No. 08-1026

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALBERT SNYDER,

Plaintiff/Appellee,
vs.
WESTBORO BAPTIST CHURCH, INC., et al.,
Defendants/Appellants,

Appeal from the District of Maryland
Trial Court Judge: Honorable Richard D. Bennett
District Court Docket Number 06-CV-1389

PETITON FOR REHEARING *EN BANC*

Defendants/Appellants Shirley Phelps-Roper (Phelps-Roper) and Rebekah A. Phelps-Davis (Phelps-Davis) hereby petition the Court for rehearing *en banc* on their motion for stay of execution of judgment pending appeal. This petition is filed pursuant to Rules 35 and 40 of the Rules of Appellate Procedure, and Local Rules 35 and 40.

Introduction

The thrust of this petition is that denying the motion to stay overlooked the issues of exceptional importance – on which some Circuits have disagreed – that pertain to the likelihood of success on the merits by defendants. Therefore, in

counsel's judgment, the following is true with respect to the denial of the motion for stay of execution of judgment pending appeal:

1. The opinion is in conflict with a decision of another Court of Appeals, which is not addressed in the opinion. Specifically, the Eighth Circuit Court of Appeals held that a preliminary injunction should have been granted to Phelps-Roper when she challenged the Missouri funeral picketing law, finding that there was a likelihood of success on the merits, because she had a First Amendment right to engage in funeral picketing. See *Phelps-Roper v. Nixon*, *infra*, 509 F.3d 480 (8th Cir. 2007) (this case is pending before the Eighth Circuit on rehearing en banc). Also, the Tenth Circuit Court of Appeals held that a soldier's funeral was not a private event, and upheld summary judgment on a case by a family member alleging invasion of privacy, see *Showler v. Harper's Magazine Foundation*, 2007 WL 867188 (C.A.10 (Okla.) 3/23/07). Copy online at http://www.ck10.uscourts.gov/opinions/06/06-7001.pdf (last checked May 31, 2008).

2. This proceeding involves one or more questions of exceptional importance which do not appear to have been addressed, including:

   a. Is there a privacy right in a funeral? If so, does it reach to the public right of ways outside the church, and if so, how far? Or, if so, does it cover all funerals, or only funerals that are closed and private (vis-à-vis open and public)?

b. Is there a privacy right in mourning? If so, does it reach to comments about the deceased on the public airwaves, including media and Internet; and if so, during what time frame?

c. If there is a privacy right in a funeral or mourning, what is the reasonable time, place and manner limits that can be placed on First Amendment speech, religious speech or religious assembly?

These are just a few of the more dominant constitutional issues raised by this appeal, which is rife with constitutional issues (including due process questions related to personal jurisdiction and punitive damages). The importance of these issues – coupled with the limited assets and income of Phelps-Roper and Phelps-Davis – support a stay in this case, pending review of these issues.

Background

Defendants are a church, its pastor, and two of its members. Plaintiff is the father of a soldier killed in Iraq. Defendants conducted a peaceful, lawful picket 1000 feet from the church where plaintiff's son's funeral was held. The events of his death and funeral were given lots of media attention; plaintiff himself spoke to the media multiple times about his son, his death, and his funeral.

Defendants have a religious belief that God is punishing this nation for its institutionalized proud sins, including homosexuality, fornication, adultery (including divorce-and-remarriage), idolatry, etc. Issues about homosexuality, the role of the churches (including the priest sex scandal in the Roman Catholic church), and the moral condition of this nation; as well as issues about the dying soldiers, and their

funerals and related memorials and similar events; are all topics of widespread public interest and dialogue. Defendants believe that the soldiers of this nation are dying while serving in this nation's military because of the nation's sins. Defendants believe catastrophes and tragic sudden deaths are occurring in this nation because of its sins. For all these reasons, and many related doctrinal reasons, defendants conduct peaceful, lawful pickets in proximity to death events, including those of soldiers killed in Iraq and Afghanistan, with the religious purpose of publishing the message just stated, in warning to the citizens of this nation that if they continue proudly sinning they will continue to have soldiers come home from the battlefield dead, and continue to experience tragic sudden deaths and various kinds of disasters such as fires, hurricanes, tornadoes and earthquakes. Defendants also believe that every human has a duty to be thankful for God's judgments in the earth, including these events which this nation sees as tragic and catastrophic, such as the deaths of soldiers, shootings in public places, and tornadoes and earthquakes.

Plaintiff says he saw the tops of some signs, but couldn't read the content of any, as he turned into the church property to go to his son's funeral. On the same path, including right up to the front doors of the church, were bikers with flags; and children from the church school with signs speaking favorably of plaintiff's son. Defendants were 1000 feet away, on a public right of way, with signs expressing their religious message as discussed above, including "God Hates You," "You're Going to Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," and "Pope in Hell." Defendants left at the time the funeral was scheduled to start.

As plaintiff left the church after the funeral, the church property was lined with bikers with flags, and children from the school. See, for instance, http://www.patriotguard.org/photos/listpics.asp?CatID=&dir=Maryland/LCpl+Snyder+Westminster+Maryland+03+10+06 (last checked June 1, 2008). For fifteen miles en route to the cemetery, the streets were lined with police officers, firefighters, and citizens, saluting, flashing lights in support, etc. There was an outpouring of support for plaintiff and his family upon the published death of his son. After his son's death, plaintiff established a Web page, www.matthewsnyder.org (last checked June 1, 2008; shows as expired as of that date), through which he received thousands of e-mails in support of him and his son.

Later in the day of plaintiff's son's funeral, plaintiff turned the television on at his parents' house in Maryland, and later at his own house in Pennsylvania, to see if the media covered the praise and support given his son, including the fact that people lined the procession to the cemetery. He saw Phelps and Phelps-Roper being interviewed; and he saw picket signs. The next morning he read news stories in the print media about his son, where he saw quotes from Phelps and Phelps-Roper. About a month after the funeral, he was doing an Internet search to find words of praise for his son. Through his search, he found an epic written by Phelps-Roper, posted on the passive Website of defendant Westboro Baptist Church, www.godhatesfags.com (last checked June 1, 2008), with religious commentary about his son, the Roman Catholic Church, his son's death, divorce-and-remarriage, and his

son's funeral. The document is full of Biblical references and language, and clearly is religious commentary.

Plaintiff sued defendants and at trial all the picket signs, and all the religious doctrines and beliefs of defendants were put in front of a jury, and dissected during testimony and opening and closing arguments. Highly inflammatory commentary was made throughout the trial, but particularly in closing argument, expressing plaintiff's belief that defendants' total theology is wrong, including any notion that God hates. Throughout the proceedings defendants asked for a clear statement for the jury about which words were actionable; the requests were denied. The list of signs that were *possibly* actionable changed throughout the case. The jury was given a large body of evidence about defendants' religious beliefs and practices, with instructions that told them if any of the signs or words targeted plaintiff or his family in any offensive way, liability could attach. The jury returned a compensatory damages verdict of $2.9 million, and a punitive damages award of $8 million. Before further closing arguments on punitive damages, the trial court advised the jury that the $2.9 million was well beyond the assets of the defendants, which at most (if fully liquidated and all exemptions were waived, including homestead) amounted to less than $1 million. After the verdict, the trial court reduced the award to $5.1 million.

Phelps-Roper and Phelps-Davis, petitioners here, asked the trial court for a stay of execution of the judgment pending appeal. The trial court made any stay subject to a bond of $125,000 from Phelps-Roper and $100,000 from Phelps-Davis. Neither of these defendants has cash, income or assets available in those amounts, so the bond

set was as prohibitive as if the full amount of the judgment had been required. A motion for stay was filed with this Court on May 5, 2008, and denied on May 19, 2008, copy of order attached. The order does not specify why the stay was denied. However, it seems evident on the face that if plaintiff attempts to collect on any of the judgment – particularly in the absence of any plan to preserve any funds he may collect – and this Court sets aside the verdict – irreparable harm will result to these petitioners, aside from the inherent harm to First Amendment activity. This petition, therefore, asserts that the order denying a stay misapprehended the issues of exceptional importance raised by this appeal, and the need to preserve the status quo pending review of these issues.

Points of Law Overlooked or Misapprehended

The previous arguments, authorities and content of petitioners' motion for stay of May 5, and reply to response filed May 9, 2008, are incorporated here. The focus of this petition is that there are issues or questions of exceptional importance raised by this appeal, including most notably whether there is a privacy right in a public soldier's funeral; and whether there is a privacy right to mourn; either of which can wholly override the First Amendment right to engage in speech, religious speech, and religious assembly.

What follows are excerpts from a series of recent law journal articles, which illustrate the importance of the many unresolved issues raised by defendants' religious picketing. These law journal articles mainly speak about laws passed by various states that target defendants, though a few of the more recent articles speak about this

case also. The laws passed by state legislatures and Congress are far less restrictive and burden far less speech than the verdict in this case; these articles speak to the same constitutional issues raised by the verdict.

> This article focuses on the latter category of laws [those banning *all* protests near a funeral ceremony in order to protect the "privacy of grieving families"] and their claim to protect privacy interests. **The term "privacy" is amorphous, ill-defined and manipulable, making it a dangerous justification for regulating speech.** Statutes regulating peaceful protests reflect the difficulty both in defining and containing the parameters of a privacy interest. Such laws appear at first glance to equate privacy with "intrusion" – i.e., an invasion into one's solitude or other private space in an especially offensive manner. Few people would argue against recognizing mourners' privacy interests when conceived of in this way. But the breadth of these statutes is inconsistent with traditional notions of intrusion. Many laws exclude protesters from areas ranging from 300 to 1,500 feet around a funeral service or procession, belying any notion of seclusion associated with an intrusion-based privacy interest. **Furthermore, because such laws aim at peaceful protests, officials cannot legitimately claim that the zones protect against unwanted invasions. Peaceful protests simply do not intrude upon funerals in the sense that this term is traditionally understood.** They are neither noisy nor disruptive. They do not necessarily impede funeral services. Nor do they involve harassment causing attendees to avoid the service.
>
> In effect, the only aspect of intrusion that peaceful protest statutes seem to capture is that funeral protests are especially offensive to mourners (and many others). Some laws explicitly state that protesting at funerals "exploit[s] … another's grief" in a manner "shocking to the conscience" and that such activity is an "unwanted and unwarranted intrusion" on the "sanctity and dignity of funeral services." **While this may be an argument vaguely rooted in privacy law, it differs from the law of intrusion. Such an approach equates privacy with decency or civility – i.e., the notion that social norms require certain decorum and respect for others.**
>
> **American law does not recognize such a privacy interest.** Our privacy tort specifically rejects recovery for "psychological" invasions such as insults and bad manners. …. (Emphasis added.)

Wells, Christina E., "Privacy and Funeral Protests," University of Missouri School of Law Legal Studies Research Paper No. 2008-06. Available at SSRN: http://ssrn.com/abstract=1106363 (last checked May 31, 2008), at 2-4. Also Wells, Christina E., "Privacy and Funeral Protests," 87 NORTH CAROLINA LAW REVIEW ____ (forthcoming 2008).

The same article states at 50-51, footnote 263:

> A federal district court used similar reasoning when refusing to set aside a verdict against the Westboro Baptist Church in an invasion of privacy and intentional infliction of emotional distress lawsuit brought by the family of a soldier at whose funeral church member's [sic, members] protested. See *Snyder v. Phelps*, No. RDB-06-1389, 2008 WL 29461 (D.Md. Feb. 4, 2008). Maryland adopts the Restatement's version of the intrusion tort. See *Forman v. Sheppard*, 744 A.2d 583, 585-86 (Md. 2000). According to *Snyder*, "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 Defendant's signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion." *Id.* at *12. **The court's reasoning allowed a common law invasion of privacy lawsuit to proceed on the theory that plaintiffs were faced with admittedly offensive speech about their son [sic, plaintiff was faced with admittedly offensive speech about his son] while watching television in their [sic, his] home. Such reasoning turns the intrusion tort on its head.** See *supra* note ___ and accompanying text. (Emphasis added.)

Another writer states:

> **The Court has yet to acknowledge a right to mourn in privacy.** The closest it has come to recognizing such a right was in *National Archives and Records Administration v. Favish*. In *Favish*, the Court held that individuals have a right to privacy in controlling the body and death images of deceased family members, which prevented disclosure of such images under the Freedom of Information Act. The decision did not address whether the right to privacy included a right to mourn. (Emphasis added.)

Mosher, Cynthia, "What They Died to Defend: Freedom of Speech and Military Funeral Protests," 112 PENN ST L REV 587, 616 (Fall 2007).

Another writer states:

> **Funeral picketing raises crucial First Amendment issues, including whether the Supreme Court's interest in protesting unwilling listeners and captive audiences is broad enough to cover mourners.** This Article reflects on whether the state should recognize mourning as a legitimate interest and how that interest should be properly balanced against the right of free speech. In an attempt to respond to this issue, the majority of state legislatures have produced laws that are unconstitutional because of their geographic overbreadth. ….
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> ****
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> **Unlike most civilian funerals, military funerals include a public dimension.** Funerals for soldiers killed in war generate greater publicity. Veteran funerals are also entitled to certain military funeral honors, including the presentation of a United Sates flag and the playing of Taps. What the United Sates must answer as a society is whether a funeral is an appropriate time or place for protesting, and whether the right to free speech, even that speech expressed in a traditional public forum, should have limits. Should there be a legally recognized time to mourn?
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> ****
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> **Funeral picketing raises important constitutional concerns that go beyond Westboro.** …. (Emphasis added.)

Rutledge, Njeri Mathis, "A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing," 67 MD L REV 295, 295-296, 298, 300 (2008).

Another writer states:

> The WBC and its controversial funeral protests have sparked a complex constitutional dispute nation-wide. ….
>
> … [A] funeral protest ban will be most successful if it is content-neutral, a reasonable time, place, and manner restriction, contains clearly defined terms, is not vague or overbroad, sets reasonable distance and time requirements and punishments, and is equally enforced among all groups. …

Beil, Kara, "Funeral Protest Bans: Do They Kill Speech or Resurrect Respect for the Dead?" 42 VAL U L REV 503, 541 (Winter, 2008).

Another writer states:

> While legislators believe the bills will pass constitutional muster as to reasonable time, place, and manner regulations, many constitutional law experts worry that the new laws unnecessarily trammel First Amendment rights. First Amendment scholars Ronald Collins and David Hudson worry that legislators, in their rush to enact the laws, are ignoring issues of free express: "[u]nderstandably, such public expressions of heartless protest offend the families and friends of the dead. And many legislatures have responded quickly to their concerns. In doing so, however, lawmakers have been overlooking significant First Amendment problems with the resulting legislation."
>
> **The main concern is that the new laws threaten the First Amendment right to "peaceably protest in public places."** UCLA Law Professor Eugene Volokh is troubled by some of the more broadly crafted laws and has expressed concern that this type of legislation may lead to restrictions on picketing in general. **Additionally some experts question whether the regulations are truly content-neutral and suggest that they not only discriminate on the basis of content, but also constitute viewpoint discrimination.** If this is the case, there will likely be a number of successful challenges to the regulations. (Emphasis added.)

Ritts, Katherine A., "The Constitutionality of 'Let Them Rest in Peace' Bills: Can Governments Say 'Not Today, Fred' to Demonstrations at Funeral Ceremonies?" 58 SYRACUSE L REV 137, 139-140 (2007).

Another writer states:

> Since June 2005, one small Kansas church has provoked an important First Amendment debate by trumpeting anti-gay messages during American military funerals. Not surprisingly, jittery politicians have sought to thwart the church's protests with dozens of statutes limiting speech near funerals and funeral processions. Free speech advocates, in turn, have challenged three of these funeral protest statutes. Courts have upheld two—in Missouri and

> Ohio[1]--while enjoining the third in Kentucky. In these cases, the legal debate has centered on the privacy interest articulated by the Supreme Court in *Frisby v. Schultz* and *Hill v. Colorado*. But that foundation may prove infirm. **Relying on privacy interest in the funeral protest context creates several significant legal inconsistencies and policy problems.** …. (Emphasis added.)

McCarthy, Robert F., "The Incompatibility of Free Speech and Funerals: A Grayned-Based Approach for Funeral Protest Statutes," 68 OHIO ST L J 1469 (2007).

Also see Asbury, Amanda, "Finding Rest in Peace and Not in Speech: The Government's Interest in Privacy Protection in and Around Funerals," 41 IND L REV 383 (2008) (noting ***the Supreme Court has yet to determine whether privacy protection should extend to those attending a funeral, particularly if doing so would abridge another's constitutional rights***, and discussing the balancing of rights if a privacy right exists); Cornwell, Andrea, "A Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals," 56 AM U L REV 1329 (June, 2007) (arguing the federal "Respect for America's Fallen Heroes Act" is unconstitutional because it is content-based, is not narrowly tailored, and provides for standardless prior restraint); Miller, Lauren M., "A Funeral for Free Speech? Examining the Constitutionality of Funeral Picketing Acts," 44 HOUS L REV 1097 (Symposium 2007) (asserts that the current funeral picketing laws are unconstitutional because they

[1] These cases are currently pending before the Eighth and Sixth Circuits as of this writing. The Eighth Circuit reversed the trial court saying a preliminary injunction should have been granted, see *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007), and the matter is now pending rehearing *en banc*. The Sixth Circuit case is found at *Phelps-Roper v. Strickland,* Appeal No. 07-3600, and is pending awaiting decision following oral argument on February 5, 2008, see http://www.ca6.uscourts.gov/case_reports/rptPendingDistrict_OHN.pdf (last checked May 31, 2008).

were enacted in a viewpoint-discriminatory manner; they will be discriminatorily enforced; and they leave no adequate alternative channels for the message).

Conclusion

The verdict in this case is a reflection of the fact that many in this society find defendants' religious message offensive. It is not credible to say the presence of picketers, *per se*, is the wrong; there were picketers beyond defendants, in larger numbers than defendants, at this very funeral. The only difference is that the larger group had a message that the deceased was a hero in heaven, while the defendants had a message that he was not a hero, and died in vain for a sinful nation. "[M]uch political and religious speech might be perceived as offensive to some," *Morse v. Frederick*, ---- U.S. ----, 127 S.Ct. 2618, 2629, 168 L.Ed.2d 290 (2007). Punishing speech because it is offensive offends the Constitution, no matter how it is packaged.

The Supreme Court has never recognized a privacy right in a funeral, let alone a privacy right to mourn. If the Court does ultimately recognize privacy rights in any funerals, or in any part of mourning, that right would have to be balanced against First Amendment speech, religion and assembly rights. In this case, a broad brush was applied, under the rubric of "privacy," even though the facts of the case demonstrated that the death and funeral of plaintiff's son were very public events. The Court can take judicial notice of the fact that the deaths of soldiers in Iraq and Afghanistan are heavily covered by the media; frequently scenes of the funerals and memorials, inside and outside the building, are in the news, with people in attendance talking to the media, including family, friends, clergy, neighbors, politicians and strangers (some of

whom may be mourners, and some not, depending on how that status is defined if such a privacy right is ever recognized).[2]

Everyone in the world is talking about these deaths and funerals. The fact that 99.9% are saying, "God bless America," and "He's a hero," does *not* mean that under the heading of privacy, a dissenting voice *on those very points* can be silenced. Letting this verdict stand – and letting execution go forth on the judgment while this matter is pending before this Court (and likely the United States Supreme Court) – would have the very practical effect of punishing one viewpoint. "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'"), *Elk Grove Unified School Dist. v. Newdow***,** 542 U.S. 1, 48, 124 S.Ct. 2301, 2329, 159 L.Ed.2d 98 (2004), Thomas, J., concurring, quoting from *Torcaso v. Watkins,* 367 U.S. 488, 495, 81 S.Ct. 1680, 1683-1684, 6 L.Ed.2d 982 (1961). A verdict of this size, against a small church, is designed to force defendants to profess belief in the "God bless America," and "our soldiers are heroes," religion. It cannot stand under current law,[3]

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[2] Defendants' testimony reflects that they consider themselves mourners, because they mourn for the sins of this nation, which they believe have brought the nation to a tragic and woeful spot with God. That notion was roundly mocked throughout the trial; yet defendants testified to the concept, reflected in the short book of the prophet Jeremiah called *Lamentations*.

[3] A 2007 survey by the First Amendment Center found that only 56% of Americans believe that the freedom to worship as one chooses extends to all religious groups, regardless of how extreme — down 16 points from 72% in 2000. The same survey found that 58% of Americans would prevent protests during a funeral procession, even on public streets and sidewalks. See http://www.firstamendmentcenter.org/news.aspx?id=19031 (last checked June 1, 2008). This nation may repeal the First Amendment to silence any message deemed offensive. But until they do, this verdict should be reviewed based on existing law, which as one of its bedrocks limits any burden on speech to a reasonable time, place, manner and

and should not go forward until these exceptionally important issues are reviewed. This verdict is a stark illustration of what the Supreme Court meant in the *New York Times* case, when the Court said that enforcement of state tort law through civil litigation may "impose invalid restrictions on … constitutional freedoms of speech …" (so civil tort actions--though between private parties--constitute government action for purposes of the Constitution), see *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 519-521, 115 P.3d 107 (2005), quoting from *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964).

Respectfully submitted,

/s/ Margie J. Phelps

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content-neutral restriction, which simply did not happen in this case – no matter what privacy right the Court may find exists, as a matter of first impression.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Rehearing *En Banc* was served as follows on June 2, 2008:

Twenty (20) copies mailed to:

Clerk of the United Sates Court of Appeals
for the Fourth Circuit
Lewis F. Powell Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
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/s/ Margie J. Phelps
_____
Margie J. Phelps

FILED: May 19, 2008

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ALBERT SNYDER,

Plaintiff - Appellee

v.

FRED W. PHELPS, Sr.; WESTBORO BAPTIST CHURCH, INCORPORATED; SHIRLEY L. PHELPS-ROPER; REBEKAH A. PHELPS-DAVIS,

Defendants - Appellants

and

JANE DOES; JOHN DOES,

Defendants

O R D E R

Upon review of submissions relative to the motion for stay pending appeal, the Court denies the motion.

Entered at the direction of Judge Shedd, with the concurrence of Judge Michael and Judge King.

For the Court

/s/ Patricia S. Connor, Clerk