

## SNYDER V. PHELPS NOTE

### *Snyder v. Phelps*: Finding the Light at the End of the Tort Brendan Mackesey\*

#### I. INTRODUCTION

Perplexing. This word aptly describes First Amendment jurisprudence surrounding tort claims. A number of indeterminable standards masquerade as doctrine for such claims: Is the plaintiff a public or private party? What of the defendant? Does the speech at issue regard a matter of public concern? Is it an assertion of fact? Was the plaintiff in a “public place?” Was he or she part of a “captive audience?” In *Snyder v. Phelps*,<sup>1</sup> the Supreme Court has a chance to clarify some of these benchmarks. However, the Court must be wary of the influx of tort litigation its holding could trigger.

*Snyder* presents three questions for the Supreme Court:

- (1) Does *Hustler Magazine, Inc. v. Falwell*<sup>2</sup> apply to a private person versus another private person concerning a private matter?
- (2) Does the First Amendment’s freedom of speech tenet trump the First Amendment’s freedom of religion and peaceful assembly?
- (3) Does an individual attending a family member’s funeral constitute a captive audience who is entitled to state protection from unwanted communication?<sup>3</sup>

Analyzing these issues, the Court will determine whether a father is entitled to damages from a religious fundamentalist group that picketed with anti-homosexual propaganda outside his son’s funeral.<sup>4</sup> Specifically, the Court’s ruling will dictate whether a religious group may be held liable for such picketing

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<sup>1</sup> 580 F. 3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

<sup>2</sup> 485 U.S. 46 (1987).

<sup>3</sup> See Petition for a Writ of Certiorari at i, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>4</sup> *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009). The plaintiff’s son in *Snyder* was a marine who had recently been killed in Iraq. *Id.* For a detailed synopsis of the facts in *Snyder*, see *infra* Part II.A.

under three tort claims: (1) intentional infliction of emotional distress; (2) invasion of privacy; and (3) civil conspiracy.<sup>5</sup>

In June 2006, Albert Snyder filed suit bringing these tort claims against the Westboro Baptist Church and its founder, Fred Phelps, Sr., in the U.S. District Court for the District of Maryland.<sup>6</sup> When Snyder filed his complaint, he presumably did not realize the significant First Amendment questions his case presented (let alone the political reaction it would trigger<sup>7</sup>). In fact, the district court explicitly downplayed the First Amendment's importance in the suit.<sup>8</sup> The Fourth Circuit, however, capitalized on the opportunity to expound upon such a high profile area of law.

Before delving into its analysis, the Fourth Circuit provided a brief history lesson of First Amendment jurisprudence arising from tort claims.<sup>9</sup> After citing several important Supreme Court cases,<sup>10</sup> the Fourth Circuit focused on *Milkovich* – a relatively recent case addressing a libelous newspaper column.<sup>11</sup> In *Milkovich*, the Supreme Court dispelled the notion that the First Amendment provides a “defamation exemption” for anything that can be classified as opinion.<sup>12</sup> However, the Court clarified that the First Amendment does protect statements that cannot be “reasonably interpreted as stating actual facts” about an individual.<sup>13</sup> The Fourth Circuit relied on this clarification holding that Westboro's communications regarding Snyder and his son were constitutionally protected<sup>14</sup> and overturning a \$5 judgment against Westboro.<sup>15</sup>

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<sup>5</sup> See Petition for a Writ of Certiorari at page i, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>6</sup> *Snyder v. Phelps*, 580 F.3d 206, 210 (4th Cir. 2009). Snyder filed a total of five tort claims. However, the district court granted summary judgment to Westboro on the (1) defamation and (2) publicity given to private life claims. *Id.* at 213. Snyder also added two additional members of Westboro as defendants. *Id.* at 212.

<sup>7</sup> Twenty-seven legislative bodies have acted on funeral picketing since *Snyder's* inception. See Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 308 (2008) (Citation omitted).

<sup>8</sup> See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 579 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010) (“This case . . . does not involve . . . any prohibition of Defendants’ First Amendment rights of religious expression.”).

<sup>9</sup> See *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009).

<sup>10</sup> See *id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1987); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 284–86 (1964); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–46 (1974)).

<sup>11</sup> *Milkovich*, 497 U.S. at 1.

<sup>12</sup> *Id.* at 18.

<sup>13</sup> See *id.* at 20 (citing *Hustler Magazine, Inc.*, 485 U.S. at 50).

<sup>14</sup> *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009).

This note argues that the Supreme Court should affirm the Fourth Circuit's judgment. In doing so, the Court needs to articulate its benchmark for similar speech-based tort claims. After reviewing prior case law in Part II, Part III discusses *Snyder* in depth. Part IV argues that the tort claims here must fail and touches on the ramifications of a judgment for *Snyder*; notably, the massive amount of litigation that would arise should this type of offensive expression be deemed a tort. Part V offers a final reminder to the Supreme Court.

## II. A BRIEF INSIGHT INTO RELATED FIRST AMENDMENT JURISPRUDENCE

The Supreme Court has adopted plenty of speech-based tort doctrine over the years,<sup>16</sup> none more featured (or scrutinized) than the “actual malice” standard. A statement is made with actual malice if it is made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>17</sup> This definition was provided in *New York Times* (in 1964), where the Supreme Court refused to hold a newspaper company liable for defamation of a public official.<sup>18</sup> The standard was relied upon in subsequent cases favoring freedom of the press, such as *Gertz*,<sup>19</sup> *Curtis Publishing Co. v. Butts*,<sup>20</sup> and *Associated Press v. Walker*.<sup>21</sup> Although the Court has acknowledged that malice is an “elusive, abstract concept, hard to prove and hard to disprove,”<sup>22</sup> the Court did not explicitly favor a different approach until the end of the 20th Century.<sup>23</sup>

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<sup>15</sup> *See id.*

<sup>16</sup> *See* Jeffrey Shulman, *Free Speech at What Cost? : Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO, June 2010, at 1.

<sup>17</sup> *New York Times Co v. Sullivan*, 376 U.S. 254, 280 (1964); *see also* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S., 749, 766 (1984).

<sup>18</sup> *New York Times Co.*, 376 U.S. at 280.

<sup>19</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). In *Gertz*, the Supreme Court held that a private individual must show actual malice to recover punitive damages from a publisher or broadcaster for defamation. *See id.* at 347.

<sup>20</sup> *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 (1974) (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967)). In *Curtis Publishing Co.*, the Supreme Court extended the actual malice standard to plaintiffs who are public figures. *Id.*

<sup>21</sup> *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 (1974) (citing *Associated Press v. Walker*, 388 U.S. 130, 162 (1967)). In *Associated Press*, the Supreme Court further clarified the extension of the actual malice standard to plaintiffs who are public figures. *Id.*

<sup>22</sup> *New York Times Co.*, 376 U.S. at 293 (Black, J., concurring).

<sup>23</sup> *Cf. Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009) (“Nevertheless, in a distinct line of cases, the Court has recognized that there are constitutional limits to the type of speech to which state tort may attach.” (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 26 (1990))).

In *Hustler Magazine*, the Supreme Court's focus shifted from the intent of speech-based tort defendants to the content of the speech itself.<sup>24</sup> Convinced that no reasonable person would interpret a pornography magazine's parody of a famous pastor to be asserting facts about the pastor, the Court declined to grant relief for intentional infliction of emotional distress.<sup>25</sup> This "content-based" approach was further illustrated in *Milkovich*.<sup>26</sup> There, a newspaper columnist was charged with libel after alleging that a wrestling coach committed perjury.<sup>27</sup> The Court reasoned that "a reasonable factfinder could conclude that statements in the column imply an assertion that petitioner perjured himself."<sup>28</sup> Judge King – who delivered the majority opinion in *Snyder* – relied on this quotation to explain how he was obliged to focus on the "plain language" and "general tenor" of Westboro's offensive statements.<sup>29</sup>

Members of Westboro recently challenged the constitutionality of statutes that regulate funeral picketing in separate actions.<sup>30</sup> These cases present similar First Amendment questions, but are analyzed in a different context.<sup>31</sup> In determining whether a statute inhibits First Amendment rights, Courts have considered whether a statute is "content-neutral"<sup>32</sup> and narrowly tailored to a government interest.<sup>33</sup> Although these concerns are not apposite in *Snyder*,<sup>34</sup> it bears mentioning that Westboro recently convinced the Eighth Circuit to enjoin enforcement of an anti-picketing statute in Missouri.<sup>35</sup> The Eighth Circuit conceded that Westboro has a "viable argument" that it may only get its

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<sup>24</sup> See *id.*; *cf.* *Hustler Magazine, Inc.*, 485 U.S. 46, 53 (1987) ("Generally speaking, the law does not regard the intent to inflict emotional distress as one which should receive much solicitude . . ."); *id.* at 50 ("Respondent would have us . . . deny protection . . . even when that speech could not reasonably have been interpreted as stating actual facts.").

<sup>25</sup> *Hustler Magazine, Inc.*, 485 U.S. at 50.

<sup>26</sup> See *Snyder v. Phelps*, 580 F.3d 206, 222 (4th Cir. 2009).

<sup>27</sup> *Milkovich*, 497 U.S. at 23.

<sup>28</sup> *Id.* at 21.

<sup>29</sup> *Snyder v. Phelps*, 580 F.3d 206, 219 (4th Cir. 2009).

<sup>30</sup> See *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008); *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008).

<sup>31</sup> See *Snyder v. Phelps*, 580 F.3d 206, 217 n.10 (4th Cir. 2009) (citing *Snyder v. Phelps*, 533 F. Supp. 2d 567, 578–79 (D. Md. 2008) (distinguishing speech-based tort claims from constitutional challenges to statutory prohibitions)).

<sup>32</sup> A statute is "content-neutral" if it is justified without reference to the content of the regulated speech. *Hill v. Colorado*, 530 U.S. 703, 720 (2000).

<sup>33</sup> A "content-neutral" regulation is subject to intermediate scrutiny, and must be narrowly tailored to a *significant* government interest. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 981 (E.D. Ky. 2006). A "content-based" regulation is subject to heightened scrutiny, and must be narrowly tailored to a *compelling* government interest. *Id.*

<sup>34</sup> *Cf. supra* note 31 and accompanying text.

<sup>35</sup> *Phelps-Roper v. Nixon*, 545 F.3d at 694.

message across by picketing at military funerals.<sup>36</sup> It behooves Snyder to convince the Supreme Court otherwise.

A. *The Road to the Supreme Court*

1. The Road to the Fourth Circuit

No father should ever have to lose a son. Unfortunately, Albert Snyder suffered such a loss. His son, Matthew, was tragically killed while serving in Iraq on March 3, 2006.<sup>37</sup> Snyder just wanted to bury Matthews and move on. The members of Westboro Church had other plans.

Shortly after Matthew's funeral, Snyder turned on the television.<sup>38</sup> What he saw has haunted him ever since; "You're Going to Hell," "Thank God for Dead Soldiers," "Priests Rape Boys," and "Fags Doom Nations."<sup>39</sup> These were just several of the messages featured prominently on picket signs by members of Westboro Church outside Matthew's funeral.<sup>40</sup> Besides traumatizing Snyder,<sup>41</sup> the messages piqued his curiosity about Westboro. Sometime around a month after the funeral, Snyder discovered an "Epic" online entitled "The Burden of Marine Lance Cpl. Matthew Snyder."<sup>42</sup> The Epic stated that Snyder and his wife "taught Matthew to defy the Creator," "raised [Matthew] for the Devil," and "taught Matt that God was a liar."<sup>43</sup>

It is important to note that Westboro only picketed within a designated public area and stopped before the funeral started.<sup>44</sup> In fact, Westboro contacted local authorities beforehand to make sure they complied with all ordinances.<sup>45</sup> Furthermore, the Epic was not deliberately made accessible to Snyder.<sup>46</sup> However, Snyder didn't care – he wasn't about to let Westboro get away with such heinous actions. In June 2006, Snyder filed a complaint with the

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<sup>36</sup> *Id.*

<sup>37</sup> *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009).

<sup>38</sup> *Id.* at 212.

<sup>39</sup> *Id.* at 212, 222.

<sup>40</sup> *Id.* at 212.

<sup>41</sup> *See id.* at 213.

<sup>42</sup> *See id.* at 212 ("Snyder learned that there was a reference to his son on the Internet after running a search on google."); *see also* Brief for Respondents at 9-10, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 230 (Shedd, J., concurring).

<sup>45</sup> *Id.* (Shedd, J., concurring).

<sup>46</sup> *Id.* at 210; *see also id.* at 213.

U.S. District Court for the District of Maryland.<sup>47</sup> Snyder alleged five tort claims, two of which were dismissed.<sup>48</sup>

The case proceeded to trial in October 2007 on the remaining three tort claims.<sup>49</sup> The district court instructed the jury to determine whether Westboro's actions were directed at Snyder and his family; and if so, then whether the actions would be (1) highly offensive to a reasonable person, (2) extreme and outrageous, and (3) so offensive and shocking as to not be entitled to First Amendment protection.<sup>50</sup> The jury answered in the affirmative and Snyder was ultimately awarded \$2.9 million in compensatory damages and \$2.1 million in punitive damages.<sup>51</sup> Westboro appealed.<sup>52</sup>

## 2. Judge King Makes His Mark

After hearing arguments in December 2008, the Fourth Circuit reversed the district court's judgment in September 2009.<sup>53</sup> Rather than explore the merit of Snyder's actual tort claims, Judge King focused on the First Amendment.<sup>54</sup> King took an aggressive, self-aggrandizing stance,<sup>55</sup> and provided a barrage of quotations lauding freedom of expression.<sup>56</sup>

After dismissing the *Gertz* analysis offered by the district court,<sup>57</sup> Judge King advocated for the content-based approach illustrated in *Milkovich* and *Hustler Magazine, Inc.*<sup>58</sup> The Fourth Circuit determined as a matter of law that Westboro's activities were not directed at Snyder or his son.<sup>59</sup> In reversing the

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<sup>47</sup> *Id.* at 212.

<sup>48</sup> *Id.* at 210; *see also supra* text accompanying note 6.

<sup>49</sup> *See* Petition for a Writ of Certiorari at page i, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>50</sup> *Snyder v. Phelps*, 580 F.3d 206, 215 (4th Cir. 2009).

<sup>51</sup> *Id.* at 216.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 206.

<sup>54</sup> *See id.* at 216–26.

<sup>55</sup> *E.g., id.* at 218 (“[W]e have the obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” (citation omitted)).

<sup>56</sup> *E.g., id.* at 226 (“[T]hese liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy.” (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940))).

<sup>57</sup> *See id.* at 222 (explaining that the district court focused on whether Snyder was a “public figure” and whether Matthew’s funeral was a “public event.”).

<sup>58</sup> *See id.* (“[W]e must assess the content of the Defendants’ protest signs as well as the Epic, and determine whether such speech is entitled to constitutional protection.”); *see also supra* Part II.

<sup>59</sup> *See id.* at 223.

judgment,<sup>60</sup> King also explicated the language of the signs as “imaginative and hyperbolic rhetoric” that could not be objectively verified.<sup>61</sup> There is no silver lining in King’s words for Snyder, who faces an uphill battle before the Supreme Court

### 3. Judge Shedd’s Concurrence

In a logical and forthright concurrence, Judge Shedd abstained from discussing the First Amendment.<sup>62</sup> Rather, he focused on the sufficiency of the evidence of Snyder’s claims.<sup>63</sup> Although the sufficiency of the evidence was only raised by amicus curiae,<sup>64</sup> Shedd convincingly argued that should not preclude the Court from addressing a legal issue.<sup>65</sup> Shedd asserted that Westboro’s actions did not constitute “intrusion”<sup>66</sup> or “extreme and outrageous conduct.”<sup>67</sup> Consequently, Shedd concluded that Snyder’s invasion of privacy and intentional infliction of emotional distress claims must fail.<sup>68</sup> This viewpoint is expounded upon in Part IV.

#### *B. The Ramifications of the Supreme Court’s Judgment*

##### 1. What Privacy Interest?

Snyder’s invasion of privacy claim does not appear to be within the scope of his certiorari petition.<sup>69</sup> Nevertheless, the Supreme Court’s ruling will undoubtedly impact the legal world’s perception of “privacy;” specifically, the direction the Court is moving in with respect to the “captive audience” and “right

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<sup>60</sup> *Id.* at 226.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 227 (Shedd, J., concurring) (“Because the appeal can be decided on this non-constitutional basis, I would not reach the First Amendment issue addressed by the majority.”).

<sup>63</sup> *See id.* (Shedd, J., concurring).

<sup>64</sup> *Id.* at 228 (Shedd, J., concurring).

<sup>65</sup> *Id.* at 227–28 (Shedd, J., concurring) (advocating for the constitutional avoidance doctrine).

<sup>66</sup> *Id.* at 230 (Shedd, J., concurring) (“[I]t is clear that there was no type of ‘intrusion’ under any of the bases that Snyder asserts.”).

<sup>67</sup> *Id.* at 232 (Shedd, J., concurring) (“[T]his conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress . . .”).

<sup>68</sup> *Id.* at 233 (Shedd, J., concurring). Judge Shedd did not discuss the civil conspiracy claim. Shedd noted that the unlawful activity required for civil conspiracy was the substantive offense of the other two tort claims. Thus, the civil conspiracy claim must fail as well. *Id.* at 232 n.3 (Shedd, J., concurring).

<sup>69</sup> Petition for a Writ of Certiorari at i-ii, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

to privacy in public spaces” doctrines. Both standards have been sharply debated amongst the Supreme Court.

“The First Amendment permits the government to prohibit offensive speech when the ‘captive’ audience cannot avoid the objectionable speech.”<sup>70</sup> The Supreme Court has applied this rationale in upholding statutes that protect unwilling listeners in residential neighborhoods and outside healthcare facilities.<sup>71</sup> The Court has not, however, applied it in the context of a funeral or other religious gathering.<sup>72</sup>

Snyder asserts that Westboro disrupted his “peaceful assembly and mourning process,”<sup>73</sup> but what disruption he refers to is unclear. Snyder *did* peacefully assemble with family and friends to mourn his son, and certainly was not held “captive” while doing so.<sup>74</sup> To buttress his argument, Snyder emphasizes the “vulgar, offensive, and shocking” content of Westboro’s activities.<sup>75</sup> Yet, the Supreme Court has consistently downplayed the substance of unwanted communication, focusing on the manner of its delivery instead.<sup>76</sup> More broadly, the Court has associated one’s privacy interest in avoiding unwanted communication with the ability to “avert one’s eyes,”<sup>77</sup> and “the right to be left alone.”<sup>78</sup>

Snyder was left alone – he never needed to avert his eyes. In fact, Snyder purposefully directed his eyes towards Matthew’s Epic by locating it via the

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<sup>70</sup> *Frisby*, 487 U.S. at 487 (1987) (citing *Consolidated Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 542 (1980)).

<sup>71</sup> *See Hill*, 530 U.S. at 735 (upholding a state statute requiring picketers to obtain consent from unwilling listeners before approaching them); *Frisby*, 487 U.S. at 487 (upholding a state statute banning picketing in front of residential homes, while noting that such residents are a “captive audience.”).

<sup>72</sup> Brief for Petitioner at 49, *Snyder v. Phelps*, No. 09-751 (U.S. May 24, 2010).

<sup>73</sup> Petition for a Writ of Certiorari at 10, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>74</sup> *Snyder v. Phelps*, 580 F.3d 206, 230 (4th Cir. 2009) (Shedd, J., concurring); *see also supra* Part III.A.

<sup>75</sup> *Snyder v. Phelps*, 580 F.3d 206, 221 (4th Cir. 2009).

<sup>76</sup> *See, e.g., McQueary v. Stumbo*, 453 F. Supp. 2d 975, 990 (E.D. Ky. 2006) (“[I]t may not be the content of the speech, as much as the deliberate ‘verbal or visual assault’ that justifies proscription [of the speech].” (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975))).

<sup>77</sup> *See id.* (“[O]ffended viewers can effectively avoid further bombardment of their sensibilities simply by averting their eyes.” (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971))).

<sup>78</sup> *See id.* at 991 (“The unwilling listener’s interest in avoiding unwanted communication . . . is an aspect of the broader ‘right to be left alone.’” (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

Internet.<sup>79</sup> Even further, Snyder arguably averted his eyes towards the protest by contacting the media to complain after the funeral.<sup>80</sup> This could have led to greater television coverage of the protest, increasing the likelihood that his privacy would be “invaded.” The Supreme Court should accentuate these flaws in Snyder’s argument to set some much-needed boundaries on the captive audience doctrine.

Likewise, the Supreme Court should clarify exactly what privacy interests Snyder was entitled to. A funeral is a deeply personal occasion, where attendees have an interest in avoiding unwanted communications “which is at least similar to a person’s interest in avoiding such communications inside his home.”<sup>81</sup> However, the Court has noted that “we are often captives outside the sanctuary of the home and subject to objectionable speech.”<sup>82</sup>

The only people subject to Westboro’s picketing were hundreds of feet away from the Church along a *public* right of way.<sup>83</sup> Public ways are “quintessential” forums for free expression.<sup>84</sup> The Supreme Court has iterated that it has “the obligation . . . to make sure that its judgment does not constitute a forbidden intrusion on the field of free expression.”<sup>85</sup> By holding that Snyder’s privacy interest was compromised, the Court would be doing just that.

Moreover, the Court would be opening the floodgates for invasion of privacy claims.<sup>86</sup> Take, for example, a fast food addict named Hugo.<sup>87</sup> Hugo has just arrived home after enjoying a tasty bucket of fried chicken at KFC. After turning on the local news, Hugo notices a group of PETA members picketing outside the KFC he just came from. PETA is publicizing its hatred for anyone supporting KFC; protestors are carrying signs branding the restaurant’s customers “CHICKEN KILLERS.” Not only is Hugo deeply offended, but he feels

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<sup>79</sup> See *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009).

<sup>80</sup> Brief for Respondents at 5, *Snyder v. Phelps*, No. 09-751, (U.S. May 24, 2010).

<sup>81</sup> *Id.* at 992.

<sup>82</sup> *Id.* at 988 (citing *Cohen*, 403 U.S. at 91).

<sup>83</sup> Brief for Respondents at 7, *Snyder v. Phelps*, No. 09-751 (U.S. May 24, 2010).

<sup>84</sup> *Hill v. Colorado*, 530 U.S. 703, 715 (2000); see also *id.* at 732 (Kennedy, J., dissenting) (“The streets are natural and proper places for dissemination of information and opinion.” (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939))).

<sup>85</sup> *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009).

<sup>86</sup> See Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO (forthcoming 2010) (manuscript at 13, on file with University of Miami School of Law Library) (discussing potential causes of action for invasion of privacy, such as posting offensive material in college dorms).

<sup>87</sup> “Hugo” is based on Hugo Reyes, a featured character on the popular television show “Lost.” Hugo was a frequent patron of Mr. Cluck’s restaurant, a fictional restaurant based on KFC.

like a murderer. In fact, Hugo doesn't feel comfortable eating chicken ever again. It seems preposterous to imagine that Hugo would have a legitimate invasion of privacy claim arising from these circumstances. Yet, a Supreme Court judgment for Snyder would suggest the privacy interest one enjoys at home may be intruded upon by offensive television. Hugo could conceivably sue KFC for millions of dollars!<sup>88</sup>

## 2. Outrageous Speech is Not Outrageous Conduct

The *Restatement (Third) of Torts* imparts that "the law [of intentional infliction of emotional distress] is still in a stage of development, and the ultimate limits of this tort are not yet determined."<sup>89</sup> In *Snyder*, the Supreme Court could expand these limits incalculably. Consider that "the tort of intentional infliction of emotional distress is rarely viable, and is to be used sparingly and only for the opprobrious behavior that includes *truly outrageous conduct*."<sup>90</sup> Now, consider the allegations of outrageous conduct in *Snyder*:

Snyder asserts that the protest was extreme and outrageous because [1] the funeral was disrupted by having the procession re-routed; [2] his grieving process was disrupted by his having to worry about his daughters observing the Phelps' protest; and [3] the Phelps' messages on their protest signs were focused on his family.<sup>91</sup>

The first two assertions are dubious at best. Re-routing a funeral procession to an alternate entrance<sup>92</sup> is inconvenient, but hardly disruptive enough to warrant "severe emotional distress."<sup>93</sup> Likewise, outside distractions are always disrupting peoples' lives – even at funerals. Take Michael Jackson's father for instance. Surely his grieving process was "disrupted" during his son's memorial at the Staples Center. Snyder is clearly reaching for a nonexistent cause of action by alleging concern for his daughters' welfare in this context.

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<sup>88</sup> In addition to \$2.9 million in compensatory damages, Snyder was awarded \$6 million by the jury in punitive damages for his invasion of privacy claim. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 589 (D. Md. 2009). Snyder's total award of punitive damages was later reduced to \$2.1 million. *Id.* at 597.

<sup>89</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1965).

<sup>90</sup> *Snyder v. Phelps*, 580 F.3d 206, 231 (4th Cir. 2009) (Shedd, J., concurring).

<sup>91</sup> *Id.* at 232 (Shedd, J., concurring).

<sup>92</sup> Brief for Petitioner at 4, *Snyder v. Phelps*, No. 09-751 (U.S. May 24, 2010).

<sup>93</sup> See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) (noting the elements of intentional infliction of emotional distress).

The third assertion poses a more complex legal question to which the Fourth Circuit devoted more extensive analysis.<sup>94</sup> The messages displayed by Westboro certainly appear to be outrageous affront to Snyder’s family in a traditional sense.<sup>95</sup> (This is particularly evident in the Epic.<sup>96</sup>) Ironically however, this very outrageousness negates the assertion that the messages focused on Snyder’s family. As the Fourth Circuit pointed out, a reasonable reader would interpret Westboro’s communications as “loose, figurative, or hyperbolic language” not directed towards a specific person.<sup>97</sup>

The Supreme Court should not expand the limits of intentional infliction of emotional distress to encompass such “rhetorical hyperbole.”<sup>98</sup> A judgment for Snyder would accelerate the tort’s “development;”<sup>99</sup> it would evolve into something more akin to strict liability than an intentional tort. Protestors would be liable for messages clearly directed at society as a whole. Consequently, they would start constraining their actions and published material. Such self-censorship runs afoul of Justice Powell’s contention that “[u]nder the First Amendment there is no such thing as a false idea.”<sup>100</sup>

### III. CONCLUSION

The members of Westboro Church victimized Albert Snyder; the law should provide some sort of remedy. Unfortunately, such a remedy is only available at the expense of the First Amendment. The Supreme Court has acknowledged that “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.”<sup>101</sup> Maryland can and should pass a content-neutral, narrowly tailored statute to prevent similar cases from arising in the future.<sup>102</sup> But in regards to Snyder, the Court ought to demonstrate the same constraint advanced by the Fourth Circuit.<sup>103</sup> Damaged

<sup>94</sup> See *Snyder v. Phelps*, 580 F.3d 206, 222–26 (4th Cir. 2009); see also *supra* Part III.B.

<sup>95</sup> Cf. *Snyder v. Phelps*, 580 F.3d *passim* (4th Cir. 2009) (identifying picket signs and quoting language from the Epic).

<sup>96</sup> See *id.* at 225 (“[God] killed Matthew so that His servants would have an opportunity to preach His words to . . . the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.” (citation omitted)).

<sup>97</sup> See *id.* at 224 (citing *Milkovich v. Lorain Journal, Co.*, 497 U.S. 1, 21 (1990)).

<sup>98</sup> *Id.*

<sup>99</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1965).

<sup>100</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974); see also *Hill v. Colorado*, 530 U.S. 703, 746 (2000) (Scalia, J., dissenting) (“[S]uppression of uncongenial ideas is the worst offense against the First Amendment . . .”).

<sup>101</sup> *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 987 (E.D. Ky. 2006).

<sup>102</sup> See *supra* notes 7, 32–33 and accompanying text.

<sup>103</sup> See *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009).

emotions must yield to constitutional protections, lest the spirit of the First Amendment becomes a phantom.