IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND – BALTIMORE DIVISION

ALBERT SNYDER,
Plaintiff,
vs. Case No. 1:06-cv-1389-RDB

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

SUPPLEMENT TO:
REPLY OF
DEFENDANTS PHELPS-DAVIS & PHELPS-ROPER
TO PLAINTIFF'S RESPONSE TO
POST-TRIAL MOTION FOR STAY

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, hereby jointly submit the following supplement to their reply regarding their motion to stay; and on the further basis of the ruling of the Eighth Circuit in the attached opinion (besides all arguments and authorities previously submitted) renew their request that the Court stay this matter in full until review by the Fourth Circuit and the Supreme Court (if necessary).

Attached hereto is a copy of the opinion of the Eighth Circuit Court of Appeals dated December 6, 2007. The Court found that the trial court abused its discretion in denying a preliminary injunction concerning Missouri's law that prohibits funeral picketing.

The plaintiff has frequently referred to the trial court's opinion in the attached case, *Phelps-Roper v. Nixon,* as well as the *McQueary* case referenced by the Eighth Circuit at pp. 5-6 and 7-8 in the attached opinion. There are several parts of this opinion that are directly applicable to this case, calling into question the outcome herein.

Further, specifically with respect to the motion for stay, the Court spoke of the four elements to consider on a request for stay (or injunction). In the context of a First Amendment case involving picketing the Court said this:

> Peaceful picketing is an expressive activity protected by the First Amendment. *Olmer v. Lincoln*, 192 F.3d 1176, 1179 (8th Cir. 1999). It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod. v. Burns*, 427 U.S. 347, 373 (1976) (plurality). If Phelps-Roper can establish a substantial likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation. [Citations omitted.] Likewise, the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights. [Citations omitted.] The balance of equities, too, generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue. ... Order, p. 5.

Further, the Court noted at pp. 7-8, that the Supreme Court has not addressed the question of whether the government has an interest in preserving and protecting the sanctity and dignity of memorial and funeral services, or protecting the privacy of family and friends of the deceased during a time of mourning and distress. Thus, to suggest, as plaintiff has done throughout this case, that this is a closed question, and it is appropriate to tag a little church, her pastor and two of her members to the tune of almost $11 million on an unsettled question is absolutely inconsistent with notions of fairness and due process. The whole nation knows that these defendants follow the law, and obey any law, whether it oversteps or not. If the Supreme Court establishes this as a valid government interest, the *only* thing that means is that narrow-tailored *content-neutral* law can be passed that puts narrow time, place and manner restrictions on picketing funerals. If/when that happens and any such law(s) is/are upheld, those laws will be followed; and in fact, as this record shows without dispute,

that is what defendants have always done, including being over seven times further away from the church in this instance than the Maryland law required (which was under consideration the day of the picket at issue in this case, and was enacted a few months later).

Further, even though plaintiff has relied upon *McQueary* as authority for the proposition that funerals are *per se* private, the Court noted at p. 8 of the attached order, that the *McQueary* Court *assumed* *without finding* an interest in the state in protecting funeral attendees from unwanted communications which would justify a three hundred foot limit. Setting aside the fact that defendants did not put forth an unwanted communication so obtrusive it was impractical to avoid, the *McQueary* Court did not hold that such could be prohibited. Further, the Supreme Court has not determined that a funeral is tantamount to a residence. There is no justification in the law for letting an $11 million verdict stand for what the Eighth Circuit has stated clearly is protected activity.

Further, at p. 9, the Court said: "Because of our holding in *Olmer*, we conclude Phelps-Roper has a fair chance of proving any interest the state has in protecting funeral mourners from unwanted speech **is outweighed by the First Amendment right to free speech**." Emphasis added.

Further, at p. 11, the Court said: "By analogy, Phelps-Roper presents a viable argument that those who protest or picket at or near a military funeral **wish to reach an audience which can only be addressed at such occasion and to convey to and through such an audience a particular message**. She has a fair chance of proving section 578.501 fails to afford open, ample and adequate alternative channels for the dissemination of her particular message." Emphasis added. Thus, the novel "targeted plaintiff and his family" theory that went forward in this case – allowing a grotesque verdict to flow from an inflamed

jury – treats what the Eight Circuit has called protected activity – to reach an audience with a message – as actionable.

Finally, at pp. 11-12, the Court concluded: "Because we conclude Phelps-Roper has demonstrated a fair chance of prevailing on the merits of her claim, we find she will suffer irreparable injury if the preliminary injunction is not issued. The injunction will not cause substantial harm to others, and the public is served by the preservation of constitutional rights. The district court abused its discretion when it concluded the balance of harms weighed toward denying the motion for a preliminary injunction based on its erroneous determination as to Phelps-Roper being unlikely to succeed on the merits." Note that the Court said this with full awareness that the pickets of military funerals are ongoing, see pp. 2-3 and footnote 2.

This opinion, coupled with the Tenth Circuit opinion in *Showler* (which held that a military funeral very similar in character to the one at issue was not private), strongly suggests that defendants have a likelihood of succeeding on appeal in this case. Thus a stay is appropriate pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that the foregoing supplement was served as follows:

On December 6, 2007, by e-mail to the Court (through the Court's law clerk) and counsel.

And, on December 7, 2007,

Original + 2 copies, with 2-hole punch, by express mail, with return envelope, to:

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