No. 09-751

THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

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ALBERT SNYDER,

*Petitioner*,

v.

FRED PHELPS, WESTBORO BAPTIST CHURCH,
REBEKAH PHELPS-DAVIS, AND SHIRLEY PHELPS-ROPER,

*Respondents*.

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

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# BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED

1. Whether the First Amendment prohibits a private civil judgment against Westboro Baptist Church and its members for organizing a protest at the funeral of Marine Lance Corporal Matthew Snyder, at which Snyder's family constituted a "captive audience."
2. Whether the First Amendment prohibits a private civil judgment against Westboro Baptist Church and its members for publishing an online "Epic" about the life and death of Marine Lance Corporal Snyder.

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## JURISDICTION

The Fourth Circuit issued its ruling on September 24, 2009. This Court granted certiorari on March 8, 2010. This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1332 (2006).

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press…."

## STATEMENT OF THE CASE

On March 3, 2006, Marine Lance Corporal Matthew Snyder died serving his country in Iraq. JA 32. As part of the grieving process, Petitioner Albert Snyder, the father of Lance Corporal Snyder, planned a traditional funeral at St. John's Catholic Church in Westminster, Maryland. JA 32, 51. Local newspapers published an obituary stating that the funeral would occur on March 10, 2006. JA 45. As is customary in our society, the private funeral was intended to honor Lance Corporal Snyder's life and bring closure to Petitioner and his family. JA 62.

The ceremony's solemn and formal atmosphere was ruined by the highly offensive and outrageous conduct of a group of strangers who specifically targeted Lance Corporal Snyder's funeral. JA 45-46. By issuing a press release announcing their protest, Respondents "created an atmosphere of confrontation," which required police protection and devolved into a media firestorm. JA 51. At the funeral, Respondents held large signs displaying offensive and inappropriate language. JA 46. Following the service, Respondents posted an online "Epic" describing their conduct and bragging

about the publicity the protest received. JA 1-7. The Epic attacked Petitioner's parenting skills and alleged false facts about Lance Corporal Snyder. JA 4.

Respondents' actions desecrated Lance Corporal Snyder's funeral. JA 62-63. As a result, Petitioner suffered psychological trauma, as evidenced by the exacerbation of his depression and diabetes. JA 62-63. This suit seeks compensation for the harm wrought by Respondents. JA 35-39.

**A. The Westboro Baptist Church**

Based in Topeka, Kansas, the Westboro Baptist Church (WBC) has approximately sixty to seventy members, including Respondents Fred Phelps, Shirley Phelps-Roper, and Rebekah Phelps-Davis. JA 45. Respondents adhere to an extremely fundamentalist Christianity which advocates a severe intolerance of homosexuality. JA 33. Respondents also preach that God hates the United States for its acceptance of homosexuality, particularly in the military. JA 45. The WBC "perceiv[es] the modern militant homosexual movement to pose a clear and present danger to the survival of America, exposing our nation to the wrath of God…." About WBC, www.godhatesfags.com/written/wbcinfo/aboutwbc.html. In accordance with these beliefs, Respondents have produced "a series of DVD video productions, which include[s] 'Thank God for 9/11,' in which members of the [WBC] celebrate[] the events of September 11, 2001 as a demonstration of God's hatred of America." JA 52 n.11.

Respondents spread their message of hate through their primary website, www.godhatesfags.com, as well as several ancillary sites, including www.godhatesamerica.com, www.godhatessweeden.com, www.thesignsofthetimes.net, www.smellthebrimstone.com, and www.priestsrapeboys.com. JA 32. As the website names demonstrate, Respondents frequently use the slur "fag"[1] to refer to gay men and lesbians. JA 4, 32. On these sites, Respondents broadcast their homophobia and their belief in a connection between homosexuality and the military:

[1] Petitioner follows this Court's practice of not redacting obscene and offensive language. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 16 (1971).

> These turkeys are not heroes. They are lazy, incompetent idiots looking for jobs because they're not qualified for honest work.
>
> They were raised on a steady diet of fag propaganda in the home, on TV, in church, in school, in mass media—everywhere….
>
> Therefore, with full knowledge of what they were doing, they voluntarily joined a fag-infested army to fight for a fag-run country now utterly and finally forsaken by God who Himself is fighting against that country.
>
> They turned America / Over to fags; They're coming home / In body bags.

JA 33. Respondents' sites articulate their rationale for targeting military funerals: "[T]he IED is God's weapon of choice in avenging [WBC] by blowing America's kids to smithereens in Iraq. And the carnage has barely begun. Thus, their funerals are the forum of choice for delivering WBC's message of choice." JA 33. As Respondents openly admit, the "website[s] speak for themselves." JA 22.

Since June 1991, Respondents have conducted over 43,000 anti-gay protests. About WBC, www.godhatesfags.com/written/wbcinfo/aboutwbc.html. Often targeting high-profile events, Respondents have picketed the funerals of hate crime victim Matthew Shepard and over two hundred troops killed in Iraq and Afghanistan. *Id.* In an effort to further publicize their message, the WBC posts its picketing schedule online. JA 36; *see also* Upcoming Picket Schedule, http://www.godhatesfags.com/schedule.html.

In response to WBC's extreme practices, "[t]he federal government and forty-one states have enacted statutes restricting protests near cemeteries and funerals." Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. Rev. 151, 158 (2008). Indeed, the State of Maryland enacted a funeral picketing statute two months after Respondents' protest. Md. Code Ann., Crim. Law § 10-205. The criminal statute prohibits picketing within a one hundred foot buffer zone of any "funeral, burial,

memorial service, or funeral procession." *Id.* at § 10-205(c). The Maryland statute also criminalizes the knowing obstruction of a funeral procession. *Id.* at § 10-205(a)(2).

**B. The Protest Of Lance Corporal Snyder's Military Funeral**

After reading Lance Corporal Snyder's obituary, Respondents issued a press release two days before the funeral announcing their plan to picket the ceremony. JA 45. Because of the outrageousness of protesting a military burial, the press release "necessarily resulted in increased police presence and media coverage at Lance Cpl. Snyder's funeral." JA 51. The media circus that ensued shattered the tranquil and somber tone of the ceremony. JA 46.

Respondents and four family members picketed Lance Corporal Snyder's funeral and displayed numerous signs at the protest, all of which were custom-made at WBC's on-site shop. JA 45. Some signs carried general statements: "God Hates America," "America Is Doomed," "Don't Pray For The USA," "Fags Doom Nations," "God Hates Fags," "Thank God For IEDs," "Fag Troops," "God Hates The U.S.A.," "Pope In Hell," and "Maryland Taliban." JA 1-4. Others contained more targeted messages: "You're Going To Hell," "Thank God For Dead Soldiers," and "God Is Your Enemy." JA 1-4. Petitioner "saw the tops of the signs during the funeral procession…." JA 58. Later that day, Petitioner viewed the signs' content while watching a news program about his son's funeral. JA 58.

Respondents' conduct caused unwarranted distractions at the ceremony. JA 46. Indeed, Respondent Phelps-Roper later bragged that "[i]f there was a media outlet in Maryland that was not present to carry the message to the people, I would be surprised." JA 7. Although Respondents' exact distance from the funeral service remains contested, JA 58, it was "undisputed at trial that [Respondents] complied with local ordinances and police directions with respect to being a certain distance from the church." JA 46.[2] Nevertheless, WBC's protest and the concomitant police presence

[2] The only numerical estimate in the record is found in Judge Shedd's concurring opinion, which states that the protestors were "located approximately 1,000 feet from the funeral." JA 97.

disrupted the funeral "by having the procession re-routed." JA 99. To this day, Petitioner suffers psychological and physical trauma from the protest. JA 62-63.

**C. The Online Epic**

Following the funeral, Respondents published a self-described online "Epic" about Lance Corporal Snyder and the protest of his funeral. JA 46, 56 n.14. Posted on the WBC's "God Hates Fags" site, the Epic is entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder." JA 46. The Epic is a seven-page attack on Lance Corporal Snyder, homosexuality, and the United States. JA 1-7. The Epic also contains three pictures of Respondents holding signs at the funeral. JA 1, 3, 4. Interspersed with Bible verses, the Epic makes clear that Respondents exploited Lance Corporal Snyder's funeral to attract media attention and "have an opportunity to preach His words to the U.S. Naval Academy at Annapolis, [and] the Maryland Legislature…." JA 6.

Additionally, the Epic makes specific factual allegations about Lance Corporal Snyder and Petitioner. JA 3-6. The Epic states that Petitioner "had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSIITE—you raised him for the devil." JA 4. The Epic continues by stating that Petitioner "taught [Lance Corporal Snyder] that God was a liar." JA 4. Respondents further contend that "Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery." JA 4. Respondents then attack the Snyders' faith, asserting that "[t]hey 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." JA 4. The anti-Catholic diatribe ends with the allegation that Petitioner "taught Matthew to be an idolater." JA 4. The Epic concludes with a recitation of Lance Corporal Snyder's obituary and a description of Respondents' other Maryland protests. JA 5-7.

A month after the funeral, Petitioner discovered the Epic while conducting a Google search about his son. JA 46. After reading it, Petitioner "'threw up' and 'cried for about three hours.'" JA 46.

**D. The Proceedings Below**

Petitioner filed this diversity suit in the United States District Court for the District of Maryland on June 5, 2006. JA 8. The Amended Complaint alleges five common-law torts: defamation, intrusion upon seclusion (intrusion), publicity given to private life, intentional infliction of emotional distress (IIED), and civil conspiracy. JA 35-39. The district court granted Respondents' motion for summary judgment on the defamation and publicity given to private life claims. JA 46-47.[3]

Under Maryland common law, the four elements of IIED are: 1) the defendants' conduct was intentional or reckless; 2) the conduct was extreme or outrageous; 3) the conduct caused emotional distress to the plaintiff; and 4) the emotional distress was severe. JA 98. To prevail on an intrusion upon seclusion claim, a plaintiff must demonstrate that the defendant engaged in: 1) an intentional 2) intrusion or prying upon 3) something which is and is entitled to be private 4) in a manner that is highly offensive to a reasonable person. JA 95-96. Civil conspiracy requires an agreement or understanding between two or more persons to accomplish an unlawful act—here, IIED or intrusion. JA 99 n.3.

At trial, Petitioner supplied substantial evidence of the harm Respondents' funeral protest and Epic caused him. Petitioner's expert witnesses stated "that his depression and diabetes were exacerbated after the events of March 10, 2006." JA 54. Petitioner's physician, Dr. Mann, testified that Petitioner lacked energy and had trouble sleeping and concentrating. JA 62. Doctor Mann linked Petitioner's depression to Respondents' conduct, concluding that "[n]ormally a funeral helps get some closure and the support of the community and friends at that time helps with that closure and the interruption of that with negative feelings and negative emotions being brought up really just stops the

[3] Petitioner did not cross-appeal the district court's grant of summary judgment to Respondents on the defamation and publicity given to private life claims. JA 80 n.3.

healing process…." JA 62. Petitioner's psychologist, Dr. Willard, also testified "that the demonstration and the things that [Plaintiff] talked about [seeing] in the website [*i.e.* 'The Burden of Marine Lance Cpl. Matthew Snyder'] have made the depression worse and lengthened it." JA 62 (alterations in original). And Chaplain Major Terry Callis stated that Petitioner's trauma was "exacerbated by 'the [D]efendants being…in the proximity of the funeral itself and then the later news broadcasts [and] Mr. Snyder seeing the events on television and reading them in the paper.'" JA 62 (alterations in original).

Furthermore, Petitioner testified at trial as to the "severity of his emotional injury, stating that he is often tearful and angry, and that he becomes so sick to his stomach that he actually physically vomits." JA 62. Petitioner also described the permanency of the trauma:

> I think about the sign [*i.e.* Thank God for dead soldiers] every day of my life…. I see that sign when I lay in bed at nights. I have one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. And for the rest of my life, I will remember what they did to me and it has tarnished the memory of my son's last hour on earth.

JA 63 (alterations in original). The district judge credited this testimony, remarking that "throughout trial" Petitioner "demonstrated significant emotion, appearing visibly shaken and distressed, and was often reduced to tears." JA 63.

The jury found for Petitioner on the IIED, intrusion upon seclusion, and civil conspiracy counts. JA 43. The jury awarded Petitioner $2.9 million in compensatory damages and $8 million in punitive damages. JA 63. Respondents filed various post-trial motions, all of which were denied by the court with the exception of Respondents' motion for Remittur. JA 71-72.

In a lengthy post-trial opinion, the district judge rejected Respondents' argument that the First Amendment protected their actions because Lance Corporal Snyder was a public figure. JA 51. The district court correctly held that Lance Corporal Snyder was a private figure entitled to civil protections from tortious speech. JA 51. The district court also concluded that the First Amendment's Free

Exercise Clause did not require immunity from tort in this case. JA 52-54.[4] The district judge, however, reduced the award of punitive damages from $8 million to $2.1 million. JA 45. The total award of damages now stands at $5 million. JA 45.

The Fourth Circuit reversed. JA 93. The court of appeals dismissed the district court's reliance on the public/private figure issue and instead based its ruling on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), which held that defamatory statements must contain verifiably false facts. JA 85-86. Concluding that the protest signs and the Epic contained rhetorical hyperbole, the Fourth Circuit rejected Petitioner's tort claims. JA 89-93.

## SUMMARY OF THE ARGUMENT

The First Amendment does not protect offensive, invasive speech targeted at private individuals. Respondents' protest of Lance Corporal Snyder's funeral was a gross violation of community norms. And the online Epic was an outrageous, unwarranted attack on this fallen soldier and his family. When such "substantial privacy interests are being invaded in an essentially intolerable manner," the State may act to protect its citizens from harm. *Cohen v. California*, 403 U.S. 15, 21 (1971). The "dignitary torts" of IIED and intrusion serve this function by allowing victims to seek compensation for the infliction of emotional distress and the invasion of their privacy rights.

The First Amendment should pose no obstacle to the imposition of liability for Respondents' funeral protest. Certain categories of speech, such as obscenity and fighting words, fall outside the protection of the First Amendment because their expressive value is far outweighed by the State's interest in preventing their harms effects. The Court should establish a new "captive audience" categorical exclusion to protect the substantial privacy interests of unwilling listeners who cannot avoid

[4] Respondents have waived their Free Exercise Clause argument before this Court. In any event, generally applicable laws do not require religious exemptions, *Employment Division v. Smith*, 494 U.S. 872 (1990), and there is no evidence that the state action in this case invidiously discriminated against Respondent's religious conduct. *See Church of Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

the intrusion. The Court has repeatedly recognized the substantial governmental interest in protecting such captive audiences in a variety of settings. Because this interest so overwhelmingly outweighs the minimal communicative value of an offensive protest at a private funeral, a new categorical exclusion for injurious speech targeting a captive audience is appropriate.

Alternatively, the Court should uphold the imposition of liability here as analogous to a time, place and manner restriction of otherwise protected speech. This Court allows such regulations on expressive conduct like picketing so long as they are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. A civil judgment represents a content-neutral form of state action. And the common-law torts of IIED and intrusion are narrowly tailored to advance the important governmental objective of protecting unwilling listeners, while leaving open ample alternative channels of expression. Even if an offensive, invasive funeral protest is protected speech, the state may still restrict it through tort law.

Petitioner's claims regarding the Epic turns on whether private figure IIED and intrusion torts are governed by *New York Times*'s actual malice standard or *Gertz*'s fault test. Given that "the law does not regard the intent to inflict emotional distress as one which should receive much solicitude," *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988), the Court should leave private figure IIED and intrusion torts unmodified by the First Amendment.

Because Lance Corporal Snyder and Petitioner are private figures, *Hustler* is not on point. *Hustler*'s actual malice requirement should be cabined to public figure IIED suits, and this Court should create symmetry between its defamation and IIED cases by applying the *Gertz* "fault" test to private figures. And while the reasoning of many of this Court's defamation cases pertains to IIED suits, the extension of *Milkovich*'s "verifiable false facts" standard to IIED would be nonsensical. Defamation suits require false factual allegations, whereas IIED claims examine the intent of the

speaker, the harm to the target, and the outrageousness of the conduct. This Court should not transplant an alien factual requirement into the IIED common law.

Thus, for Petitioner to receive compensatory damages, only the *Gertz* standard needs to be satisfied. But since Petitioner also seeks punitive damages, a final question remains: whether the Epic involves a matter of private concern. Given that the Epic's discussion of Lance Corporal Snyder and Petitioner focuses on private familial matters, the *Gertz* standard, as articulated in *Dun & Bradstreet*, should govern the punitive damages claims. Because the Epic constitutes an offensive and outrageous attack on Lance Corporal Snyder and Petitioner, the common law elements for IIED and intrusion are satisfied. Accordingly, this Court should reinstate the jury's verdict.

## ARGUMENT

### I. THE FIRST AMENDMENT DOES NOT PROTECT OFFENSIVE PICKETING THAT IS TARGETED AT A CAPTIVE AUDIENCE OF FUNERAL ATTENDEES.

Conduct that intentionally "invade[s]" the "substantial privacy interests" of a captive audience in an "essentially intolerable manner" should be categorically excluded from First Amendment protection. *Cohen*, 403 U.S. at 21. Alternatively, imposing tort liability for such conduct should be upheld because it burdens speech no more than a legitimate time, place and manner restriction.

#### A. Offensive And Intrusive Conduct Directed At A Captive Audience Should Be Categorically Excluded From First Amendment Protection.

The Court has categorically excluded certain forms of speech from First Amendment protection because they have minimal expressive value and cause great harm. Outrageous and offensive protests that intentionally intrude upon the privacy of mourners should also be excluded. Whatever limited social value such conduct has is far outweighed by what this Court has already recognized as the significant government interest in protecting captive audiences.

### *1. Certain Narrow Categories Of Speech Do Not Enjoy First Amendment Protection Because Their Harms Greatly Outweigh Their Expressive Value.*

This Court has long recognized that "[t]here are certain…classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). So far, the Court has identified six such categories: (1) "fighting words," *id.* at 572; (2) speech inciting imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); (3) "true threat[s]," *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam); (4) obscenity, *Roth v. United States*, 354 U.S. 476, 485 (1957); (5) child pornography, *New York v. Ferber*, 458 U.S. 747, 754-64 (1982); and (6) offers to engage in illegal activity, *United States v. Williams*, 553 U.S. 285, 297-99 (2008).

Categorical exclusions exist because some types of speech form "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. They impose significant social costs while failing to promote the First Amendment's core purpose "to create[] an open marketplace where ideas, most especially political ideas, may compete without government interference." *N.Y. State Bd. of Elec. v. Lopez Torres*, 128 S. Ct. 791, 801 (2008).

To identify a category of proscribable speech, the Court applies a balancing analysis: where "it may be appropriately generalized that…the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake," then the entire class of speech may be prohibited. *Ferber*, 458 U.S., at 763-64. After setting forth the balancing test in *Chaplinsky* to categorically exclude "fighting words," the Court employed it again in *Roth*, 343 U.S. at 483, *Ferber*, 458 U.S. at 763-64, and *Williams*, 553 U.S. at 297-98, to carve out three new categories.

The Court has therefore recognized the need for balancing when a novel issue arises. This case presents such a novel issue, pitting the communicative value of offensive, expressive conduct against a

captive audience's privacy interest in avoiding an intrusive protest. The balance so overwhelmingly favors the privacy interests of the captive audience that a new categorical exclusion is justified.

**2. *The Court Has Acknowledged The Extensive Privacy Interests Of Unwilling Listeners In A Variety Of Forums.***

This Court's precedents firmly establish the substantial state interest in protecting the "unwilling listener…who…[i]n his home or on the street…is practically helpless to escape…interference with his privacy by loud speakers except through the protection of the municipality." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). This concept is often referred to as the captive audience doctrine. *See, e.g.*, *U.S. Postal Service v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 140 (1981) (Brennan, J., concurring). The Court has applied the captive audience doctrine to protect unwilling listeners in a variety of settings, including the home, medical clinics, and schools. In these cases, the unwanted speech invades the "privacy interests" of a "captive audience," who "cannot avoid the objectionable speech." *Frisby v. Shultz*, 487 U.S. 474, 487 (1988).

In *Frisby*, the Court heard a First Amendment challenge to a city ordinance that "completely ban[ned] picketing 'before or about' any residence." *Id.* at 476. The municipality had promulgated the law after a group of anti-abortion protestors had repeatedly picketed a local physician's home. The Court upheld the ordinance, which it found was narrowly drawn to "protect[] the well-being, tranquility, and privacy of the home"—an interest "of the highest order in a free and civilized society." *Id.* at 484 (citations omitted).

The Court has also shielded unwilling listeners in public "confrontational settings." *Hill v. Colorado*, 530 U.S. 703, 717 (2000). In *Hill*, the Court upheld a statute that restricted displaying signs, leafleting, and oral speech within 100 feet of a health care facility. The Court recognized the "significant and legitimate" governmental interest of providing "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id.*

at 715. The decision followed the Court's reasoning in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), which upheld an injunction against anti-abortion protestors who picketed a women's clinic, "threaten[ing] not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance." *Id.* at 768. Both cases emphasized the "recognizable privacy interest in avoiding unwanted communication" in such a vulnerable setting. *Hill*, 530 U.S. at 716.

The captivity of unwilling listeners has justified the restriction of speech in other public situations. In *Ward v. Rock Against Racism*, 491 U.S. 792 (1989), the Court found noise restrictions in Central Park consistent with the First Amendment because they "retained the character of the Sheep Meadow and its more sedate activities, and…avoided undue intrusion" on the interests of park users who pursue "passive recreations like reclining, walking, and reading." *Id.* at 781. The Court has also referred to students as constituting a "captive audience" while in school. *See, e.g.*, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986); *cf. Lee v. Weisman*, 505 U.S. 577, 630 (1992) (Souter, J., concurring). These cases follow the principle articulated in *Tinker* that schools may restrict student speech that "intrudes upon" the "rights of other students to be secure and to be let alone." *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 508 (1969).

In a variety of situations in which a speaker intrudes upon unwilling listeners' legitimate privacy interests and where escape would be impracticable, the Court has applied the captive audience doctrine to permit government prohibitions of speech.

### 3. *Funeral Attendees Are A Captive Audience Which The State Has A Substantial Interest In Protecting From Offensive And Intrusive Speech.*

Funeral attendees mourning the loss of a loved one have as or more significant an interest in privacy as individuals who are sitting in their homes, entering health clinics, relaxing in parks, or attending school. Just as patients entering hospitals are "often in particularly vulnerable…emotional conditions," *Hill*, 530 U.S. at 729, the bereaved also experience an "intense emotional impact." Peter

Metcalf & Richard Huntington, *Celebrations of Death: The Anthropology of Mortuary Ritual* 43 (2d ed. 1991). The groundswell of pain survivors invariably endure reaches its depths at the funeral, where the vicious taunts of picketing strangers that their son or daughter is "Going to Hell" would only exacerbate their anguish. JA 46.

This Court has acknowledged the important "privacy right of the living…in the character and memory of the deceased." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004). In *Favish*, the Court held that a Freedom of Information Act request for photographs of a public official's death scene were protected from disclosure "when the family objects." *Id.* at 160. Writing for a unanimous Court, Justice Kennedy emphasized the cultural significance of burial rites and the effect of an unwanted intrusion on the privacy rights of mourners:

> Burial rites or their counterparts have been respected in almost all civilizations from time immemorial….They are a sign of the respect a society shows for the deceased and for…the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person.

*Id.* at 167-68. The "respect a society shows for the deceased and for the surviving family members," finds no greater expression than in the funeral or burial service, where mourners come together to express their collective grief and pay their final respects. *Id.* at 168. The cultural significance of this rite, along with the unparalleled emotional vulnerability of the bereaved, surely combine to create a zone of privacy which the community feels compelled to protect.

Furthermore, the "recognizable privacy interest in avoiding unwanted communication" is most important "when persons are powerless to avoid it." *Hill*, 530 U.S. at 716. Just as a resident subjected to picketing is "left with no ready means of avoiding the unwanted speech," *Frisby*, 87 U.S. at 487, funeral attendees are for practical purposes "powerless to avoid" the onslaught of uninvited picketers.

To be sure, mourners could avert their eyes, plug their ears, or simply stay home to escape an offensive intrusion. But this is a false choice. To say that "one may avoid further offense" by leaving your son's funeral "is like saying that the remedy for an assault is to run away after the first blow." *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (majority opinion). Survivors should no more be forced to forego their final farewell to a family member in order to avoid a verbal attack than should a seriously ill individual have to forego medical treatment to avoid a gauntlet of picketers outside a health center. The "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Madsen*, 512 U.S. at 772-73. Likewise, Petitioner should not have been expected to "opt-out" of his son's funeral.

By virtue of their profound privacy interest, their psychological vulnerability, and their practical inability to leave, funeral attendees constitute a captive audience. And, as much as if they were in their homes or a hospital, the government has compelling reasons to shield them from hostile, intentionally hurtful speech. Recognizing this interest, forty-one states and the federal government have enacted statutes prohibiting funeral protests. As the Sixth Circuit wrote in rejecting Respondent Phelps-Roper's challenge to one such law, "Ohio has an important interest in the protection of funeral attendees, because a deceased's survivors have a privacy right in the character and memory of the deceased." *Phelps-Roper v. Strickland*, 539 F.3d 356, 466 (8th Cir. 2008) (internal quotation marks omitted). Two other federal district courts have acknowledged this "substantial interest." *See Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691, 696 (W.D. Mo. 2007), *rev'd*, 509 F.3d 480 (8th Cir. 2007); *McQuery v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006). This Court should also recognize this government interest.

#### *4. Offensive Conduct Directed At Captive Audiences Is Low-Value Speech.*

This Court's case law differentiates between "pure speech," at which First Amendment values are at their zenith, and expressive conduct, which receives a lower level of protection. This distinction

was drawn in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). Speech that is part of "a single and integrated course of conduct" that "violate[s] valid laws designed to protect important interests of society" is not protected by the First Amendment. *Id.* at 501; *see also O'Brien v. United States*, 391 U.S. 367, 376-77 (1968). Relying on *Giboney*, the Court in *Cox v. Louisiana* "emphatically reject[ed] the notion…that the First…Amendment[] afford[s] the same kind of freedom to those who would communicate ideas by conduct such as picketing on streets and highways, as…to those who communicate ideas by pure speech." 379 U.S. 536, 555 (1965).

These cases belong to a long line identifying the especially limited protection the Court accords picketing. *See, e.g.*, *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 616 (1980). The *Giboney* Court described picketing as "more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Giboney*, 336 U.S. at 503 n.6. Likewise, Respondents' very act of picketing such an emotional event was intrinsically harmful and provocative.

Of course, peaceful political demonstrations are entitled to constitutional protection. *Thornhill v. Alabama*, 310 U.S. 88 (1940). In *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), for instance, the NAACP organized a boycott of white merchants in Port Gibson, Mississippi, in order to secure racial equality in a community that had long lacked it. A group of affected businesses sued the NAACP and 130 of the boycott participants for malicious interference with business relations and civil conspiracy. The trial court found the defendants jointly and severally liable and the Mississippi Supreme Court affirmed, reasoning that eight isolated acts of intimidation rendered the "entire boycott unlawful." *Id.* at 886. The Supreme Court reversed, holding that the boycott and the "peaceful…marches associated with" it were constitutionally protected activity. *Id.* at 903. The Court

declared that the State may "only award compensation for…those losses proximately caused by unlawful conduct." *Id.* at 918.

Respondents' protest is distinguishable from *Claiborne* in two ways. First, it is a form of targeted, harassing picketing—not a general public demonstration to effect political change. The *Claiborne* boycott "grew out of a racial dispute with the white merchants and city government…and…the picketing [was] directed to the elimination of racial discrimination in the town." *Id.* at 915. Respondents' protest, by contrast, was directed at a captive audience of private funeral attendees and, the jury found, was "designed to inflict emotional distress on [Petitioner]." JA 44. In *Frisby*, the Court specifically emphasized that targeted picketing is more suspect than general demonstrations because it "does not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way." *Frisby*, 487 U.S. at 486. This was precisely the purpose—and effect—of Respondents' protest.

And, unlike *Claiborne*, liability was imposed on Respondents only for their own tortious conduct that proximately caused the plaintiff's injury. The *Claiborne* Court held that the defendants could not be held jointly and severally liable for *all* economic damages resulting from the boycott simply because a few of its participants had engaged in acts of intimidation. *Claiborne*, 458 U.S. at 921. However, "[u]nquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained." *Id.* at 926. Here, Respondents are being held to account precisely for the harms they intentionally inflicted.

For the very reason that Respondents' protest was deeply offensive, however, it receives even less protection than ordinary expressive conduct because patently offensive speech occupies a lower rung in "the hierarchy of First Amendment values." *See Pacifica*, 438 U.S. at 746 (plurality opinion). In *Pacifica*, the Court upheld the FCC's prohibition on a radio station's broadcast of George Carlin's

"Filthy Words" monologue because it was "patently offensive" material in an afternoon broadcast. *Id.* at 739. Though the "monologue would be protected in other contexts," the "constitutional protection accorded to a communication containing such patently offensive…language" need "not be the same in every context." *Id.* at 747. Because of the "time of day," the likelihood of children listening in, and the difficulty in "protect[ing] the listener…from" offensive "program content," the "social value" of the monologue was so minimal that the FCC was justified in prohibiting it. *Id.* at 746-50.

Respondents' protest of Lance Corporal Snyder's funeral was of equally low value. The protest occurred at a time and place most likely to cause offense and inflict injury. Indeed, unlike the broadcast of the Carlin monologue, which may only have incidentally threatened the "well-being of [the] youth," Respondents *deliberately* targeted their offensive protest at Petitioner and the other funeral guests. *Pacifica*, 438 U.S. at 749 (majority opinion). Such harassment is no "more social value as a step to truth," than an offensive radio broadcast. *Chaplinsky*, 315 U.S. at 572.

In keeping with the maxim that "personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution," *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), numerous lower courts have upheld prohibitions and punishments of such "low-value" speech as "vulgar and offensive language," when it is designed to offend or harass. *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000); *see also Gormley v. Dir., Conn. State Dep't of Prob.*, 632 F.2d 938 (2d Cir. 1980). Courts have also held that the First Amendment does not protect harassing and discriminatory speech in the workplace. *See, e.g.*, *Aguilar v. Avis Rent A Car System, Inc.*, 980 P.2d 846 (Cal. 1999). This Court has itself stated that the First Amendment does not shield "sexually derogatory" speech from liability under Title VII's "general prohibition against sexual discrimination in employment." *RAV v. St. Paul*, 505 U.S. 377, 389 (1992).

There is widespread agreement that funeral picketing is low-value speech. The *Roth* Court found support for the proposition that obscenity was "without redeeming social importance" in the promulgation of obscenity bans by forty-eight States and the federal government. *Roth*, 354 U.S. at 484-84. Likewise, forty-one states and Congress have enacted funeral-picketing statutes that prohibit protests in the vicinity of a funeral. These statutes reflect the overwhelming national consensus that funeral protests are of negligible social value and unworthy of First Amendment protection.

***5. Even If Respondent' Protest Had Political Content, This Presents No Bar To Categorical Exclusion From First Amendment Protection.***

In the Fourth Circuit's view, Respondents' protest cannot serve as the basis for liability because it involved "matters of public concern, including the issue of homosexuals in the military." JA 90. But to suggest a sign reading "Fag Troops," expresses some distinct idea concerning "the issue of homosexuals in the military" is rather like saying a burning cross offers a commentary on race relations in the United States. *Cf. Virginia v. Black*, 538 U.S. 343, 357 (2003). Respondents' signs cannot possibly said to contribute to "the free flow of ideas and opinions on matters of public interest" that lies "[a]t the heart of the First Amendment." *Hustler*, 485 U.S. at 50. Indeed, the signs were not designed to "persuade others to change their views," *Hill*, 530 U.S. 703, 716, but to provoke anger and inflict pain—which, the jury found, was precisely their effect.

Even if Respondents' protest were somehow connected to public discourse, that does not automatically render it protected speech in any context. As Justice Holmes wrote, "We admit that in many places and in ordinary times the defendants in saying all that was said…would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done." *Schenck v. United States*, 249 U.S. 47, 52 (1919). In determining whether government proscription of speech is justified, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v.*

*City of Rockford*, 408 U.S. 104, 116 (1972). The presence of a captive audience makes any protest, especially one calculated to inflict injury, fundamentally incompatible with a private funeral.

To be sure, "the right to free speech…includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill*, 530 U.S. at 716. "But th[is] protection…does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Id.* As the Ninth Circuit stated in upholding a school's suspension of a high school student for wearing a t-shirt condemning homosexuals, the political or religious backdrop of a verbal attack does not nullify the injury it inflicts:

> We do not deny that there is [a political disagreement regarding homosexuality in this country]….Such disagreement[] may justify social or political debate, but [it does] not justify students…assaulting their fellow students with demeaning statements: by calling gay students shameful, by labeling black students inferior or by wearing T-shirts saying that Jews are doomed to Hell….There are numerous locations and opportunities available to those who wish to advance such an argument….The First Amendment does not justify…launching such injurious and harmful personal attacks….

*Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1181 (9th Cir. 2006). Nor does the First Amendment license a verbal bombardment on the sanctity of a young man's last rites.

Protesting a funeral with hateful signs and vicious invective "violates fundamental notions of decency." *Williams*, 553 U.S. at 288. Its expressive value is de minimus and is far outweighed by the State's significant interest in preserving the privacy rights of captive mourners. Such conduct should be categorically excluded from First Amendment protection.

### B. Alternatively, The Imposition Of Civil Tort Liability Is Justified As An Analogue To A Time, Place, And Manner Restriction.

It is firmly established that even protected speech may be subject to "time, place, and manner" restrictions. To pass constitutional muster, such regulations must (1) be "content-neutral"; (2) advance "a significant government interest"; (3) be "narrowly tailored to serve [that] interest"; and (4) "leave

open ample alternative channels of communication." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

The *Perry* test is most commonly applied to statutes and ordinances. The Court, however, has used the test to inform its First Amendment scrutiny of court injunctions, common-law contract actions, and statutory torts. Though the Court has not applied the *Perry* test to common-law tort liability, the application of its principles here demonstrate that the civil judgment against Respondents is consistent with the kind of limited regulations of expressive conduct the First Amendment permits. *See Tompkins v. Cyr*, 995 F. Supp. 664, 676-81 (N.D. Tex. 1998) (applying *Perry* test to justify imposition of common-law tort liability as a time, place, and manner restriction).

**1. *Imposing Common-Law Tort Liability Is A Content-Neutral Form Of State Action.***

The torts of IIED and intrusion are content-neutral. A regulation is content-*based* when it was "adopted…because of disagreement with the message [the speech] conveys." *Ward*, 491 U.S. at 791. A regulation is content-*neutral* when it is "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Certainly, the Maryland courts did not adopt the dignity torts IIED and intrusion upon seclusion because of "disagreement with the message" of Respondents' protest in this case. And the torts apply equally to any conduct, whether expressive or not, that satisfies their elements.

Although this Court has never applied content-neutrality analysis to common-law torts, it has examined whether the First Amendment barred application of the common-law promissory estoppel doctrine to a newspaper's breach of its confidentiality guarantee to a source. *Cohen v. Cowles Media Company*, 501 U.S. 663 (1991). Noting that "[t]here can be little doubt that the…doctrine of promissory estoppel is a law of general applicability," the Court held that "generally applicable laws do not offend the First Amendment simply because their enforcement…has incidental effects" on the First

Amendment. *Id.* at 669. The dignitary torts are no different—they are generally applicable to all forms of conduct, with no exemptions suggesting favoritism or hostility, and do not somehow become content-based simply because some such conduct may have expressive content.

Of course, both IIED and intrusion require proof that the defendant's behavior was outrageous or offensive—standards to which the content of speech is often relevant. But content-neutral laws may apply to some types of speech but not others. In *Hill*, the Court found that the anti-picketing ordinance at issue was content-neutral, even though it specifically restricted only oral speech involving "protest, education, or counseling." *Hill*, 530 U.S. at 720. The Court rejected the notion that this transformed the ordinance into a content-based regulation: "We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721. Likewise, simply because a jury may consider the content of a defendant's expressive conduct to determine whether the elements of the dignitary torts are met, does not render these common-law torts content-based government regulation.

***2. Imposing Liability On Respondents Serves The Important State Interest Of Protecting Captive Audiences At Funerals From Tortious Injury.***

The state clearly has a significant interest in shielding individuals attending funerals from painful intrusions into their privacy. *See supra* Subsection I.B.2. As a general matter, this Court has held that "[t]he State…has a substantial interest in protecting its citizens from…emotional distress." *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 302 (1977). In addition, States have both "the power and duty…to take adequate steps to preserve the peace and protect the privacy…of [their] residents." *Carlson v. California*, 310 U.S. 106, 113 (1940). Specifically, this Court has "repeatedly held" the government has a "substantial and justifiable interest" in the "protection of the unwilling listener" —whether in the home, the hospital, or the schoolhouse. *Frisby*, 487 U.S. at 485, 488, 484. And the Court has acknowledged the "personal stake" people "have

in honoring and mourning their dead and objecting to unwarranted…exploitation." *Favish*, 541 U.S. at 167-68. Recognizing the government's considerable interest in preventing such exploitation of mourners at funerals is a logical extension of this Court's prior holdings.

### *3. Imposing Liability Is A Narrowly Tailored Means Of Advancing The Government's Significant Interest In Protecting Captive Audiences At Funerals.*

A regulation is narrowly tailored when it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485. Although this Court has never applied narrow-tailoring analysis to a common-law tort, its decision in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), provides some guidance as to when a civil judgment is *not* narrowly tailored under the First Amendment. In that case, the tort stemmed from a newspaper's public disclosure of the identity of a rape victim. The Court acknowledged that protecting the privacy and safety of rape victims and encouraging them to report the crime were "highly significant interests." *Id.* at 537. But imposing civil liability under a statute making it unlawful to "print, publish, or broadcast ... in any instrument of mass communication" was not narrowly tailored to advance those interests. *Id.* at 541.

The Court's analysis is instructive. It found the imposition of liability was not narrowly tailored for three reasons: First, because the police department had mistakenly released the victim's name to the newspaper, "the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." *Id.* at 538. Second, the statute was overbroad because it imposed negligence *per se* upon a simple showing that the defendant had published a private fact about the plaintiff. *Id.* at 539. Third, the Court found the statute "facial[ly] underinclusive[]" because it prohibited the disclosure of identifying information only in an "instrument of mass communication," while ignoring "alternative forms of dissemination." *Id.* at 540.

Because Maryland's IIED and intrusion torts avoid these problems, imposition of liability in this case is narrowly tailored in light of this Court's most relevant precedent. First, the State of

Maryland did not contribute to Respondents' reprehensible conduct or forego any more limited means of protecting Petitioner from it. Police instructed Respondents to follow local ordinances and increased their manpower in anticipation of the inevitable disruption and media frenzy the protest would incite. JA 48, 53. There is no reason to think the State "failed to utilize" a "more limited" available "means of guarding" Petitioner's privacy interests. *Florida Star*, 491 U.S. at 538.

Of course, Maryland could have enacted its funeral picketing statute *before* Snyder's funeral. This would have either deterred Respondents from engaging in their tortious conduct or subjected them to criminal liability for forcing the funeral procession to be rerouted, JA 99—conduct that plainly violates the statute. *See* Md. Code Ann., Crim. Law § 10-205(a)(2). But a funeral picketing statute does not constitute a "more limited means" of protecting captive audiences at funerals than tort liability under IIED and intrusion. After all, the statute prohibits *all* targeted "picketing activity" near a funeral, while liability here was imposed only because Respondents' intentionally or recklessly inflicted emotional distress and invaded the privacy of Petitioner in a manner that was "extreme and outrageous" and "highly offensive." *Id.* at § 10-205(c). This covers a much narrower category of behavior than the funeral statutes, which impose strict liability for any picketing.

Furthermore, even if the funeral statute were more limited than civil liability, the First Amendment does not require states to select the "least restrictive or least intrusive means of serving the [governmental] goal" when regulating expressive conduct. *Hill*, 530 U.S. 726. In *Florida Star*, the Court did not say that the state could have found a more limited means of protecting the victim's privacy than tort but rather that Florida actually *had* such a means and "failed to police itself in disseminating [her] information." *Florida Star*, 491 U.S. at 538.

Second, the IIED and intrusion torts clearly avoid the "broad sweep of the negligence *per se* standard that applied under the civil cause of action" the Court struck down in *Florida Star*. *Id.* at 539.

In Maryland, "[i]ntrusion upon seclusion must always be intentional in order to be tortious." *Bailer v. Erie Ins. Exchange*, 687 A.2d 1375, 1384 (Md. 1997). The state courts follow the Restatement definition, which requires not just an "intentional intrusion" upon the "private affairs or concerns" of another, but one that "would be highly offensive to a reasonable person." *Pemberton v. Bethlehem Steel Corp.,* 502 A.2d 1101, 1116 (Md. Ct. Spec. App. 1986). Although the Restatement does not define the "highly offensive" standard, the requirement has the effect of limiting liability to "the more flagrant breaches of decency and propriety that could in practice be reached." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 216 (1890).

IIED imposes an even higher liability threshold. It requires plaintiffs to demonstrate that the "defendant[s] intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer emotional distress." *Miller v. Bristol-Myers Squibb Co,*, 121 F. Supp. 2d 831, 839 (D. Md. 2000). The Maryland Court of Appeals has stated that only conduct "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" will sound in the IIED tort. *Harris v. Jones,* 380 A.2d 611, 614 (Md. 1977). IIED's elevated liability standards, like those for intrusion upon seclusion, ensure that only expressive conduct that "amount[] to almost physical aggression" will incur liability. Alexander Bickel, *The Morality of Consent* 72 (1975). The sheer dearth of Maryland cases in which defendants have been held liable for IIED or intrusion is further evidence that the torts are not overbroad. *See* JA 54-56.

Finally, the torts do not suffer the "facial underbreadth" the *Florida Star* Court found of the Florida statute, which only prohibited disclosure of identifying information in an "instrument of mass communication." *Florida Star*, 491 U.S. at 540. Rather, IIED and intrusion are generally applicable torts through which courts impose liability for any action that violates the legitimate dignity interests of individuals, whether the publication of a media defendant or the expressive conduct of an individual

one. Unlike the *Florida Star* statute, IIED and intrusion apply "evenhandedly, to the smalltime disseminator as well as the media giant." *Id.* These common-law torts are not underbroad. Because Maryland's IIED and intrusion torts avoid the fatal flaws identified in *Florida Star*, they are narrowly tailored to achieve the legitimate government interest in protecting captive audiences at funerals.

***4. Imposing Liability Leaves Open Ample Alternative Channels Of Communication.***

Even if the damage award here effectively operated as an injunction against protesting future funerals, it would still satisfy the final prong of the *Perry* test by leaving open "ample alternative channels of communication." *Perry*, 460 U.S. at 45. In *Frisby*, the Court held that an ordinance prohibiting picketing in front of a home afforded ample alternative channels of communication: "They may go door-to-door to proselytize their views. They may distribute literature in this manner or through the mails. They may contact residents by telephone, short of harassment." *Frisby*, 487 U.S. at 483-84.

Likewise, the unavailability of funerals as a platform for offensive protests poses no obstacle to Respondents' use of countless other expressive tactics—from neighborhood canvassing to downtown demonstrations. As the Sixth Circuit found, Respondent Phelps-Roper reaches "an international audience with her website, where her message is seen by millions," and "has appeared on national radio and television." *Strickland*, 539 F.3d at 373. These and many other means remain available for Respondents to voice their views, provided they do not impinge upon the rights of others.

The civil judgment here is therefore narrowly tailored to advance the significant government interest in protecting mourners at funerals from injurious intrusions which they cannot avoid, yet leaves open a plethora of expressive channels to Respondents. Even if their conduct is not categorically excluded from First Amendment protection, the jury's imposition of tort liability should be upheld as analogous to a time, place, and manner restriction under the First Amendment.

## II. BECAUSE THE EPIC TARGETS A PRIVATE FIGURE, CIVIL LIABILITY MAY BE IMPOSED UPON A SHOWING OF FAULT.

### A. *New York Times* And Its Progeny Provide A Comprehensive Framework For Adjudicating Defamation And IIED Claims.

This Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (plurality opinion). Accordingly, since issuing its landmark decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court has constructed an elaborate architecture to balance the First Amendment against the legitimate state interests in protecting individuals from tortious remarks.

The Court's defamation jurisprudence reveals two standards of First Amendment protection against common-law torts. In *New York Times*, this Court articulated the "actual malice" standard, which requires that a statement be made with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. The actual malice standard was fashioned to guarantee that "debate on public issues [remain] uninhibited, robust, and wide-open…." *Id.* at 270.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court announced a "fault" standard, which prohibits strict liability in defamation suits. *Id.* at 347 & n.10. The *Gertz* "fault" standard otherwise allows states to "define for themselves the appropriate liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347. By setting a significantly lower threshold than actual malice, the fault standard "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 347-48.

The *New York Times* line of cases identifies three interrelated factors in determining whether the actual malice or *Gertz* standard applies. First, this Court looks to whether speech targets a public or private figure. The *New York Times* Court held that the actual malice standard applies to "public

officials" who hold elected office. *New York Times*, 376 U.S. at 283 n.23. Shortly thereafter, this Court extended actual malice protection to "public figures" who are "'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" *Gertz*, 418 U.S. at 337 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring)). The *Gertz* standard, however, applies when speech is directed at a private figure on a matter of public concern. *Id.* at 347. Thus, this Court's defamation jurisprudence affords greater protections to speech directed at public figures.

Second, the type of damages requested may trigger different First Amendment protections. For compensatory damages, the public versus private figure dichotomy determines the standard. Public figures must prove actual malice, whereas private figures need only meet the *Gertz* standard. *See New York Times*, 376 U.S. at 279-80 (applying actual malice test for compensatory damages); *Gertz*, 418 U.S. at 347 (applying fault standard for compensatory damages). Presumed and punitive damages, however, present a more complicated story. For public figures, presumed and punitive damages require a showing of actual malice. *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 8 (1970). The question of punitive damages in private figure cases is controlled by the next factor.

Third, in suits brought by private figures, the relevant standard for obtaining punitive damages is determined by whether the speech involved a matter of public or private concern. On matters of public concern, private figure plaintiffs seeking punitive damages must demonstrate actual malice. *Gertz*, 418 U.S. at 349. However, because "speech on matters of purely private concern is of less First Amendment concern," *Dun & Bradstreet*, 472 U.S. at 759 (plurality opinion), this Court has applied the *Gertz* standard in punitive damages cases involving matters of private concern and private figures. *Id.* at 761. The public versus private issue has only controlled the outcome in private figure cases

involving presumed and punitive damages. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773-75 (1986) (distinguishing *Gertz* and *Dun & Bradstreet*).

In the past forty-six years, this Court has built an intricate framework to "reshape the common-law landscape to conform to the First Amendment." *Hepps*, 475 U.S. at 775. A simple but consistent theme emerges from the *New York Times* line of cases: as speech becomes more focused on private figures or issues, the common-law torts require less modification. Defamation and IIED suits brought by public figures always trigger the *New York Times* actual malice standard. By contrast, in the private figure context, the determining factor is whether the plaintiff seeks punitive damages. For the award of compensatory damages, the *Gertz* fault standard applies. If punitive damages are sought, the actual malice standard governs speech about public issues, whereas the *Gertz* test controls speech about private matters. Thus, "[w]hen speech is of exclusively private concern and the plaintiff is a private figure…the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Id.*

In addition to the *Gertz* and *New York Times* standards, this Court has also required that defamation plaintiffs prove a statement is false. In *Milkovich*, the Court refused to create "an artificial dichotomy between 'opinion' and fact," *Milkovich*, 497 U.S. at 19, and held that a defamatory statement must be verifiable as a false fact. The *Milkovich* inquiry asks whether a statement "is sufficiently factual to be susceptible of being proved true or false." *Id.* at 21. In other words, *Milkovich* affirms the long-standing rule that, by definition, defamation suits require a verifiably false fact. *See, e.g.*, *Hepps*, 475 U.S. at 776 (discussing the "constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages").

Finally, while the majority of *New York Times*'s progeny involve defamation suits, this Court has extended this line of cases to other common law torts. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967),

this Court applied *New York Times* to a "right to privacy" statute. *Id.* at 387-88. The state court, however, had "made crystal clear…that truth is a complete defense in actions under the statute…." *Id.* at 383. Thus, the right to privacy statute interpreted in *Time* resembled a defamation tort in its requirement of a verifiably false fact. And in *Hustler*, this Court held that the actual malice standard governed IIED torts against public figures. *Hustler*, 485 U.S. at 56. The application of *New York Times* to the IIED tort was not a "'blind application,'" but rather "reflect[ed] [this Court's] considered judgment to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.*

**B. The *Gertz* "Fault" Standard Applies In This Suit About A Private Figure.**

The Epic is an extreme and outrageous attack on private figures about a matter of private concern. Although *New York Times* and its progeny provide guidance, this is a case of first impression. The applicability of this Court's defamation doctrine to private figure IIED and intrusion torts must be examined carefully and systematically.

***1. Lance Corporal Snyder And Petitioner Are Private Figures.***

In determining whether an individual is a public or private figure, this Court looks to several factors. First, an individual who holds elected office qualifies as a public official. *See New York Times*, 376 U.S. at 283 n.23. Second, a public figure voluntarily places himself or herself in the limelight. *See Gertz*, 418 U.S. at 345 (commenting that "the instances of truly involuntary public figures must be exceedingly rare"). This Court has also asked whether an individual has "as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." *Butts*, 388 U.S. 164 (Warren, C.J., concurring). The public figure inquiry looks to whether an individual "invite[s] attention and comment." *Gertz*, 418 U.S. at 345.

Lance Corporal Snyder and Petitioner are private figures. Neither held elected office or voluntarily put himself in the public eye. Petitioner had no ability to respond to Respondents' protest or

Epic through policymaking. It is undisputed that Petitioner desired a private funeral for his son, and this is not one of those "exceedingly rare" cases where a plaintiff is an involuntary public figure. *Gertz*, 418 U.S. at 345. In any event, Respondents now concede that Petitioner and his son are private figures.

***2.*** **Hustler*'s Logic Is Limited To Suits Brought By Public Figures.***

The *Hustler* Court's rationale for applying the actual malice standard to IIED claims is expressly limited to "public figures and public officials." *Hustler*, 485 U.S. at 56. *Hustler*'s logic is also inextricably linked to its facts. The *Hustler* case began with a parody of a 1980s liquor advertisement. The satire used sexual double entendre to imply that Reverend Jerry Falwell lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse." *Id.* at 48. Falwell then sued Hustler for libel, IIED, and invasion of privacy. *Id.* at 47-48. At the trial court, Falwell lost on his libel and invasion of privacy claims, but prevailed on his IIED tort. *Id.* at 48. The Court, therefore, was confronted with a parody that made no factual allegations at all, much less verifiable ones. *See id.* at 57 (accepting the lower courts' determinations that the ad parody was not "reasonably believable").

The *Hustler* Court focused on whether public figures could "recover for the tort of [IIED] by reason of *publications such as the one at issue*…." *Id.* at 56 (emphasis added). The Court provided a detailed history of political cartoons, concluding that "[f]rom the viewpoint of history it is clear that our political discourse would have been considerably poorer without them." *Id.* at 55. Extending the actual malice standard to satirists is appropriate given the prominent role political cartoonists play in our nation's politics. Indeed, the actual malice standard bestows de facto immunity for satirists. A parody, by definition, lacks factual allegations; it is designed to exaggerate and mock. Satire's playground is the subjective, not fair and balanced facts. The *Hustler* Court's logic centers on how to preserve a role for satire in our nation's politics.

The Court also voiced concern over whether IIED's outrageousness standard provided sufficient protection for speakers commenting on public figures. Specifically, the Court noted that "'[o]utrageousness' in the *area of political and social discourse* has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler*, 485 U.S. at 55 (emphasis added). Thus, the Court found that IIED's outrageousness standard set too low a bar for preserving "uninhibited, robust, and wide-open" debate on public figures. *New York Times*, 376 U.S. at 270. In the interest of preserving discourse, the Court grafted the actual malice standard to public figure IIED suits. *See generally* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601 (1990).

Because of the importance of debate about public figures, the actual malice standard "administers an extremely powerful antidote to the inducement to media self-censorship…" *Gertz*, 418 U.S. at 342. The *New York Times* test also "exacts a correspondingly high price from the victims of defamatory falsehood." *Id.* The Court found that the First Amendment required this balance in public figure IIED cases. But as in the defamation context, "the state interest in compensating injury to…private individuals requires that a different rule should obtain with respect for them." *Id.* at 343. Accordingly, the actual malice standard should be cabined to public figure IIED torts.

Doctrinal symmetry is more than a reflexive extension of *Gertz*. The justifications underlying *Gertz* also apply to private figure IIED and intrusion torts. Because private figures lack the self-help media options of public figures, they are "more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Id.* at 344. Similarly, private figures have not voluntarily entered the public realm and "consequently [have] a more compelling call on the courts for redress of injury…." *Id.* at 345. Private figures lack the political incentives to use IIED torts as a means of silencing political

opponents. *Cf. New York Times*, 376 U.S. at 276-77 (comparing the Sedition Act to public official libel suits). And private figures are less likely to be targeted by the media, thus reducing the likelihood that a private figure IIED suit would chill the press. *Cf. Gertz*, 418 U.S. at 345. Finally, IIED's outrageousness standard and intrusion's intent requirement erect high thresholds that are content-neutral. *See supra* Subsections I.B.1 & I.B.3.

An extension of the actual malice standard to private figure compensatory damage claims would be unprecedented. This Court should recognize the state interest in protecting private figures from intentional infliction of emotional distress and hold that the high standard of outrageous conduct provides sufficient First Amendment protection for speakers. The question, then, is whether other aspects of this Court's defamation jurisprudence apply to IIED and intrusion torts.

#### *3.* **Milkovich*'s "Verifiable False Fact" Requirement Has No Place In Private Figure IIED And Intrusion Torts.***

As Justice White noted in his *Hustler* concurrence, *New York Times* and its progeny have "little to do with this case, for here the jury found that the ad contained no assertion of fact." *Hustler*, 485 U.S. at 57 (White, J., concurring). Nevertheless, this Court imported the actual malice test—which requires the finding of a false fact—into IIED suits to provide additional First Amendment protections in public figure cases. But as discussed above, the rights of private individuals to seek redress for tortious remarks strikes a different First Amendment balance.

Under *Gertz* and *Milkovich*, the verifiability of a false fact is the *sine qua non* of a defamation claim. This requirement stems from the elements of defamation laws, which protect reputations from false statements. Historically, the fair comment privilege immunized a statement if it "was upon true or privileged facts." *Milkovich*, 497 U.S. at 13. *Milkovich* simply preserves the ancient defense of truth in defamation cases. The verifiability of a false fact, therefore, cabins the reach of defamation suits to provide "breathing space" for opinionated discourse. *New York Times*, 376 U.S. at 272.

In the IIED context, the inquiry shifts to whether the defendant's extreme and outrageous conducted caused severe emotional distress. Indeed, "it is the intent to cause injury that is the gravamen of the tort." *Hustler*, 485 U.S. at 53. Similarly, in the intrusion context, courts examine whether a defendant violated an individual's privacy in a manner highly offensive to the reasonable person. These standards are not only high, but require defendants to engage in behavior that violates socially constructed norms of behavior. *See supra* Subsections I.B.1 & I.B.3.

Furthermore, these torts serve fundamentally different purposes. Defamation, at its core, seeks redress for false facts that damage reputation—a concern that arises because of the importance of an individual's identity in the community. Defamation suits "allow[] an individual to vindicate his good name" in the eyes of others. *Milkovich*, 497 U.S. at 12. By contrast, IIED examines the psychological harm caused to the plaintiff by the defendant's conduct, and the intrusion tort focuses on whether the defendant intentionally violated the plaintiff's privacy.

***4. The Epic Involves A Matter Of Private Concern.***

Because Petitioner seeks punitive damages, he must demonstrate that the Epic concerns a private matter to recover under the fault standard. *See Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion). Whether speech is a matter of public concern is "'determined by [the expression's] content, form, and context…as revealed by the whole record.'" *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (alterations in original)).

The Epic qualifies as a matter of private concern for three reasons. First, the Epic attacks Petitioner and Lance Corporal Snyder about familial matters. The Epic makes repeated references to the child-rearing practices of the Synder family, accusing Petitioner of teaching his son to "to divorce, and to commit adultery." JA 4. The Epic also disparages Petitioner's religious affiliation and asserts

that Petitioner "taught [his son] to be an idolater." JA 4. The Epic's criticism of Petitioner's family involves a matter of quintessential private concern.

Second, the fact that a non-media speaker distributed the Epic is evidence that it concerns a private matter. The vast majority of this Court's defamation and IIED cases—*New York Times*, *Gertz*, *Hepps*, *Hustler*, and *Milkovich*—involve media defendants. When a newspaper covers a story, it is strong evidence that the issue is one of public concern. But when a non-media speaker posts an online Epic, the context of the publication militates in favor of finding the speech a matter of private concern.[5]

Third, to the extent that the Epic recounts the media spectacle at the protest, Respondents cannot "by their own actions transform a private funeral into a public event." JA 51. Respondents' behavior would create perverse incentives by rewarding extreme and outrageous picketing that receives media attention. Indeed, absent the protest itself, the Epic would undoubtedly concern a private ceremony for family and friends that received no media coverage aside from the obituary.

To be sure, the Epic mentions public issues. The role of gays in the military and the Catholic Church pedophile scandal are undoubtedly newsworthy topics. But the simple fact that the Epic references these matters should not bootstrap Respondents into greater First Amendment protections.

Here, an example may be illustrative. Suppose that a student group opposed a university's affirmative action programs. Suppose further that this group posted pictures of a minority student around campus and included the caption "This student was admitted because of his/her race." This hypothetical clearly implicates a matter of public concern. But the tort of defamation would provide little recourse to the victims of this publicity stunt, as the plaintiffs would have to prove that defendants knew their statements were false. The IIED and intrusion torts, by contrast, provide victims with recourse in situations where a group that wants to make a political point cynically plunks them from

[5] Although this Court has left open the question of whether different standards should apply to media and non-media defendants, *Hepps*, 475 U.S. at 779 n.4, Petitioner only asks this Court to take the identity of the speaker into consideration when making a public versus private issue determination.

obscurity. Targeted speech at private figures should not result in victims involuntarily losing their common law tort recovery rights.

The Epic's discussion of Petitioner and his family is a matter of private concern. Accordingly, Petitioner needs to only meet the *Gertz* standard to receive punitive damages.

### *5. Private Figure/Public Issue IIED And Intrusion Torts Do Not Require "Verifiably False Facts."*

Respondents argue that speech about matters of public concern that does not include defamatory remarks should be immunized from tort liability. As an initial matter, this Court need not reach Respondents' argument if it finds that the Epic involves a matter of private concern. Respondents' theory fails on its merits because it lacks doctrinal support, any workable standard to differentiate public/private issues and opinion/facts, and would encourage outrageous conduct.

The Court has often conflated the public figure and public issue analysis, presuming that speech about a public figure was, by definition, an issue of public concern. Unsurprisingly, then, the Court has never differentiated between matters of public and private concern in public figure cases. It has also never meaningfully distinguished between issues of public and private concern outside of the punitive damages context. *See Hepps*, 475 U.S. at 775. Indeed, this Court rejected a variant of Respondents' public issue exception in defamation private figure cases. This Court should eschew the adoption of the public issue exception given the lack of a workable distinction between matters of public and private concern. *See Gertz*, 418 U.S. at 346 (refusing to impose the "additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not").

Respondents' request for factual assertions in IIED and intrusion torts reveals an overly narrow focus on *Milkovich*'s verifiable false fact requirement. The *Milkovich* Court emphatically declared that the *New York Times* line of cases did not "intend[] to create a wholesale defamation exemption for

anything that might be labeled 'opinion.'" *Milkovich*, 497 U.S. at 18. Respondents' seek to revive a version of this discarded theory by requiring factual allegations in IIED cases. Respondents' theory would result in the immunization of so-called "opinionated" speech. This Court has never recognized "a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id.*

Importing *Milkovich*'s verifiable false fact test to private figure IIED would create an unwieldy chimera, as IIED suits would no longer hinge on the intentional infliction of emotional distress. Opinions, as well as verifiably false facts, can inflict severe psychological damage, and the outrageousness standard provides satisfactory protection against the chilling effect of lawsuits. Respondents' contention that verifiable false facts are required for private figure IIED and intrusion torts ignores the fundamental difference between defamation and the torts at issue in this case. *Cf.* David A. Anderson, *Tortious Speech*, 47 Wash. & Lee L. Rev. 71, 79-82 (1990) (discussing the inherent tension in imposing an actual malice factual requirement in *Hustler*). Ultimately, Respondents' witless transplant of the *Milkovich* test would make private figure IIED suits *more difficult to prove* than defamation, as plaintiffs would need to establish all of the IIED elements in addition to proving a verifiably false fact. The IIED tort would be transformed into an outrageous defamation tort.

Additionally, Respondents' proposed exception would reward unscrupulous speakers. This Court's precedents have emphasized the voluntariness of the target, not the strategic calculation of the speaker. Respondents' theory turns the public-private figure dichotomy on its head by allowing the speaker to enhance the level of First Amendment protection by instigating a media spectacle.

Respondents have an immense amount of freedom and discretion in their speech. Per *Hustler*, Respondents are almost wholly immune from IIED liability for opinionated speech about public figures. Respondents, for example, are completely free to maintain their website depicting President Barack Obama as the Antichrist. *See* Antichrist Beast Obama, www.beastobama.com. In contrast to the

Epic, the "Beast Obama" site concerns a public figure and is protected by *Hustler* and *New York Times*. When Respondents instead choose to target a private figure, they should not be rewarded with additional First Amendment protections that were designed to only apply to public figures.

### C. The Epic Makes Offensive And Outrageous Factual Allegations About A Private Figure.

As demonstrated above, Petitioner need only prove that the Epic meets the *Gertz* test. Nevertheless, Petitioner can also demonstrate that the Epic contains verifiable false facts and was published with actual malice.[6]

#### *1. The Epic Satisfies The* Gertz *Standard.*

Under *Gertz* and Maryland common law, Petitioner must demonstrate that Respondents' Epic constituted outrageous behavior and was designed to intentionally inflict emotional distress. Here, the jury found that the Epic satisfied the IIED elements, and the trial judge concluded that Respondents' "actions had a significant impact" on Petitioner's diabetes and depression. JA 54.

The jury's findings are unsurprising given the Epic's highly offensive language and sensitive subject matter. Respondents' vociferously proclaim that Petitioner "raised [his son] for the devil," "taught Matthew to defy his Creator, to divorce, and to commit adultery," and "to be an idolater." JA 4. The Epic continues by claiming that Lance Corporal Snyder died fighting for the "United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life…." JA 4. The Epic also attacks Petitioner's religious beliefs by referring to the Roman Catholic Church as the "largest pedophile machine in the history of the entire world…." JA 4.

The Epic's contextual relation to the funeral protest provides additional support for the jury's determination. The Epic includes pictures the signs brought to the protest, including messages such as

[6] While this Court has employed heightened appellate review to "determine whether the record establishes actual malice with convincing clarity," *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984), this practice only applies to "portions of the record which relate to the *actual malice* determination…." *Id.* at 514 n.31 (emphasis added).

"You're Going To Hell," "Thank God For Dead Soldiers," and "God Hates Fags." JA 1, 4. Furthermore, the timing of the Epic—posted upon Respondents' return to their Kansas compound—occurred during Petitioner's time of bereavement. The callousness for Petitioner's time of mourning reveals Respondents' intent to inflict emotional distress. And Petitioner amply demonstrated the impact of Respondents'' conduct. This Court should leave the jury's findings regarding IIED undisturbed.

***2. The Epic Contains Verifiably False Facts.***

Petitioner still prevails even if the Court imports *Milkovich*'s verifiable false facts standard into the private figure context. This Court has noted that "[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler*, 485 U.S. at 52. In determining whether a statement is false, this Court looks to whether a reasonable person could conclude that the statement implied knowledge of fact. *Milkovich*, 497 U.S. at 21. The Court has eschewed a bright line distinction between fact and opinion, because such a rule "would ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact.'" *Id.* at 18. While the Epic does contain religious overtones that may constitute "loose, figurative, [and] hyperbolic language," *id.* at 21, there are nevertheless specific factual allegations that the reasonable reader could interpret as facts about Petitioner and Lance Corporal Snyder.

Respondents claim that Petitioner taught Lance Corporal Snyder "to divorce, and to commit adultery." JA 4. This statement implies two facts. First, the Epic implies that Petitioner affirmatively instructed his son to divorce and commit adultery, a fact that Petitioner denies. JA 35. Second, Respondents imply that Lance Corporal Snyder actually divorced his spouse and committed adultery, since the reasonable reader would conclude that the inclusion of these facts makes little sense unless these alleged acts took place. JA 35. Both these allegations are verifiable. One can verify through legal

records if an individual ever married and then divorced. Maryland family law defines adultery as intercourse between a married individual and someone other than their spouse. *See Flood v. Flood*, 330 A.2d 715 (Md. Ct. Spec. App. 1975). The record contains no evidence that Lance Corporal Snyder ever married, committed adultery, or divorced.

The Epic also alleges that Petitioner "taught Matthew to be an idolater," "raised him for the devil," "taught him that God was a liar," and "taught Matthew to defy his Creator." JA 4. These statements about Petitioner's religious teachings to his son are verifiably false. Even if one assumes that religious *belief* is "opinion" rather than "fact," one can still determine whether Petitioner actually raised his son to be a Satanist or idolater. Here, that is not the case. JA 35-36.

***3. Respondents Published The Epic With Actual Malice.***

The *New York Times* Court defined "actual malice" as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280. Respondents have never met Petitioner. Respondents' only factual information about Petitioner and his family was taken from the obituary. Respondents made no attempt to verify the veracity of their claims. JA 45-46. Tellingly, the Epic lists a series of facts taken from the obituary, which mentions nothing about a spouse or divorce. JA 5. The factual allegations about divorce and adultery, therefore, were made "with reckless disregard of whether [they] were false or not." *New York Times*, 376 U.S. at 280.

## CONCLUSION

For the foregoing reasons, the ruling of the Fourth Circuit should be reversed.

Respectfully submitted,

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