

No. 09-751

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In the

***SUPREME COURT OF THE UNITED STATES***

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**ALBERT SNYDER**

***Petitioner,***

**v.**

**FRED W. PHELPS, SR., *et al.*,**

***Respondents.***

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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***AMICI CURIAE*** BRIEF OF THE THOMAS JEFFERSON  
CENTER FOR THE PROTECTION OF FREE  
EXPRESSION, THE MARION B. BRECHNER FIRST  
AMENDMENT PROJECT, NATIONAL COALITION  
AGAINST CENSORSHIP, THE PENNSYLVANIA  
CENTER FOR THE FIRST AMENDMENT

IN SUPPORT OF RESPONDENTS

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## STATEMENTS OF INTEREST OF AMICI CURIAE<sup>1</sup>

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. The Center is familiar with the facts and issues presented in this appeal having filed as *amicus curiae* when this case was before the United States Court of Appeals for the Fourth Circuit.

The Marion B. Brechner First Amendment Project (“Project”) is a nonprofit, non-partisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition and freedom of thought.

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<sup>1</sup> Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The National Coalition Against Censorship (NCAC), an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups, educates and advocates on behalf of freedom of thought, inquiry, and expression. The positions advocated in this brief do not necessarily reflect the position of each of NCAC's participating organizations.

The Pennsylvania Center for the First Amendment ("PaCFA") was established by the Pennsylvania State University to promote awareness and understanding of the principles of free expression to the scholarly community, the media and the general public. Directed by attorney Robert D. Richards, the PaCFA's members publish books and scholarly articles on First Amendment topics. The PaCFA regularly tracks issues related to free expression, and research generated from those projects is presented at national conferences and in law journals.

## **SUMMARY OF ARGUMENT**

As a father grieving the loss of a son who sacrificed his life serving his country, Albert Snyder deserves only sympathy and compassion. Nonetheless, members of the Westboro Baptist Church (hereinafter "the Phelps") expressed themselves in a manner that compounded Mr. Snyder's emotional anguish. In the limited context of the law, however, Mr. Snyder's suffering is

tangential to the fundamental question of the case before the Court: Did the Phelps cause Albert Snyder to suffer cognizable claims of Intrusion Upon Seclusion and Intentional Infliction of Emotional Distress (IIED)? Viewed in this strictly legal context, the answer clearly is no; the facts necessary to establish the elements of these torts are simply not present.<sup>2</sup>

This elemental absence provides grounds for resolving the case without addressing whether the Phelps' expression is protected under the First Amendment. In such circumstances, this Court adheres to a self-imposed doctrine of judicial restraint by avoiding the adjudication of constitutional questions—even if properly presented by the record—if another ground exists to decide the case. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Deemed as one of “the sixteen great maxims of judicial self-restraint” (Henry J. Abraham, *The Judicial Process* 348 (6<sup>th</sup> ed. 1993)), the doctrine of constitutional avoidance counsels that this case be resolved exclusively on the basis of Maryland tort law. Although evidentiary issues were not specifically raised in the questions presented by Mr.

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<sup>2</sup> The Phelps were also held liable for civil conspiracy by the district court. Because the unlawful activity required for this count was the substantive offense of Intrusion Upon Seclusion or IIED, the civil conspiracy claim must also be reversed. *See Green v. Washington Suburban Sanitary Comm'n*, 259 Md. 206, 269 A.2d 815, 824 (Md. 1970) (noting that “[a] civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act”).

Snyder, this Court has plenary power to consider any issue evident from the record. Sup. Ct. R. 24(1)(a). In this case, the record reveals that the Phelps' actions do not meet the elements of the alleged torts. Arriving at this conclusion does not require this Court to second-guess the lower court's factual findings. Indeed, the facts of this case are largely undisputed. See *Snyder v. Phelps*, 580 F.3d 206, 211 (4<sup>th</sup> Cir. 2009). Only the district court's conclusions of law are at issue.

A review of the record makes it apparent that the district court misapplied Maryland law to the facts presented. The doctrine of constitutional avoidance, coupled with the determination that the Phelps did not commit the torts alleged by Mr. Snyder, makes the sufficiency of the evidence issue especially deserving of this Court's review.

The availability of a non-constitutional ground on which to resolve this case does not vitiate the Fourth Circuit's conclusion that the Phelps' expression is protected under the First Amendment. Indeed, were it necessary for this Court to address the First Amendment issue, *amici* would fully endorse the Fourth Circuit's analysis. The availability of a non-constitutional ground, however, makes such an analysis unnecessary. With regard to the specific torts underlying the challenged judgment, two deceptively simple principles bind the inquiry. On the one hand, both Maryland law and the United States Constitution permit recovery for injuries suffered as a result of harmful expression.

Equally clear, on the other hand, is the severely limited scope of such remedies essential to maintain consistency with First Amendment freedoms. Thus, even if the First Amendment is not the basis for deciding this case, it nonetheless serves as a constitutional backdrop for the Court's analysis.

The need for careful appellate review is inescapable in cases involving messages that most citizens find deeply offensive and profoundly unpatriotic. This Court has consistently demanded in such cases that appellate courts review the circumstances *de novo*. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). Such rigorous scrutiny is vital “because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace,” so a reviewing court must determine “whether a given course of conduct falls on the near or the far side of the line of constitutional protection.” *Id.*; see also *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995). A case such as this one, in which the message is almost universally abhorrent, is precisely the kind that calls for the most sensitive and rigorous review.

## ARGUMENT

### I. NEITHER THE FUNERAL PROTEST NOR THE POSTING OF THE “EPIC” CONSTITUTED INTRUSION UPON SECLUSION UNDER MARYLAND LAW.

The district court correctly itemized the elements of Intrusion in Jury Instruction No. 18: “(1) An intentional (2) intrusion or prying upon (3) something which is and is entitled to be private (4) in a manner which is highly offensive to a reasonable person.” Vol. XII p. 3110.<sup>3</sup> Under Maryland law, the facts presented at trial do not establish a viable claim under this tort.

#### A. As a matter of Maryland law, an Intrusion plaintiff cannot claim a right to seclusion in something widely known by others.

The critical issue in Intrusion claims is “whether there has been an intrusion into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or affairs.” *Furman v. Sheppard*, 744 A.2d 583, 586 (Md. Ct. Spec. App. 2000); *see also Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1116 (Md. Ct. Spec. App. 1986). Intrusion plaintiffs must have reasonable

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<sup>3</sup> Consistent with both Petitioner’s and Respondents’ briefs, references to the record are contained in the Appellants’ Appendix submitted to the Court of Appeals.

expectations of privacy in the location or information allegedly intruded upon. See *Furman*, 744 A.2d at 586; *Trundle v. Homeside Lending, Inc.*, 162 F.Supp.2d 396, 440 (D. Md. 2001).

Under Maryland law, Intrusion plaintiffs may not claim a reasonable expectation of privacy in publicly available information. In *Hollander v. Ludbow*, for example, an Intrusion claim was brought against a defendant for disclosing that the plaintiff was a partner in a competing firm. 351 A.2d 421 (Md. 1976). The court rejected the claim, holding there was no reasonable expectation of privacy in the information because it was contained in the formal partnership documents on file in the public records office. *Id.* at 428.

Maryland law further posits that a reasonable expectation of privacy does not exist in publicly visible places. See *Furman*, 744 A.2d at 586. In *Furman*, surveillance conducted while the plaintiff was on a yacht in a public waterway was not an actionable Intrusion, even though defendant was trespassing on private property, because “[t]here is no liability for observing him in public places since he is not then in seclusion.” *Id.* Similarly, in *Barnhart v. Paisano Publications, LLC*, 457 F.Supp.2d 590 (D. Md. 2006), the plaintiff had neither a reasonable expectation of privacy nor a valid Intrusion claim for semi-nude photographs taken of her at a public event because anyone could have seen her and the photographs constituted nothing more than “giving publicity to what is

already public . . . .” *Id.* at 593 (citations omitted). And finally, in *Solomon v. National Enquirer, Inc.*, 1996 W.L. 635384 (D. Md. June 21, 1996), a plaintiff photographed in her window with the curtains open did not have a reasonable expectation of privacy for purposes of Intrusion because she did nothing to “conceal herself from uninvited eyes” while in full view of the general public. *Id.* at \*3.

The evidence before the district court left no doubt that information about Matthew Snyder’s funeral service was publicly and freely available. “Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.” *Snyder v. Phelps*, 533 F.Supp.2d 567, 571 (D. Md. 2008). Thus, the Phelps did not publicize either the news of Matthew Snyder’s death or the time and location of his funeral service. *Cf. Showler v. Harper’s Mag. Found.*, 222 F. App’x 755, 764 (10th Cir. 2007) (magazine’s publication of a photo taken at a funeral showing the open casket of a soldier killed in the Iraq war was not an intrusion because a newspaper previously published details that the funeral service was open to the public).

Given that the obituary notices did not exclude members of the public from attending the service, the Phelps cannot be held responsible for the fact that the church was filled, thereby denying Mr. Snyder the right “to be let alone” during the service. *See Klipa v. Bd. of Educ.*, 460 A.2d 601, 606 (Md. Ct. Spec. App. 1983) (quoting William Prosser, *Handbook of the Law of Torts* 832 (3d ed. 1964)).

Under Maryland law, a plaintiff in a public place cannot claim to be in seclusion. *Furman*, 744 A.2d at 587.

Even if Mr. Snyder had a right of seclusion within the confines of the church, that right did not extend to public spaces out of sight of the church. The Phelps' protest took place 1000 feet away from the church. Vol. XV p. 3758 (Defendants Exhibit 2, aerial photo of area with distance between protest and church marked). In finding that a protest near—but not at—a funeral service and unseen by the plaintiff constitutes Intrusion Upon Seclusion, the district court essentially declared that Mr. Snyder's right to seclusion is geographically boundless. Indeed, there is nothing in the lower court's reasoning that would preclude a finding of liability if the Phelps' protest had taken place 1000 miles from the funeral service. Such a prospect was enhanced by the court's determination that the intrusion element could be satisfied by turning on a television set. "A reasonable jury could find...that when Snyder turned on the television to see if there was footage of his son's funeral, he did not 'choose' to see close-ups of the defendants' signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion." *Snyder*, 580 F.3d at 581.

This analysis confuses an intrusion with the receipt of undesirable information. Mr. Snyder never observed the actual protest. He only saw a television

report on the protest filtered (for better or worse) through the eyes of a television camera crew.

It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial *that Snyder did not actually see the signs* until he saw a television program later that day with footage of the Phelps family at his son's funeral.

*Id.* at 572 (emphasis added). The act of turning on a television set of his own volition represents Mr. Snyder's willingness to accept whatever content was on the channels he selected. The district court's analysis to the contrary transforms every television viewer in Maryland into a potential Intrusion plaintiff anytime they view something that they find personally offensive.

B. Under Maryland law, a non-disruptive protest that is neither seen nor heard by a plaintiff cannot constitute an intrusion for the purpose of an Intrusion claim.

The plain meaning of Instruction No. 18 is that the intent to intrude or pry is insufficient to find liability unless it led to an *actual act* of intrusion or prying. At a minimum, therefore, legally-actionable

“intrusion” pre-supposes entry into a physical space or access to private information.

The facts presented at trial conclusively establish that the Phelps did not intrude upon the funeral service either physically or audibly. At all times, the Phelps’ protest occurred in a public place, designated by local police, approximately 1000 feet from the church where the service was held. Vol. XV p. 3758 (Defendants Exhibit 2, aerial photo with distance between protest and church). Moreover, it was impossible to observe the Phelps’ protest from the church because the view was obstructed by St. John’s Catholic School. Vol. VII p. 2079 (testimony of Albert Snyder); *see also* Vol. XV p. 3758 (Defendants’ Exhibit 2, aerial photo of grounds); Vol. XV p. 3795 (Defendant’s Exhibit 19, DVD with footage of church and picketing area). The fact that the Phelps used no sound amplification—combined with the distance and physical obstructions between the protest and the church—prevented any sounds from the protest being heard in the church. Vol. VIII p. 2165. Nor were the Phelps even seen by many driving to the service because their protest was several hundred feet away from the processional route. Vol. X p. 2640 (testimony of Father Dobranski). Although Mr. Snyder testified that he observed the Phelps’ signs for a moment from his car on his way to the funeral, he conceded that the signs were too far away to read. Vol. VII p. 2080 (testimony of Albert Snyder). Given that Mr. Snyder never saw or heard the actual protest, his Intrusion claim based on the protest lacks proof of the requisite act of an intrusion.

C. Under Maryland law, liability for Intrusion Upon Seclusion is based on the offensiveness of the manner of intrusion, not the offensive content of speech.

An intentional intrusion “in a manner which is highly offensive to a reasonable person” is the fourth and final element of an Intrusion claim. Vol. XII p. 3010. The plain meaning of the instruction centers liability on the *manner* of intrusion, not the *content* of the speech. *See Trundle*, 162 F. Supp. 2d 396, 401 (D. Md. 2001); *see also Pemberton*, 502 A.2d at 1116. The Phelps’ message may have been offensive to a reasonable person, but peaceful, non-disruptive and lawful picketing is a time-honored *manner* of expressing one’s views on political and social issues. *See Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1132 (2008) (citations omitted)

The fact that Mr. Snyder brought legal claims only against the Phelps and not the far greater number of highly visible Patriot Guard and student demonstrators there to honor Matthew Snyder illustrates that the content of the Phelps’ speech, and not the manner of their alleged intrusion, is at the heart of the claim. While Mr. Snyder’s choice of defendants is certainly understandable from an emotional point of view, the elements of an Intrusion tort are not met by offensive speech alone.

Though conceivably it might have been reasonable to consider an Intrusion claim had there been an actual disruption of the service, this is not

what occurred. As understandable as it might be to desire to provide legal redress to Mr. Snyder in his time of grief, the requisite elements of an Intrusion Upon Seclusion claim are not present in the facts of the Phelps' protest.

D. The posting of a written statement on the Internet that shares no private information about another person does not constitute an Intrusion Upon Seclusion.

Many of the foregoing facts about the protest that thwart an actionable Intrusion claim apply with equal force to the posting of the "epic" on the Westboro Baptist Church's website, such as the fact that Mr. Snyder came upon the information of his own volition:

In posting the "epic," the Phelps did not do anything to direct it to Snyder's attention ... Instead, Snyder learned of the "epic" during an Internet search, and upon finding it he chose to read it. By doing so, any interference with Snyder's purported interest in seclusion was caused by Snyder himself rather than the Phelps.

*Snyder*, 580 F.3d 206, 231 (4th Cir. 2009) (Shedd, J., concurring).

In reviewing the jury's findings regarding the "epic," the district court ruled, "[t]here was sufficient evidence in the trial record for a reasonable jury to conclude that Defendants' conduct unreasonably invaded Snyder's privacy and intruded upon his seclusion during a time of bereavement." *Snyder*, 533 F. Supp. 2d at 581. Under the district court's analysis, therefore, *the Phelps intruded* upon Mr. Snyder's privacy only because *Mr. Snyder chose to access* the Westboro website. Such Jabberwockian reasoning eviscerates the tort's requirement of an intrusion. A plaintiff cannot willingly seek out information and then claim his seclusion was intruded upon. The statements contained in the "epic" were certainly despicable, but they were not thrust upon Mr. Snyder against his will.

Moreover, as previously noted, a plaintiff who alleges Intrusion must have a reasonable expectation of privacy in the arena that is the target. *Hollander*, 351 A.2d 421 (Md. 1976). For obvious reasons, Mr. Snyder had no expectation of privacy in the Westboro website. Nor could he have had any expectation of privacy in the content of the so-called "epic" setting forth the Phelps' religious and political views as well as their admittedly hurtful but highly personal beliefs as to why Matthew Snyder died. Only something "which is and is entitled to be private" can serve as the basis for an Intrusion claim. Perhaps Mr. Snyder might have had a reasonable expectation of privacy in some of the factual information contained in the posting if it had not already been widely known but such was not the case here. In fact,

four weeks prior to the posting, the factual information contained in the “epic” was made available through Matthew’s obituary and the “two or three” press interviews given by Mr. Snyder about Matthew prior to the funeral service. Vol. VIII p. 2150 (testimony of Albert Snyder). Under Maryland law, a plaintiff does not have a reasonable expectation of privacy in information that has already been made publicly available. *See Furman*, 744 A.2d at 587.

The district court specifically held that the “epic” revealed no private information. Indeed, it was on that basis that the district court granted the Phelps’ motion for summary judgment on the Publicity Given to Private Life claim. *Snyder*, 533 F.Supp.2d at 573. Given that determination, the district court erred in not also granting the Phelps summary judgment on the Intrusion claim, at least as far as it pertained to the “epic.” Under Maryland law intrusion and publicity claims both “require the invasion of something secret, secluded or private pertaining to the plaintiff.” *Hollander*, 351 A.2d at 427. If Mr. Snyder had no reasonable expectation of privacy for the purposes of the Publicity claim, he could have no privacy interest in the exact same information for the purposes of the Intrusion claim.

## II. RULING THAT THE PHELPS' EXPRESSION WAS INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CONSTITUTED REVERSIBLE ERROR.

In the Court's Instruction No. 19, the jury was informed that the elements of IIED were "(1) that the Defendants' conduct was intentional or reckless; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress to the Plaintiff; and (4) that emotional distress was severe." Vol. XII p. 3011. Each element of the claim "must be pled and *proved* with specificity." *Foor v. Juvenile Servs. Admin.*, 552 A.2d 947, 959 (1989) (emphasis added). A detailed review of Maryland's IIED standards reveals that neither the Phelps' protest nor their subsequent website posting of the "epic" constitute "extreme and outrageous" conduct.

### A. Maryland tort law imposes a particularly high standard for recovery of Intentional Infliction of Emotional Distress.

Under Maryland law, a defendant is not liable for IIED for exercising his legal rights in a permissible way. *See Young v. Hartford Accident & Indem. Co.*, 492 A.2d 1270, 1278 (Md. 1985). Recovery for IIED is a rare and extreme remedy "meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves." *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75 (Md. 1991) (quoting *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1065 (Md. 1986)). In

fact, liability for IIED in Maryland is found so infrequently that twenty years after the tort was first recognized there had only been three instances in which IIED claims were upheld. *Penhollow v. Bd. of Comm'rs for Cecil County*, 695 A.2d 1268, 1285 (Md. Ct. Spec. App. 1997) (citing *Batson v. Shiflett*, 602 A.2d 1191, 1217 (Md. 1992)). Five years later, the Maryland District Court reiterated the rarity of a finding of liability by pointing out that

[T]here is a surfeit of cases in which allegations of the tort have failed to clear the dispositive motion stage . . . . For a *sample* of the *reported* cases in this district decided *only within the last year*, see, e.g., *Silvera v. Home Depot U.S.A., Inc.*, 189 F.Supp.2d 304 (D.Md. 2002); *Carson v. Giant Food, Inc.*, 187 F.Supp.2d. 462 (D.Md. 2002); *Green v. Wills Group, Inc.*, 161 F.Supp.2d. 618 (D.Md. 2001); *Collier v. Ram Partners, Inc.*, 159 F.Supp.2d. 889 (D. Md. 2001); *Rich v. United States*, 158 F.Supp.2d 619 (D.Md. 2001); *Vincent v. Prince George's County, MD*, 157 F. Supp.2d 596 (D.Md. 2001); *White v. Maryland Transp. Authority*, 151 F.Supp.2d 651 (D.Md.2001); *Robinson v. Cutchin*, 140 F.Supp.2d 488 (D.Md.2001).

*Arbabi v. Fred Meyers, Inc.*, 205 F.Supp.2d 462, 466 (D. Md. 2002) (emphasis in original). The tort's requirement of "extreme and outrageous" conduct

also imposes a particularly high barrier to recovery: For conduct to meet the test of “outrageousness” it must be “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.” *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977) (quoting Restatement (2d) of Torts § 46, cmt. d (1965)). This barrier “exists to screen out claims amounting to ‘mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities’ that simply must be endured as part of life.” *Batson*, 602 A.2d 1191, 1216 (Md. 1992) (citations omitted).

Consistent with a literal interpretation of this tort, Maryland courts have upheld IIED liability in cases involving extreme and outrageous *conduct*, not speech. See e.g., *Figueiredo-Torres*, 584 A.2d 69 (Md. 1991) (a marriage counselor had sexual relations with the wife of a patient he was counseling); *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1998) (a physician had sexual relations with a nurse without telling the nurse that he had herpes); *Young*, 492 A.2d 1270 (a worker’s compensation insurer insisted that a claimant submit to a psychiatric examination in order to harass the claimant and force her to abandon the claim). A common feature among the foregoing cases (and one absent from the instant case) is a prior relationship between the parties that placed the defendant in a unique position of power over the plaintiff. “In cases where the defendant is in a peculiar position to harass the plaintiff, and cause emotional distress, his conduct will be carefully scrutinized by the courts.” *Harris*, 380 A.2d 611, 615

(Md. 1977); *cf. Borchers v. Hrychuck*, 727 A.2d 388 (Md. 1999) (holding that a pastor who had sexual relations with a congregant in the course of marriage counseling did *not* amount to IIED since he was not in an officially-sanctioned treatment relationship with the defendant, distinguishing the situation from *Figueiredo-Torres*).

In contrast, Maryland courts do not appear to have upheld liability in IIED cases where speech was the alleged cause of the distress. For example, even defamatory speech does not automatically translate to IIED liability. *Batson*, 602 A.2d 1191, 1217 (Md. 1992) (defamatory statements made in connection with a labor dispute) (“[T]hough we have held that petitioners’ statements were defamatory, this conduct in no way satisfies our exacting standard for ‘extreme and outrageous conduct.’”).

Derogatory statements made in the workplace regarding gender, religion, national origin and race over a period of five years did not survive a motion for summary judgment on an IIED claim. *Arbabi*, 205 F.Supp.2d 462, 465-66 (D. Md. 2002) (“As inappropriate and repulsive as workplace harassment is, such execrable behavior almost never rises to the level of outrageousness...as to reach the high threshold invariably applicable to a claim of intentional infliction of emotional distress under Maryland law.”)

Nor was it “extreme and outrageous” conduct for a husband to lie to his wife for twenty years that

he had obtained a divorce from a previous marriage. *Vance v. Vance*, 408 A.2d 728 (Md. 1979); *see also Bongam v. Action Toyota, Inc.*, 14 F. App'x 275 (Md. 2001) (car salesman who referred to a black customer as a "nigger" and breached an agreement to sell a car did not meet the outrageous conduct requirement of IIED); *Collier v. Ram Partners, Inc.*, 159 F.Supp.2d 889 (D. Md. 2001) (an employer's persistent use of racial slurs and threats of bodily harm to an employee did not rise to level of outrageousness). These cases illustrate the very high legal threshold imposed by the "extreme and outrageous" standard in IIED claims, particularly those stemming from speech-related conduct.

- B. The posting of lawful statements of opinion on a website does not constitute "extreme and outrageous" conduct merely because the statements may be offensive.

The district court's finding that the posting of the "epic" on the Westboro Church's website constituted "extreme and outrageous" conduct is unwarranted under Maryland law and represents an unprecedented expansion of this tort. The Phelps posting of the "epic" on their website was entirely lawful. A defendant is not liable for IIED in Maryland for exercising his legal rights in a permissible way. In *Young v. Hartford Accident & Indem. Co.*, the plaintiff filed IIED and Negligence claims against her insurance company for the emotional stress caused by the insurer's demand that she submit to an additional psychiatric examination

in order to continue receiving her disability benefits. 492 A.2d 1270, 1278 (Md. 1985). The trial court dismissed the insured's IIED claim. On appeal, the Maryland Court of Appeals affirmed the trial court's IIED decision because it was the insurance company's legal right to insist upon the evaluation. In reaching this conclusion, the court relied upon the Restatement's position that an IIED defendant is "never liable...where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." *Id.* (citing Restatement (2d) of Torts § 46 cmt. g (1965)).

Similarly, a defendant's summary judgment motion on an IIED claim was granted in a case involving a man calling his live-in fiancé a "bitch," "whore," and a "one-breasted woman" while she was recovering from breast cancer treatments in an attempt to get her to move out of his house. *Miller v. Ratner*, 688 A.2d 976, 978 (Md. Ct. Spec. App. 1997),

The verbal language directed to Ms. Miller, and the conduct was solely verbal, although it included threats, was for the purpose of pressuring appellant to leave Warren's house, where, *regardless of the morality of his position*, she had no legal right to remain. Considering that the appellees *had the legal right to require appellant to leave*, we do not perceive their verbal actions alone to be, as nauseating as

they are if true, of such egregiousness  
so as to satisfy the elements of the tort.

*Id.* at 996 (emphasis added).

The act of posting one's opinion on the Internet is today clearly an accepted act performed widely by an inestimable number of speakers around the world. While the Phelps' opinions may be offensive, the act of posting them is not extreme and outrageous. Moreover, the statements made in the "epic" do not fall under any of the categorical exceptions to First Amendment protection such as obscenity, incitement to violence or fighting words. *See Snyder*, 580 F.3d at 224-226. The "epic" did not contain personal information or other material obtained by force or without permission. *Cf. Mitchell v. Baltimore Sun Co.*, 883 A.2d 1008 (Md. Ct. Spec. App. 2005). Disclosure did not violate a pre-existing duty or promise between the Phelps and Mr. Snyder. *Cf. Cohen. v. Cowles Media Co.*, 501 U.S. 663 (1991). Nor did it propose to commit an illegal act, (*cf. Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997)), or unlawfully make use of the intellectual property of another. *Cf. Zacchini v. Scripps-Howard Broadcasting, Co.*, 433 U.S. 562 (1977). To allow liability for the posting of the "epic" would represent an expansion of IIED liability that would severely chill the exercise of lawful expression on the Internet.

C. The Phelps' protest in the vicinity of the funeral service was not extreme and outrageous conduct and was not the cause of Mr. Snyder's emotional distress.

For myriad reasons, it was reversible error to find that the Phelps' protest near the funeral service constituted "extreme and outrageous" conduct. First, as with the posting of the "epic," the Phelps' protest was entirely lawful and therefore did not constitute "extreme and outrageous" conduct under Maryland law. *See Young*, 492 A.2d 1270 (Md. 1985). Peaceful, non-disruptive picketing is a time-honored means of expressing one's views on political and social issues. *See Pleasant Grove*, 129 S. Ct. 1125, 1132 (2008) (citations omitted).

Second, the messages displayed on the signs did not mention Matthew Snyder's name and, like the "epic," did not fall under any of the exceptions to First Amendment protection. *See Snyder*, 580 F.3d at 222-224. Further, "as utterly distasteful as these signs were, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens." *Id.* at 222-23. That the signs addressed matters of public concern should inform the analysis of whether the Phelps' conduct was "extreme and outrageous." Indeed, this Court has expressly recognized that the "outrageousness" standard of the IIED tort is problematic when

applied to speech that involves matters of public concern:

“Outrageousness” 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. An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

*Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

Third, the Phelps took deliberate steps to ensure that their protest would not disrupt the service. Rather than simply appearing on the day of the funeral service, the Phelps gave advance notice to local law enforcement, providing them with the time and opportunity to make arrangements for the protest. Vol. XV p. 3776 (Phelps' letter to Officer Spaulding). After their arrival in Maryland, the Phelps' obeyed all laws, regulations and directions. Vol. VII pp. 2285-86 (testimony of Major Thomas Long). Of particular relevance, the Phelps agreed to protest in a police-designated location that could neither be seen nor heard from the church—something they were not obligated to do. Many of

the Patriot Guard funeral demonstrators were allowed to form a “tunnel” immediately outside the church through which Mr. Snyder passed in order to access the service. Vol. VII p. 2080 (Testimony of Albert Snyder); Vol. XV p. 3762 (Defendants’ Exhibit 42, photo of Patriot Guard outside church). The undoubted basis for this disparate treatment was the message expressed by the Phelps. While content-neutral and reasonable restrictions on time, place, and manner may have been permissible, restrictions based on viewpoint are prohibited under the First Amendment. *See Carey v. Brown*, 447 U.S. 455, 463 (1980). Realizing that the many other demonstrators were not similarly restricted, the Phelps would have been within their constitutional rights to move beyond their segregated space to an area closer to the church (which they chose not to do). Finally, the Phelps took the ultimate step to ensure the funeral service would not be disrupted by ending their protest just as the service was beginning. Vol. VIII pp. 2285-86 (testimony of Major Long). While one might argue that picketing which actually disrupts a funeral service constitutes extreme and outrageous conduct, such an argument is not available in the context of this case.

Yet even if the Phelps’ protest could be considered “extreme and outrageous” conduct, it was not the cause of Mr. Snyder’s emotional distress for the simple reason that he neither saw or heard it. The true source of Mr. Snyder’s emotional pain was a *television news report* on the protest that he watched after the funeral service. *See Snyder v. Phelps*, 533

F.Supp.2d 567, 572 (D. Md. 2008). The Phelps had no control over the broadcaster's independent and constitutionally protected editorial decision to cover and broadcast their edited version of the protest. The Phelps were only responsible for providing some of the news report's content.

If a television news report of a political protest can serve as the basis for an IIED claim, then freedom of the press would be in jeopardy because the television station that covered the protest would be potentially as culpable as the Phelps. Knowing that Mr. Snyder had not seen the Phelps' protest because he was attending the funeral service, the broadcaster would be aware of both the high probability that Mr. Snyder would witness the protest only through the news report and that seeing it would cause him severe emotional distress. In such a context, it is reasonable to believe that a jury would conclude that it was "extreme and outrageous" for the television broadcaster to give the Phelps exactly what they wanted—a platform allowing their highly offensive speech to reach a much greater audience. Of course such a basis for potential liability of a television station seems unlikely – though explaining why the message-creator is liable while the messenger is immune is a daunting task, and suggests the hazards of such a standard as the one on which this appeal focuses.

To hold a speaker legally accountable for IIED in so public a setting invites a nearly limitless scope of tort liability—a result clearly at odds with

Maryland precedent requiring recovery for IIED claims to be “meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves.” *See Figueiredo-Torres*, 584 A.2d 69, 75 (Md. 1991) (citations omitted). “Although reasonable people may disagree about the appropriateness of the Phelps’ protest, this conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law.” *Snyder*, 580 F.3d 206, 232 (4th Cir. 2009) (Shedd, J., concurring).

III. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE COUNSELS THAT THIS COURT REVIEW THE SUFFICIENCY OF THE EVIDENCE TO DETERMINE IF THERE ARE NON-CONSTITUTIONAL GROUNDS TO DECIDE THE CASE.

A. The Court of Appeals erred in not adhering to the doctrine of constitutional avoidance.

Endorsed by this Court over 100 years ago, the doctrine of constitutional avoidance is a fundamental rule of judicial restraint. *See Burton v. U.S.*, 196 U.S. 283 (1905); *see also Ashwander*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); Henry J. Abraham, *The Judicial Process* 348 (6<sup>th</sup> ed. 1993). This prudent approach to adjudicating constitutional issues developed in part out of concern for the potential threat to our democratic system of government by having the non-elected federal judiciary too quickly

declaring unconstitutional the acts of the democratically-elected Congress. See Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539, 1548-1549 (2007). “The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.” *Ashwander*, 297 U.S. at 346. Included among those rules:

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

*Id.* at 347. See also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975) (vacated); *NAACP v. City of Annapolis*, 133 F. Supp. 2d 795, 812, n. 24 (Md. 2001).

Although the doctrine of constitutional avoidance initially developed in the context of acts of

Congress, similar concerns exist when federal courts rule on issues that are in the province of the states to decide. “The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence.” *Huffman*, 420 U.S. 592, 603 (1975).

The Fourth Circuit majority’s refusal to review the sufficiency of the evidence created the risk of usurping Maryland’s authority to set the boundaries for imposing civil liability within the state. While that harm was averted by the appellate court’s finding that the Phelps’ expression was constitutionally protected, such would not have been the case had the appellate court come to the opposite conclusion. As previously noted, a person is not liable for IIED in Maryland where he has insisted upon his legal rights in a sanctioned manner, even when he is aware his actions are certain to cause someone emotional distress. *Young*, 492 A.2d 1270, 1278 (Md. 1985). Since at the time of the protest Maryland had not yet followed the example of approximately forty other states by enacting a statute restricting funeral protests, the Phelps were within their legal rights to protest where they did.<sup>4</sup>

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<sup>4</sup> Maryland has since passed a statute regulating funeral protests; however, even under the statute the Phelps’ conduct is still immune from liability. Md. Code Crim. Law § 10-205(c) (2006) (“A person may not engage in picketing activity within

If a stricter standard is deemed necessary to harness activities such as protests *near* funerals, it should be left to the individual states to decide. Had the Court of Appeals determined that the Phelps' expression was unprotected, such a ruling effectively would have endorsed a federal expansion of Maryland tort liability beyond the well-established limits previously set by Maryland state courts. Avoiding federal judicial interference with state civil functions is one of the goals served by the doctrine of constitutional avoidance. *Huffman*, 420 U.S. at 603.

In addition, refusing to address a case-dispositive evidentiary issue simply because the parties did not raise it on appeal would “turn the principle of constitutional avoidance on its head; rather than avoiding unnecessary constitutional issues, we allow the parties to structure the case in order to force ...[courts] to reach constitutional issues.” *See Snyder*, 580 F.3d at 227 (Shedd, J., concurring) (citing *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 447 (1993)(noting that “the contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical acts of Congress or dubious constitutional principles...”).

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100 feet of a funeral . . . that is targeted at one or more persons attending the funeral . . .”).

B. The sufficiency of the evidence claim was addressed by the Court of Appeals and properly preserved for review by this Court.

Although the Fourth Circuit correctly determined that the Phelps had properly challenged the sufficiency of the evidence in the district court, the appeals panel puzzlingly held that the church “abandoned that contention on appeal” and therefore “voluntarily waived the sufficiency issue.” *Snyder*, 580 F.3d at 216. In fact, a review of the record reveals that the Phelps made several challenges to the sufficiency of the evidence in their appeal. In their brief to the Court of Appeals, the Phelps claimed that Mr. Snyder “had no privacy right in his son’s funeral or his own mourning under *the circumstances of this case*.” Brief of the Appellants at 14, *Snyder*, 580 F.3d 206 (4th Cir. 2009) (No. 08-1026). The difference between this claim and an explicit “sufficiency of the evidence” claim is one of semantics, not substance. The reference to “the circumstances of the case” obviously addresses solely the adequacy of the evidence as it applied to the only privacy-based tort still at issue.

To buttress their claim that the circumstances of the case presented no valid privacy interest, the Phelps cited several examples of similar factual situations in which this Court and lower courts have determined that a right of privacy does not exist. *Id.* at 14-16. The Phelps’ brief also notes a case in which a court found that a right of privacy does not exist in the specific context of a public funeral. *Id.* at 15-16.

The clear purpose of highlighting these cases was to demonstrate by contrast that the evidence presented here failed to constitute the elements of the only torts at issue on appeal.

The Phelps also claimed on appeal that the jury's "verdict was the product of passion and bias." *Id.* at 23-24. Such an argument simply offers an alternative way of stating a challenge to the sufficiency of the evidence for both Intrusion and IIED in that it claims the jury's verdict was based on factors other than the presented evidence.

Whether or not the Phelps could have more effectively disputed the sufficiency of the evidence in the Court of Appeals is certainly debatable, but imprecise court filings are not unusual. As a descriptive and practical matter, determining such issues as whether a claim has been made or waived on appeal is more of an art than a science. Appellate courts are to approach making such determinations with a degree of flexibility. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations omitted) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule.").

The argument by an *amicus*<sup>5</sup> in the Court of Appeals that the facts of this case did not meet the elements of the alleged torts was not a new claim, but an argument in support of a claim already made by the Phelps. As such, the Phelps may properly seek this Court’s review of the issue in its Brief on the Merits and *amici* may seek to assist this Court by providing further argument supporting or opposing the claim. Clearly, Mr. Snyder suffers no prejudice in that he will have the opportunity to challenge the claim in his Reply Brief, just as he did in the Court of Appeals. *See Snyder*, 580 F.3d at 228 (Shedd, J., concurring).

The concurring opinion did note, however, that even if the sufficiency claim had been raised only by the brief of an *amicus*, an appellate court has the authority to review the issue. *Id.* at 227 (Shedd, J., concurring); *see also Teague v. Lane*, 489 U.S. 288, 300 (1989); *Davis v. U.S.*, 512 U.S. 452, 457 n.1 (1994). In addition, the fact that the Fourth Circuit panel chose to address the sufficiency claim invites this Court to do the same. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (“[E]ven if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below.”); *see also Citizens United v. Federal Election Comm’n*, 130 S. Ct. 876, 882 (2010). Although the two-judge majority in the Court of Appeals held that the sufficiency claim had been waived, it did so only after evaluating

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<sup>5</sup> *Amicus Curiae* Brief of the Thomas Jefferson Center for the Protection of Free Expression.

the merits of the claim. “We are content to reject each of these non-First Amendment contentions without further discussion because they are all plainly *without merit*.” *Snyder*, 580 F.3d at 216 (emphasis added). A waived claim requires absolutely no consideration of the claim’s merits. The statement that the non-First Amendment contentions were “plainly without merit” reveals that the two-judge majority conducted an evaluation of the contentions’ substance, albeit a cursory one. Among the “non-First Amendment contentions” to which the judges were referring were “that Snyder had no privacy right,” “that the jury was impermissibly biased,” and the “district court made prejudicial evidentiary errors at trial.” *Id.* As discussed above, the sufficiency of the evidence argument is surely relevant to each of these “non-First Amendment contentions.”

Moreover, the concurrence to the Fourth Circuit’s opinion was based entirely on an assessment of the sufficiency of the evidence. “Although I agree with the majority that the judgment below must be reversed, I would do so on different grounds . . . I would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims.” *Id.* at 227 (Shedd, J., concurring). Thus, all three members of the Fourth Circuit panel addressed the sufficiency of the evidence. In so doing, the Fourth Circuit made a ruling of law that is entirely appropriate for this Court’s review.

Yet even if a challenge to the sufficiency of the evidence had not been advanced in the Court of Appeals, this Court has the plenary power to review a claim if it so chooses. “At its option...the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.” Sup. Ct. R. 24(1)(a). In this matter, the record simply does not contain evidence proving the elements of the alleged torts and therefore clearly warrants this Court’s review of the issue.

C. Challenges to evidentiary conclusions of law should rarely be deemed waived in the appeals of First Amendment cases.

In *Bose Corp. v. Consumers Union of U.S., Inc.*, this Court stated that in cases alleging expression as unprotected under the First Amendment, it regularly conducts

. . . an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.

*Bose*, 466 U.S. 485, 505 (1984). Such review is constitutionally required. *Id.* at 510; *see also Hurley*, 515 U.S. 557, 567 (1995). Independent appellate

review reflects “a deeply held conviction that judges...must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.” *Bose*, 466 U.S. at 511-12; (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

While the Fourth Circuit recognized the obligation to “make an independent examination of the entire record,” it cited waiver to exclude review of the district court’s findings of fact concerning the evidence and limited its examination to a single conclusion of law, namely whether the Phelps’ expression was protected under the First Amendment and therefore immune from tort liability. *Snyder*, 580 F.3d at 218 (citations omitted). This analysis represents an unduly constrained view of the appellate court’s constitutional obligation in cases potentially defining the perimeters of the First Amendment. Appellate courts are expected to examine finding of facts “where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it.” *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927) (citations omitted). Such encompassing scrutiny by appellate courts is vital

[B]ecause the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of

constitutional protection. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that '[f]indings of fact ... shall not be set aside unless clearly erroneous,' we are obliged to make a fresh examination of crucial facts.

*Hurley*, 515 U.S. 557, 567 (1984). In appeals not involving First Amendment claims, deference to a lower court's finding of facts is both reasonable and necessary for the efficient administration of justice. The Fourth Circuit's decision not to consider the sufficiency of the evidence, however, represents a failure to recognize that not all findings of fact deserve the same degree of deference. This is particularly true when findings of fact are so intermingled with a conclusion of law that a review of the facts becomes crucial to determine if First Amendment rights are being properly respected. *See Fiske*, 274 U.S. at 385-386. Yet here, a challenge to the sufficiency of the evidence would not require the Court to question or evaluate any of the district court's findings of fact. As the district court noted, "the facts of this case as presented at trial are largely undisputed." *Snyder*, 533 F.Supp.2d at 571. What was in dispute were the district court's conclusions of law that its factual findings constituted the elements necessary to prove claims of Intrusion and IIED. Had the Court of Appeals reviewed the district court's conclusions of law regarding the evidence, the insufficiency of the evidence would have become

readily apparent. A review of the facts to determine if some particular speech is protected under the First Amendment invariably includes examining the basis for claiming the expression is unprotected.

It must be acknowledged that the purpose of *Bose*-type independent appellate review is both to verify that the speech in question is actually unprotected and to confine the perimeters of any unprotected speech within acceptably narrow limits to ensure that protected expression will not be inhibited. *Bose*, 466 U.S. at 505. That being the case, it could be argued that evidentiary errors that do not speak to those purposes are irrelevant.

Yet such an argument must be qualified by the doctrine of constitutional avoidance. While it initially might appear ironic to argue that an approach to applying the law—one born out of concern for protecting First Amendment rights—should result in *not* addressing the First Amendment question, such irony dissipates upon further consideration. An independent review of the record does not presuppose a finding that the speech at issue is protected or not. The review therefore may result in a determination that the First Amendment is not an issue. Further, constitutional avoidance will only play a role if the independent review of the record reveals an alternative that will fully resolve the case without having to address the First Amendment question. Most importantly, however, the merits of constitutional avoidance are unchanged if in the course of a *Bose*-type review an appellate court

determines the evidence to be insufficient as a matter of law to prove the underlying offense. As such, the doctrine of constitutional avoidance should counsel courts to determine if a case can be resolved on evidentiary grounds even if the issue was not raised on appeal.

While it is not common for the Court to address issues other than those presented in the petition, such a broader scope of review is certainly not unprecedented. It is within the plenary power of the Court to decide the case on issues other than those presented in a petition. Sup. Ct. R. 24(1)(a). In the instant case, the record simply does not contain evidence proving the elements of the alleged torts. That deficiency, combined with the Court's own mandate of independent review of the record and the doctrine of constitutional avoidance, clearly warrants this Court's review of the sufficiency of the evidence.

## CONCLUSION

*Amici* respectfully urge this Court to affirm the Court of Appeals' judgment that the Phelps are not liable for the alleged torts.

/s/ J. Joshua Wheeler

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