

# SNYDER V. PHELPS, FIRST AMENDMENT BOUNDARIES ON SPEECH-BASED TORT CLAIMS

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## I. INTRODUCTION

*Snyder v. Phelps*<sup>1</sup> addresses the limits of the First Amendment in protecting expressive conduct from tort claims.<sup>2</sup> On March 10, 2006, the Westboro Baptist Church picketed the funeral of Lance Corporal Matthew Snyder (Lance Cpl. Snyder) who was killed while on military duty in Iraq.<sup>3</sup> Albert Snyder (Snyder), Matthew’s father, subsequently sued the Westboro Baptist Church, the Reverend Fred Phelps, and two of Phelps’s daughters (collectively the WBC), alleging a number of tort claims arising from the incident.<sup>4</sup> A jury awarded Snyder \$10.9 million in damages for “intentional infliction of mental and emotional distress, invasion of privacy by intrusion upon seclusion, and conspiracy to commit these acts.”<sup>5</sup> The WBC renewed an earlier motion for judgment as a matter of law and judgment notwithstanding the verdict, claiming its speech was “purely religious in nature” and that the verdict “unconstitutionally restricted the *content* of [the speech in question].”<sup>6</sup> The district court denied these motions, focusing on Snyder’s status as a private (i.e., not a public) figure.<sup>7</sup> The WBC appealed, and the Fourth Circuit reversed, holding that “[b]ecause the judgment attaches tort liability to constitutionally protected speech, the district court erred in declining to award

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1. *Snyder v. Phelps*, No. 09-751 (U.S. argued Oct. 6, 2010).

2. *Id.*

3. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571–72 (D. Md. 2008).

4. *Id.* at 572. The claims alleged are “defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy.” *Id.*

5. *Id.* at 569.

6. *Id.* at 576.

7. *Id.* at 576–77 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758, 763 (1985)).

judgment as a matter of law.”<sup>8</sup> Snyder filed a petition for writ of certiorari, arguing that the Fourth Circuit’s ruling resulted in an overbroad application of First Amendment protection, and that funerals deserve special protection from tortious speech.<sup>9</sup>

## II. FACTS

Lance Cpl. Snyder was killed in Iraq on March 3, 2006.<sup>10</sup> Local newspapers published his obituary and notices that his funeral was scheduled for March 10, 2006.<sup>11</sup> The WBC notified local police that its members would be present, issued a press release announcing plans to picket the funeral, and arrived, as planned, on the day of the funeral to picket the ceremony.<sup>12</sup> While religious duty may have factored into the motive for the protest,<sup>13</sup> the WBC’s likely purpose was to generate publicity.<sup>14</sup> The WBC’s past activities—which have involved expressing opposition against Jews,<sup>15</sup> Catholics,<sup>16</sup> and other minority groups<sup>17</sup>—suggested that retaliatory purposes may also have been at play.<sup>18</sup>

At Lance Cpl. Snyder’s funeral, the Phelps’ picketing included signs of a “general” nature<sup>19</sup> and others that might be interpreted as specifically directed at Lance Cpl. Snyder’s family.<sup>20</sup> Although each

8. *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009).

9. Brief for Petitioner at 18–20, *Snyder v. Phelps*, No. 09-751 (U.S. May 24, 2010).

10. *Snyder*, 533 F. Supp. 2d at 571.

11. *Id.*

12. *Id.* at 571–72.

13. *Phelps-Roper v. Nixon*, 545 F.3d 685, 688 (8th Cir. 2008) (“As part of [the plaintiff’s] religious duties, she believes she must protest and picket at certain funerals, including the funerals of United States soldiers, to publish the church’s religious message . . .”).

14. *See Snyder*, 533 F. Supp. 2d at 571–72 (“Defendants’ rationale was quite simple. They traveled to Matthew Snyder’s funeral in order to publicize their message of God’s hatred of America for its tolerance of homosexuality.”).

15. *See, e.g.*, Mary Murphy, *Jewish Schools Brace for Hate*, WPIX 11 (Oct. 7th, 2010, 6:28 PM), <http://www.wpix.com/news/wpix-jewish-school-brace-for-hate,0,1867514> (discussing the WBC’s acts directed at a Jewish school).

16. *See, e.g.*, PRIESTS RAPE BOYS, <http://www.priestsrapeboys.com> (last visited Nov. 7th, 2010) (denouncing Catholic pedophilia).

17. *See, e.g.*, Chris Prevolos, *Nerds Unite, Fight Religious Extremists at Comic Con*, SAN FRANCISCO CHRONICLE (July 23, 2010, 9:28 AM), [http://www.sfgate.com/cgi-bin/blogs/hottopics/detail?entry\\_id=68540](http://www.sfgate.com/cgi-bin/blogs/hottopics/detail?entry_id=68540) (documenting the WBC protest at comic book convention).

18. Brief for Petitioner, *supra* note 9, at 36 (“The evidence at trial, however, established that the Phelps began protesting military funerals shortly after members of the WBC allegedly were accosted by Marines.”).

19. *Snyder*, 533 F. Supp. 2d at 578. “General” signs refer to those that the WBC addressed to the world at large, such as signs that read “America is Doomed,” and “God hates America.”

20. *Id.* Signs of a more “specific” nature those which directly addressed the Snyder family including Lance Cpl. These signs read “You are going to hell” and “God hates you.”

party disputed the distance between the protestors and the funeral,<sup>21</sup> it was “undisputed . . . that [d]efendants complied with local ordinances and police directions.”<sup>22</sup> Moreover, although Snyder could see the tops of the signs during the funeral procession, he did not see their content until watching a news program that covered the event.<sup>23</sup> Later, the WBC posted an “Epic”<sup>24</sup> on its website: “The Burden of Marine Lance Cpl. Matthew Snyder.”<sup>25</sup> The Epic stated that “Snyder had been ‘raised for the devil’ and ‘taught to defy God.’”<sup>26</sup>

### III. LEGAL BACKGROUND

Generally, the First Amendment does not permit restrictions on speech based upon the content of the speech itself.<sup>27</sup> Not all speech, however, is permitted.<sup>28</sup> There are two different lines of case law that apply to the arguments made in *Snyder v. Phelps*. The first line of case law addresses whether the speech Phelps engaged in is protected from tort liability due to its style or subjects. The second line addresses whether Snyder, as a funeral attendee, may have any recourse under the “captive audience doctrine.”<sup>29</sup>

Whether tort liability attaches to speech depends on the type of speech or to whom the speech is directed, as analyzed under the standard set in *New York Times Co. v. Sullivan*.<sup>30</sup> In *New York Times*, the named newspaper was sued by the Montgomery Public Safety Commissioner for publishing inaccurate descriptions of some activities taken by the Montgomery police against civil rights

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21. See Brief for Petitioner, *supra* note 9, at 54 (asserting that the distance was 200–300 feet during the funeral procession); Brief for Respondents at 7, *Snyder v. Phelps*, No. 09-751 (U.S. July 7, 2010) (asserting that the distance was over 1,000 feet from the church).

22. *Snyder*, 533 F. Supp. 2d at 572.

23. *Id.*

24. The “Epic” was a fictional account of Lance Cpl. Snyder’s upbringing and life authored by the WBC. See *Snyder*, 533 F. Supp. 2d at 570.

25. *Snyder*, 533 F. Supp. 2d at 572.

26. *Id.* at 570. See also Brief for Petitioner, *supra* note 9, at 45–55 (claiming that there was, in the “Epic,” at least one provably false statement which bore no relationship to issues that allegedly were the subject of the protest).

27. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

28. See *id.* at 103 (Burger, C.J., concurring) (stating that “the First Amendment does not literally mean that we ‘are guaranteed the right to express any thought, free from government censorship.’”).

29. See *infra* notes 44–48 and accompanying text.

30. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

protestors.<sup>31</sup> The Court held that to recover tort damages against the newspaper the Commission must show that the *New York Times* knowingly published a false story and did so with actual malice.<sup>32</sup> The opinion is “authority for the proposition that the imposition of tort liability is state action subject to constitutional limitation in order to prevent the inhibition of free speech . . . although it has also been distinguished as applying only to debate on issues of public concern . . .”<sup>33</sup>

Over the next two decades, the Court extended and honed *New York Times*. In *Gertz v. Robert Welch, Inc.*,<sup>34</sup> the Court suggested that speech pertaining to public figures might be treated differently than speech pertaining to private figures.<sup>35</sup> *Gertz* additionally set the standard for determining what makes an individual a public figure—by either gaining “fame or notoriety” or, alternatively, by voluntarily injecting oneself or being drawn into a public controversy.<sup>36</sup> *Hustler Magazine v. Falwell*<sup>37</sup> extended the *New York Times* standard to an intentional infliction of emotional distress (IIED) claim made by a public figure.<sup>38</sup> Finally, *Milkovich v. Lorain Journal Co.*<sup>39</sup> suggested that speech pertaining to private figures and public figures should be treated differently.<sup>40</sup> *Milkovich* also stands for the proposition that “hyperbolic” public speech that cannot be interpreted as stating or implying actual facts should be protected.<sup>41</sup>

31. *Id.* at 256–59.

32. *Id.* at 279–80. *See also* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (articulating the standard for determining whether speech is “public speech”).

33. Alan Stephens, Annotation, *First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming from Speech Allegedly Causing Bodily Injury*, 94 A.L.R. Fed. 26 (1989).

34. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

35. *See id.* at 342–45 (1974) (discussing the distinction between public and private figures as plaintiffs in speech-based tort claims, and concluding that “the state interest in compensating injury to the reputation of private individuals requires that a different rule [than the rule stated in *New York Times*] should obtain with respect to [private figures]”).

36. *See id.* at 351–52 (“Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.”).

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

38. *Id.* at 56.

39. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

40. *Id.* at 20.

41. *Id.* at 21. Note the similarity between the “hyperbolic” language protected here and the “extreme and outrageous conduct” that is defined as an element of the tort of IIED (IIED is defined in the Restatement (Second) of Torts as “*extreme and outrageous conduct* [that]

A subordinate issue in this discussion is how to determine whether speech is related to a matter of public concern. In *Dun & Bradstreet v. Greenmoss Builders, Inc.*,<sup>42</sup> the Court held that such a determination depends on an evaluation of an expression’s “content, form, and context . . . as revealed by the whole record.”<sup>43</sup> Importantly, in rejecting the argument that giving out certain credit information was public speech, the *Dun & Bradstreet* Court noted that the speech in question was “solely in the individual interest of the speaker and its specific business audience.”<sup>44</sup>

A separate line of case law pertains to the captive audience doctrine. To find that the target of speech is part of a protected “captive audience,” a court must determine that a listener’s privacy interests warrant protection and that the speaker’s conduct interferes with the listener’s interest in an intolerable way.<sup>45</sup> In *Frisby v. Schultz*,<sup>46</sup> the Supreme Court upheld a narrow municipal ordinance that prohibited picketing in front of a residence.<sup>47</sup> The Court focused on the unavoidable nature of speech targeted at a home and the unique nature of the home itself.<sup>48</sup> The Court’s narrow holding later was broadened in another, limited context—abortion protest cases.<sup>49</sup>

#### IV. HOLDING

On appeal, the Fourth Circuit reversed the lower court to hold that the WBC could not be held liable for an IIED claim because the First Amendment protected the speech at issue. The court focused on reassessing the implications of Phelps’ conduct and on Jury

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intentionally or recklessly causes severe emotional distress to another.”). RESTATEMENT (SECOND) OF TORTS § 46 (1965) (emphasis added).

42. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

43. *Id.* at 761 (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

44. *Id.* at 762.

45. *Cohen v. California*, 403 U.S. 15, 21 (1971).

46. *Frisby v. Schultz*, 487 U.S. 474 (1988).

47. *Id.* at 487–88 (1988) (upholding an ordinance prohibiting picketing near a specific residence).

48. *Id.* at 484 (“Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . the home is different.” (citations omitted)).

49. *See Hill v. Colorado*, 530 U.S. 703, 718 (2000) (upholding a statute which prohibited knowingly approaching within eight feet of an individual within 100 feet of a health care facility); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 781 (1994) (finding that First Amendment protections did not “encompass attempts to abuse an unreceptive or captive audience” and that there was no “unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services.”).

Instruction No. 21.<sup>50</sup> The Fourth Circuit analyzed three aspects of Phelps' expressive conduct (the general and specific signs used at the protest, and the online Epic), held that all three forms of expression constituted protected speech, and reversed the judgment of the district court accordingly.<sup>51</sup>

The Fourth Circuit did not focus on Snyder's private status (as the district court had), but instead was concerned with the type of speech in question.<sup>52</sup> The court noted that "certain types of speech are protected regardless of plaintiff's status as private or public figure."<sup>53</sup> The court stated that there are two protected subcategories of speech: statements on matters of public concern that did not contain facts that could be proven false,<sup>54</sup> and "rhetorical statements employing 'loose, figurative, or hyperbolic language . . . .'"<sup>55</sup> The Fourth Circuit questioned whether the Phelps' speech "could reasonably be interpreted as asserting 'actual facts' about an individual," or consisted merely of "rhetorical hyperbole."<sup>56</sup> Although the Fourth Circuit conceded that signs reading "You're Going to Hell" and "God Hates You" presented "a closer question" of whether the Phelps were asserting actual facts about Lance Cpl. Snyder, the court held that none of the signs, nor the Epic, reasonably could be interpreted as "asserting actual and provable facts."<sup>57</sup> Instead, the signs and Epic could only be interpreted as "hyperbolic rhetoric," and thus the First Amendment protected Phelps's speech as a matter of law.<sup>58</sup>

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50. *Snyder v. Phelps*, 580 F.3d 206, 214–15, 221–22 (4th Cir. 2009). Jury Instruction No. 21 addresses how the jury should balance "the Defendants' expression of religious belief with another citizen's right to privacy." Jury Instruction 21 was irrelevant because the Fourth Circuit held it protected as a matter of law.

51. *Id.* at 222–26 ("[W]e are constrained to conclude that the Defendants' signs and Epic are constitutionally protected.").

52. *Id.* at 222.

53. *Id.* at 218 (citing *Deupree v. Iliff*, 860 F.2d 300, 304–05 (8th Cir. 1988)).

54. *Id.* at 219 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). The court adds that whether speech involves a matter of public concern is a matter of law, to be ascertained by "examining the content, form, and context of such speech, as revealed by the whole record." *Snyder*, 580 F.3d at 219.

55. *Id.* at 220 (quoting *Milkovich*, 497 U.S. at 21).

56. *Id.* at 222 (citing *Milkovich*, 497 U.S. at 20).

57. *Id.* at 224.

58. *Id.* at 223–26.

## V. ARGUMENTS

### A. Snyder's (Petitioner's) Arguments

Petitioner Snyder's arguments focused on his status as a private individual and the captive audience doctrine. First, he contends that private and public figures are subject to different First Amendment standards as plaintiffs in civil tort claims. Snyder argues that the Fourth Circuit erred by granting protection to the WBC on the grounds that the WBC's speech could not "reasonably be interpreted as stating actual facts" that could be proven false.<sup>59</sup> Snyder claims that he should not have to prove the falsity of the WBC's speech as an element of his claim in addition to the standard elements of an IIED claim.<sup>60</sup> The standard elements, Snyder asserts, are sufficient.<sup>61</sup>

To support this argument, Snyder contends that no matter of public concern was involved in the dispute—just because the WBC says this is a matter of public concern does not make it one.<sup>62</sup> Further, he argues that the Fourth Circuit misapplied *Hustler* to the facts of this case.<sup>63</sup> Snyder asserts that the standard set out in *New York Times* and applied (to an IIED claim) in *Hustler*—that a public figure could not recover damages in a libel action without proving the falsity of the speech and "actual malice"—was justified because the speech was directed at public figures.<sup>64</sup> Snyder notes that *Gertz* specifies that speech directed at private individuals is not "equally positioned" relative to speech directed at public individuals, and therefore private individuals deserve a greater degree of protection.<sup>65</sup>

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59. Brief for Petitioner, *supra* note 9, at 21.

60. *Id.* at 41–43. Snyder argues that the falsity requirement should only apply when the claim is one of defamation, as in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and claims that adding falsity to the elements of an IIED claim deprives a plaintiff protection from entire categories of expressive conduct and allows a speaker to ensure constitutional immunity from liability by relying on outrageous statements that do not contain a provably false factual connotation. Snyder contends that, in effect, the element of outrageousness in the IIED claim becomes an affirmative defense to the claim itself because outrageous conduct is an element of the tort of IIED.

61. *Id.*

62. *Id.* at 18–19, 34–40.

63. *Id.* at 28 (asserting that "[t]he *Hustler* Court grounded its opinion on the special status of those who intentionally enter the public arena" and contrasting *Hustler* and *Gertz* on the basis of whether to apply the *New York Times* standard to public and private figures, respectively).

64. *Id.* at 23–28.

65. *Id.* at 23.

Snyder also asserts that as a private individual who did not expose himself to a public matter he did not assume the risk of emotional harm by voluntarily “stepping into the public arena.”<sup>66</sup> He claims that the Fourth Circuit misapplied *Milkovich* as “an absolute tort exemption for ‘rhetorical hyperbole.’”<sup>67</sup> Instead, he contends that *Milkovich* stands for the proposition that speech rights must be balanced against society’s interest in preventing and redressing attacks upon reputation.<sup>68</sup> Snyder points out that *Milkovich* did not apply to all “rhetorical hyperbole” regardless of the cause of action, but only to defamation claims.<sup>69</sup>

Second, Snyder argues that funeral attendees constitute a “captive audience” in that they may be protected from unwanted speech without violating First Amendment principles.<sup>70</sup> Specifically, he asserts that the captive audience doctrine justifies protection from emotional harm like that inflicted by the Phelps.<sup>71</sup> Snyder argues that funeral mourners have a sufficient privacy interest and that the WBC’s conduct interfered with Snyder’s privacy interest in an intolerable manner.<sup>72</sup> Although whether the conduct amounted to interference ultimately is a question of fact, Snyder raises a legal question as to whether funeral mourners have a sufficient privacy interest to qualify as a captive audience. *Frisby* focuses on the special nature of the home as a refuge or retreat that can be protected by a special ordinance prohibiting picketing, while Snyder argues that such special protection depends on the features that define this setting, rather than the setting itself.<sup>73</sup> Snyder contends that the value of a privacy interest may vary depending on the setting, and that a funeral setting is of the kind the Court has sought to protect.<sup>74</sup>

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66. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (discussing the rationale for distinguishing public from private figures)).

67. *Id.* at 30.

68. *Id.* (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990)).

69. Brief for Petitioner, *supra* note 9, at 31 (arguing that the Fourth Circuit improperly interpreted *Hustler* and *Milkovich* as establishing that “‘rhetorical hyperbole’ is immune from any tort liability, regardless of the target of [the speech]” (emphasis added)).

70. *Id.* at 18–21.

71. *Id.* at 45.

72. *Id.* at 54.

73. *Id.* at 47.

74. *Id.* at 46, 48. Note that Snyder also points to *Hill v. United States*, 530 U.S. 703 (2000) and *Madsen v. Women’s Health Ctr.*, 512 U.S. 753 (1994) as examples of recognized captive audiences in settings outside of the home.



### B. *The WBC's (Respondents') Arguments*

Respondent WBC asserts that this case is about hyperbolic public speech pertaining to issues of public concern and is thus deserving of First Amendment protections.<sup>75</sup> The WBC asserts three broad arguments. First, that the WBC's speech pertained to public issues and could not be proven false, and therefore should be considered protected speech under the First Amendment.<sup>76</sup> Second, the WBC's speech was also hyperbolic and could not be interpreted as stating actual facts (and pertains to public issues)—and for those reasons, is protected by the First Amendment.<sup>77</sup> Third, Snyder was not a member of a captive audience, and even if he was, that the protest was too far away from Lance Cpl. Snyder's funeral to invade the Snyder family's privacy.<sup>78</sup>

The WBC's first argument—that the speech in question was not provably false and pertained to public issues—primarily is based on the application of *Hustler's* requirements of falsity and actual malice to Snyder's tort claims.<sup>79</sup> The WBC encourages the protection of open debate in society on matters of public importance, particularly when the speech involved is unpopular or offensive.<sup>80</sup> It stresses the need to protect public speech in particular.<sup>81</sup> Under the standard articulated in *Dun & Bradstreet*, the WBC argues its speech was public and therefore deserves a high level of protection.<sup>82</sup> The argument boils down to an assertion that the WBC's speech is public speech and therefore *Hustler* should apply to this case.<sup>83</sup> If *Hustler* applies, then the WBC's speech must be provably false and, if it is not, then Snyder's claim must fail.<sup>84</sup>

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75. Brief for Respondents, *supra* note 21, at 1 (“This case is about a little church in Topeka, Kansas . . . engaging in public speech on a public right-of-way, about issues of vital public interest and importance, over a thousand feet from a public funeral paid for by public funds with public law enforcement overseeing the event, with a large presence of public media who published details about the funeral and deceased soldier before and after the funeral.”).

76. *Id.* at 20.

77. *Id.* at 33.

78. *Id.* at 37.

79. *See id.* at 20 (arguing that Snyder wants “an exemption from the requirement[s] of *Hustler*”).

80. *Id.* at 21.

81. *Id.* at 21–25 (citing *New York Times*, 376 U.S. 254, 269–73 (1964); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 147 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971); *Gertz v. Welch*, 418 U.S. 323, 339 (1974)).

82. Brief for Respondents, *supra* note 21, at 26, 29–30.

83. *Id.* at 20, 30.

84. *Id.* (arguing that the Court should reject Snyder's arguments and not permit liability to

The WBC's bases its second argument on the Court's holding in *Milkovich*: the First Amendment protects "words that are no more than rhetorical hyperbole, or vigorous epithet; and words which could not reasonably have been interpreted as stating actual facts, used in a loose, figurative sense."<sup>85</sup> The WBC argues that "[t]he signs and [E]pic contain language that plainly shows it is religious commentary, purposefully hyperbolic," concerning public issues, and, therefore, the WBC's speech should be protected.<sup>86</sup> If the Court were to decline to protect hyperbolic public speech from tort liability, the WBC argues that such a rule would "rip the First Amendment to useless shreds."<sup>87</sup> Such a standard would be overly subjective and likely render some public or religious speech tortious, potentially chilling the exercise of public speech.<sup>88</sup>

Third, the WBC disputes Snyder's contention that funeral attendees may be considered members of a captive audience.<sup>89</sup> Even if they can be part of a captive audience, the WBC argues that its speech "occurred well outside of any zone of privacy the [C]ourt might ever recognize in a public funeral."<sup>90</sup> It emphasizes that close physical proximity is necessary to find that an audience is captive.<sup>91</sup> In disputing Snyder's claim that funeral attendees have a sufficient privacy interest at stake to warrant captive audience status, the WBC points to multiple cases where courts have failed to recognize such a broad privacy interest at funerals.<sup>92</sup> Although the WBC concedes a "body disposition right," it maintains that "by no process of logic" does such a right "lead to a per se privacy interest in a funeral, no matter how public."<sup>93</sup>

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attach for "not-proven-false words").

85. Brief for Respondents, *supra* note 21, at 35 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990)).

86. *Id.* at 36.

87. *Id.*

88. *Id.*

89. *Id.* at 37, 58 (asserting that "[p]etitioner is not entitled to assert a privacy claim, because there was no intrusion").

90. *Id.* at 37.

91. *Id.* at 43.

92. *Id.* at 44, 49–50.

93. *Id.* at 51.

## VI. ANALYSIS AND LIKELY DISPOSITION

Although the Fourth Circuit's decision might be lauded for its simplicity, it is unlikely that the Supreme Court will take such a straightforward approach to the case. While the Fourth Circuit was correct in holding that the jury was improperly instructed to decide a matter of law, the court's protection of the right to free speech in the context of this case seems overbroad. The Fourth Circuit erred by applying the standards from defamation cases involving *public*-figure plaintiffs with IIED claims to *private*-figure plaintiffs with similar claims. As noted by Snyder, the Fourth Circuit's ruling may "[turn] outrageousness from the threshold element of the tort into an affirmative defense."<sup>94</sup> Essentially, the Fourth Circuit's rationale would protect speech such as that made by the WBC, simply because the speech fell within the definition of the tort.<sup>95</sup> By protecting Phelps's conduct in this way, the Fourth Circuit did not protect public speech; instead, it may simply have interfered with the ability of the states to protect their citizens from harm.<sup>96</sup> The specific facts of this case, however, are not helpful to Snyder under the current First Amendment jurisprudence. While it is possible that the Supreme Court will use *Snyder* to expand upon these doctrines, it is more likely that the Court will affirm the Fourth Circuit's opinion. However, the Court may decide simply to articulate more detailed guidelines for evaluating similar future cases.

Both parties' arguments confirm that this case provides an opportunity for the Court to articulate some guidelines about where First Amendment protections end and viable tort claims begin. Although Snyder's arguments pertaining to the public-private distinction make sense when considering the Court's prior decisions (e.g., *Gertz*, *Milkovich*, and even *Frisby*), these rulings will probably not persuade the Court to create standards that limit the free exchange of ideas on public issues—even if such an exchange is as otherwise deplorable as that exercised by the WBC. On the one hand,

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94. Brief for Petitioner, *supra* note 9, at 20. See notes 41 and 60 and accompanying text.

95. See notes 41 and 60 and accompanying text.

96. See Brief for the State of Kansas et al. as Amici Curiae in Support of Petitioner at 23–24, *Snyder v. Phelps*, (No. 09-751) (U.S. July 14, 2010) (asserting that applying First Amendment protections to the WBC's conduct will do nothing to promote "public debate on public matters" and instead will only interfere with "states' traditional latitude to define and enforce tort remedies for intentional interference with privacy interests.").

relevant case law states that distinguishing between public and private figures is important, and here it would seem that Snyder is not a public figure. On the other hand, for the Court to rule in favor of Snyder, it would have to find that distasteful or outrageous speech on public issues could be the basis for liability if aimed at a private party with the intent of inflicting emotional distress. The Court is unlikely to do so. This is because of the subjective nature of the element of outrageousness within an IIED tort<sup>97</sup> and because causing some distress to an audience is exactly what makes some speech effective.<sup>98</sup> As the Court has previously noted, “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”<sup>99</sup> The Court will likely follow this general line of reasoning.

As for Snyder’s contention that an expansion of the captive audience doctrine would be appropriate here, the Court seems unlikely to agree.<sup>100</sup> First, the captive audience doctrine is extremely narrow in its application, thus far limited to those within their own residence and to those accessing abortion services.<sup>101</sup> Although those attending a funeral may be similarly captive to those in their home or those entering an abortion clinic, the particular funeral attendees in this case were not similarly captive. As some have noted, the Court generally will only recognize a captive audience in circumstances with a “physical or aural intrusion, or an intrusion into the home, that the individual cannot avoid.”<sup>102</sup> Here, the funeral was held inside of a building, Snyder did not actually read the signs during the funeral, no

97. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (“‘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 . . . perhaps [the jurors’] dislike of a particular expression. [Such a] 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.”). Note, during oral arguments Justice Kagan pointed to this specific passage of *Hustler*. Transcript of Oral Argument at 22, *Snyder*, No. 09-751 (U.S. Oct. 6, 2010).

98. See Amicus Brief of the American Center for Law and Justice at 16–17, *Snyder v. Phelps* No. 09-751 (U.S. July 14, 2010) (“Free speech is often designed precisely to distress the audience. . . . In short, there is a crucial place under the First Amendment for speech that ‘inflicts emotional distress.’ . . . It is thus constitutionally insufficient to assert that speech is designed to distress the listener.”). Note also that this amicus brief offers perhaps a more workable standard to the Court: maliciousness.

99. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

100. See Transcript of Oral Argument at 48–50, *Snyder*, No. 09-751 (U.S. Oct. 6, 2010) (discussing captive audience doctrine with attorney for respondents).

101. See generally *Frisby v. Schultz*, 487 U.S. 474 (1988); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 781 (1994).

102. Brief of Amici Curiae Scholars of First Amendment Law in Support of Respondent Phelps at 8, *Snyder v. Phelps* No. 09-751 (U.S. July 14, 2010).

noted physical or aural intrusion occurred, and the WBC complied with all applicable ordinances and police instructions.<sup>103</sup> The only possible physical intrusion was a diversion of the funeral procession.<sup>104</sup> Under these facts, a finding that Snyder was a member of a captive audience would mark a broad expansion of the doctrine.<sup>105</sup> For similar reasons, it is likely that Snyder's intrusion upon seclusion claim will fail as well. Although the WBC's arguments on public speech ignore distinctions between libel and IIED and between public and private figures, they more clearly line up with a policy of giving public speech "breathing room," and therefore will likely be convincing to the Court. This does not mean that a funeral audience could not be a captive audience in other circumstances, as there are conceivable facts that provide a much closer question. Whether the Court will take this opportunity to articulate such a standard is debatable, but observers should expect, at least, a broad reaffirmation of free speech rights.

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103. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008).

104. Brief for Petitioner, *supra* note 9, at 4.

105. See Brief of Scholars of First Amendment Law, *supra* note 102, at 9 ("Nothing in the facts of this case suggests that an intrusion of the type recognized by the Court ever occurred at the funeral ceremony. Rather, in the absence of any physical or aural intrusion on the ceremony, Snyder complains of a purely psychological intrusion from the emotional impact of a message that offended him.").