents

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