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

REPLY BRIEF

CRAIG T. TREBILCOCK
SHUMAKER WILLIAMS
1 East Market Street
York, PA 17401
(717) 848-5134

SEAN E. SUMMERS
Counsel of Record
ALEX E. SNYDER
BARLEY SNYDER LLC
100 East Market Street
P.O. Box 15012
York, PA 17405-7012
(717) 846-8888
ssummers@barley.com

Attorneys for Petitioner

231570

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Other Authorities

Rules

ARGUMENT

This case is about the intentional targeting of a grieving father by attention-seeking strangers. It is not solely about those strangers' First Amendment rights. Rather, as explained in Mr. Snyder's opening brief, the case requires this Court to balance the Phelpses' interest in engaging in tortious expressive conduct against the countervailing interests of Mr. Snyder, as both target and captive audience, and the State of Maryland. The Fourth Circuit erred by failing to conduct this balancing, leaving Mr. Snyder without remedy for the harm he suffered.

In their responses, the Phelpses and their supporting *amici* posit several arguments based neither on the record evidence nor this Court's precedent. First, they treat the facts as if the jury had found in the Phelpses' favor, mischaracterizing their disruptive effect on the funeral, the harm they caused Mr. Snyder, and the nature of the speech involved in their tortious conduct. Second, ignoring the requirement that a victim's public or private figure status is determined at the moment the tort is committed, the Phelpses cite Mr. Snyder's response to their harassment as evidence that he is a "public" figure to whom *Hustler*'s falsity requirement applies. Third, the Phelpses used Mr. Snyder's name in connection with hateful epithets, purportedly to express beliefs on matters unrelated to him. Yet the Phelpses and their *amici* disregard Mr. Snyder's status as the subject and target of the Phelpses' expressive conduct and treat him as if he were a mere "listener" who disagreed with or was offended by the Phelpses' speech. Fourth, the Phelpses make a

misguided "viewpoint discrimination" argument, suggesting that Mr. Snyder's choice to sue them and not others who protested at the funeral is somehow akin to selective enforcement of an ordinance. Finally, several of the *amici* contend that this Court should permit the Phelpses to take advantage of purported procedural errors committed by the District Court, despite the fact that these purported errors were both harmless and invited by the Phelpses.

In sum, the Phelpses and their *amici* mischaracterize the jury verdict in this case as an expansion of tort liability at the expense of the First Amendment. The record and the relevant caselaw, however, demonstrate that they have it backwards. While Mr. Snyder merely seeks to recover for harm caused by the Phelpses' intentionally targeted harassment, the Phelpses and their allies seek an expansion of the First Amendment beyond the reasonable limits recognized by this Court. No such expansion is warranted.

I. The Phelpses and Their *Amici* Mischaracterize the Record and the Nature of the Speech at Issue.

The Phelpses and their *amici* have cherry-picked evidence favorable to their position—that the protesters did not "disrupt" the funeral service itself, that they stayed over 1,000 feet away, that Mr. Snyder did not see them until later in the day on television—while ignoring contrary evidence that the jury apparently credited—that the funeral planners rerouted the procession to avoid the Phelpses, that the Phelpses turned the funeral into a circus, that Mr. Snyder saw

them during the funeral procession from a distance of approximately 200–300 feet. Indeed, the entire basis of the Phelpses' First Amendment defense is that they were discussing issues of public concern, including homosexuals in the military and the scandals involving the Catholic Church. Many of the Phelpses' signs and the Epic, however, failed to mention these or any other public issue. And Mr. Snyder presented evidence that the signs and Epic *were not about these issues* at all. By characterizing as "undisputed fact" their one-sided version of events and their subjective interpretation of the speech at issue, the Phelpses and their supporters urge this Court to usurp the jury's fact-finding role.

A court generally may overturn a jury verdict only if it finds "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *See*, *e.g.*, Fed. R. Civ. P. 50(a). In reviewing a jury verdict, therefore, courts "review the evidence in the light most favorable to the prevailing plaintiff to determine if the evidence permits a reasonable jury to find in favor of the plaintiff on any permissible theory." *Howard v. Antilla*, 294 F.3d 244, 249 (1st Cir. 2002). Jury determinations on credibility and the appropriate weight afforded to specific evidence must remain undisturbed. *See Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004).

The First Amendment provides a limited exception to these general principles. In this context, an appellate court may review the record to ensure "that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to

ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984); *see also New York Times v. Sullivan*, 376 U.S. 254, (1964) (noting that the "Court's duty is not limited to the elaboration of constitutional principles" but "must also in proper cases [include a] review [of] the evidence to make certain that those principles have been constitutionally applied").[1] The Court has also affirmed, however, that there are numerous findings of fact "that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan*, and to which the clearly-erroneous standard . . . is fully applicable." *Bose*, 466 U.S. at 514 n.31; *see also id.* at 499–500 (noting that "due regard" must be given to the fact-finder's opportunity to observe the demeanor of witnesses). In a defamation case, for example, only those facts related to the critical and often determinative finding of "actual malice" must be "independently assessed" by a reviewing court. *Id.* at 514 n.31. And even the Court's "independent review is subject to limitations and is not equivalent to *de novo* review of the entire record." *Howard*, 294 F.3d at 249 n.8. The Court "accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent

1. The American Center for Law & Justice's citation to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in this context is misplaced. That case involved a reevaluation of the threshold question of whether the conduct at issue—refusal by the petitioner to permit gay and lesbian groups to march as part of a public parade—was expressive conduct, at all. 515 U.S. at 567. In contrast, here, it is undisputed that the Phelpses' conduct, at least in part, was expressive; the jury simply refused to accept the Phelpses' version of the surrounding factual circumstances.

resolution of that conflicting testimony," and then ensures that the appropriate constitutional principles have been applied. *See Harte-Hanks Commc'ns Inc. v. Connaughton*, 491 U.S. 657, 698 (1989) (Scalia, J., concurring).

The Phelpses ignore these principles and attempt to re-litigate the facts. They suggest that Mr. Snyder was not harmed by their conduct, but the trial evidence demonstrated that their conduct interfered with Mr. Snyder's grieving process, caused him to vomit, and exacerbated his diabetes and his depression. (*Compare* Resp'ts' Br. 10 *with* Vol. VII at 1988 Vol. VIII at 2130, 2139 & 2145 *and* Vol. X at 2578.) The Phelpses and their supporting *amici* argue that there was no disruption of the funeral, but evidence was presented that the funeral procession had to be rerouted to avoid the Phelpses' presence and that the Phelpses turned the funeral into a circus. (*Compare* Resp'ts' Br. 6–7, Br. for The Thomas Jefferson Center of the Protection of Free Expression *et al.* as *Amici Curiae* Supporting Resp'ts (hereinafter "Thomas Jefferson Ctr. Br.") 12–13, *and* Br. for Scholars of First Amendment Law as *Amici Curiae* Supporting Resp'ts (hereinafter "Scholars Br.") 13 *with* Vol. VII at 2082 *and* Vol. VIII at 2250–2251, 2254–2255.) The Phelpses and their supporting *amici* assert that the Phelpses stood over 1,000 feet away from the funeral at all times, but Mr. Snyder presented evidence that, even after adjusting the funeral route, the Phelpses stood only 200–300 feet away from the funeral procession at the main entrance to the church property. (*Compare* Resp'ts' Br. 7 *with* Vol. VII at 2079, 2141 *and* Vol. VIII at 2244.) The Phelpses and their supporting *amici*

assert that Mr. Snyder did not see the protesters except on television, but Mr. Snyder testified that he saw them as he traveled from the viewing to the funeral and, of course, he knew the Phelpses were there because they had announced their intention to interlope well in advance. (*Compare* Resp'ts' Br. at 7, 9, 17, Thomas Jefferson Ctr. Br. 10, Scholars Br. 4,13, Br. for Reporters Committee for Freedom of the Press *et al.* as *Amici Curiae* Supporting Resp'ts (hereinafter "Reporters Committee Br.") 8, Br. for American Civil Liberties Union *et al.* as *Amici Curiae* Supporting Resp'ts (hereinafter "ACLU Br.") 4, 12, *and* Br. for Foundation of Individual Rights in Education *et al.* as *Amici Curiae* Supporting Resp'ts (hereinafter "FIRE Br.") 26 *with* Vol. VIII at 2144, 2194.)

With respect to each of these factual disputes—all of which involve questions of pure historical fact based solely on evaluations of witnesses' credibility—the jury sided with Mr. Snyder and found that the Phelpses' conduct toward Mr. Snyder made them liable for intentional infliction of emotional distress and invasion of privacy under Maryland law. To revisit these findings without any deference would essentially render juries purposeless in any case that arguably implicates the First Amendment.

Even the foundation of the Phelpses' First Amendment defense relies on their asking this Court to revisit a factual determination made by the District Court and, incidentally, again by the jury—namely, that many of the Phelpses' signs and much of the Epic did

not pertain to issues of public concern.[2] Indeed, the Fourth Circuit acknowledged that some of the signs, including the statements "God Hates You"[3] and "You're Going to Hell," had no relation to any matter of public concern. *Snyder v. Phelps*, 580 F.3d 206, 224 (4th Cir. 2009). And both the Phelpses and their expert conceded that the Snyders were "the target of [the Phelpses'] attacks and that many of their signs "referred to" the Snyders and were "directed at" and "personal" to them. (Vol. IX at 2333, 2366; Vol. X at 2572, 2618, 2630.)

Particularly in the context of the funeral for Matthew Snyder—who was not gay, who had no involvement in the scandals involving the Catholic Church, and who had no influence on or known opinion about these issues—it was far more likely that the signs were not about these public issues but were, instead, targeted, harassing epithets intended to cause the kind of harm tort law is designed to remedy. *See Rosenfeld v. New Jersey*, 408 U.S. 901, 902 (1972) (Berger, J.,

---

2. As discussed further *infra*, any error caused by the trial judge's decision to instruct the jury on First Amendment issues—after first determining himself that the Phelpses' signs were not protected by the First Amendment—was both harmless and invited by the Phelpses. Therefore, no remand is warranted on this ground. *See infra* Part V.

3. The ACLU points out that the back of the "God Hates You" sign said, "God Hates America." (ACLU Br. 16.) Since only one side of the sign would have been visible at any given time, it is unclear how anyone other than the Phelpses was supposed to understand that "You" referred "to the nation as a whole" rather than to "Petitioner or any one specific individual," as the ACLU claims. (*Compare id. with* Vol. VII at 2086–2087 *and* Vol. VIII at 2113, 2119, 2121.)

dissenting) ("When we undermine the general belief that the law will give protection against fighting words and profane and abusive language . . . we take steps to return to the law of the jungle."). This conclusion is further supported by the signs' and Epic's repeated use of the Snyders' names and the word "you" and Fred Phelps, Sr.'s admission that he began protesting military funerals after unidentified military personnel allegedly assaulted his son.[4] (Vol. VIII at 2226.) As set forth in Mr. Snyder's opening brief at Part I.B, this harassment should not be entitled to First Amendment protection.[5]

The Phelpses respond that a speaker's motives are irrelevant to the determination of whether the First Amendment protects his or her speech. Here, however, the Phelpses' subjective interpretation of their signs and the Epic is the only evidence that they relate to matters of public concern. The signs and Epic say nothing about homosexuals in the military or the Catholic sex abuse scandal, nor did the context of their

---

4. According to the ACLU, Phelps testified only that his son's attack "convinced him that there were gays in the military and that [he] should begin protesting that issue." (ACLU Br. 16 n.6.) The jury, however, was free to reject that explanation and, instead, conclude from the admitted temporal proximity that revenge motivated Phelps.

5. The ACLU argues that the Phelpses' speech was not "about" anybody. (*See* ACLU Br. 26 n.8.) This argument assumes that the Phelpses' subjective interpretation of their signs must be correct and ignores the repeated use of the Snyders' names and the word "you" as well as the admissions by the Phelpses and their expert that the signs "refer[ed] to" and were "personal" to the Snyder family. (Vol. IX at 2366; Vol. X at 2572, 2618, 2629.)

"protest" clarify their intended meaning. If the Phelpses had directed their conduct toward an outspoken supporter of gay rights, for example, or a politician or lobbyist with some influence on these issues, perhaps it would be reasonable to accept their interpretation. But they targeted their "message," instead, at Mr. Snyder, who had no connection to or influence over these issues. (*See also* Petitioner's Br. Part I.C.)[6] The Phelpses presented no evidence that either the Snyders or a neutral passerby would have understood their purportedly political message. The protected status of the protest and Epic, therefore, depends entirely on the credibility of the Phelpses' explanation for their conduct, and Mr. Snyder appropriately undermined this explanation with evidence that this conduct was targeted at the Snyders as revenge for an unrelated alleged assault in the past.

By the Phelpses' logic, the Court should grant "absolute" First Amendment protection even to obscenity or fighting words so long as the speaker can later ascribe a farfetched "political" meaning to it. Indeed, the Phelpses' sign depicting males engaging in anal intercourse was arguably obscene and, thus, not protected by the First Amendment. The Phelpses rely

---

6. Indeed, in the view of the Fourth Circuit and several of the *amici*, the Phelpses' picketing and Epic would garner absolute protection even if it had been targeted at a non-military funeral. *See Snyder*, 580 F.3d at 222; (Reporters Committee Br. 18; FIRE Br. 18; ACLU Br. 12, 25). The Phelpses apparently are free to pick a deceased person's name at random out of any local newspaper and target his or her family thereafter, so long as they stick to epithets and rhetoric rather than factual statements.

on an incredible leap of logic to explain that sign and many of the others as statements about issues of public concern. A person cannot shout "fire" in a crowded theater and later claim that he was trying to garner attention for fire safety issues or the inadequacy of the local fire department. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (noting that language which is "'vulgar,' 'offensive,' and 'shocking' . . . is not entitled to absolute constitutional protection under all circumstances"). Likewise, the Phelpses cannot stand outside Matthew Snyder's funeral hurling personal, targeted epithets and then later immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality or the supposed evils of the Catholic Church.

In sum, the Phelpses seek to shield themselves from liability by changing the jury's factual findings and by ignoring the personal and targeted nature of their signs and Epic. The trial judge and jury did not accept the Phelpses' version of events, and their findings are supported by competent and sufficient evidence. This Court should not revisit their determinations. *Harte-Hanks*, 491 U.S. at 693.

II. Mr. Snyder is a Private Figure for All Purposes.

The Phelpses also argue that Mr. Snyder "wants exemption from the requirement of *Hustler* . . . that falsity and actual malice be shown to sustain an IIED claim against public speech." (Resp'ts' Br. 20.) The *Hustler* holding, however, is limited to public figures, and the Phelpses' argument that Mr. Snyder is a public

figure is meritless.[7] *See* Rodney A. Smolla, *Emotional Distress and the First Amendment: an Analysis of Hustler v. Falwell*, 20 Ariz. St. L.J. 423, 466 (1988) (noting that the holding of *Hustler* is explicitly limited to public officials and public figures).

The *Gertz* Court recognized two "alternative bases" for designating a plaintiff as a public figure. First, "an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Gertz v. Robert Welch*, *Inc.*, 418 U.S. 323, 351–52 (1974). Second and "more commonly," a plaintiff becomes a public figure when he or she "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* Mr. Snyder and his deceased son meet neither of these criteria.

"Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Id.* at 352. The Snyder family has no "general fame or notoriety." In fact, outside of the instant context, Mr. Snyder is completely unknown apart from his friends, family, and colleagues.

Nor did the Snyders "voluntarily inject" themselves into any public controversy. *Id.* at 351. The Phelpses cite the media attention garnered by Matthew Snyder's

---

7. It is also a tacit acknowledgement that the Fourth Circuit misapplied the "actual malice" standard to expressive conduct targeting private figures.

funeral and the interviews granted by Mr. Snyder as evidence that the funeral was not a "private" event. (Resp'ts' Br. 18, 32–33.) But the evaluation of a plaintiff's public figure status must be limited to the time at or before the tortious conduct, and a defendant cannot transform a private figure into a public figure by dragging him into the spotlight of a public controversy. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). The vast majority of Mr. Snyder's contact with the media occurred *after* the Phelpses' involvement in his son's funeral and then only to counter the negative attention thrown on him by the Phelpses. Accordingly, the more recent publicity received by Mr. Snyder is irrelevant to the public figure analysis. *See Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1558–59 (4th Cir. 1994) (noting that a plaintiff's public replies to a defendant's public accusations do not confer public figure status).

Prior to the Phelpses' unwanted involvement in Mr. Snyder's life, Mr. Snyder received minimal media attention. He placed Matthew's obituary in the newspaper and gave brief quotations over the phone to two local newspapers that printed articles each time a local individual died in combat. (Vol. VIII at 2150.) The Phelpses suggest that this alone was sufficient to confer public figure status on Mr. Snyder. (Resp'ts' Br. 5–6.) The Phelpses further spend multiple pages noting that the wars in Iraq and Afghanistan have been "the most reported . . . in American history" and that military "funerals are highly publicized events" generally. (*Id.* 2–4; *see also id.* 46–52 (arguing that *Favish*'s recognition of a family's privacy right to photographs of deceased soldiers and to "a good memory of the deceased" is inconsistent with the public's interest in

military issues).) The Phelpses' logic, however, would confer public figure status on every military family who loses a loved one in war and chooses to publish an obituary. This Court's jurisprudence neither commands nor invites such an absurd result.

Mr. Snyder's minimal contact with the media also undermines the argument that permitting liability in this case would open the floodgates to claims against media outlets and controversial commentators. For example, the Reporters Committee for Freedom of the Press suggests that the Phelpses' hateful epithets referring to and targeted at the Snyders is akin to Ann Coulter's criticism of the so-called "Witches of East Brunswick"—four outspoken widows of 9/11 victims who were heavily involved in the creation of the 9/11 commission. (Reporters Committee Br. 23.) But this example demonstrates precisely why Mr. Snyder should be protected. Coulter's targets, like Jerry Falwell in the *Hustler* case, sought to use their status and personality to influence policies and thereby opened themselves up to public criticism, including Coulter's charges of opportunism. In contrast, it is undisputed that Mr. Snyder never entered the political arena and had no relationship to the purported matters of public concern the Phelpses now claim they were protesting. Mr. Snyder had no capacity to "shape events" and was not "intimately involved in the resolution of important public questions." *Hustler Magazine*, *Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (internal quotation marks omitted); *see also Wells v. Liddy*, 186 F.3d 505, 533–34 (4th Cir. 1999) (noting that public figure analysis requires determination of whether a plaintiff has attempted to influence the merits of a controversy or has drawn

attention to himself in order to invite public comment). He merely wanted to bury his son in peace. Holding the Phelpses liable for disturbing that process would in no way expose to liability those, like Coulter, who criticize public figures.[8]

Finally, *Hustler*'s application of defamation law to intentional infliction of emotional distress claims makes sense only with respect to public figures. The *Hustler* Court explained that Falwell's intentional infliction of emotional distress claim was merely a defamation claim in disguise—that the real "harm" Falwell experienced was reputational. Mr. Snyder's situation is reversed: as a private figure, he has very little "public" reputation to protect, and the harm he experienced was primarily emotional—though, as noted above, he also experienced physical manifestations of harm.[9] Imposing a "falsity" requirement on his claim would, thus, be arbitrary and, as the American Center for Law & Justice observes, "would in effect constitutionally abolish the tort of intentional infliction of emotional distress by means of speech (or at least render it wholly redundant of the tort of defamation." (Br. of American Center for Law & Justice as *Amicus Curiae* in Support of Neither Party (hereinafter "ACLJ Br.") 8–10.)

---

8. Likewise, the fact that intentional infliction of emotional distress claims are rarely successful under Maryland law—a fact noted by the Thomas Jefferson Center (Thomas Jefferson Ctr. Br. 16–17)—undermines the argument that permitting liability here would open the floodgates on tort claims and chill protected speech.

9. For this reason, the Phelpses' assertion that Mr. Snyder's reputation has benefited from the instant controversy while they have been vilified is of no moment. (*See* Resp'ts' Br. 18.)

III. This is Not a Pure Speech Case, and the Verdict Did Not Depend on Mr. Snyder's Subjective "Outrage."

The Phelpses spend considerable effort setting up the straw argument that Mr. Snyder "wants to equate his disagreement with words—no matter where, when, how, or in what form he saw them—with captive audience status." (Resp'ts' Br. 38; *see also id*. 36 ("Letting liability attach to not-proven-false words on public issues because a person subjectively claims to be outraged . . . would simply rip the *First Amendment* to useless shreds." (emphasis in original)); *id.* 52 (referring to Mr. Snyder's allegations as a "subjective claim of outrage"); *id.* 53 ("This is what Petitioner seeks—treating speech that speaks ill of the military-dead or is subjectively deemed outrageous to mourners of the military-dead as unprotected.").) But the Phelpses did not merely write a newspaper editorial, and the jury verdict did not depend on Mr. Snyder's subjective "disagreement with words" or his "outrage." Instead, the Phelpses engaged in *conduct*: they showed up uninvited to Matthew Snyder's funeral; they ensured media coverage of their protest by sending out a press release in advance; they created and displayed signs at the funeral depicting, among other things, two nude male figures engaging in anal sex; they created a website that referred to Mr. Snyder by name and alleged that he taught his recently-deceased son to "divorce" and "commit adultery." The jury found that this conduct met the elements of the state law tort claims at issue. Mr. Snyder's "subjective" reaction may have been relevant to whether he had suffered emotional harm as a result of the Phelpses' conduct, but it was not relevant

to the inquiry of whether that conduct was extreme and outrageous under Maryland law.

The jury instructions further undermine the position of the Phelpses and their *amici* that the verdict was based solely on the content of the Phelpses' speech. (*See* Vol. XII at 3113–3114 ("The Defendants in this case claim that their actions were protected by the First Amendment of the United States . . . The government, including the courts, can place reasonable time, place, and manner restrictions on how protected speech may be expressed.").) The instructions focused on *acts*, and the Fourth Circuit should not have divorced the language contained in the Phelpses' signs and Epic from the manner in which they presented that language to Mr. Snyder.

The arguments of the *amici* that Mr. Snyder was merely an offended "listener" are equally misplaced. (*See*, *e.g.*, ACLU Br. 10; Reporters Committee Br. 4.) Rather, the Phelpses physically disrupted Matthew Snyder's funeral. They stationed their protest so that it would directly interfere with Matthew Snyder's funeral procession, and Mr. Snyder was forced to follow an alternate route to mitigate the interruption. The Phelpses also took deliberate steps to draw maximum attention to their activities, at the expense of the Snyder family. The characterization of Mr. Snyder as a mere listener does not square with the reality of the Phelpses' conduct.

The Phelpses argue that Mr. Snyder advocates a novel principle of law in which a speaker can be held liable for any speech that is "outrageous" or subjectively

distressing to the listener. Mr. Snyder, however, seeks no exception to the protections provided by existing First Amendment doctrine. Rather, Mr. Snyder merely notes that the Fourth Circuit failed to give any consideration to the interest of Maryland in protecting his ability to recover, in tort, for the harm he suffered because of the Phelpses' harassment. Of course, Mr. Snyder does not deny that "outrageousness" is an element to the Maryland tort of intentional infliction of emotional distress. The jury, however, did not premise the Phelpses' liability merely on the subjective outrageousness of the Phelpses' conduct from Mr. Snyder's vantage point. Instead, the jury found that the Phelpses physically disrupted Matthew Snyder's funeral and targeted Mr. Snyder for harassment even though neither he nor Matthew had any rational connection with the Phelpses' purportedly religious message.[10]

Finally, the Phelpses admit that they seek absolute constitutional protection for all outrageous and intentionally harmful expressive conduct that does not include provably false statements—no matter the context or the relationship between the tortfeasor and the victim—urging that such protection is necessary and consistent with the First Amendment. (Resp'ts' Br. 35–36.) This position makes sense neither logically nor constitutionally. Encouraging harassers to escalate their rhetoric and to spout hateful epithets so that they can immunize themselves from liability undermines the

---

10. The Phelpses' own expert testified that there was no connection between their religion and the funeral protests in which they engaged. (Vol. X at 2606.)

purpose of tort law by encouraging victims to seek self-help. *See Rosenfeld v. New Jersey*, 408 U.S. 901, 903 (1972) (Burger, J., dissenting) ("[I]t does not unduly tax the imagination to think that some justifiably outraged parent whose family were exposed to the foul-mountings of the speaker would 'meet him outside' and either alone or with others, resort to the 19th Century's vigorous modes of dealing with such people."). And, as set forth above and in Petitioner's opening brief, imposing defamation's falsity requirement on other claims brought by private individuals is an entirely arbitrary means of distinguishing tortious-but-protected speech from speech which subjects the speaker to liability. (*See* ACLJ Br. 9–10 ("If anything, the exploitation of *truth* to inflict emotional harm—rejoicing maliciously in the death or suffering of another, for example—can hurt far worse than some vile but ultimately untrue accusation.").)

IV. The Actions of Third Party Demonstrators at the Funeral are Irrelevant.

In an effort to suggest viewpoint discrimination and to bolster their meritless argument that Mr. Snyder is a public figure, the Phelpses note that multiple other groups showed up at Matthew Snyder's funeral in response to the Phelpses' presence. (Resp'ts' Br. 6, 41.) The Phelpses even go so far as to suggest that Mr. Snyder himself used the funeral as the opportunity to hold a "patriotic pep rally." (Resp'ts' Br. 41.) The presence of other groups, however, is irrelevant to whether the Phelpses are "absolutely" protected by the First Amendment.

As an initial matter, the Phelpses' argument is without factual support. Mr. Snyder has never claimed that he invited the other groups' presence at his son's funeral. Indeed, to the extent that they contributed to the circus-like atmosphere and interfered with Mr. Snyder's mourning process, they, too, invaded his privacy. Mr. Snyder's decision not to sue these individuals, however, is not akin to a municipality selectively enforcing an ordinance or a police department selectively arresting protesters who express a particular viewpoint. A plaintiff need not sue everyone who harms him, and his failure to seek tort liability from a particular group does not diminish the harm it may have caused. The "viewpoint discrimination" cases cited by the Phelpses, therefore, are inapposite. *See*, *e.g.*, *A.N.S.W.E.R. Coal. v. Kempthorne*, 537 F. Supp. 2d 183, 204 (D.D.C. 2008) (granting summary judgment to plaintiff anti-war group who was denied a permit during Presidential Inauguration because National Park Service could not bestow preferential treatment on inaugural committee as compared with protesters).[11]

Moreover, the presence of the veterans groups and emergency personnel was caused by the Phelpses' actions. They likely would not have come had the

---

11. The Phelpses mischaracterize this case by suggesting that it stands for the proposition that protesters on public sidewalks do not "physically intrude into another's event to interject their own convictions or beliefs." (Resp'ts' Br. 60–61.) The case is also inapposite because the Presidential Inauguration was a public event and the protesters were discussing issues of public concern relevant to the President's policies.

Phelpses not chosen to target their hateful expressive conduct at the Snyder family. These groups were, thus, like firefighters who inadvertently cause water damage to property when putting out a fire; their actions may contribute to the harm suffered by the property owner, but they are not similarly situated with the arsonist.

V. The Court Need Not Remand this Case Because of Purportedly Faulty Jury Instructions.

Amici argue that, if Mr. Snyder's claims are not precluded as a matter of law based on the First Amendment, the District Court committed at least two errors warranting remand for a new trial: (1) permitting the jury to determine the constitutionally protected status of the Phelpses' speech and (2) failing to limit the jury's exposure to certain of the Phelpses' signs. These alleged errors, however, were both harmless and invited by the Phelpses. Accordingly, no remand is necessary.

With regard to the first alleged error, the advocates for remand neglect to mention that, prior to instructing the jury on the First Amendment, the District Court made its own determination that the Phelpses' speech and conduct did not fall within the scope of the First Amendment. The Phelpses moved for judgment as a matter of law on three separate occasions—after the presentation of Mr. Snyder's case, after the conclusion of the Phelpses' case, and at the conclusion of rebuttal testimony. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 576 (D. Md. 2008). On each occasion, the Phelpses argued that the First Amendment barred Mr. Snyder's claims as a matter of law and the District Court made the legal

determination that those claims were not so barred. (Vol. XII at 3113–3114.) The District Court thus fulfilled its duty of deciding whether the Phelpses' speech was protected by the First Amendment. Indeed, the jury instructions essentially added an extra element into Mr. Snyder's tort claims, prejudicing *him* rather than the Phelpses. The Phelpses cannot seriously complain about a jury instruction that offered them this additional measure of protection.

Moreover, even if the District Court offered an improper instruction concerning the First Amendment, it did so only at the Phelpses' invitation. Following the close of testimony and the denial of the Phelpses' third motion for judgment as a matter of law, the District Court requested proposed jury instructions from both parties. Mr. Snyder requested that the Court give no jury instruction concerning the First Amendment. The Phelpses, however, called for the Court to offer a lengthy instruction on the scope of the First Amendment. (Vol. XV at 3833–3834.) The Court's ultimate instruction was based on the Phelpses' proposal. (Vol. XI at 2877–2879.) The Phelpses therefore invited the alleged error in the jury instructions, and they cannot now cry foul. *See*, *e.g.*, *Harvis v. Roadway Express*, *Inc.*, 923 F.2d 59, 60 (6th Cir. 1991) ("[A] party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit."); *Krienke v. Ill. Cent. R.R. Co.*, 249 F.2d 840, 846 (7th Cir. 1958) ("A party cannot complain of an alleged error in instructions when the same error is found in its own instructions.").

Likewise, the second alleged error—that the District Court failed to limit the jury's exposure to certain of the Phelpses' signs—was both harmless and invited by the Phelpses. The most controversial signs were presented to the jury *by the Phelpses* when they played several videos, which included a montage of hundreds of signs that they had used at various protests. (*See* Vol. XV at 3796–3807 (Exhibits 41a-41f, titled, "Thank God for 911," "Thank God for IEDs," "Fag Troops," and "God Hates You," "You're Going to Hell," respectively).) It is unclear why the Phelpses chose to present these images to the jury, but, regardless of their motivation, they are now precluded from arguing that they have been prejudiced by the jury's exposure to these signs. *See All Am. Life & Cas. v. Oceanic Trade Alliance Council, Int'l, Inc.*, 756 F.2d 474, 479–80 (6th Cir. 1985) (refusing, on the basis of the invited error rule, to exclude otherwise inadmissible evidence because the plaintiff had invited witnesses to make the references it later sought to exclude).

CONCLUSION

For the reasons stated above as well as those set forth in Petitioner's opening brief, this Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

CRAIG T. TREBILCOCK
SHUMAKER WILLIAMS
1 East Market Street
York, PA 17401
(717) 848-5134

SEAN E. SUMMERS
Counsel of Record
ALEX E. SNYDER
BARLEY SNYDER LLC
100 East Market Street
P.O. Box 15012
York, PA 17405-7012
(717) 846-8888
ssummers@barley.com

Attorneys for Petitioner