

No. 09-751

Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

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

Respondents.

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

Brief *Amicus Curiae*
of the Center for Constitutional Jurisprudence
In Support of Neither Party
Suggesting Reversal

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QUESTIONS PRESENTED

The Fourth Circuit reversed a jury determination in favor of Albert Snyder ("Snyder") for the intentional harm perpetrated against him by Fred W. Phelps, Sr., Westboro Baptist Church, Incorporated, Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper (collectively, "Phelps"). Snyder's claim arose out of Phelps' intentional acts at Snyder's son's funeral. Specifically the claims were: (1) intentional infliction of emotional distress, (2) invasion of privacy and (3) civil conspiracy. These claims were dismissed by the Fourth Circuit notwithstanding that (a) *Hustler Magazine, Inc. v. Falwell* does not apply to private versus private individuals; (b) Snyder was a "captive" audience; (c) Phelps specifically targeted Snyder and his family; (d) Snyder proved that he was intentionally harmed by clear and convincing evidence; and (e) Phelps disrupted Snyder's mourning process. The Fourth Circuit's decision gives no credence to Snyder's personal stake in honoring and mourning his son and ignores Snyder's right to bury his son with dignity and respect. Three questions are presented:

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

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Interest of *Amicus Curiae* ¹

Amicus curiae, the Center for Constitutional Jurisprudence, is an educational, litigation and advocacy program in constitutional law and jurisprudence. Founded in 1999 as the public interest litigation arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the Center provides legal representation and litigation support through the work of students and attorneys in cases of constitutional significance, advancing through its strategic litigation the Institute's mission of restoring the principles of the American Founding to their rightful and preeminent authority in our national life.

SUMMARY OF ARGUMENT

First Amendment principles of freedom of speech in a traditional public forum can accommodate the traditional deference and respect shown for the dead when funeral processions or funerals briefly occupy some portion of that public forum, under standards set by state law protecting funerals from disruption. The split in the circuits presented in this action favors the analysis of the Sixth Circuit Court of Appeals in *Phelps-Roper v. Strickland* (6th Cir. 2008) 539 F.3d 356, which upheld funeral speech laws as reasonable time, place and manner regulations.

¹The Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

ARGUMENT**FIRST AMENDMENT PRINCIPLES AND
FEDERALISM SHOULD PERMIT STATES
TO RECOGNIZE PRIVATE FUNERALS AS
CULTURALLY AND CONSTITUTIONALLY
APPROPRIATE CONTEXTS FOR LEGAL
RESTRICTIONS ON DISRUPTIVE SPEECH
IN A TRADITIONAL PUBLIC FORUM.**

The principal problem with the First Amendment speech analysis of the Fourth Circuit Court of Appeals in this action is that it fully protects speech in a traditional public forum, the streets and sidewalks where the Respondents demonstrated, without adequate consideration of the context, a private funeral, and the strong American -- indeed universal -- cultural tradition of showing respect for the dead and deference to mourning relatives and friends associated with private funerals and funeral processions.

In protecting speech in traditional public forums like public streets and sidewalks, states should be permitted to take into consideration the traditional, cultural exception to such public expression associated with the practice which has been observed in human societies from time immemorial of allowing families to conduct private funerals without disruption. States should be allowed under the First Amendment and principles of federalism to legislate against interference with or disruption of private funerals, including providing causes of action in tort for intentional infliction of emotional distress as in the present action, and similar state law regulations, by

legal prohibitions against knowingly, intentionally or willfully disrupting or disturbing private funerals by speech or expressive conduct, whether or not the substantive content of that speech or conduct is directed at the funeral or its participants.

The Fourth Circuit opinion, *Snyder v. Phelps* (4th Cir. 2009) 580 F.3d 206, focused on whether the offensive content of the Respondents' messages was directed personally at the Petitioner or his son, whose funeral was being conducted at the time of the demonstrations. Finding that it was not so directed, the Court of Appeals invoked First Amendment protection for the Respondents' speech and disallowed the state law remedies for disruption of the Petitioner's funeral to be implemented.

[T]he First Amendment will fully protect "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."

580 F.3d at 218, citing and quoting *Milkovich v. Lorain Journal Company* (1990) 497 U.S. 1 at 20 (alteration in original), quoting *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46 at 50.

The finding of the Court of Appeals that the content of the Respondent demonstrators' speech was not directed against the Petitioner or his son is doubtful on the evidence presented, but even if a reasonable observer could find that the Respondents' messages were not directed personally against the Petitioner or his son and were speech on important issues of public concern, it remains indisputable that the Petitioner and his son were selected by the

Respondents to be the targets of their demonstration because of they are members of classes of people that the Respondents wanted to attack, specifically the military and Roman Catholics, and because the Respondents intentionally wanted to target and disrupt the funeral. *Id.*, 580 F.3d at 211-212.

But the rule of constitutional law in this case should not turn on whether the Respondents' speech targeted the Petitioner or his son individually, or as members of protected or unprotected classes, or not at all. The constitutional focus in this action should be on the *event* targeted by the Respondent's speech, a private funeral. *Id.*, 580 F.3d at 211 (Respondents "issued a news release . . . announcing that members of the Phelps family intended to come to Westminster, Maryland, and picket the funeral").

"[P]rotected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.* (1985) 473 U.S. 788, 799.

The fact that private funerals may temporarily intersect areas of public property that are traditional public forums should not convert them into public occasions for disruptive expression protected by the First Amendment if states want to guard funerals and grieving families from such distressing, disrespectful and reprehensible conduct and expression.

Personal privacy receives constitutional protection under the First Amendment, even in traditional public forums, under narrow circumstances. In *Frisby v. Schultz* (1988) 487 U.S. 474, this Court held that a local ordinance that prohibited "picketing focused on, and taking place in front of, a particular residence" satisfied intermediate First Amendment scrutiny

because it was content neutral, "narrowly tailored to serve a significant government interest" and left open "ample alternative channels of communication." 487 U.S. at 482. The significant government interest was identified in *Frisby* as "the protection of residential privacy." 487 U.S. at 484. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Id.*, citation omitted. "[E]ven if some [residential] picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt." 487 U.S. at 486. "The offensive and disturbing nature of the form of communication banned by the [residential picketing] ordinance thus can scarcely be questioned." 487 U.S. at 487.

Private funerals that temporarily intersect or occupy public streets or other locations that represent traditional public forums deserve a similar, narrow First Amendment exception to freedom of speech, like the protection of the public interest in the privacy and tranquility of the home.

This Court has expressed in another context that respect for the dead and for the experiences, emotions and memories of the people who mourn their passing can represent a compelling government interest. In *National Archives and Records Administration v. Favish* (2004) 541 U.S. 157, this Court found that refusal to release information about an investigation into an "apparent suicide" pursuant to a Freedom of Information Act request was justified under the provision of the statute that protected against

disclosures that constitute an "unwarranted invasion of personal privacy." 541 U.S. at 160. This Court found that privacy interests concerning the dead and the family members of the deceased were deserving of protection even against important public rights to freedom of information, rights closely akin to the freedom of speech asserted in this action.

[W]e think it proper to conclude from Congress' use of the term "personal privacy" that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.

...

Burial rites or their counterparts have been respected in almost all civilizations from time immemorial.

541 U.S. at 167-168.

This Court noted that "[t]he ritual burial of the dead" has been practiced "from the very dawn of human culture and . . . in most parts of the world," and that "[F]uneral rites . . . are the conscious cultural forms of one of our most ancient, universal, and unconscious impulses." 541 U.S. at 168, citations omitted.

They [funeral rites] are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in *Antigone* maintains its hold to this day because of the universal acceptance

of the heroine's right to insist on respect for the body of her brother.

Id., citation omitted.

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 who was once their own.

Id.

"[S]urviving relatives of a deceased person" are entitled to laws to "protect his memory, . . . to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased." 541 U.S. at 168-169, citation omitted.

For the same reasons and by the same reasoning this Court should recognize the authority of states and the federal government to protect the important public interest in maintaining respect for the dead and the memories and experiences of mourning friends and families of the deceased by legal protection of funeral rites against the assaults of insults, mockery, heckling and disruption at issue in this action.

States should be permitted under principles of federalism to enact laws that restrict, penalize or impose tort liability on people who engage in disruptive expression even in traditional public forums when such speech or expressive conduct targets or knowingly takes place in the presence of a private funeral.

In *Phelps-Roper v. Strickland* (6th Cir. 2008) 539 F.3d 356, the Respondents in this action sued to have an Ohio law banning picketing associated with funerals or funeral processions declared facially unconstitutional under the First Amendment, but the Sixth Circuit Court of Appeals upheld the law. The Ohio statute prohibited "protest activities that disrupt or disturb a funeral, burial service, or funeral procession" from being conducted within 300 feet of a funeral for one hour before until one hour after a funeral or burial service. 539 F.3d at 358. Violation of the law is a misdemeanor. 539 F.3d at 359. The Sixth Circuit found that the law was a valid, reasonable and content-neutral regulation of the time, place and manner of speech under the First Amendment because it advanced a significant public interest, the privacy of funerals. 539 F.3d at 360-373.

A contrary result was reached by the Eighth Circuit Court of Appeals in another case involving the Respondents in this action, *Phelps-Roper v. Nixon* (8th Cir. 2008) 545 F.3d 685. In *Phelps-Roper v. Nixon* the court held that no privacy interest other than the home can outweigh the right to free speech in a traditional public forum. "[T]he government has no compelling interest in protecting an individual from unwanted speech outside of the residential context." 545 F.3d at 692, citations omitted. An unreported District Court decision enjoining enforcement of a municipal ordinance against funeral picketing was issued in *Phelps-Roper v. City of Gladstone, Mo.* (W.D. Mo. 2009), Not Reported in F.Supp.2d, 2009 WL 995565, on the grounds of the binding Eighth Circuit precedent of *Phelps-Roper v. Nixon*.

The conflict between the circuits presented in this

action should be resolved against the Fourth Circuit opinion in this action, *Snyder v. Phelps, supra*, and against the Eighth Circuit reasoning in *Phelps-Roper v. Nixon, supra*, and in favor of the analysis of the Sixth Circuit in *Phelps-Roper v. Strickland, supra*.

Forty states and the federal government had statutes regulating speech and conduct in areas surrounding private funerals as of 2007, including locations that are traditional public forums. Stephen R. McAllister, "Funeral Picketing Laws and Free Speech," 55 *University of Kansas Law Review* (April, 2007) 575, 576, 579-583.

These state and federal laws protect important public interests that satisfy applicable First Amendment criteria and should be held by this Court to be constitutionally valid.

Conclusion

Traditional public forums are not absolute First Amendment locations that must put up with disruptive expression when the forum is being used temporarily for such solemn and important public purposes as private funerals. This Court has acknowledged the constitutional authority of states under principles of federalism and the First Amendment to protect the privacy of the home from forms of expressive intrusion, including by demonstrators engaging in free speech in a traditional public forum, the public streets, and the same protection is appropriate for funerals and funeral processions, when provided under applicable state or federal statutory law.

The traditional public forum doctrine of the First

Amendment should recognize not only the tradition of freedom of speech but also the tradition of permitting people to bury and mourn their dead in peace and dignity.

Rights to freedom of speech in traditional public forums have existed in the Anglo-American consciousness "immemorially," since "time out of mind," and "from ancient times" as "part of the privileges, immunities, rights, and liberties of citizens," *Hague v. C.I.O.* (1939) 307 U.S. 496, 515, but such rights have always coexisted with another ancient and traditional right, the right to mourn and bury our dead without public interference or disruption, with solemn dignity and sacred respect.

Respectfully submitted,

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