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

BRIEF OF *AMICUS CURIAE* JEFFREY I. SHULMAN IN SUPPORT OF APPELLEE

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No. __08-1026____ Caption: _____Albert Snyder v. Fred Phelps, Sr., et al._____

Pursuant to FRAP 26.1 and Local Rule 26.1,
____Jeffrey I. Shulman_____ who is _____Amicus_____,
(name of party/amicus) (appellant/appellee/amicus)
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If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? NO

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5. Is party a trade association? (amici curiae do not complete this question)

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. Does this case arise out of a bankruptcy proceeding? NO

If yes, identify any trustee and the members of any creditors' committee:

_____s/ Jeffrey I. Shulman_____ July 30, 2008_____

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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.

INTEREST OF THE *AMICUS CURIAE*

Jeffrey Shulman teaches law at the Georgetown University Law Center.* He teaches and writes on law and religion, among other subjects. His publications include *What* Yoder *Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 Villanova Law Review 173 (2008) and *Spiritual Custody: Relational Rights and Constitutional Commitments*, 7 Journal of Law & Family Studies 317 (2005). The subject matter of this brief--whether and to what extent religious entities are constitutionally protected from tort liability for religiously motivated conduct--involves contested issues of constitutional law about which *amicus* is currently teaching and writing. He addresses the subject in his most recent publication, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, which will be published in the Penn State Law Review. *Amicus* believes that this case presents the Court an opportunity to affirm the principle that religious entities may be held liable for tortious conduct even if that conduct is religiously motivated. To hold otherwise

*University affiliation is provided for identification purposes only.

would permit every religious entity to become a law unto itself. The adjudication of tort claims arising from religiously motivated conduct does not require intermeddling--constitutionally impermissible intermeddling--in ecclesiastical affairs. Indeed, far from threatening the expressive liberty of religious entities, the neutral and generally applicable principles of tort law work to ensure a civic order where all people are equally free to express their deepest beliefs, whether that freedom lies in the right to disseminate religious belief or in the right of the captive listener to be free from unwanted and offensive religious advocacy.

I. SUMMARY OF ARGUMENT

Matthew Snyder was not a member of the Westboro Baptist Church, nor was he in any way connected to the activities of the Westboro Baptist Church. He had never met the Defendants, never made a public statement about the Defendants or their religious viewpoint and activities--indeed, there is nothing to suggest that prior to his death Matthew had ever heard of the Westboro Baptist Church. In short, as far as Defendants were concerned, Matthew Snyder was a complete stranger to the Church. Yet Defendants targeted Matthew and his family during a time of bereavement for a campaign, as described by the United States District Court for the District of Maryland, of personal verbal assault. *See Snyder v. Phelps*, 533 F. Supp. 2d 567, 579 (D. Md. 2008). Defendants would now have this Court afford heightened constitutional protection under the Free Exercise Clause to their confrontational acts, no matter how outrageous or intrusive, and no matter how compelling the government's interest in protecting its private citizens from such hurtful activity.

No court has held that the Free Exercise Clause reaches so far. Whatever immunity religious entities enjoy from tort liability is based on the principle that members consent to abide by the beliefs and practices of the religious groups with which they choose to affiliate. What the Constitution protects is "[t]he right to organize voluntary religious associations." *Watson v. Jones*, 80 U.S. (13 Wall.)

679, 728 (1871). Of course, this right includes the freedom of religious advocacy, a right that may even allow the "vilification of men who have been, or are, prominent in church or state." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). What Defendants seem to want, however, is the right to make any private individual the target of personal verbal confrontation--and to do so with impunity "[u]nder the banner of the First Amendment provisions on religion." *Madsen v. Erwin*, 481 N.E.2d 1160, 1167 (Mass. 1985). The district court properly rejected this proposition, relying on the well-settled principle that "the First Amendment does not afford absolute protection to individuals committing acts directed at other private individuals." 533 F. Supp. 2d at 570. Indeed, no court has suggested that religious entities can treat private non-members as though they had consented to ecclesiastical governance and discipline.

The district court's decision was entirely consistent with an abundant body of case law teaching 1) that religious entities are not beyond the reach of civil law, *see, e.g., Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79 (1990) (religious beliefs do not excuse failure to comply with valid law); *Watson v. Jones*, 80 U.S. (13 Wall.) at 728-29 (religious freedom includes right to express and disseminate religious doctrine "*which does not violate the laws of morality and property, and which does not infringe personal rights*") (emphasis added), and 2) that religious entities are not immune from all tort claims arising out

of religiously motivated conduct, *see, e.g., Van Schaick v. Church of Scientology of Cal.*, 535 F. Supp. 1125, 1135 (D. Mass. 1982) ("Causes of action based upon some proscribed conduct may . . . withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose."); *see also Turner v. Unification Church*, 473 F. Supp. 367, 371 (D.R.I. 1978); *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 762 P.2d 46, 56-63 (Cal. 1988); *Hester v. Barnet*, 723 S.W.2d 544, 552 (Mo. Ct. App. 1987); *Meroni v. Holy Spirit Ass'n for the Unification of World Christianity*, 506 N.Y.S.2d 174, 176 (N.Y. 1986). The law is clear on this point: holding religious entities liable in tort for religiously motivated conduct need not infringe individual religious rights or the institutional autonomy of religious entities.

Nothing in this case requires the Court to retreat from the First Amendment principle that civil courts should not "intermeddle in internal ecclesiastical disputes." *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 330 (4th Cir. 1997); *see also Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 709 (1976); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871). The outcome of this dispute can be determined by the neutral and generally applicable principles of tort law. But where the common law provides a remedy to protect the privacy

of a grieving family against egregiously hurtful conduct, Defendants would invoke a constitutional license to invade, with unwanted speech of a personally offensive nature, the sanctuary traditionally set aside for the most painful of familial moments. This Court should reject any suggestion that the Constitution provides Defendants with such a privilege.

The district court followed longstanding legal precedent in imposing tort liability based on Defendants' conduct in the exercise of its religious beliefs.[1] 533 F. Supp. 2d. at 579. Where, as here, that conduct consists of personally demeaning remarks thrust upon private individuals who are captive to special circumstances, the courts may adjudicate tort claims without fear of sacrificing First Amendment rights. The district court correctly concluded that personal invective does not gain in constitutional stature merely because it is "delivered in the milieu of religious practice." *Hester v. Barnett*, 723 S.W.2d at 559.

No matter what degree of protection, if any, the Constitution affords Defendants' conduct, the state has a compelling interest in protecting the privacy of families, especially military families, during a time of bereavement. That interest justifies the imposition of tort liability to deter confrontational misconduct aimed at disrupting a private moment of mourning. *Cf. Hill v. Colorado*, 530 U.S.

[1] It is not clear that Defendants' conduct should be construed as an exercise of its religious beliefs. *See* Appellee's Brief at 10-11, *Snyder v. Phelps*, No. 08-1026 (4th Cir. July 21, 2008).

703, 715 (2000) (state's interest in health and safety of citizens "may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests"); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 768 (1994) (targeted picketing of a hospital or clinic threatens psychological well-being of the patient held captive by medical circumstance); *Frisby v. Schultz*, 487 U.S. 474, 486-87 (1988) (devastating effect of targeted picketing is beyond doubt); *Carey v. Brown*, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting) (targeted residential picketing causes psychological tensions and pressures) (citing *City of Wauwatosa v. King*, 182 N.W.2d 530, 537 (Wis. 1971)). The state's interest in preserving the sanctity of family privacy during funeral services is compelling enough under ordinary circumstances. It can only be more so in the case of a fallen soldier.

II. ARGUMENT

A. The Free Exercise Clause does not afford heightened protection to acts of personal verbal confrontation directed against private individuals who have not chosen to submit to ecclesiastical governance or against private individuals who are unwilling listeners held captive by special circumstances.

1. The Free Exercise Clause does not afford heightened protection to acts of personal verbal confrontation directed against private individuals who have not chosen to submit to ecclesiastical governance.

The district court determined that Defendants seek, as part of their religious practice, to subject non-members--that is, private individuals unaffiliated in any

way with the Westboro Baptist Church--to acts of personal verbal assault, and to do so when these non-members are subject to great emotional vulnerability. 533 F. Supp. 2d at 579 ("[T]his case involves . . . the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement."). While Defendants enjoy the freedom to spread a religious message, they may not, as the district court rightly observed, "impose their will on the unwilling and claim immunity from secular judicature for their tortious acts." *Id.* at 580 (quoting *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 779 (Okla. 1989)). "The First Amendment requires that citizens be tolerant of religious views different from and offensive to their own . . . ." *Guinn*, 775 P.2d at 779 (footnote omitted); *see also Cantwell*, 310 U.S. at 310; *cf. Cohen v. California*, 403 U.S. 15, 24-25 (1971). But "it surely does not require that those . . . who choose not to submit to the authority of any religious association, be tolerant of that group's attempts to govern them." *Guinn*, 775 P.2d at 779. The Free Exercise Clause does not afford Defendants a license for confrontational acts personally targeting private individuals who are not affiliated with or connected to the Westboro Baptist Church.

Those who belong to a religious entity consent to submit to its authority, and for this reason religious associations enjoy a constitutional shield against some judicial inquiries. *See, e.g.*, *Watson v. Jones*, 80 U.S. (13 Wall.) at 728-29. Thus,

conduct taken by a religious entity against a current member may be constitutionally protected,[2] provided, of course, that such conduct does not "constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention." *Paul v. Watchtower Bible & Tract Soc'y of N.Y.*, 819 F.2d 875, 883 (9th Cir. 1987). "When people voluntarily join together in pursuit of spiritual fulfillment, the First Amendment requires that the government respect their decision and not impose its own ideas on the religious organization." *Guinn*, 775 P.2d at 774; *see also Paul*, 819 F.2d at 883 ("Courts generally do not scrutinize closely the relationship among members . . . of a church."); *cf. Meroni*, 506 N.Y.S.2d at 178 (dismissing emotional distress action against religious entity because church member "chose to subject himself to the church's discipline").

But only those who freely choose to unite themselves in religious association are bound to submit to it. Thus, once a member withdraws consent, the shield of constitutional privilege is lost. *See Guinn*, 775 P.2d at 781 ("[T]he First Amendment will not shield a church from civil liability for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not

[2] Of course, not all religiously motivated conduct is protected even if it is based on the consent of current members. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding conviction for violation of child labor laws); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding constitutionality of law requiring vaccinations for communicable diseases); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding law against polygamy).

consented to undergo ecclesiastical discipline."). *But cf. Paul*, 819 F.2d at 883 (holding that members of church are free not to associate with former member). By the same measure, if a religious entity has undermined a member's capacity to consent, it forfeits any claim of constitutional immunity. *See Molko*, 762 P.2d at 54, 56-63 (reversing summary judgment for church on emotional distress claim where atmosphere of coercive persuasion rendered plaintiffs incapable of deciding not to join church); *Wollersheim v. Church of Scientology of Cal.*, 66 Cal. Rptr. 2d. 1, 7-19 (Cal. Ct. App. 1989) (affirming emotional distress judgment for plaintiff where church conducted religious practices in coercive environment).

The rationale for judicial abstention is especially weak when the court is not asked to resolve an intra-church dispute. *See Gen. Council on Fin. & Admin. of the United Methodist Church v. Super. Ct. of Cal.*, 439 U.S. 1355, 1372-73 (Rehnquist, Circuit Justice 1978) (judicial abstention is "premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs"); *see also Paul*, 819 F.2d at 878 n.1 (where plaintiff seeks relief for harms suffered as a result of conduct that is presumably consistent with governing law of religious entity, "doctrine of *Serbian Orthodox Diocese* does not apply"); *Guinn*, 775 P.2d at 773 (where controversy is concerned with tortious nature of religiously motivated acts and not with their conformity to church

doctrine, "justification for judicial abstention is nonexistent"). It is not disputed that Defendants' confrontational practices are consistent with the beliefs of their church: no intra-church dispute exists here. Thus, this Court need only consider whether Defendants' conduct is of a type so egregiously outrageous and intrusive that a decent society need not tolerate it.

The resolution of this question does not require the court "to intermeddle in internal ecclesiastical disputes." *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d at 330. This case is not an ecclesiastical one. It does not ask the Court to render a decision about "'discipline, faith, internal organization, or ecclesiastical rule, custom or law.'" *Id.* at 331 (quoting *Serbian E. Orthodox*, 426 U.S. at 713). The Court need not "second-guess ecclesiastical decisions made by hierarchical church bodies." *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808, 811 (Md. Ct. Spec. App. 1996) (citing *Serbian E. Orthodox*, 426 U.S. at 724-25). The Court need not determine "the correctness of an interpretation of canonical text or some decision relating to government of the religious polity." *Paul*, 819 F.2d at 878 n.1. Nor does this case ask the court to decide whether or not Defendants are correct that "God hates fags." *See United States v. Ballard*, 322 U.S. 78 (1944) (courts will not inquire as to the truth or falsity of religious beliefs). This case is about Defendants' conduct: whether that conduct must conform to neutral and generally applicable laws or whether that conduct--and, by extension, all

religiously motivated conduct--is superior to the law of the land. *See Smith*, 494 U.S. at 879 (to make religious practices superior to the law of the land would permit every citizen "'to become a law unto himself'") (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).[3]

"[C]ourts do not inhibit the free exercise of religion by applying neutral principles of law to a civil dispute involving members of the clergy." *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1225 (Me. 2005); *cf. Jones v. Wolf*, 443 U.S. at 606 (a "neutral-principles approach" to dispute over ownership of church property does not frustrate exercise of religious rights); *Hull Church*, 393 U.S. at 449 (same). Those principles preserve public order and thus ensure a robust marketplace for religious controversy. Those principles also ensure that the adjudication of tort claims against religious entities can be made according to objective measures of misconduct. *See, e.g.*, *Smith v. O'Connell*, 986 F. Supp. 73, 80 (D.R.I. 1997) (in civil action against church, finding that "there is no question that the principles of tort law, at issue, are both neutral and generally applicable"). Nor does tort liability place a special burden on Defendants' religious practice. True, the Westboro Baptist Church would be subject to suit if its religious

[3] Even if this Court were to apply strict scrutiny to this case under a "hybrid rights" theory, *see Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881-82 (1990), the state's interest in preserving the privacy and well-being of military families during a time of bereavement is sufficiently compelling to withstand heightened scrutiny. *See infra* Part II.B.

advocacy amounts to tortious conduct. So would any other religious group. Or any other non-religious group. To the extent that Defendants are obligated not to commit tortious acts, the burden they suffer is the incidental effect of a neutral and generally applicable rule of law. *See Smith*, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'") (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

There is no doubt that Defendants' right of religious advocacy is subject to limitation. *See, e.g.*, *Hill v. Colorado*, 530 U.S. at 716 ("[T]he protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.") (citing *Frisby*, 487 U.S. at 487); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (restrictions on speech are warranted when it is impractical for the unwilling viewer or auditor to avoid exposure). Those limits operate whenever activities "begin to affect or collide with liberties of others or of the public." *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment). The Westboro Baptist Church is free to advocate for its religious viewpoint. It may be free to require that its members refrain from association with Matthew Snyder and his family. *Compare Paul*, 819 F.2d at 883-84 (practice of shunning is protected by Free Exercise Clause) *with Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107-08

(Pa. 1975) (shunning may endanger paramount state interests). But it is not free to commit torts on religious grounds. To hold otherwise would permit every religious entity truly to become a law unto itself.

2. The Free Exercise Clause does not afford heightened protection to acts of personal verbal confrontation directed against private individuals who are unwilling listeners held captive by special circumstances.

Defendants' campaign against the Snyder family is not the kind of activity protected by the Free Exercise Clause. To be sure, this case involves a claim based on the conduct of a religious group. But it is well settled that religious entities are not immune from all tort claims arising out of religiously motivated conduct. *See, e.g.*, *Van Schaick*, 535 F. Supp. at 1135 (tort liability may be upheld "even if alleged wrongdoer acts upon a religious belief or is organized for a religious purpose"); *Turner*, 473 F. Supp. at 371-72 (religious activities "not solely in ideological or intellectual realm" are subject to tort liability); *see also, e.g.*, *Molko*, 762 P.2d at 57 (courts will recognize tort liability even for acts that are religiously motivated); *Hester v. Barnet*, 723 S.W.2d at 552 (torts of a cleric are actionable, even though incidents of religious practice and belief); *Meroni*, 506 N.Y.S.2d at 176 (church may be held liable for tortious conduct, even if that conduct is carried out as part of the church's religious practices); *Carrieri v. Bush*, 419 P.2d 132, 137 (Wash. 1966) (church members not entitled, "under the guise of exercising religious beliefs," to interfere wrongfully with familial relationships).

While Defendants are free to spread their religious message, they are not free to do so in a way that infringes the personal rights of private individuals.[4] In *Cantwell*, the Supreme Court considered the tension between the right of religious advocacy and the power of the state to prevent "a great variety of conduct destroying or menacing public order and tranquility." 310 U.S. at 308. The Court reasoned that there had been no breach of the peace because Cantwell 1) used no coercive means to spread his message, *id.* at 301, 308, and 2) used no personal abuse "intended to insult or affront the hearers," *id.* at 309. Of particular importance to the Court were the facts that Cantwell sought to persuade "willing listener[s]" and that his advocacy involved "no truculent bearing, no intentional

[4] The district court concluded that it was Defendants who thrust the Snyder family into the unwelcome glare of national media coverage, "transform[ing] a private funeral into a public event." 533 F. Supp. 2d at 577. The fact that Matthew's funeral attracted public attention does not make him a public figure. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979). Defendants' reasoning would in effect nullify the Supreme Court's precedents that establish the contours of the public figure doctrine. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *cf. St. Luke Evangelical Lutheran Church v. Smith*, 537 A.2d 1196, 1202-04 (Md. Ct. Spec. App. 1988) (plaintiff's objection to pastor at church meeting does not render her a public figure) (citing *Gertz* and *Firestone*). If there is no evidence that Matthew or his family assumed a prominent role in public controversy, *see Gertz.*, 418 U.S. at 351, or that the Snyders sought to use Matthew's funeral "as a fulcrum to create public discussion," *see Wolston*, 443 U.S. at 168, the district court rightly rejected Defendants' attempt to "bootstrap their position by arguing that Matthew Snyder was a public figure," 533 F. Supp. 2d at 577.

discourtesy, no personal abuse." *Id.* at 310. On these facts, Cantwell "had invaded no right or interest . . . of the men accosted." *Id.* at 309. The Court hastened to distinguish speech that *would* amount to a breach of the peace because it "consisted of profane, indecent, or abusive remarks directed to the person of the hearer." *Id.*

> Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Id. at 309-10; *cf. Cohen v. California*, 403 U.S. at 20 ("While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.'") (quoting *Cantwell*, 310 U.S. at 309).

Following *Cantwell*, the Court has affirmed the principle that "'not all speech is of equal First Amendment importance.'" *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758 (1985)); *cf. F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (content that is "vulgar," "offensive," or "shocking" is not entitled to absolute constitutional protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (prevention and punishment of "insulting" words which by their very utterance inflict injury is constitutionally permissible). It remains true that mere personal vilification of private citizens does not communicate information or opinion safeguarded by the Constitution. The district court adhered to this

principle by distinguishing between acts that expressed general points of view and those that expressed particularized and personal messages "that could reasonably be interpreted as being directed at the Snyder family." 533 F. Supp. 2d at 577; *cf. Madsen*, 512 U.S. at 769 ("We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation."); *Frisby*, 487 U.S. at 486 ("The type of focused picketing prohibited by the [city] ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas.").

Defendants not only resorted to language intended to insult and affront, but they did so, at least in part, when the grieving family was held captive by special circumstances. The Supreme Court has said that "*in public debate* our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment,'" *Boos v. Barry*, 485 U.S. 312, 322 (1988) (emphasis added) (quoting *Hustler*, 485 U.S. at 56); but there are "narrow circumstances"--where the speaker intrudes on the privacy of the home, or where "*the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure*"--that call for a mechanism to shut off outrageous discourse and to hold responsible those whose words inflict

tortious injury, *Erznoznik*, 422 U.S. at 209-10 (emphasis added).[5] When speech is forced upon "an audience incapable of declining to receive it," *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring), the Court has not hesitated to uphold the regulation of expressive activity. *See Hill v. Colorado*, 530 U.S. 703 (2000); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994); *Frisby v. Schultz*, 487 U.S. 474 (1988); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Packer Corp. v. Utah*, 285 U.S. 105 (1932); *cf. Cohen v. California*, 403 U.S. 15, 21 (1971) (persons confronted with defendant's jacket bearing the words "Fuck the Draft" could have avoided "further bombardment of their sensibilities simply by averting their eyes"); *Collin v. Smith*, 578 F.2d 1197, 1207 (7th Cir. 1978) (residents could "simply avoid" Nazi-affiliated party protest activities).

"'That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.'" *Frisby*, 487 U.S. at 484 (quoting *Rowan*, 397 U.S. at 738). The Supreme Court has

[5] The captive audience doctrine is often described as addressing a conflict of constitutional rights, *see, e.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (weighing petitioner's right to express his views against the rights of captive audience to be free from forced intrusions on privacy), but it is better understood as reflecting basic common law tort principles, *see, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 717 n.24 (2000) (characterizing "right to avoid unwelcome speech" as a common-law "'interest' that States can choose to protect in certain situations").

applied by analogy the state's interest in protecting residential privacy to other settings where the unwilling auditor cannot avoid exposure to offensive remarks. *See Madsen*, 512 U.S. at 768 (citing *Operation Rescue v. Women's Health Ctr.*, 626 So. 2d 664, 672 (Fla. 1993)) ("We conclude that the reasoning underlying this government interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy."); *cf. Tompkins v. Cyr*, 995 F. Supp. 664, 681 n.10 (N.D. Tex. 1998) ("The Court is troubled by the notion that a person may be subjected to focused picketing at their place of worship. Indeed, the right to engage in quiet and reflective prayer without being subjected to unwarranted intrusion is an essential component of freedom of religion."); *St. David's Episcopal Church v. Westboro Baptist Church*, 921 P.2d 821, 830 (Kan. Ct. App. 1996) ("[I]n addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well."). *But see Olmer v. City of Lincoln*, 192 F.3d 1176, 1182 (8th Cir. 1999) ("Allowing other locations, even churches, to claim the same level of constitutionally protected privacy [as residences] would, we think, permit government to prohibit too much speech and other communication.").

Surely, the reasoning that protects residential and medical privacy applies with great force to the momentary sanctuary afforded the family in mourning. "[M]ourners are a captive audience unable to avoid communications simply by

averting their eyes . . . .” *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 619 (N.D. Ohio 2007); *see also McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006) (“A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, *funeral attendees are captive*.”) (emphasis added). *But see Phelps-Roper v. Nixon*, 509 F.3d 480, 486-87 (8th Cir. 2007) (no significant state interest in protecting funeral attendees). If there are places outside the home where we need not be held captive to verbal confrontation, the setting where we mourn the dead certainly must be one. No fair reading of the Free Exercise Clause or the relevant case law even remotely suggests that religious entities are privileged to intrude upon that setting to disrupt the private grief of families in mourning.

B. The state has a compelling interest in protecting families, especially military families, from acts of verbal confrontation during a time of bereavement.

No matter what degree of protection, if any, the Constitution affords Defendants’ conduct, the state’s interest is a compelling one. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (governmental regulation of conduct prompted by religious beliefs is permissible when such conduct poses “some substantial threat to public safety, peace or order”). The state has a compelling interest in

preserving the privacy of families, especially military families, during a time of bereavement. Matthew Snyder died in service to his country, but the injuries that took his life left a legacy of trauma for his family. While the Snyder family, like other private military families, cannot avoid contentious discussion of public issues, tort liability can provide these families a narrowly tailored remedy in the law against the most egregious examples of personally offensive and intrusive conduct. *See, e.g.*, *Molko*, 762 P.2d at 60-61 (allowing injured parties to bring private actions for fraud is least restrictive means available for advancing state's interest in protecting individuals and families).

The state has a paramount interest in protecting families during a time of bereavement from the "'tensions and pressures . . . inimical to family privacy'" that arise from personal verbal confrontations. *Carey v. Brown*, 447 U.S. at 478 (Rehnquist, J., dissenting) (describing the psychological stress that results from targeted residential picketing) (quoting *Wauwatosa*, 182 N.W.2d at 537); *cf.* *Molko*, 762 P.2d at 60 (state has a compelling interest in protecting families from coercive religious advocacy). For all families in mourning, disruptive confrontation cannot but exacerbate the trauma of a loved one's death; and for

military families, having already endured the anxiety that accompanies wartime service, such conduct can only make that trauma even more stressful.[6]

The captive audience doctrine protects the psychological well-being of those who cannot escape unwanted speech. *See Madsen*, 512 U.S. at 768 (targeted picketing of a hospital or clinic threatens psychological well-being of the patient "held 'captive' by medical circumstance"); *Frisby*, 487 U.S. at 486-87 (targeted picketing of the home threatens the psychological well-being of the "captive" resident). The psychological tensions and pressures that arise from targeted residential picketing are equally present, and equally hurtful, when offensive communication is forced upon unwilling listeners in other private settings, and nowhere more so than in the private sanctuary where the family grieves its deepest losses.

The Supreme Court has spoken eloquently about "the interests decent people have for those whom they have lost." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 168 (2004). The privacy interest is, of course, a deeply personal

[6] The military family faces a difficult enough adjustment when a service member returns home from war. *See, e.g.*, *Returning from the War Zone: A Guide for Families of Military Personnel*, The National Center for Posttraumatic Stress Disorder (Dept. of Veterans Affairs), available at http://ptsd.about.com/gi/dynamic/offsite.htm?zi=1/XJ/Ya&sdn=ptsd&cdn=health&tm=41&gps=100_421_1020_563&f=22&su=p284.8.150.ip_&tt=14&bt=1&bts=1&zu=http%3A//www.ncptsd.va.gov/ncmain/ncdocs/manuals/nc_manual_returnwarz_gp.html.

one. "Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." *Id.* But the state too has a significant stake in ensuring the survival of "well-established cultural tradition[s]" that signify "the respect a society shows for the deceased and for the surviving family members." *Id.*; *see also Phelps-Roper v. Taft*, 523 F. Supp. 2d at 619 (state has "a significant interest in protecting its citizens from disruption during the events associated with a funeral or burial service"). The district court's decision properly protects that interest.

III. CONCLUSION

The United States District Court for the District of Maryland rightly concluded that Defendants' actions and comments are not protected by the Free Exercise Clause. The Free Exercise Clause does not afford protection to personally confrontational acts, however motivated, directed against private individuals who have not chosen to submit to ecclesiastical governance or who are unwilling listeners held captive by special circumstances. Even if this Court determines that such acts are constitutionally protected, the state has a compelling interest in protecting families, and most especially military families, from assaults on their privacy during a time of bereavement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed.R.App.P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 5,109 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii), as counted by the word-processor used to prepare this brief.

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Amicus
July 30, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this date the Brief of *Amicus Curiae* Jeffrey I. Shulman in support of Appellee is being filed and served via the Court's EM/ECF System upon the following:

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