No. 09-751

In the Supreme Court of the United States

ALBERT SNYDER, PETITIONER

v.

FRED W. PHELPS, SR., SHIRLEY L. PHELPS-ROPER; REBEKAH A. PHELPS-DAVIS; AND WESTBORO BAPTIST CHURCH, INC., RESPONDENTS

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

BRIEF FOR THE AMERICAN LEGION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the First Amendment permits state tort law to redress wrongs such as invasion of privacy and intentional infliction of emotional distress caused by targeted picketing of funerals.

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[*]

Whether by protesting or proselytizing, the right to express one's religious views lies at the heart of the First Amendment. Indeed, this is a principle for which many members of amicus The American Legion have risked their lives—and for which many military personnel, like petitioner's son, Lance Corporal Matthew Snyder, have died. Contrary to the decision below, however, this case is not about the right to protest or proselytize. It is about the state's long-established interest in shielding private citizens from "focused picketing"—which, as this Court has noted, is "fundamentally different from more generally directed means of communication that may not be completely banned." *Frisby* v. *Schultz*, 487 U.S. 474, 483, 487 (1988); see also *Rowan* v. *U.S. Post Office Dept.*, 397 U.S. 728 (1970).

What justifies regulation in such cases is not the speech's content, but "the offensive and disturbing nature of the *form* of the communication"—its "verbal or [visual] assault" on those targeted. *Frisby*, 487 U.S. at 488 (emphasis added); see also *Erzoznik* v. *Jacksonville*, 422 U.S. 205, 210 n.6 (1975). As this Court has recognized, where picketing is narrowly directed, it "inherently and offensively intrudes." *Frisby*, 487 U.S. at 487. That is because it is "a mixture of conduct and communication," and thus is "qualitatively different from other modes of communication." *DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. &*

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[*] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or part, and no person or entity other than the *amicus* has made a monetary contribution to its preparation or submission. See Rule 37.6.

Constr. Trades Council, 485 U.S. 568, 580 (1988) (citations omitted); *Hughes* v. *Superior Court*, 339 U.S. 460 (1950). Accordingly, it is now well settled that picketing that might be protected in some contexts *may* be limited by reasonable time, place, and manner restrictions in particularly sensitive contexts such as homes and hospitals. *E.g.*, *Frisby*; *Rowan; Hill* v. *Colorado*, 530 U.S. 703, 716 (2000).

Funerals are at least as sensitive and historically sacrosanct as homes and hospitals. As the Court has recognized, "[b]urial rites and their counterparts have been respected in almost all civilizations from time immemorial"—long before the First Amendment. *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 168 (2004). And funerals are unique in still other ways: The intense sorrow and anguish caused by loss of a loved one has not yet subsided, the sense of finality is acute, and there are no "do-overs." Indeed, the hallowed nature of funerals is confirmed by the fact that Congress and some 44 States have enacted laws specifically regulating funeral protests.

By the reasoning of the Fourth Circuit, these laws—and similar regulation of funeral picketing under state tort law—are unconstitutional. But as this Court has recognized, highly targeted picketing is not pure speech. And it is of no moment that the restrictions at issue here are imposed by tort law rather than by ordinance. Rather, as Justice Frankfurter famously put it, where picketing is at stake "[i]t is not for this Court to deny to a State the right, or even to question the desirability, of fitting its law to a concrete situation through the authority given * * * to its courts" under the common law. *Hughes*, 339 U.S. at 467 (citation omitted).

Military funerals are of special importance to amicus The American Legion which, ever since its charter by Congress in 1919, has had a powerful interest in honoring fallen servicemen. See 36 U.S.C. §§ 21701-21708 (2000). As the largest veterans organization in the United States, comprising almost 2.5 million current and former soldiers, the Legion is charged by Congress with "preserv[ing] the memories and incidents of the * * * great hostilities fought to uphold democracy. 36 U.S.C. § 21702(3). And that includes the memories of veterans like Matthew Snyder, fallen in the line of duty. Because the decision below is likely to make it more difficult to honor fallen soldiers like Mr. Snyder appropriately, the American Legion has a powerful interest in seeing that decision overturned.

STATEMENT OF THE CASE

As this Court has recognized, "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that * * * tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." *Favish*, 541 U.S. at 167. Here, rather than seeking to honor the fallen, the respondents attended Matthew Snyder's funeral so that they could *picket* it with abusive signs—signs containing such statements as "Thank God for dead soldiers" and "Fag troops." *Snyder* v. *Phelps*, 580 F.3d 206, 212 (4th Cir. 2009).

Although respondents stayed some distance from the church, and petitioner (Snyder's father) did not see the signs until a subsequent newscast, the assault at the funeral had done its damage. At a time when his grief was most acute, respondents subjected

petitioner to lasting emotional injury. "I think about the sign [*i.e.*, 'Thank God for dead soldiers'] every day of my life," testified petitioner. *Id.* at 213. "I [had] one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. And for the rest of my life, I will remember what they did to me[;] and it has tarnished the memory of my son's last hour on earth." *Ibid.*

After a trial on whether respondents committed torts of intrusion upon seclusion and intentional infliction of emotional distress, a jury returned a verdict against respondents of $10.9 million, later reduced by the court to $5 million. *Id.* at 211. In Maryland, to recover for intentional infliction of emotional distress, a plaintiff must show that the defendants, engaged in specific conduct that was "intentional or reckless," "extreme and outrageous," causing "severe emotional distress. *Vauls* v. *Lambros*, 553 A.2d 1285, 1289 (Md. Ct. Spec. App. 1989). Intrusion upon seclusion is shown by establishing an "[u]nreasonable intrusion upon the seclusion of another." *Household Finance Corp*. v. *Bridge*, 250 A.2d 878, 882 (Md. Ct. Spec. App. 1969 (quotation omitted).

In post-judgment motions, respondents protested that their picketing could not be subject to tort liability because it was absolutely protected under the First Amendment. *Snyder* v. *Phelps*, 533 F. Supp.2d 567, 576 (D. Md. 2008). The district court rejected this contention, citing this Court's precedents "recogniz[ing] that there is not an absolute First Amendment right for any and all speech directed by private individuals against other private individuals," and that "[c]onduct," in particular, "remains subject to regulation for the protection of society." *Id.* at 577, 579 (citations omitted).

The court of appeals reversed. The court acknowledged that "there is no categorical constitutional defense for statements of 'opinion,'" yet paradoxically asserted that "the First Amendment will *fully protect* statements that cannot reasonably [be] interpreted as stating actual facts." 580 F.3d at 218 (emphasis added; citation omitted). Although the court further recognized that "governmental bodies are entitled to place reasonable and content-neutral time, place, and manner restrictions on activities that are otherwise constitutionally protected" (*id.* at 226), the court never considered whether the tort law here could be viewed as imposing such restrictions.

SUMMARY OF ARGUMENT

Although it disclaimed doing so, the Fourth Circuit effectively ruled that respondents' speech was automatically protected simply because it constituted opinion. As this Court's precedents make plain, however, even opinion can be regulated in certain limited contexts—most importantly, where combined with offensive conduct—so long as the government's interests are strong enough and the regulations are appropriately tailored. By failing to consider this possibility, the Fourth Circuit mistakenly struck down critical common-law shields that protect private citizens from focused picketing, which is fundamentally different from more generally directed means of communication that may not be completely banned. *Frisby*, 487 U.S. at 487.

I. In the unusually sensitive context of a funeral, where mourners are faced with the powerful speech-conduct mixture of targeted picketing, these tort-law shields are valid time, place, and manner restrictions. Because the Maryland courts did not develop or apply

the torts at issue to express any disagreement with the message of respondents' picketing (or any other particular message), they are content-neutral. And under this Court's precedents, the fact that a facially content-neutral restriction may incidentally affect some speakers but not others is of no constitutional moment. *E.g.*, *Boos* v. *Barry*, 485 U.S. 312, 345 (1988); *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

Moreover, as applied here, Maryland's invasion-of-privacy and intentional-infliction-of-emotional-distress torts address vitally important governmental interests—a survivor's personal stake in honoring and mourning his dead and preserving the character and memory of the deceased. *Favish*, 541 U.S. at 168 The torts at issue shield that interest in a narrowly tailored fashion—because that interest could not be achieved as effectively absent tort liability. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989). Respondents also have adequate alternative means of communication, including picketing *not* targeted at the funeral itself, as well as all manner of print and telecommunications media. See *Frisby*, 487 U.S. at 483-484.

Indeed, the tort law restrictions at issue here merely limit the *manner* in which respondents may speak and the *place* where they may picket, and they do so for only a few hours of *time*. They thus operate as valid time, place, and manner restrictions.

II. Because there is no meaningful constitutional distinction between state positive law and state tort law in this context, the Fourth Circuit's approach would threaten the validity of democratically enacted

statutes regulating picketing and passed by some 44 States and Congress.

First, if speech is protected merely because it constitutes opinion, as the decision below seems to have held, the democratically enacted picketing statutes of virtually every state and the federal government are necessarily unconstitutional. As we will explain, those statutes take diverse approaches to regulating funeral picketing—from banning fighting words, to creating buffer zones, to forbidding conduct based in part on tort-like standards. But if opinion trumps all, it does not matter *how* the statutes regulate picketing; they all are invalid because they interfere with expression of opinion.

Second, even under a narrower reading of the Fourth Circuit's approach—such that expressions of opinion can be regulated, just not by tort law—many state statutes would remain in jeopardy because, as noted, they frequently invoke tort law standards.

The Court should prevent both results—sweeping or more narrow invalidation of funeral picketing statutes—by reversing the decision below and declaring that the First Amendment *does* permit state tort law to redress wrongs such as invasion of privacy and intentional infliction of emotional distress caused by the targeted picketing of funerals.

ARGUMENT

I. Even if the speech here was opinion, it was not protected by the First Amendment.

As noted, the court of appeals held that "the First Amendment will *fully* protect statements that cannot reasonably [be] interpreted as stating actual facts about an individual." 580 F.3d at 218 (emphasis add-

ed; citation omitted). As we now show, the court's apparent ruling that respondents' picketing was absolutely protected simply because it was opinion was error. Moreover, the state-law prohibitions on intentional infliction of emotional distress and invasion of privacy acted as valid time, place and manner restrictions on respondents' actions.

A. Free Speech Clause analysis does not end merely because the speech at issue constitutes opinion.

It is axiomatic that "[t]he rights of free speech * * * while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965). Thus, even in a public forum, expressions of opinion can be limited by "reasonable restrictions on the time, place, or manner of [the] protected speech, provided the restrictions are justified without reference to the content of the regulated speech, * * * are narrowly tailored to serve significant governmental interests, and * * * leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (citation omitted); see also *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972) (same).

The question, therefore, is whether the restrictions here are reasonable and appropriately tailored. As this Court has instructed:

> The *nature of a place, the pattern of its normal activities*, dictates the kinds of regulations of time,

> place, and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. * * * *The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time*."

Grayned, 408 U.S. at 232 (emphasis added).

Here, the Fourth Circuit failed to ask this "crucial question"—whether targeted picketing is "compatible with the normal activity of a [funeral]." *Ibid.* As shown below, it is not. And the Fourth Circuit erred in assuming that it could avoid this question simply because the statements at issue were opinions. Indeed, if expressions of opinion were absolutely protected in all circumstances, a speaker would be able to evade reasonable time, place, and manner restrictions—even restrictions on "fighting words"—simply by couching his statements as opinions. *Cf., e.g., R.A.V.* v. *St. Paul*, 505 U.S. 377, 386 (1992); *Cohen* v. *California*, 403 U.S. 15, 20 (1971); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942).

B. As shown by this Court's decision in *Hughes*, valid restrictions against targeted picketing are permissibly established, as here, by the common law.

Like fighting words, targeted picketing is *not* compatible with the normal activity of a funeral, and the jury here did no harm to the First Amendment by saying so. That is because the torts at issue here "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Frisby*, 487 U.S. at 481. We address each requirement in turn.

1. There can be no doubt that imposing tort liability here serves an *important governmental interest*—indeed, a compelling interest—which this Court has already held has "deep[] roots in the common law": namely, "rights in the character and memory of the deceased" and the state interest in "protect[ing] [the] feelings" of the survivors, which "may * * * be * * * violated by improper[] interfere[nce]." *Favish*, 541 U.S. at 168-169.

As this Court noted in *Favish*, "[f]amily 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." *Ibid.* While these words were written to protect survivors from having photographs of their dead loved ones obtained under the Freedom of Information Act (see *ibid.*), they apply with full force here.

Petitioner, too, has a personal stake in honoring and mourning his son and in preventing funeral activities that tend to degrade the rites and the respect he sought to accord to his fallen son. But by appearing at Matthew's funeral to make abusive comments such as "Thank God for dead soldiers" and "Fag troops," respondents seriously compromised petitioner's "personal stake in honoring and mourning [his] dead." *Ibid.* "I [had] one chance to bury my son and they took the dignity away from it," petitioner testified. "I cannot re-bury my son. And for the rest of my life, I will remember what they did to me[;] and it has tarnished the memory of my son's last hour on earth." 580 F.3d at 213. This is the epitome of the kind of "unwarranted public exploitation" that this Court decried in *Favish*.

At a minimum, petitioner's "rights in the character and memory of the deceased" are far greater here than in most other contexts. See *Ward*, 491 U.S. at 792 (park); *Grayned*, 408 U.S. 118-119 (public school); *Cox*, 379 U.S. at 562 (courthouse); *Burson*, 504 U.S. at 206-208 (polling places). Indeed, the "right of privacy of the living"—the right to have "their feelings" "protect[ed]" and "to prevent a violation of their own rights in the character and memory of the deceased" (*Favish*, 541 U.S. at 168-169)—runs at least as deep as privacy rights in the home (see *Frisby*, *Rover*) or the hospital (see *Madsen*, *Hill*).

To be sure, homes and hospitals are unique places of rest. See *Frisby*, 487 U.S. at 484 ("the unique nature of the home, the last citadel of the tired, the weary, and the sick"; "the one retreat to which men and women can repair to escape") (citation omitted); *Hill*, 530 U.S. at 728-729 ("hospitals" are "where patients and relatives alike often are under emotional strain and worry * * * where the patient and [her] family need a restful, uncluttered, relaxing, and helpful atmosphere"). But the grave is a *final* place of rest, and a funeral is a proceeding at least as hallowed than any respite in a home or a hospital. Once desecrated, the funeral, like the grave, can never fully be restored—in part because a funeral happens only once. If it is spoiled, that is that. The mourners' memories of the event will be forever tarnished. Thus, if the government has an important interest in protecting the sanctity of the home and hospital—as it surely does—it has at least as powerful an interest in protecting the sanctity of a funeral.

In short, in punishing a "deliberate verbal * * * assault" at a funeral, there is no question that tort law protects a government interest that is substan-

tial. *Hill*, 530 U.S. at 716 (quoting *Erznonznik*, 422 U.S. 205, 210-211). Indeed, that interest is compelling.

2. The tort liability at issue here is also *narrowly tailored*, meaning it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798. This does not require that a proscription adopt "the *least* restrictive or least intrusive means of doing so." *Ibid.* Indeed, even "[a] complete ban can be narrowly tailored" so long as "each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485.

Here, imposing tort liability directly promotes "protect[ion] of [Matthew's] memory" and helps "prevent a violation of [his father's] rights in [Matthew's] character and memory" more effectively than the absence of liability. *Favish*, 541 U.S. at 168-169; *Ward*, 491 U.S. at 798. Indeed, even if respondents themselves would have picketed just the same despite the risk of a large money judgment, the presence of a tort remedy certainly promotes the interest identified in *Favish* more effectively than the *absence* of such a remedy. See *Ward*, 491 U.S. at 798.

Nor does it matter to "tailoring" analysis that the damages award here is provided by the common law, rather than by ordinance. As noted, this Court disposed of that question in *Hughes*, which, as we explain further below, upheld state tort remedies against targeted picketing. In so doing, the Court held that "[t]he fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial." 339 U.S. at 467 (Frankfurter, J.) (collect-

ing cases). And the Court went on to note that "[i]t is not for this Court to deny to California that choice from among all the weapons in the armory of the law." *Ibid.* (citation omitted). After all, "[r]egulation may take the form of legislation * * * or be left to the ad hoc judicial process * * *. Either method may outlaw an end not in the public interest or merely address itself to the obvious means toward such end. The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice." *Id.* at 468; *cf. San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) (regulation "can be as effectively exerted through an award of damages as through some form of preventive relief"; "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy"); *Geier* v. *Am. Honda Motor Co., Inc.*, 529 U.S. 861, 886 (2000).[1]

Finally, applying tort law here does not "run[] afoul of [this Court's] long standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Hustler* v. *Falwell*, 485 U.S. 46, 55 (1988). The reason is that picketing is "inseparably something more and different" than publishing a magazine

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[1] *Hughes* was decided a decade *after Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), which held that the First Amendment trumped Connecticut's too "general and indefinite" tort of "breach of the peace." *Id.* at 308. Moreover, *Cantwell* involved pure speech, which, as we explain below, is "qualitatively different" from the picketing at issue here. *DeBartolo*, 485 U.S. at 580 (quoting *Babbitt* v. *Farm Workers*, 442 U.S. 289, 311 n.17 (1979)); see also *Hughes*, 339 U.S. at 465 ("Picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.").

article. *Hughes,* 339 U.S. at 464. "Publication in a newspaper, or by distribution of circulars," such as occurred in *Hustler*, "may convey the same information or make the same charge," "[b]ut the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by the printed word." *Id*. at 465. Thus, this Court has "emphatically" rejected the notion that the First Amendment "afford[s] [the] same kind of freedom to those who would communicate ideas by conduct such as * * * picketing * * * as [it does] to those who communicate ideas by pure speech." *Cox*, 379 U.S. at 555; accord *DeBartolo*, 339 U.S. at 580. By imposing liability for expressive conduct, rather than pure speech, state tort law recognizes the unique dangers of targeted picketing repeatedly recognized by this Court.

The torts here, moreover, have the virtue of *not* effecting a "complete ban" on targeted picketing, which was upheld in *Frisby*, 487 U.S. at 485. Instead, these torts are subject to standards that provide an acceptable "flexibility and reasonable breadth." *Grayned*, 408 U.S. at 110 (citation omitted); see also *Ward*, 491 U.S. at 794-795 ("perfect clarity and precise guidance have never been required"). Specifically, intentional infliction of emotional distress requires establishing conduct that is both "extreme and outrageous" and causes "severe" emotional distress, *Vauls*, 553 A.2d at 458—which, as we have shown, is an acceptable standard where speech is mixed with conduct. See also *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently

important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," and regulation of such expressive conduct need only "further[] [an] important or substantial governmental interest" that is "unrelated to the suppression of free expression" and be "no greater than is essential to the furtherance of that interest"). And an intrusion upon seclusion creates liability only where the intrusion was unreasonable. *Bridge*, 250 A.2d at 882. Because these torts "promote[] a substantial governmental interest that would be achieved less effectively absent the regulation," *Ward*, 491 U.S. at 798, the torts here are narrowly tailored.

3. Next, the tort laws here are *content-neutral*. In determining content neutrality, "the controlling consideration" is "the government's purpose"—"whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.

Here, the torts of intrusion upon seclusion and intentional infliction of emotional distress are undoubtedly content-neutral. By their very nature, they apply equally to any conduct that violates their standards, with no exemptions or exceptions hinting at favoritism or hostility toward a particular viewpoint. *Cf. United States* v. *Playboy Entmt. Group, Inc.*, 529 U.S. 803, 878 (2000) (statute "focuses only on the content of [the] speech," which "is the essence of content based regulation"); *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992) (statute "not * * * facially content-neutral" because, "[w]hether individuals may exercise their free speech rights * * * depends entirely on whether their speech is related to a political campaign"); *Boos* v. *Barry*, 485 U.S. 312, 345 (1988) (clause "readily"

shown as content-based because "justified only by reference" to "whether * * * picket signs are critical of [targeted] foreign government or not"). Respondents, moreover, presented no evidence that the verdict here was based upon the content of their speech rather than the time, place and manner of its delivery.

Moreover, a restriction that is facially content-neutral will be upheld even though it may have incidental effects on some speakers or messages but not others. *Ibid*; see also *Renton*, 475 U.S. at 47-48. Thus, "[t]he fact the [restriction] [here] covered people with a particular viewpoint does not itself render the [restriction] content or viewpoint-based." *Madsen* v. *Women's Health Ctr*., 512 U.S. 753, 762-763 (1994). As in *Madsen,* there is no "suggestion in this record that [Maryland] would not equally restrain similar conduct" by picketers with messages different from the Phelps, and "none of the restrictions [imposed by the court at issue] were directed at the contents of [the Phelps's] message." *Ibid*.

4. Lastly, the torts at issue here leave open more than adequate *alternative channels of communication*. As respondents themselves have noted in a different case, "funeral[s] [are] the *occasion* of [their] speech, not its *audience*." *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 372 (6th Cir. 2008) (emphasis added). But even if funerals were respondents' most effective means to reach their perceived audience—a point they also have expressly disclaimed (*ibid*.)—"the First Amendment does not guarantee the right to communicate one's views * * * in *any* manner that may be desired." *Heffron* v. *Int'l Soc. for Krishna Consciousness, Inc*. 452 U.S. 640, 647 (1981) (emphasis added).

Indeed, unlike the total ban on targeted picketing enforced in *Frisby*, enforcing the torts here would not *categorically* bar respondents from anything. They could not be held liable at all for non-targeted picketing—say, at the Pentagon. Nor would they be categorically barred from speaking in the public areas surrounding churches or cemeteries. They may also publish articles, go door-to-door, distribute literature, and speak on radio or television. See *Frisby*, 487 U.S. at 485. Indeed, respondents could engage in the very same picketing—at the very same location—provided they ceased doing so before any members of the funeral party arrived or began after the party left.

One might thus think of the restriction imposed by the tort law here as a "buffer zone" of time—a few hours before and after the funeral itself. Given that reality, respondents have "ample alternative channels of communication." *Ibid.*

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Under this Court's decisions, the Fourth Circuit halted its First Amendment analysis too soon upon deciding the speech here constituted opinion. It should have gone further, and asked whether the tort actions at issue here "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample channels of communication." *Frisby*, 487 U.S. at 481. As we have shown, the answer to that question is yes, and the decision below must therefore be reversed.

II. The Fourth Circuit's approach would likely invalidate numerous funeral picketing statutes, thereby placing many more funerals at risk of disruption.

Another reason to reverse the decision below is that its approach to the First Amendment would likely invalidate numerous statutes passed by governments across the Nation. And that is true both under the Fourth Circuit's apparent holding that statements of opinion are entitled to absolute First Amendment protection, and the court's narrower suggestion that, although some time, place, and manner restrictions may be valid, tort remedies cannot be.

1. Not only is there a federal statute regulating funeral picketing, 38 U.S.C. § 2413, but no fewer than *44* states—every state other than Alaska, Arizona, Hawaii, Nevada, Oregon and West Virginia—have statutes restricting funeral picketing.[2] As one com-

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2 Ala. Code § 13A-11-17; Ark. Code Ann. § 5-71-230; Cal. Penal Code § 594.35; Colo. Rev. Stat. §§ 13-21-126, 18-9-101, -106(3),-107(3),- 108(2),-117,-125; Conn. Gen. Stat. § 53a-183c; Del. Code Ann. Tit. 11, § 1303; Fla. Stat. Ann. §§ 871.01-.02; Ga. Code Ann. § 16-11-34.2; Idaho Code Ann. § 18-6409(2); 720 Ill. Comp. Stat. 5/26-6; In. Code §§ 35-45-1-3, -2-1; Iowa Code Ann. § 723.5; Kan. Stat. Ann. § 21-4015a; Ky. Rev. Stat. Ann. §§ 525.055, .060,.145,.155; La. Rev. Stat. Ann. § 14:103; Me. Stat. 17-A § 501-A; Md. Code Ann., Crim. Law § 10-205; M.G.L.A. 272 § 42A; Mich. Camp. Laws §§ 123.1111-.1115; Minn. Stat. § 609.501; Miss. Code Ann. § 97-35-18; Mo. Rev. Stat. §§ 578.501--.502; Mont. Code Ann. III. 45, ch. 8, pt. I; Neb. Rev. Stat. §§ 28-1320.01-.03; N.H. Rev. Stat. § 44:2-b; N.J. Stat. Ann. § 2C:33-8.1; N.M. Stat. Ann. § 30-20B-1--5; N.Y. CLS Penal § 240.21; N.C. Gen. Stat. Ann. § 14-288.4; N.D. Cent. Code, § 12.1-31-01.1; Ohio Rev. Code Ann. § 3767.30; Okla. Stat. Ti. 21, § 1380; 18 Pa. Cons. Stat. Ann § 7517; R.I. Gen. Laws § 11-11-1; S.C. Code Ann. § 16-17-525; S.D. Cod. Laws §§ 22-13-17 to

mentator has observed, these statutes take different, sometimes overlapping approaches to regulating funeral picketing. See Christina E. Wells, *Privacy & Funeral Protests*, 87 N.C. L. Rev. 151, 163-174 (2008).[3]

But all of these statutes have one thing in common: They are in jeopardy as applied to the kind of picketing at issue here if this Court follows the broad approach taken below—that is, holding that expressions of opinion are protected no matter how a state attempts to regulate them. Indeed, if this Court followed what the Fourth Circuit *did*—striking down a regulation of funeral picketing on the ground that opinion trumps all—then the decision would be a jurisprudential wrecking ball, effectively requiring invalidation of every one of the 44 statutes that regulate funeral picketing. That is because *every* protest would undoubtedly involve some expression of opinion, thereby precluding the application of any of these statutes in a manner that would prohibit it.

2. Even if the Court were to adopt the narrower approach suggested by the opinion below—that opi-

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-20; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann. §§ 42.04, .055; Utah Code Ann. § 76-9-108; Vt. Stat. Ann. Ti. 13, § 377 I; Va. Code Ann. § 18.2-415; Wash. Rev. Code Ann. § 9A.84.030; Wis. Stat. § 947.011; Wyo. Stat. Ann. § 6-6- 105.

[3] *E.g.*, 38 U.S.C. § 2413(a)(2)(A)(ii)(2006) ("willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral" within 150 feet of an entrance to cemetery property); Ill. Comp. Stat. 5/26-6(C)(2) (West 2008) ("fighting words or actual or veiled threats"); N.Y. Penal Law § 240.21 ("unreasonable noise or disturbance"); Fla. Stat. § 721.02; Tex. Penal Code Ann. § 42.055(b) ("picketing within 1,000 feet of a facility or cemetery being used for a funeral service").

nion can validly be regulated, but that tort laws cannot constitute valid time, place, and manner restrictions—a number of statutes would still be jeopardized. That is especially true of those that employ tort-like standards or are based on regulation of the same types of harms as are redressed by the torts of invasion of privacy and intentional infliction of emotional distress.

For example, in language reminiscent of the torts at issue here, Oklahoma prohibits certain targeted funeral picketing because "picketing of funerals causes emotional disturbance and distress to grieving families who participate in funerals." 21 Okla. Stat. Ann. § 1380.A.1.c. And Idaho subjects to criminal penalties "[e]very person who maliciously and willfully" so much as "*disturbs the dignity or reverential nature* of any funeral, memorial service, funeral procession, burial ceremony or viewing of a deceased person." Idaho Code § 18-6409(2) (emphasis added). Thus, these States regulate funeral picketing based on the same rationale that animates Maryland's common law tort of intentional infliction of emotional distress, which regulates "intentional or reckless" conduct that is "extreme and outrageous" and causes "severe emotional distress." *Vauls*, 553 A.2d at 1289.

The threat to existing state statutes is amplified by the fact that, as Professor Wells has noted, "[*m*]*ost states* regulate peaceful funeral protests based on mourners' privacy interests"—indeed, "the preambles or statutory statements of several laws explicitly invoke the privacy of grieving families. Wells, *supra*, 87 N.C. L. Rev. at 173 (emphasis added). Kansas, for example, recognizes the "substantial privacy interests in funerals." Kan. Stat. Ann. § 21-4015a (2009). And other statutes recognize families' right to "peace-

fully and privately mourn," Neb. Rev. Stat. § 28-1320.01 (2007); see also Pa. Cons. Stat. Ann. § 7517(a)(2)(West. Supp. 2008) (right to "mourn privately and in peace"). Such laws call to mind Maryland's tort barring invasions of privacy, which is based on the same rationales: preventing an "[u]nreasonable intrusion upon the seclusion of another." *Bridge*, 250 A.2d at 882 (quotation omitted).

If Maryland's tort actions fail as valid time, place, and manner restrictions, therefore, it is not difficult to predict that statutes depending on similar principles may fail for the same reasons. The Constitution constrains enforcement of both positive law and common law, both of which are forms of state action. *E.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). True, these statutes sometimes contain additional provisions setting further spatial and temporal bounds on funeral picketing. But by overlaying these restrictions with tort-type rationales, the statutes will likely become subject to some of the same attacks pressed here—for example, that they are content-based and not narrowly tailored. And insofar as the statutes rest on similar rationales, the decision here will have implications for their validity.

For the reasons we have explained, however, such torts *can* be confined to constitutional limits, and the same is true of the many statutes that reflect similar regulatory approaches. The Court's decision in this case should make that plain by reversing the decision below and prescribing proper limits on regulation of funeral picketing, not unjustified ones like those imposed by the Fourth Circuit.

CONCLUSION

This Court has already recognized that "[b]urial rites have been respected in almost all civilizations from time immemorial"—long before the First Amendment. *Favish*, 541 U.S. at 169. And just as the decision in *Frisby* allowing regulation of picketing "rested upon the unique nature of the home," *Hill*, 530 U.S. at 752, 744-745 (Scalia, dissenting) (citation omitted), so too this Court's decision upholding the application of Maryland tort law in the context of funeral picketing can and should rest upon the unique nature of funerals. Relying on these principles, and on *Hughes*, which shows that picketing may validly be regulated by tort law, the Court should reverse the decision below. If the Court does *not* reverse, as we have shown, as many as 44 statutes will be on the chopping block. That result would seriously undermine the government's important interest in the sanctity of funerals, particularly funerals for fallen soldiers such as Matthew Snyder.

For all of these reasons, the judgment below should be reversed.

Respectfully submitted.

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