RECORD NUMBER: 08-1026

United States Court of Appeals

for the

Fourth Circuit

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

Appellants,

– v. –

ALBERT SNYDER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION and ACLU OF MARYLAND IN SUPPORT OF APPELLANTS SEEKING REVERSAL

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CONSENT TO FILE AS *AMICUS CURIAE*

This brief is filed with the consent of the parties pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Maryland is one of its state affiliates. Throughout its history, the ACLU has addressed the relationship between freedom of speech and such torts as the intentional infliction of emotional distress, including participating as *amicus curiae* in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The ACLU has also long advocated in favor of gay rights, including the right of gays and lesbians to serve in the military, and has been publicly attacked by Appellant Westboro Baptist Church for those views.[1] The First Amendment issues raised on this appeal are therefore a matter of substantial concern to the ACLU and its members in Maryland and elsewhere.

[1] In a news release issued on November 2, 2004, the WBC stated, among other things: "God Hates Fags! & Fag-Enablers! *Ergo* God Hates the ACLU."

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants displayed signs on a public street outside the funeral of a deceased veteran expressing their views — grounded in their religious faith — on homosexuality, sexual abuse in the Catholic Church, and that America is paying a price in Iraq and elsewhere because of its tolerance of gays and lesbians in the military. They also posted written statements of their views, largely to the same effect, on their church website. All of these issues are controversial subjects of public moment in the United States.

Rather than protect Appellants' free-speech rights, the district court allowed the jury to sift through all of Appellants' speech in this case — including speech it had indicated earlier was protected under the First Amendment — to determine whether the Appellee should be compensated for the emotional harm caused by Appellants' words. Not surprisingly, given the extreme and unpopular views expressed by Appellants, the jury awarded Appellee $10.9 million in compensatory and punitive damages on his claims for intentional infliction of emotional distress, intrusion upon seclusion, and conspiracy.

The judgment violated the First Amendment and must be reversed. The district court abdicated its constitutionally mandated gate-keeping function when it allowed the jury to decide for itself whether Appellants' words were protected by the First Amendment. Had the district court properly applied controlling First

Amendment principles, this case would never have gone to the jury — for Appellants' speech expressed their opinions on matters of public concern, and, as such, was entitled to "full constitutional protection" from tort liability. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). The multi-million dollar judgment is an imposing deterrent to anyone who might seek to express unpopular or offensive views on public issues, thereby chilling the very speech most in need of protection under the First Amendment.

STATEMENT OF THE CASE

This appeal arises out of statements by members of Westboro Baptist Church ("WBC") before, during, and after the March 10, 2006 funeral of Appellee Albert Snyder's son Matthew, an American Marine who was killed in the line of duty in Iraq. WBC is a fundamentalist Baptist church based in Kansas whose members practice a "fire and brimstone" religious faith. (VIII Appellants' Appendix ("App.") 2190; X App. 2607.) Among other things, they believe that God hates gay men and lesbians and is punishing America for its tolerance of homosexuality (particularly in the military), and for other sins. (VIII App. 2227, 2232-34.)

WBC members also believe it their religious duty to spread their message that America is incurring God's wrath — and God is killing American soldiers — for the country's sins, in a manner that will attract as much attention as possible.

(VIII App. 2215, 2232; IX App. 2431, 2513, 2518-19.) To publicize their message and attract media attention, WBC has conducted more than 30,000 pickets over the past 17 years, and more recently has begun picketing funerals, including soldiers' funerals. (VIII App. 2227; IX App. 2343, 2420, 2430.)

One such demonstration was at Matthew Snyder's funeral. WBC members Fred Phelps, Shirley Phelps-Roper, and Rebekah Phelps-Davis (collectively with WBC, "Appellants") learned of the Snyder funeral from an obituary notice, and traveled with four of Phelps-Roper's children to St. John's Catholic Church in Westminster, Maryland, where the funeral service was held. (VII App. 2069; IX App. 2405-06.) Appellants coordinated with local police about where they should stand, and stood with the four Phelps-Roper children on a public street approximately 1,000 feet from the church, holding signs which read: "America is Doomed," "God Hates the USA/Thank God for 911," "Pope in Hell," "Fag Troops," "You're Going to Hell," "God Hates You," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "God's View [with a picture of "Uncle Sam" targeted in a gun scope]/Not Blessed, Just Cursed," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." (VI App. 1588-89; VIII App. 2273-74; IX App. 2360-62, 2370-71, 2499, 2510; XV App. 3784-87.) Appellants had carried these same signs earlier that day, in front of the Maryland legislature and the U.S. Naval Academy. (VIII App. 2238; IX App. 2404.)

Appellants displayed their signs outside the Westminster church for about 30 minutes, and left when the service started. (VIII App. 2285; IX App. 2371, 2435.) They neither went to the cemetery nor entered the church. (VIII App. 2168.) The media covered the funeral picket and interviewed Appellants about their presence near the church. (IX App. 2407, 2412.) Following the display, Appellants returned to Kansas. (IX App. 2371, 2407.) Mr. Snyder did not see what was written on Appellants' signs, and did not learn of it until later that day, when he saw television coverage of the picket. (VIII App. 2075, 2079-80, 2086; VIII App. 2143.)

Other individuals too gathered outside the church before and after the service, some closer to the church than Appellants. Patriot Guard Riders (who travel to funerals WBC pickets to surround the picketers and block their signs) carried American flags and stood between Appellants and the church. (VII App. 2080; VIII App. 2171.) Students from a nearby school carried small American flags and signs near the church, including signs reading: "St. John School is Praying for You," and "We Are Proud of Your Son." (VII App. 2082-84; VIII App. 2248; XV App. 3759-60.)

A few weeks after the funeral, Phelps-Roper wrote and posted on WBC's website the "Burden of Marine Lance Cpl. Matthew Snyder," which WBC refers to as an "epic." (IX App. 2407-09.) Among other things, the "epic" expressed the

view that Mr. Snyder taught Matthew to "defy his Creator," "raised him for the devil," and "taught him that God was a liar." (XV App. 3788-94.) Approximately four to five weeks after the funeral, Mr. Snyder encountered the "epic" while searching his son's name on the Internet. (VIII App. 2129-30.)

In June 2006, Mr. Snyder sued WBC and the three adult members who picketed the funeral, seeking damages for the funeral picket and for posting the "epic." (I App. 0002, 0027.) The complaint alleged five counts: (1) defamation; (2) "publicity" given to private life; (3) intrusion upon seclusion; (4) intentional infliction of emotional distress; and (5) conspiracy. (*Id*.)

The district court granted summary judgment on the "publicity" and defamation claims (both claims based solely on the "epic") — the "publicity" claim because no private information was publicized, and the defamation claim because the challenged statements in the "epic" were not defamatory because they were Phelps-Roper's religious opinion, and would not tend to expose Mr. Snyder to public hatred or scorn. (V App. 1217-21, 1227-28.)

However, the district court rejected the Appellants' argument that the First Amendment barred the intrusion-upon-seclusion, intentional-infliction-of-emotional-distress, and conspiracy claims. The summary judgment hearing on these claims was focused on the funeral picket. In its bench ruling, the district court concluded that some of the picket signs commented on matters of public

concern and were therefore not actionable under the First Amendment. (V App. 1299.) Nevertheless, it denied summary judgment on the intrusion-upon-seclusion, intentional-infliction-of-emotional-distress, and conspiracy claims, and those claims proceeded to trial, because it concluded that the jury could find that other signs addressed only private matters, and could lawfully impose liability based on those signs. (V App. 1299, 1305-06.)

The trial court rejected Appellants' request to instruct the jury that liability could be based only on those signs that the court had indicated on summary judgment could be actionable because they arguably addressed matters of private, not public, concern. (XV App. 3822-26, 3833; XI App. 2875-79.) But instead, the jury was permitted to consider all of the picket signs and the entire "epic" in its deliberations.

The jury returned a verdict for Mr. Snyder on all three counts, awarding him $2.9 million in compensatory damages and $8 million in punitive damages (the latter award ultimately reduced by the court to $2.1 million). (XII App. 3136-41; XIII App. 3593.) The district court denied Appellants' various post-trial motions for judgment notwithstanding the verdict. (XIII App. 3544-98.) This appeal followed.

ARGUMENT

THE JUDGMENT IN THIS CASE VIOLATES THE FIRST AMENDMENT

Liability in this case was based on the *content* of Appellants' speech, as expressed on their picket signs and in their "epic." Had Appellants' signs or the "epic" read "God Loves You" and "God Bless America," instead of "God Hates You," and "God Hates the USA," there would have been no lawsuit. It is what Appellants *said* that formed the basis of the jury's finding of intentional infliction of emotional distress and intrusion upon seclusion. *Cf. Cohen v. California*, 403 U.S. 15, 18 (1971) (conviction of individual who peacefully displayed offensive message in a public place was necessarily based on "speech," not conduct).

Because this is a speech-based tort suit concerning the content of Appellants' speech, this case implicates the First Amendment's guarantee of free expression. Accordingly, the jury's verdict must be measured not just by state tort law, but by constitutional principles that limit a party's ability to recover damages based on speech.[2]

[2] There was no allegation in this case that Appellants' speech constituted obscenity or "fighting words," which are afforded "no protection" under the First Amendment. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985).

A. The First Amendment Bars Tort Liability For Opinions On Matters Of Public Concern

Beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court repeatedly has held that the First Amendment limits tort actions that seek damages based on speech. *Sullivan* held that to help secure the freedom of expression guaranteed by the Constitution, a public official cannot recover damages in a libel action without proving that a false statement was made with "actual malice" (i.e., knowledge that it was false, or reckless disregard of falsity). *Id.* at 279-80.

While *Sullivan* involved a public official, the Court later extended constitutional limits to defamation actions brought by private-figure plaintiffs seeking damages for speech on matters of public concern.[3] A private figure cannot recover presumed or punitive damages unless the challenged statement was made with actual malice as defined in *Sullivan*. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Further, a private figure cannot recover damages for speech on matters of public concern unless he or she proves that the challenged statement is false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).[4] Thus,

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[3] *Amici* assume for the purpose of this brief that Albert Snyder is a private figure, and take no position as to whether he is a public figure or limited-purpose public figure under the *Sullivan* line of cases.

[4] *Hepps* and other decisions following *Sullivan* involved media defendants. The Supreme Court has never expressly decided whether the principles announced in those cases apply also to non-media defendants. However, this Court has indicated

"a statement of *opinion relating to matters of public concern* which does not contain a provably false factual connotation will receive *full constitutional protection*." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (emphasis added). Also protected are "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual," including statements of "'imaginative expression'" and "'rhetorical hyperbole.'" *Id.* (citation omitted).

Underlying these limits on liability for speech on matters of public concern is the recognition that such speech occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (citations omitted). "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Id.* at 758-59 (citations omitted).

Although the Supreme Court has most often applied these First Amendment principles in defamation cases, it has expressly recognized that the same limitations on tort liability apply to suits alleging speech-based intentional infliction of emotional distress. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56

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in dicta that the same rules should apply to media- and non-media alike, *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1563-64 (4th Cir. 1994), and every circuit to decide the issue has so held. *See, e.g., Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (media/non-media distinction is "untenable"); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986) (en banc).

(1988). In *Falwell*, the Court confronted two competing interests: the state's interest in protecting its citizens from emotional harm by "outrageous" conduct on the one hand (there, a magazine parody stating that Jerry Falwell had incestuous relations with his mother), and the First Amendment's protection of speech on the other.

The Court rejected the court of appeals' view that "so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it [was] of no constitutional import whether the statement was fact or opinion, or whether it was true or false." *Id.* at 53. Instead, the Court held that "in the area of public debate about public figures," *id.*, the First Amendment barred tort liability for "outrageous" speech, where the speech at issue was an opinion and could not reasonably be interpreted as stating "actual facts" about an individual. *Id.* at 55, 57. To hold otherwise would "run[] afoul of [the Court's] longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Id.* at 55.

After *Falwell*, a plaintiff may not "recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claims." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999). Although *Falwell* involved a public-figure plaintiff, its rule also applies to private figures seeking damages for opinions on

matters of public concern. *See, e.g.*, *Deupree v. Iliff*, 860 F.2d 300, 304 (8th Cir. 1988) (*Falwell* precludes private-figure's emotional-distress claim based on defendant's opinion).[5] The *Falwell* rule applies to *any* tort in which the plaintiff seeks damages for injury to his "'state of mind'" based on the defendant's speech. *Food Lion*, 194 F.3d at 523 (citation omitted); *see id.* at 523-24 (applying *Falwell* rule to trespass and duty-of-loyalty claims seeking damages for reputational injury). Indeed, a contrary ruling would allow state tort law to evade the First Amendment's "full constitutional protection" for opinions on matters of public concern, *Milkovich*, 497 U.S. at 20, simply by recasting a defamation action under another tort — an impermissible "end run" around First Amendment strictures. *Food Lion*, 194 F.3d at 522.

In summary, controlling Supreme Court precedent holds that the First Amendment bars tort damages for the emotional impact of opinion speech on matters of public concern. Because, as we now proceed to explain, this is precisely what occurred in this case, the verdict must be reversed.

[5] *See also Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 127-28, 134 (1st Cir. 2000); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 880 (9th Cir. 1988), *abrogated on other grounds by Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Citizen Pub. Co. v. Miller*, 115 P.3d 107, 110-15 (Ariz. 2005). *See generally* 2 Rodney A. Smolla, *Law of Defamation* § 11:24 (2d ed. 2008).

B. The Jury Verdict Must Be Reversed Because Liability Was, Or At Least May Have Been, Based On Appellants' Opinion On Matters Of Public Concern

1. Principles Of Review.

The judgment must be reversed if Appellants' speech was (a) on matters of public concern and (b) constituted their opinions. *Milkovich*, 497 U.S. at 20. Moreover, if *any* of the speech is protected, the judgment must be reversed, because the jury's general verdict does not indicate what part of Appellants' speech that the trial court permitted the jury to consider was the basis for its verdict. (XII App. 3136-41.) *See Greenbelt Coop. Publ'g. Ass'n, Inc. v. Bresler*, 398 U.S. 6, 11 (1970) ("[W]hen 'it is impossible to know, in view of the general verdict returned' whether the jury imposed liability on a permissible or an impermissible ground 'the judgment must be reversed and the case remanded.'" (citation omitted)); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991) (same). Because it is a question of law, the district court erred when it allowed the jury to decide the "public concern" issue. On summary judgment, the district court ruled that some picket signs (e.g., "Don't Pray for the USA") were "directed to a nation" and therefore constitutionally protected, but held that that the jury could determine whether other signs were so protected, depending on whether the jury found that the signs were directed at the plaintiff personally. (V App. 1299, 1305-06.) At trial, the jury was permitted to consider all of the Appellants'

speech (even that which the district court had earlier found "protected"), and was instructed that if it found Appellants' speech "w[as] directed at private people and matters of private concern," the First Amendment did not prohibit liability. (XII App. 3113-14.)[6]

Finally, this Court must "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Milkovich*, 497 U.S. at 17 (internal quotation marks omitted); *see also, e.g.*, *In re Morrissey*, 168 F.3d 134, 137 (4th Cir. 1999) (same). "This requirement of independent appellate review is not a procedural directive, but, rather, 'a rule of federal constitutional law' that 'reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.'"

[6] The district court's First Amendment instruction read, in part: "[A] distinction has been drawn between matters of public and private concern. Where the speech is directed at private people and matters of private concern . . . the First Amendment interest in protecting particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury. You must balance the Defendants' expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. . . . [Y]ou as the judges of the facts in this case must determine whether the Defendant's actions were directed specifically at the Snyder family. If you do so determine, you must then determine whether those actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection." (XII App. 3113-14.)

Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997) (alteration in original) (quoting *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 510-11 (1984)).

2. Appellants' Speech Was On Matters Of Public Concern.

Whether speech is on a matter of public concern is a question of law which this Court can decide in the first instance on appeal. *See Dun & Bradstreet*, 472 U.S. at 761-63 (deciding public concern issue where lower courts had not ruled on the issue); *Levinsky's*, 127 F.3d at 134 ("[W]e have the authority to resolve public concern issues *ab initio* at the appellate level.").

"Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community," *Kirby v. City of Elizabeth City, N.C*, 388 F.3d 440, 446 (4th Cir. 2004)[7]—as opposed to "purely private" matters. *Dun & Bradstreet*, 472 U.S. at 759. "The public-concern inquiry centers on whether the public or the community is likely to be truly concerned with or interested in the particular expression." *Kirby*, 388 F.3d at 446 (citation and internal quotation marks omitted). Moreover, "the relevant community need not be very large and the relevant concern need not be of paramount importance or

[7] *Kirby* involved the issue of speech on public concern in the public-employment retaliation context. However, the Supreme Court has borrowed from public-employee cases in applying First Amendment principles in the defamation context, *see Dun & Bradstreet*, 472 U.S. at 759, as have the courts of appeal. *See Levinsky's*, 127 F.3d at 132.

national scope." *Levinsky's*, 127 F.3d at 132. Rather, "it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested." *Id.* (internal quotation marks omitted). Further, the offensive or controversial nature of the speech is irrelevant to the public-concern inquiry. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."); *Seemuller v. Fairfax County Sch. Bd.*, 878 F.2d 1578, 1583 (4th Cir. 1989). To decide the public-concern issue, this Court must consider the "'content, form, and context'" of the speech, as "'revealed by the whole record.'" *Dun & Bradstreet*, 472 U.S. at 761 (citation omitted).

a. Funeral picket.

Appellants' picket signs stated the following: "America is Doomed," "God Hates the USA/Thank God for 911," "Pope in Hell," "Fag Troops," "You're Going to Hell," "God Hates You," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "God's View/Not Blessed, Just Cursed," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." The signs expressed Appellants' viewpoints about the Catholic Church, including the Church's child sex-abuse scandal ("Pope in Hell," "Priests Rape Boys"); homosexuality and gays in the military ("Fag Troops," "Semper Fi Fags," "God Hates Fags"); and criticizing the United States in general ("America is Doomed," "God's View,"

"Don't Pray for the USA," and "God Hates the USA/Thank God for 911"). These are not "purely private" subjects, *Dun & Bradstreet*, 472 U.S. at 759; they are matters of "social [and] political" interest, *Kirby*, 388 F.3d at 446.

Appellants' testimony about the meaning of and motivation behind the signs further demonstrated that their speech was of public concern. *See Dun & Bradstreet*, 472 U.S. at 762 (motivation for speech relevant to public-concern issue); *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (same); *Levinsky's*, 127 F.3d at 133 (court may consider "speaker's subjective intent to contribute to any. . . public discourse" (alteration in original) (citation and internal quotation marks omitted)). Appellants testified that the signs expressed their sincerely held religious views that God is killing American troops as punishment for the nation's sins, including homosexuality, abortion, and divorce (VIII App. 2227, 2223, 2232; IX App. 2422-23, 2426); that God is perfect and must be thanked for everything, including the death of soldiers (IX App. 2414, 2421); and that God hates and will punish all sinners which, in Appellants' view, is the vast majority of Americans (IX App. 2372-73).

No matter how unpopular they may be, these are Appellants' religious beliefs and speak to critical social and political issues of the day. *See, e.g.*, *Acanfora v. Bd. of Educ. of Montgomery County*, 491 F.2d 498, 500-01 (4th Cir. 1974) (speech regarding homosexuality is matter of public concern); *Scarbrough v.*

Morgan County Bd. of Educ., 470 F.3d 250, 257 (6th Cir. 2006) ("speech on . . . religious views and on homosexuality are matters of public concern"); *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) ("[Plaintiff's] speech is religious expression and it is obviously of public concern."). Indeed, when similar statements have been made by prominent religious figures — as when Jerry Falwell and Pat Robertson stated that 9/11 was God's punishment for America's tolerance of homosexuality and abortion — these statements generated widespread media coverage and discussion. *See, e.g.*, Daniel Weintraub, *Falwell Says America Got What It Deserved*, The Sacramento Bee, Sept. 18, 2001, at B7; *cf. Tao v. Freeh*, 27 F.3d 635, 640 (D.C. Cir. 1994) (prior media coverage indicates issue is a matter of public concern).[8]

The context of Appellants' speech also establishes that it was of public concern. It is clear that the signs were not directed solely at the Snyders personally (which might have been indicative of the sort of "purely private" personal dispute

[8] A Google search further demonstrates that the issues Appellants spoke of are public issues and the subjects of intense popular discussion. A search of the terms "Catholic Church Sex Abuse Scandal" yields more than 2 million results; "Homosexuality and Sin" more than 400,000 results; and "Gays in the Military," more than 470,000 results. The issues were the subject of considerable news coverage at the time of the picket, and continue to be today. *See, e.g.*, Rachel Zoll, *Catholic Leaders Report 783 New Claims of Sex Abuse*, Fort Worth Star-Telegram, Mar. 31, 2006, at A7; Marie Cocco, *End Bias Against Gays in Military*, Albany Times Union, Mar. 6, 2006, at A7; Rachel Stassen-Berger, *1,000 Gather to Protest Gay Marriage*, St. Paul Pioneer Press, Mar. 21, 2006, at 1A.

of less constitutional import, *see Mutafis v. Erie Ins. Exch.*, 775 F.2d 593, 595 (4th Cir. 1985)). The funeral picket was one of more than 30,000 pickets Appellants have conducted over the past 17 years, in accordance with their belief that it is their religious duty to demonstrate in this manner. (VIII App. 2222; IX App. 2420, 2430, 2467.) Appellants did not know the Snyders, and they brought the same signs to two other pickets that day, at the Naval Academy and the Maryland legislature. (IX App. 2358, 2404.) When this context is considered, it is obvious that signs such as "You're Going To Hell," "God Hates You," and "Thank God for Dead Soldiers" were not invective towards Mr. Snyder personally, as the district court appeared to believe, but were statements to all passersby of Appellants' religious view that Americans are sinners and are suffering, and will continue to suffer, God's wrath unless they change. (IX App. 2372-73.)

Finally, the form of Appellants' speech reflects that it was of public concern. In general, speech is not of public concern if it is made privately or to a limited audience. *See Dun & Bradstreet*, 472 U.S. at 762 (credit report was not of public concern, in part because it was available to only five subscribers who were prohibited from distributing it further); *Mutafis*, 775 F.2d at 595 (inter-office memorandum for use by only certain employees was not of public concern). Unlike such "private" speech, Appellants' speech here was meant to reach the broadest possible audience. (VIII App. 2214-15.) Moreover, their speech took the

form of a picket on a public street — a quintessential public forum where expressive activity must be afforded the greatest First Amendment protection. *See Boos v. Barry*, 485 U.S. 312, 318 (1988) ("[P]ublic streets and sidewalks [are] traditional public fora that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" (citation omitted)); *Tompkins v. Cyr*, 202 F.3d 770, 780 & n.4 (5th Cir. 2000) (tort damages cannot be imposed for peaceful picketing activity in public fora).

b. The "epic."

Much of the foregoing about the picket signs applies equally to the "epic." To begin, the "epic" is Appellants' account of the funeral demonstration that they wrote and posted on their church's website a few weeks after the picket, and consists of Bible passages interspersed with statements discussing the funeral picket and other issues.

Some of the statements in the "epic" mention the Snyders by name, but even these are interspersed with statements about Appellants' religious, social, and cultural views. For instance, the "epic" states: "[The Snyders] taught [Matthew] how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity."; "They also, in supporting satanic Catholicism, taught Matthew to be an idolator."; "[T]hey sent him to fight for the United States

of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him on the cross hairs of a God that is so mad he has smoke coming from his nostrils. . . .”; “God rose up Matthew for the very purpose of striking him down, so that God’s name might be declared throughout all the earth . . . ; so that His servants would have an opportunity to preach His words to the U.S. Naval Academy at Annapolis, the Maryland Legislature, and the whorehouse called St. John Catholic Church . . . .” (XV App. 3788-94.)

Beyond the reference to the Snyders, the “epic” contains more general statements: “It will be more tolerable for Sodom and Gomorrah in the Day of Judgment than for the people of Maryland”; “[W]e criss-cross this nation daily, reminding you that if you would turn from your wicked ways, God will bless you; and if not, he will continue to curse you. . . .”; “[T]he Maryland Legislature (THINK: TALIBAN) is setting about to pass a law attempting to shred the First Amendment. Their purpose is simple: it is to blot out the word of God from the landscape. In response, God will blot out their young men.”; “Maybe the Maryland legislature can pass a law abolishing hell and preventing God from killing any more of their young men.” (*Id.*)

Although the content of much of the “epic” would, understandably, be considered offensive or controversial by many people, and is contrary to the ACLU’s own views on these issues, it nevertheless speaks to issues of public

concern when viewed as a whole. *Cf. Rankin*, 483 U.S. at 387 (inappropriate or controversial nature of speech irrelevant to public-concern inquiry). Statements criticizing Catholicism and the Church's sex-abuse scandal, or calling the United States a wicked and sinful nation, or criticizing the Maryland legislature for passing a law "shred[ding] the First Amendment,"[9] address social and political matters of public concern, not "purely private" matters. *Dun & Bradstreet*, 472 U.S. at 759.

Even the statements that mention the Snyders by name do not merely address purely private matters but, in context, serve as examples illustrating Appellants' broader points. That connection is readily apparent, for example, in the statement that Matthew's death provides Appellants with "an opportunity to preach [God's] word to the Naval Academy at Annapolis, and the Maryland Legislature," which Appellants in fact picketed on the same day as Matthew's funeral. Consistent with that contextual understanding, Appellants testified that the reference to the Snyders "hating" Matthew and "rais[ing] him for the devil" meant that by allowing him to fight for America ("God's enemy," in Appellants' view) and by not following the literal teaching of the Bible, they were invoking God's wrath. (IX App. 2422-30.) However unpopular, these are Appellant's

[9] The law Appellants were referring to is Maryland's subsequently passed ban on picketing within 100 feet of a funeral. Md. Code Ann., Crim. Law § 10-205(c).

sincerely held religious views about social and political issues, and, as such, address matters of public concern. *See, e.g., Scarbrough,* 470 F.3d at 257; *Tucker,* 97 F.3d at 1210.[10]

3. Appellants' Statements Were Their Opinion.

The First Amendment requires that statements on matters of public concern must, at a minimum, be provable as false in order to be actionable. *Hepps*, 475 U.S. at 777-78. Because an opinion cannot be proved true or false, a corollary to this principle is that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive *full constitutional protection.*" *Milkovich*, 497 U.S. at 20 (emphasis added). This is not a matter of state tort law; it is a constitutional requirement necessary to ensure that "debate on public issues remains 'uninhibited, robust, and wide open.'" *Id.* (citation omitted); *see also Falwell*, 485 U.S. at 56. If this Court finds that Appellants' speech was their opinion on matters of public concern, it is fully protected under the First Amendment.

Whether speech is an opinion or fact is a question of law. *See Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 n.12 (4th Cir.

[10] Of course, even statements on matters of public concern can cause personal pain, and *amici* certainly do not question the sincerity of Appellees' response to the statements at issue here.

1987). The district court's ruling that the issue presents a question of fact (I App. 0098) was therefore error.

In determining whether a statement expresses an opinion, the Court considers "the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made." *Lapkoff v. Wilks*, 969 F.2d 78, 82 (4th Cir. 1992). If a "'defendant's words cannot be described as either true or false,'" they are non-actionable opinion. *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 183 (4th Cir. 1998) (citation omitted).

Appellants' picket signs contained only such "opinions" — indeed, in the district court, Appellee never contended otherwise. None of what was written on the picket signs can be proved or disproved, or described as true or false. This speech is Appellants' religious opinion, the sort of "'rhetorical hyperbole'" which the Supreme Court has long held is protected under the First Amendment." *Milkovich*, 497 U.S. at 20 (citation omitted).[11]

[11] Appellants argued repeatedly in the district court that *all* of their speech was protected opinion, (*e.g.*, I App. 0052, 0220; IV App. 1153), but the district court apparently did not address the issue with respect to the statements on the picket signs. Nevertheless, this Court can decide the issue on appeal in the first instance without remanding, both because it is a question of law whose resolution is clear, and pursuant to the Court's constitutional obligation to "'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . .

The same is true with respect to the "epic." Indeed, the district court held as much in rejecting Appellee's defamation claim based on the "epic," on the ground that the challenged statements therein were Appellants' "religious opinion" which did not contain implied assertions of fact. (V App. 1220-21.)

The district court's finding of "opinion" was correct. Under the circumstances of this case, statements in the "epic" that Mr. Snyder raised his son "for the devil" and taught him "to defy his Creator, to divorce, and to commit adultery" (the only statements Appellee contended were actionable (V App. 1212-13)), are best understood as "'loose, figurative, or hyperbolic language which would negate the impression that the writer' was stating fact." *Biospherics*, 151 F.3d at 184 (quoting *Milkovich*, 497 U.S. at 21).

This becomes clear when the "context and 'general tenor'" of the "epic" is considered, as it must be. *Id.* (citation omitted). The "epic" is replete with Bible passages discussing sin and other religious matters, and was posted on a church website — not the sort of publication in which one reasonably would expect assertions of fact, rather than religious belief, to be discussed. *Cf. Potomac Valve*, 829 F.2d at 1290 (holding that statement in an industry newsletter was an opinion, in part because the newsletter was not the sort of publication one would expect to

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protect.'" *Sullivan*, 376 U.S. at 285 (1964) (citation omitted); *see also Milkovich*, 497 U.S. at 17.

contain a "dispassionate and impartial assessment" of the matters discussed therein).

As for the remainder of the epic, it cannot seriously be contested that statements such as the Catholic Church is a "satanic" "pedophile machine"; America ("the United States of Sodom") is a "filthy" country; the Maryland legislature is like the "Taliban"; and the other similar statements are anything other than the Appellants' subjective beliefs, not statements of fact.

Accordingly, this Court should hold that all of Appellants' speech in this case was non-actionable opinion.

4. The Verdict Must Be Reversed.

For the reasons just discussed, this Court should find that all of Appellants' speech in this case was their opinion about matters of public concern. As such, it was "full[y] . . . protect[ed]" under the First Amendment, and should never have gone to the jury. *Milkovich*, 497 U.S. at 20.

However, if the Court determines that only some, but not all, of the speech was protected public-concern opinion, the verdict must still be reversed, because there is no way to know whether the jury impermissibly based its verdict on speech that is protected under the First Amendment. At trial, and over Appellants' objections, the district court allowed the jury to consider all of the statements on the signs and in the "epic" (even the speech the district court had earlier indicated

was "protected"), and rejected Appellants' request that the verdict sheet require the jury to indicate which statements in the case it found actionable. (XI App. 2875-79; XV App. 3837-40.) Allowing the jury to consider all of Appellants' speech is especially problematic in cases like this one because juries are "'unlikely to be neutral with respect to the content of speech and hold[] a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail.'" *Bose*, 466 U.S. at 510 (1984) (citations omitted).

Because it was permitted to consider all of Appellants' speech in its deliberations and was not required to indicate what speech it found actionable, liability in this case could have based solely on the jury's strong disagreement with statements on the signs like "Pope In Hell," "America is Doomed," and "God Hates America," or references in the "epic" to Catholicism as a "satanic" faith and a "pedophile machine," and to the United States as the "United States of Sodom" and a "filthy country" — statements which unquestionably state opinions on matters of public concern. Therefore, because "'it is impossible to know, in view of the general verdict returned' whether the jury imposed liability on a permissible or an impermissible ground 'the judgment must be reversed and the case remanded.'" *Bresler*, 398 U.S. at 11.

CONCLUSION

The district court's judgment should be reversed and judgment entered for Appellants.

Dated: June 25, 2008

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1026 **Caption:** Snyder v. Phelps, et al.

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