No. 09-751

IN THE

Supreme Court of the United States

ALBERT SNYDER,
Petitioner,
v.
FRED W. PHELPS SR., *et al*.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MARYLAND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

DEBORAH A. JEON
DAVID ROCAH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Ste. 350
Baltimore, MD 21211
(410) 889-8555

JOEL KLEINMAN
Counsel of Record
DAVID SCHUR
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006
(202) 420-2200
kleinmanj@dicksteinshapiro.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization 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. Historically, the ACLU and its affiliates have addressed the relationship between freedom of speech and such torts as the intentional infliction of emotional distress, including participating as *amici curiae* in the instant case before the Fourth Circuit Court of Appeals, and in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The First Amendment issues raised on this appeal are a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

1. This case arises out of statements by members of Westboro Baptist Church ("WBC") before and after the March 10, 2006, memorial service for Petitioner Albert Snyder's son Matthew, an American Marine killed in Iraq.

WBC is a fundamentalist Baptist church whose members practice a "fire and brimstone" religious faith. They believe that the Bible contains literal truth and that God hates gay men and women and is punishing America for its tolerance of homosexuality (particularly in the military), and for other sins, including abortion and divorce. WBC members also

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[1] Letters consenting to the filing of this brief have been submitted to the Clerk. Counsel for *amici* states that no counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. Only *amici curiae*, their members, and their counsel contributed to its preparation or submission.

believe it is their religious duty to spread their message broadly and publicly that America is incurring God's wrath—and God is killing American soldiers—for the country's sins. They believe that "God is cursing America," and that "you can either pay attention [to the WBC's] message, repent and get healed, or you can rebel against it and be destroyed." (IX App. 2344.)[2]

WBC has conducted pickets over the past 20 years to publicize their message through media attention. More recently, they have begun demonstrating outside funeral memorial services, including soldiers' memorial services. WBC has picketed more than 150 memorial services in all 50 states in order, they believe, to be "timely and topical."

WBC picketed at three different locations on March 10, 2006. WBC members (collectively with WBC, "Respondents") traveled with four of their children from Kansas to Baltimore, Maryland, taking with them picket signs they had previously used at other protests. (VIII App. 2222.) They went first to the Naval Academy in Annapolis, Maryland, to protest gays in the military. (IX App. 2369.) They displayed the same picket signs before the Maryland State House to protest that legislature's consideration of a proposed statute prohibiting picketing activity within a certain distance from funeral services. (*Id.* at 2369-70.) Each picket lasted about 30 minutes.

Respondents next conducted the picket from which this case arises, outside St. John's Catholic Church in Westminster, Maryland, where Matthew Snyder's memorial service was held. They met on arrival with

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[2] References are to the Appendix submitted in the Court of Appeals.

local police to learn where they should stand for their picket, having earlier notified the police of their intent to picket outside the service. The police directed them to a 20- by 25-foot area behind a plastic fence, located on public land that was 1000 feet from the church. (VIII App. 2282-85.) Respondents stood where the police directed them, and displayed the same signs they had displayed at their two earlier pickets: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "You're Going to Hell," "God Hates You/God Hates America," "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."[3]

Respondents displayed their signs for about 30 minutes, sang hymns, and recited Bible verses. (*Id.* at 2286; IX App. 2371.) Although Petitioner claims that Respondents "disrupt[ed]" the memorial service (Pet'r Br. 53), the facts show otherwise. Mr. Snyder testified that the service was "very nice." (VII App. 2080.) Others testified that the ceremony was "beautiful and very moving," and "could not have been any more beautiful." (X App. 2651.) Respondents remained inside the fenced-in area the entire time, and did not yell or use profanity. (VIII App. 2286, 2293.) They neither went to the cemetery nor entered the church. (VIII App. 2168; IX App. 2371.)

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[3] "God Hates the USA/Thank God for 9/11," "God Hates You/God Hates America," and "God's View/Not Blessed, Just Cursed," were two-sided signs that Respondents flipped back and forth during the picket to make visible the writing on each side. (IX App. 2526-28.)

Others, too, displayed messages outside the church. More than 20 Patriot Guard Riders (who surround WBC picketers at funerals and block their signs) carried American flags and stood between Respondents and the church. (VII App. 2080; VIII App. 2171.) The Patriot Guard made a "tunnel" of flags from Mr. Snyder's car to the church entrance for him to walk through as he entered the church. Students from a nearby school also attended, standing in the church parking lot displaying small American flags and signs, including signs reading: "St. John's School is Praying for You" and "We Are Proud of Your Son." (XV App. 3759-60.)

Mr. Snyder did *not* see the writing on Respondents' signs either as he arrived or as he departed the service. He testified that he could see only the "tops" of the signs in the distance as his car was pulling into the church, and every other witness on the subject said that they could neither see nor hear the protestors. (VII App. 2260; VIII App. 2142, 2164.) It was only at home later that day watching television coverage of the picket that Mr. Snyder saw what was written on Respondents' signs. (VII App. 2086.)

A few weeks after the funeral, there was posted on WBC's website the "Burden of Marine Lance Cpl. Matthew Snyder," which WBC refers to as an "epic." WBC members write "epics" after all of their pickets. (IX App. 2522.) Among other things, this "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." (Pet. App. 37a.) Approximately four to five weeks after the funeral, Mr. Snyder stumbled upon the "epic" while searching his son's name on the Internet. (VIII App. 2129-30.)

2. On June 6, 2006, Mr. Snyder filed a five-count suit in the United States District Court for the District of Maryland. Two counts arose solely from the "epic" (defamation and "publicity" given to private life) and three arose from both the picketing and the "epic" (intrusion upon seclusion, intentional infliction of emotional distress, and conspiracy).

At the final pretrial conference on October 15, 2007, after substantial discovery, the district court dismissed on summary judgment the "publicity" and defamation claims, the former because the "epic" did not publicize any "private" information about Mr. Snyder, and the latter because the "epic" (a) was not defamatory, (b) reflected only Respondents' religious opinion, and (c) did not tend to expose Mr. Snyder to public hatred or scorn. (Pet. App. 66a.) Mr. Snyder did not cross-appeal these rulings.

However, the district court rejected Respondents' argument that the First Amendment barred the intrusion-upon-seclusion, intentional-infliction-of-emotional-distress, and conspiracy claims. It concluded that all but three of the picket signs commented on matters of public concern and therefore were not actionable under the First Amendment. (V App. 1299.) Nevertheless, it denied summary judgment because it concluded that the jury could find three signs ("You're Going to Hell," "God Hates You," and "God Hates Fags") addressed only private matters, and if so, could lawfully lead to liability in tort. And although the district court ruled that all but three of Respondents' signs presented constitutionally protected speech immune from tort liability, it permitted Mr. Snyder to present *all* of the signs to the jury.

Later, at the jury charge conference, the district court: (a) rejected Respondents' requested instructions that would limit the jury to deciding liability based only upon the three signs that it had held could possibly be unprotected by the First Amendment (XV App. 3822-26, 3833 (defendants' proposed jury instructions); XI App. 2875-76 (rejecting such instructions)); (b) stated that it would instruct the jury on principles of First Amendment law, and have the jury apply those legal principles to Respondents' speech (XI App. 2877-78); and (c) declined to instruct the jury that the signs which it had held were entitled to First Amendment protection could *not* form the basis for a plaintiff's verdict (XV App. 3822-26, 3833; XI App. 2875-79). Finally, it decided to charge the jury in a fashion that invited a verdict for Mr. Snyder on intentional infliction of emotional distress if the jury found that Respondents' speech was "outrageous" (a term it did not define), and on the "intrusion" claim if the jury found that Respondents' speech was "highly offensive to a reasonable person." (XI App. 3004-05.)

The foregoing caused Petitioner to emphasize in closing argument that the content of Respondents' placards was "vulgar, outrageous and shocking"—language that tracked the expected jury instructions—and to request a verdict for plaintiff because of the messages the placards conveyed. The jury indeed returned a plaintiff's verdict, awarding $2.9 million in compensatory damages and $8 million in punitive damages (later reduced by the court to $2.1 million). The district court denied post-trial motions. (Pet. App. 125a-126a.) Respondents appealed.

3. The Court of Appeals reversed. It observed that "tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment" and that "there are constitutional limits on the *type* of speech to which state tort liability may attach." (Pet. App. 20a, 22a.) Most significantly, after reviewing this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), its predecessor decisions, and its progeny, the Court of Appeals concluded that "[t]here are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected." (Pet. App. 24a.) One was "statements on matters of public concern that fail to contain a 'provably false factual connotation.'" (*Id.* (quoting *Milkovich*, 497 U.S. at 20).) The other was "rhetorical statements employing 'loose, figurative, or hyperbolic language.'" (*Id.* at 26a (quoting *Milkovich*, 497 U.S. at 20-21).)

The Court of Appeals then addressed the "First Amendment Instruction." It concluded that the district court erred by having the jury decide whether Respondents' speech was entitled to First Amendment protection, and then to balance Respondents' First Amendment rights with Petitioner's interest to be free from speech that caused him emotional distress. (*Id.* at 29a.) It noted in particular that the Instruction permitted the jury to impose liability based on signs that the district court had acknowledged *were* entitled to full First Amendment protection because they stated only Respondents' opinions on matters of public concern. (*Id.* at 29a n.16.) The Court of Appeals therefore held that the judgment had to be vacated because the trial

court improperly abdicated to the jury the duty of applying the law. (*Id*. at 29a.)[4]

However, because the extent of First Amendment protection is a question of law, and because each of the placards was in the record, the Court of Appeals proceeded to measure the placards under the First Amendment itself. The Court found that 10 placards—"distasteful as these signs are"—"involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens" (*id.* at 32a), and consequently could not constitutionally give rise to tort liability. (*Id.* at 34a.) The Court found that another group of placards (ones condemning the United States, and referring to "fags," troops, and dead soldiers), by their literal terms referred to groups of people generally, and could not reasonably be interpreted to refer specifically to Petitioner's son. (*Id.* at 33a.) Moreover, these rhetorical and hyperbolic statements were, the Court held, (a) not subject to objective verification, (b) not assertions of "actual facts *about* [Petitioner] or his son," and (c) "designed to spark controversy and debate" about the issues in which Respondents were interested. (*Id*. at 34a.) Only two signs "present[ed] a closer question"—"You're Going to Hell" and "God Hates You" (the latter of which appeared on the back side of the "God Hates America" sign, *see supra* note 3). (*Id.* at 35a.)

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[4] "The inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 146, 148 n.7 (1983); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985) (deciding public concern issue where lower courts had not ruled on the issue).

Although those signs, the Court ruled, possibly could be interpreted as being directed at Petitioner individually, they were still constitutionally protected because they could not reasonably be "interpreted as stating actual facts about any individual." (*Id.*)

The Court of Appeals similarly reviewed the "epic." It concurred with the district court's conclusion that its contents "were 'essentially [Respondents'] religious opinion'" (*id.* at 40a n.20), and that its contents "primarily focused on the more general message to which their protests were directed" (*id.* at 39a)—*viz.*, American tolerance of homosexuality, the activities of the Catholic Church, and the military.

In sum, the Court of Appeals held that each aspect of Respondents' speech on which the jury predicated liability was protected by the First Amendment. It therefore reversed.

SUMMARY OF ARGUMENT

It is important at the outset to stress what this case is and is not about. First and foremost, this case is about *speech,* not conduct. The theory of Petitioner's case was that his injury flowed directly from the content of Respondents' speech. Had Respondents attended the Snyder memorial service without their signs, or instead displayed signs expressing sympathy (such as those held by the St. John's school children), there would have been no verdict against Respondents. The jury found against Respondents because of what they *said*, not because of their *presence* at Matthew Snyder's funeral.

Second, this case is not about the constitutionality of statutes regulating the time, place, and manner of funeral protests, and the arguments of various *amici* predicting that affirmance here will invalidate such

laws are incorrect. No "funeral statute" is involved in this case. Respondents displayed their signs at a location chosen for them by local law enforcement, not one they chose themselves. And that location—1000 feet from the church entrance—was 10 times farther removed from the church than Maryland's later-enacted funeral statute would permit.

Because this is a pure speech case, the Court of Appeals ruled correctly. The common law torts of "intentional infliction of emotional distress" and "intrusion upon seclusion" are intended to protect individuals from unwanted and injurious conduct that is directed towards them. Where, as here, the plaintiff alleges that the *substance* of speech caused emotional injury, these torts are designed to protect the *listener* from hearing speech that he prefers not to encounter, and to impose liability on the speaker for having spoken. That is why the district court instructed the jury to return a verdict for Petitioner on the "intrusion" claim if the jurors found Respondents' speech to be "highly offensive to a reasonable person." It is also why it instructed the jurors to return a verdict for Petitioner on the "emotional distress" claim if they found that Respondents' speech was "extreme and outrageous."

However, the First Amendment guarantees of freedom of speech and the free exercise of religion are designed to protect the right of *speakers* to voice their views on matters of public concern and to express their religious convictions. So, while tort law penalizes "highly offensive" speech, "[i]t is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). Likewise,

while tort law may penalize "extreme and outrageous" speech, this Court has noted that:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988). In short, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This is so even if the idea is so offensive that it causes personal pain (*amici* certainly do not question the sincerity of Petitioner's response to the statements at issue here).

1. The Court of Appeals properly held that the speech on which the jury rested its verdict expressed Respondents' religious and political views on matters of public concern and, furthermore, that Respondents' speech could not reasonably be interpreted "as stating actual facts about any individual" because its rhetorical hyperbole was not subject to objective verification. As the Court of Appeals found, most of Respondents' picket signs addressed matters of obvious public concern, including America's tolerance of homosexuality, the role of gays in the military, and the abuse of young parishioners by Catholic priests. The two remaining signs the Court of Appeals thought to be ambiguous—"God Hates You" and

"You're Going to Hell"—likewise are entitled to constitutional protection when their content, form, and context are assessed (as they must be) against the entire record.

2. The Court of Appeals did not err because the *listener* in this case was a "private" individual rather than a "public figure." The First Amendment protects the right of *speakers* to express their personal views on public issues, and this Court has long understood the First Amendment to protect the right to speak without regard to the identity of the target audience. Consequently, affirmance in this case does not require this Court to "extend [the] *Hustler*" decision to protect "private" citizens from offensive speech (Cert. Pet. 6), but merely to apply existing First Amendment doctrine allowing expression of opinions on matters of public concern without fear of potentially ruinous tort liability of the sort the jury imposed here.

3. This case does not involve a "captive audience." That issue was neither raised in, nor decided by, the courts below. In any event, there was simply no captive audience for Respondents' speech. Respondents stood so far away from the church that Petitioner could not see what was written on their picket signs. Moreover, unlike a rule designed to protect "captive audiences," the jury's post-hoc verdict based on the "outrageousness" and "offensiveness" of Respondents' speech was neither content neutral, nor a reasonable time, place, and manner limitation on speech.

ARGUMENT

I. RESPONDENTS' SPEECH WAS PROTECTED UNDER THE FIRST AMENDMENT

A. The First Amendment Protects The Right Of Speakers To Express Even Offensive Opinions On Matters Of Public Concern.

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). A citizen's right to speak on matters of public concern "'is more than self-expression; it is the essence of self-government.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (citation omitted). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values." *Id.* (citation and internal quotation marks omitted). This is so even if the speech may be offensive to listeners. "'Indeed, if it is the speaker's opinion that gives offense, that consequence is a *reason* for according it constitutional protection.'" *Hustler*, 485 U.S. at 55-56 (emphasis added) (citation omitted).

Moreover, while the State has an interest in protecting its citizens' emotional well-being through tort law, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982).

Thus, the threshold question is whether Respondents' speech expressed their views, however controversial, on matters of public concern. If so, it was entitled to "special protection" under the First

Amendment, *Dun & Bradstreet*, 472 U.S. at 759, subject to punishment in tort by the State only in very narrow circumstances not present here.[5]

B. Respondents "Spoke" On Matters Of Public Concern.

Whether speech addresses matters of public concern depends upon the "'content, form, and context'" of the speech, "'as revealed by the whole record.'" *Dun & Bradstreet*, 472 U.S. at 761 (citation omitted). Here, the record reveals that Respondents' speech was addressed to matters of public concern.

1. The Picket

There can be little dispute that the majority of the signs displayed at the picket addressed matters of public concern: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "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," "Thank God for Dead Soldiers," "Priests Rape Boys," and "God Hates Fags." Respondents 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. 2223, 2227, 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);

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[5] Speech on matters of public concern may not be protected if it constitutes speech which the Court has "accorded no protection," such as obscenity or "fighting words." *Dun & Bradstreet*, 472 U.S. at 758 n.5; *see also Hustler*, 485 U.S. at 56. But Petitioner does not contend that Respondents' speech falls within that category.

and that God hates and will punish all sinners who, in Respondents' view, are the vast majority of Americans (IX App. 2372-73).

The Fourth Circuit concluded: "[A]s utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens." (Pet. App. 32a.) This conclusion is clearly correct, and Petitioner does not appear to seriously contend otherwise. *See, e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 461, 466 (1995) (holding that plaintiff's lectures on religion were matters of public concern).

Indeed, when prominent religious figures made similar statements—as when Revs. 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*, Sacramento Bee, Sept. 18, 2001, at B7; *cf. City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) ("public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication"). Respondents' speech may have been inappropriate and controversial to many, but "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

The Fourth Circuit believed that the remaining signs displayed at the picket ("You're Going to Hell"

and "God Hates You") presented a "closer question." Viewed in context, however, it is clear that these signs, too, comment on matters of public concern, and not "purely private" matters which are of "less First Amendment concern." *Dun & Bradstreet*, 472 U.S. at 759. On the reverse side of the "God Hates You" sign was written "God Hates America," showing that the sign's reference to "You" is to the nation as a whole, not Petitioner or any one specific individual in the context of a private dispute. Moreover, the signs cannot be divorced from the context of the larger picket; when this context is considered, the references to "You" imply the damnation of all sinners, for the reasons expressed on the other signs at the picket. And these same signs were used by Respondents at numerous pickets all over the country, including two that same day at the Maryland State House and the Naval Academy. This demonstrates that "You're Going to Hell" and "God Hates You" were not intended as invective towards Mr. Snyder personally, as the district court appeared to believe, but were statements to all passersby of Respondents' religious view that Americans are sinners and are suffering, and will continue to suffer, God's wrath unless they change.[6]

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[6] Petitioner asserts that Respondents' "signs were *not* about the purported matters of public concern cited by the Fourth Circuit" because "the Phelpses began protesting military funerals shortly after members of the WBC allegedly were accosted by Marines." (Pet'r Br. 36.) Not so. Respondents testified that the "assault" *convinced* them that there were gays in the military and they should begin protesting on that issue. (VII App. 2226-27.) But even if Petitioner is correct that Respondents were motivated to picket out of revenge or hatred, this would not make their speech any less of public concern. "[E]ven when a speaker or writer is motivated by hatred or

2. The "Epic"

The "epic" Respondents posted on their website a few weeks after their demonstration essentially recapped the events of the picket, and consisted of Bible passages interspersed with statements discussing the picket and other issues. The district court dismissed Petitioner's defamation claim based on the "epic" on the ground that it was essentially Respondents' "religious opinion." (Pet. App. 66a.) Petitioner never cross-appealed this ruling, and his brief in this Court does not challenge any particular statement in the "epic" as being unrelated to public concern.

The "epic" constitutes a statement of Respondents' views on matters of public concern because it states their beliefs about the root causes of America's domestic and foreign problems. Respondents believe that America is suffering "God's vengeance" because Americans do not live in accordance with "God's word" as communicated in the Bible, by, *inter alia*, tolerating homosexuality and permitting divorce.

So, for example, the "epic" states: "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 . . . .";

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illwill his expression [may be] protected by the First Amendment." *Hustler*, 485 U.S. at 53. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

"[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." (XV App. 3793-94.)

These statements are entitled to constitutional protection because they express what Respondents believe to be the *causes* of American domestic and foreign difficulties. Although many people would consider the content of much of the "epic" offensive or controversial, and it is contrary to the ACLU's own views on these issues, it nevertheless addresses 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," address social and political matters of public concern, not "purely private" matters. *Dun & Bradstreet*, 472 U.S. at 759.

The fact that a small number of statements mention the Snyders by name does not disqualify the statements from constitutional protection. Those statements cannot be viewed in isolation—whether they address matters of public concern or "purely private" matters must be assessed in the context of the "epic" as a whole. *See Rankin*, 483 U.S. at 386 (statement expressing hope that assassin shoots President dealt with matter of public concern; "in context," it "was made in the course of a conversation

addressing the policies of the President's administration"); *cf. Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (statement made during anti-war rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was constitutionally protected; "[t]aken in context," it was "'a kind of very crude offensive method of stating a political opposition to the President'").

Viewed in context, the statements that refer to the Snyders do not address mere private matters but are examples illustrating Respondents' broader points. That connection is readily apparent, for example, in the statement that Matthew's death provides Respondents with "an opportunity to preach [God's] words to the U.S. Naval Academy at Annapolis, [and] the Maryland Legislature," which Respondents picketed on the same day as Matthew's funeral. (XV App. 3793.) Likewise, the statement "they sent [Matthew] 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 . . . ." (*Id.* at 3791.) Consistent with this contextual understanding, as Respondents testified, the reference to the Snyders "hating" Matthew and "rais[ing] him for the devil" (statements the district court expressly held were not defamatory) meant that by allowing him to fight for America ("God's enemy," in Respondents' view) and by not following the literal teaching of the Bible, they, like all Americans, were invoking God's wrath. However unpopular, these are Respondents' sincerely held religious views about social and political issues, and, as such, address matters of public concern.

C. The Tort Rights Of "Private Figures" Are Properly Limited By The First Amendment.

Petitioner and various *amici* assert that the Court of Appeals erred because it failed to give weight to the fact that Petitioner was a "private figure," and by limiting the tort rights of private figures in ways similar to the way the First Amendment limits the rights of "public figure" plaintiffs. Petitioner warns (Pet'r Br. 42) that unless reversed, the Court of Appeals decision will mean that in cases such as this:

> The plaintiff may recover for emotional distress caused by outrageous speech that includes false statements, but he may not recover for the same degree of emotional distress caused by outrageous and intentionally harmful statements that are not capable of being proven true or false.

This argument, however, misapprehends the basic nature of this Court's First Amendment jurisprudence. An unbroken line of cases brought by "private figures" asserting common law tort claims holds that where the speech at issue relates to matters of public concern and is not demonstrably false, the First Amendment protects *the speakers'* rights to free expression.

For example, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986), the Court held that where speech is on a matter of public concern, a private-figure plaintiff in a defamation case cannot recover absent proof, at a minimum, that the challenged speech contained a false statement of fact. Thus, "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 rule is necessary to "encourage debate on public issues," *Hepps*, 475 U.S. at 777, and provides the "'breathing space'" that freedom of expression needs to survive. *New York Times*, 376 U.S. at 271-72 (citation omitted). The Court recognized that placing the burden of proving falsity on private figures would mean that some deserving plaintiffs would be unable to recover damages for speech about them that is false, but not provably so. *Hepps*, 475 U.S. at 778. Nevertheless, the First Amendment mandates that private figures go uncompensated to protect speakers' rights to express their opinions on matters of public concern. *Id.*[7]

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[7] The State Attorneys General *amici* suggest that as a matter of tort law the First Amendment protects speech only when the speaker defendant is a member of the media. (Br. of Kansas, *et al*. 18.) Although this Court has never expressly decided whether the principles announced in the *New York Times* line of cases apply to non-media defendants, *see Milkovich*, 497 U.S. at 20 n.6 (reserving the issue), any such distinction is incompatible with the Court's view that the "inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978); *see also Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 905 (2010) ("'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'" (citation omitted)); *Dun & Bradstreet*, 472 U.S. at 781-82 (Brennan, J., dissenting) (media/nonmedia distinction is "irreconcilable with the fundamental First Amendment principle" that the inherent worth of speech does not depend on identity of its source).

It is therefore unsurprising that every circuit to decide the issue, including the Fourth Circuit in this case, has concluded that the same First Amendment protections apply to media and

This First Amendment rule has not been limited to defamation cases. To the contrary, the Court has stressed that the First Amendment right to express one's opinion freely on matters of public concern without fear of liability does not turn on creative pleading or the particular tort law designation invoked by a plaintiff in litigation.

Thus, in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court held that a private-figure plaintiff could not recover damages (including for emotional distress) under an invasion-of-privacy statute based on the publication of information on matters of public concern, without first proving that the speech at issue was false, and that it was made knowingly or recklessly. *Id.* at 390-91. Again, the Court rested its conclusion on the "breathing space" required by the First Amendment to survive. *Id.* at 388 (citation and internal quotation marks omitted); *cf. Claiborne*, 458 U.S. at 907-15 (First Amendment barred private figures from recovering tort damages for interference with business and conspiracy, where alleged injury arose out of peaceful picketing on matters of public concern).

The Court applied these principles to the tort of intentional infliction of emotional distress in *Hustler*. At issue in *Hustler* was whether Rev. Jerry Falwell could recover emotional distress damages for offensive and "outrageous" speech (an offensive ad parody which implied that Rev. Falwell had sex with his mother). Balancing the interests in protecting citizens from emotional harm by "outrageous" conduct on one hand against the First Amendment's protection of

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non-media defendants alike. (Pet. App. 24a n.13 (collecting cases).)

speech on the other, the Court rejected the 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 a fact or an opinion, or whether it was true or false." 485 U.S. at 52-53. Nor could liability turn on whether the speech was "outrageous" because "[a]n 'outrageousness' standard . . . runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Id.* at 55.

Emphasizing again the "breathing space" the First Amendment requires, the Court held that Rev. Falwell could not recover damages without first proving that the speech at issue contained a "false statement of fact," and that the false statement was made with "'actual malice'" (that is, "with knowledge that the statement was false or with reckless disregard as to whether or not it was true"). *Id.* at 56.

Petitioner and some *amici* contend that *Hustler* has no relevance here because it involved a public-figure plaintiff. Undoubtedly, as the Court noted throughout, Rev. Falwell was a public figure. *See id.* at 57 & n.5. But it is equally clear that the speech criticizing him was a matter of public concern, a fact the Court also emphasized. *See id.* at 53 (describing the speech at issue as "*public debate* about [a] public figure[]" (emphasis added)); *id.* (rejecting argument that state could punish speech if spoken out of hatred as impermissible "in the world of *debate about public affairs*" (emphasis added)); *id.* at 55 (rejecting "outrageousness" standard for speech "*in the area of political and social discourse*" (emphasis added)). Speech of the sort at issue in *Hustler*—a coarse

parody of a public figure known for his virtue—was in itself a matter of public concern.

Hustler thus falls neatly within the continuum of cases where the Court has held that, regardless of the identity of the plaintiff, and regardless of the tort alleged, the First Amendment prohibits the State from awarding damages for the emotional impact of speech on matters of public concern without proof, at a minimum, that the speech was *false*. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) (First Amendment limitations on tort apply where a plaintiff is "seeking damages for injury to his reputation or his state of mind.").

Accepting Petitioner's argument, that a private figure alleging intentional infliction of emotional distress or intrusion upon seclusion based on the impact of speech on public concern need not prove falsity to recover damages, would eviscerate the First Amendment's protections for such speech, and the "breathing space" the Constitution requires. Otherwise, a private-figure plaintiff could easily evade the First Amendment simply by bringing a speech-based claim as a tort other than defamation.

Moreover, the rationale for distinguishing between public and private figures in the defamation context makes little sense where the speech at issue is an opinion on matters of public concern, incapable of being proven true or false. The Court makes it more difficult for public figures to recover for defamation because, unlike private individuals, public figures "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood *concerning them*," and usually "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract *false*

statements." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) (emphasis added). But where the speech at issue is an opinion on public issues that states no actual facts about anyone, these rationales do not apply. The speech is not factual, so there is nothing to "counteract" or disprove. And it is not *about* any individual, so the question whether a person voluntarily "assumed the risk" of harmful speech is simply not germane. *Cf. Time*, 385 U.S. at 391 ("Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane.").

Adopting Petitioner's approach would also lead to the illogical result that offensive speech on matters of public concern which does not describe actual facts about any individual, and is directed to the public at large (as in a picket), would be immune from tort liability in a case by a public figure who suffered emotional distress from viewing the speech, but subject to liability in the same case brought by a private figure. Thus, for example, a private-figure employee of the Vatican Embassy in Washington, D.C. could recover damages from a protestor outside the embassy carrying signs expressing the opinion "Vatican Hides Pedophiles," while the public-figure ambassador living in the embassy could not. *Cf.* Eleanor Goldberg, *A Long Stand Against Sex Abuse; Outside the Vatican Embassy, One Man's Protest Has Continued for 12 Years*, Wash. Post, May 15, 2010, at B2 (discussing protester of sex abuse in Catholic Church who, for 12 years, has carried signs such as "Vatican Hides Pedophiles" outside the Vatican embassy "because he's confident that his presence disturbs the Roman Catholic officials inside"). And a

protestor picketing a medical clinic with a sign reading "Abortion Is Murder" would be subject to liability if sued by a private-figure patient entering the clinic, but not if that patient happened to be a public figure. With speech of this kind, there is no rational basis for allowing a private figure to recover, and not a public figure. In either case, allowing damages for such speech would profoundly inhibit debate on public issues, a result incompatible with the First Amendment.[8]

D. Respondents' Speech Was Not "Provably False."

Although Petitioner argues that the Fourth Circuit erred by requiring him to prove the falsity of Respondents' speech, he does not challenge that court's ultimate conclusion that the speech was not false because it did not describe actual facts about him or any individual. Indeed, in neither lower court did Petitioner assert that the speech expressed on the picket signs was factual or false, and he never cross-appealed the district court's ruling that the "epic" contained no defamatory statements because it was Respondents' "religious opinion." (Pet. App. 66a.) Thus, the "falsity" of Respondents' speech is not an issue in this Court.

In any event, the Fourth Circuit correctly held that none of the speech is provable as false. To provide

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[8] For this reason, Petitioner's argument that opinions on matters of public concern can be punished in tort where the plaintiff does not have "some reasonable relationship" to the public issue does not withstand scrutiny. (Pet'r Br. 38.) Unsurprisingly, no court has ever adopted such an approach. By definition, speech on public issues which does not describe actual facts about an individual is not *about* anybody.

"assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation," the First Amendment protects statements "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich*, 497 U.S. at 20 (alteration in original) (citations omitted). Thus, this Court held that a statement in a news article describing a plaintiff's negotiating position as "blackmail" was protected rhetoric, not a factual statement accusing the plaintiff of committing a crime, because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable." *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970). Similarly, the Court has held that a nonunion plaintiff could not recover damages for statements referring to him as a "scab"—"*a traitor to his God, his country, his family and his class*"—as no reasonable reader would have understood this as charging him with committing the offense of treason. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 268, 285-87 (1974) (citation omitted). Rather, the statement was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286.

Respondents' speech here contained only such rhetoric. The picket signs did not refer to Petitioner or any other individual (except the Pope) by name, and statements like "You're Going to Hell," "God Hates You," and "Thank God for Dead Soldiers," while offensive, rhetorically expressed Respondents'

religious opinion. None of the statements could be proved or disproved, or described as true or false.

The same is true with the "epic," as even the district court concluded in dismissing Petitioner's defamation claim. Statements that Petitioner raised his son "for the devil" and taught him "to defy his Creator, to divorce, and to commit adultery" (the only statements Petitioner contended in district court were actionable (V App. 1212-13)), are best understood as the "sort of loose, figurative, or hyperbolic language which would negate the impression" that the writer was stating fact. *Milkovich*, 497 U.S. at 21; *see also Austin*, 418 U.S. at 285-86. As for the remainder of the "epic," 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 Respondents' subjective beliefs, not verifiable statements of fact.

The "general tenor" of the "epic" further negates any impression that it is describing actual facts about Petitioner or his family. *Milkovich*, 497 U.S. at 21. The "epic" is replete with Bible passages discussing sin and other religious matters, and was posted on WBC's website—not the sort of publication where one reasonably would expect assertions of fact, rather than religious belief, to be discussed. As the Fourth Circuit concluded: "[Respondents] utilized distasteful and offensive words, atypical capitalization, and exaggerated punctuation, all of which suggest the

work of a hysterical protestor rather than an objective reporter of facts." (Pet. App. 39a.)[9]

E. Remand Is Required If The Court Determines Only Some Of The Speech Is Protected.

As explained above, all of the speech in this case is constitutionally protected. But if the Court concludes that only some, but not all, of the speech is protected, it should not enter judgment for Petitioner, but should remand for a new trial.

Over Respondents' objections, the jury was permitted to consider all of Respondents' speech, and it returned a general verdict which did not indicate the precise statements on which it based its verdict. Thus, even if the Court deems some speech unprotected, liability in this case could have been based on speech that is clearly protected (statements such as "America is Doomed" and "God Hates

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[9] Applying the constitutional principle that offensive opinions on matters of public concern cannot be punished in tort without proof of falsity will not leave states powerless to protect private figures "intentionally harmed by expressive conduct," as Petitioner contends. (Pet'r Br. 45.) Provably false statements, even on matters of public concern, are still a proper subject of tort liability. *Hepps*, 475 U.S. at 776. And if a defendant commits separate, independently tortious acts while speaking, the fact that the speech was of public concern would not insulate the defendant from liability for those acts. *See Claiborne*, 458 U.S. at 933-34. Further, if the speech at issue is "of exclusively private concern," then "the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Hepps*, 475 U.S. at 775. Finally, as the Fourth Circuit pointed out, states can regulate speech through content-neutral laws which impose reasonable time, place, and manner restrictions. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

America"). In that event, remand for a new trial would be required. *Bresler*, 398 U.S. at 11 ("[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.'" (citations omitted)).

II. THERE IS NO "CAPTIVE AUDIENCE" ISSUE IN THIS CASE

Petitioner asserts that even if Respondents' "*speech alone* would be entitled to First Amendment protection in other circumstances, Mr. Snyder is entitled to governmental protection from the Phelpses' conduct because he was a captive audience at his son's funeral." (Pet'r Br. 45.) This argument fails.

First, the issue was neither raised in, nor decided by, the lower courts in this case. Accordingly, the Court should decline to consider it. *See Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

Second, Petitioner was not "captive." "Captive audience," as used in First Amendment cases, refers to individuals who, as a practical matter, "cannot avoid" the objectionable speech. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988). Thus, a person subjected to targeted picketing in his home is "captive" because "[t]he resident is figuratively, and perhaps literally, trapped," with no means of avoiding the speech. *Id.* Similarly, in a "confrontational setting[]," an unwilling listener approached within eight feet for counseling or protest purposes could, in some sense, be considered "captive." *Hill v. Colorado*, 530 U.S. 703, 717 (2000). Here, however, at 1000 feet, Respondents were *three football fields* from St. John's Church. Far from being "captive," the testimony is that Petitioner

did not *see* Respondents' picket signs at the time of the demonstration.

Third, the "captive audience" concept has no application to the tort judgment here. The Court's analysis of "captive audience" arises in connection with its evaluation of whether a content-neutral statute imposes a reasonable time, place, and manner restriction on speech. *Frisby*, 487 U.S. at 487-88 (content-neutral statute prohibiting residential picketing); *Hill*, 530 U.S. at 719-35 (content-neutral statute prohibiting approaching within eight feet of unwilling listener for certain purposes). Aside from the fact that no statute is at issue in this case, the jury verdict here in no sense rested on "content neutrality"—the jury was invited to, and did, impose liability because it found the content of Respondents' message "outrageous" and "offensive." *Cf. Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that statute prohibiting speech critical of foreign governments was content based because it "focuses *only* on the content of the speech and the direct impact that speech has on its listeners").

Moreover, unlike statutes that give notice of specific "time, place, and manner" limits that permit speakers to act accordingly, the jury here imposed a post-hoc $11.9 million punishment on Respondents' speech because (presumably), in addition to the content, it found the location at which Respondents chose to speak (1000 feet from the church) objectionable. This despite the fact that (a) Respondents coordinated with local law enforcement before the picket and picketed only where the police told them they could stand, and (b) the distance at which Respondents stood would have complied with the vast majority of the state "funeral protest" statutes

cited by the State Attorneys General *amici*, including the law subsequently passed by the Maryland legislature, which prohibits picketing only within 100 feet of a memorial service, *see* Md. Code Ann., Crim. Law § 10-205(c).[10]

If the statutory analogy is appropriate at all, it highlights the constitutional problems with the jury verdict here. A statute prohibiting "offensive" speech on matters of public concern within 1000 feet of a church would never pass constitutional muster under this Court's precedents. *See, e.g.*, *Boos*, 485 U.S. at 334 (striking down statute prohibiting displaying within 500 feet of foreign embassy any sign that tends to bring a foreign government into "public disrepute"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 774-75 (1994) (striking down statute prohibiting picketing within 300 feet of homes of abortion clinic staff). But, unless tort law is limited by the First Amendment in the manner discussed in Part I above, a state could regulate indirectly through tort what it would be unable to regulate through statute. *Cf. New York Times*, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise

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[10] Indeed, of the 34 laws cited by the State Attorneys General *amici* prohibiting picketing or other activities within a certain distance of a funeral service, Respondents' 1000-foot distance would have complied with *33* of them—in most cases, by many multiples of the allowable distance. Four states prohibit certain activities within 100 feet of a funeral (*e.g.*, Maryland, *supra*); six within 150 feet (*e.g.*, Kan. Stat. Ann. § 21-4015a(e)(1)); two within 200 feet (*e.g.*, Utah Code Ann. § 76-9-108(2)(d)); six within 300 feet (*e.g.*, N.C. Gen. Stat. § 14-288.4(a)(8)); fourteen within 500 feet (*e.g.*, Okla. Stat. tit. 21, § 1380(D)); one within 1000 feet (*see* Tex. Penal Code Ann. § 42.055(b)); and one within 1500 feet (*see* Mont. Code Ann. § 45-8-116(1)).

beyond the reach of its civil law of libel."). Even the threat of liability, even if none were actually imposed, impermissibly chills the constitutional right to peacefully express opinions on matters of public concern, and "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Fourth Circuit.

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
Counsel for Amicus Curiae American Civil Liberties Union

DEBORAH A. JEON
DAVID ROCAH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Ste. 350
Baltimore, MD 21211
(410) 889-8555
Counsel for Amicus Curiae American Civil Liberties Union Foundation of Maryland

JOEL KLEINMAN
Counsel of Record
DAVID SCHUR
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006
(202) 420-2200
kleinmanj@dicksteinshapiro.com
Counsel for Amici Curiae

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