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# *Snyder v. Phelps*: The Demise of Constitutional Avoidance

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## SNYDER V. PHELPS NOTE

### *Snyder v. Phelps*: The Demise of Constitutional Avoidance Emily Horowitz\*

#### I. INTRODUCTION

Over 200 years ago when the First Congress of the United States set forth the Bill of Rights, the application of the First Amendment<sup>1</sup> was a seemingly simple task.<sup>2</sup> This, however, proved not to be the case.<sup>3</sup>

The Fourth Circuit Court of Appeals' decision in *Snyder v. Phelps*<sup>4</sup>, coupled with the Supreme Court's granting of certiorari on the issue confirmed the great extent to which First Amendment law remains unsettled. Despite the unresolved nature of First Amendment law and the fact that the "Supreme Court has never addressed the specific issues of laws designed to protect the sanctity and dignity of memorial and funeral services as well as the privacy of family and friends of the deceased,"<sup>5</sup> a court should not address a constitutional issue when other grounds exist for the disposition of the case.<sup>6</sup>

In *Snyder*, the Fourth Circuit Court of Appeals reversed the United State District Court for the District of Maryland's judgment in favor of the plaintiff, Snyder, and determined that the defendant's speech and written epic were protected forms of speech under the First Amendment.<sup>7</sup> In a witty concurrence,

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<sup>1</sup> Jason M. Dorsky, *A New Battleground for Free Speech: The Impact of Snyder v. Phelps*, 7 PIERCE L. REV. 235 (2009) (quoting U.S. CONST. amend. I) ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .").

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

<sup>5</sup> Bill Mears, *Justices To Hear Case over Protests at Military Funerals*, CNN.COM, <http://www.cnn.com/2010/POLITICS/03/08/homosexuality.protest/index.html> (last visited July 19, 2010) (internal quotations omitted).

<sup>6</sup> *Snyder*, 580 F.3d at 227 (Shedd, J., concurring).

<sup>7</sup> *Snyder*, 580 F.3d at 206.

Judge Shedd argued that under the doctrine of constitutional avoidance, this case should not be resolved on the First Amendment issue.<sup>8</sup>

This note argues that Shedd's concurrence in *Snyder* is correct and should be followed on two grounds. Part II of this note presents a factual and procedural background of *Snyder v. Phelps*. Part III provides a historical account of First Amendment case law and its application in *Snyder v. Phelps*. Part IV is an analysis of the Majority's arguments. Part V analyzes the concurrence and argues why it is correct. Finally, Part VI discusses the potential consequences of the decision in this case.

## II. SNYDER V. PHELPS: FACTUAL AND PROCEDURAL BACKGROUND

### A. Factual Background

On March 3, 2006, Matthew Snyder was killed in the line of duty while serving in the Iraq war.<sup>9</sup> Albert Snyder arranged for his son's funeral to be held on March 10, 2006 at St. John's Catholic Church in Westminster, Maryland.<sup>10</sup> Fred Phelps, Pastor of Westboro Baptist Church, along with other members of his Kansas-based congregation, decided to picket outside Matthew Snyder's funeral in order to publicize their message of God's hatred of America because of its tolerance of homosexuality.<sup>11</sup> Phelps complied with police instructions and local ordinances and maintained the required distance from the church while picketing.<sup>12</sup> After returning from Matthew Snyder's funeral, Phelps-Roper, the daughter of and attorney for Fred Phelps, published an "epic" titled, "The Burden of Marine Lance Cpl. Matthew Snyder," on the church's website.<sup>13</sup> At trial, Snyder admitted that he did not actually see the signs displayed outside the church during Matthew's funeral.<sup>14</sup> Further, he testified that he learned about Phelps-Roper's epic only after running an Internet search.<sup>15</sup>

### B. Procedural Background

Snyder filed a complaint alleging five tort claims against Fred Phelps, the Church, Shirley Phelps-Roper, and Rebekah Phelps-Davis in June 2006.<sup>16</sup> The claims were defamation, intrusion upon seclusion, publicity given to private life,

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<sup>8</sup> *Id.* at 227.

<sup>9</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571–572 (D. Md. 2008).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Snyder*, 533 F. Supp. at 571–572.

<sup>16</sup> *Snyder*, 580 F.3d at 211.

intentional infliction of emotional distress, and civil conspiracy.<sup>17</sup> In October 2007, the district court granted the Defendant's Motion for Summary Judgment on the defamation and publicity given to private life claims.<sup>18</sup> The remaining three claims subsequently went to trial, where the jury returned a verdict for Snyder, awarding him an aggregate \$10.9 million in damages.<sup>19</sup> In a post-trial opinion, the district court remitted the punitive damages award, resulting in a total award of \$5 million for Snyder.<sup>20</sup> Defendants appealed to the Fourth Circuit Court of Appeals, contending that the district court's judgment violated their First Amendment right to freedom of speech.<sup>21</sup> The Fourth Circuit reversed the district court's judgment, holding that the Phelps' signs and epic were both forms of protected speech under the First Amendment.<sup>22</sup> On December 23, 2009, Snyder submitted his Petition for Writ of Certiorari, and on March 8, 2010, the Supreme Court granted his request.<sup>23</sup>

### III. PRIOR LAW: A HISTORY OF RELEVANT FIRST AMENDMENT DECISIONS AND THEIR APPLICATION TO SNYDER

In *Snyder*, Judge King began his analysis of First Amendment case law with a discussion of *New York Times Co. v. Sullivan*<sup>24</sup>. *Sullivan*, a case of first impression for the United States Supreme Court,<sup>25</sup> addressed the issue of to what extent the First Amendment limited Alabama's power to award damages in a libel action brought by a public official.<sup>26</sup> In that case, Sullivan brought a libel action against the *New York Times* and four petitioners after the *New York Times* published a full-page advertisement entitled, "Heed Their Rising Voices."<sup>27</sup> The advertisement contained several paragraphs mentioning the unfair treatment of Alabama State College students by the police.<sup>28</sup> Though Sullivan's name was not specifically mentioned in the advertisement, he felt that because he was the Montgomery Commissioner responsible for supervising the police department, the word "police" in the third paragraph was a reference to him.<sup>29</sup> The Supreme Court unanimously ruled in favor of the *New York Times* when it "established a rule barring public officials from recovering damages for the common law tort of

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<sup>17</sup> *Id.* at 212.

<sup>18</sup> *Id.* at 213.

<sup>19</sup> *Id.* at 213–215.

<sup>20</sup> *Id.* at 216.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 223–224.

<sup>23</sup> Petition for Writ of Certiorari at 5, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>24</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>25</sup> *Id.* at 256.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 256–257.

<sup>28</sup> *Id.* at 257.

<sup>29</sup> *Id.*

defamation unless the allegedly defamatory statement was made with actual malice....”<sup>30</sup>

While the Court expanded constitutionally protected speech to public officials in *New York Times*, and later to public figures<sup>31</sup> in *Gertz v. Robert Welch, Inc.*,<sup>32</sup> it declined to extend it further to private figures.<sup>33</sup> In ruling that the district court erred by its use of an incorrect legal standard in its Post-Trial Opinion, the Fourth Circuit stated in *Snyder* that “the [district] court focused almost exclusively on the Supreme Court’s opinion in *Gertz*. . . [although] [t]he Supreme Court has created a separate line of First Amendment precedent that . . . does not depend upon the public or private status of the speech’s target.”<sup>34</sup>

The Fourth Circuit termed the 1990 case *Milkovich v. Lorain Journal Co.*,<sup>35</sup> “crucial precedent” in its analysis and disposition of *Snyder*. In *Milkovich*, the Court addressed whether a newspaper that published a column referring to a wrestling coach as a liar enjoyed First Amendment protection.<sup>36</sup> The Court clarified the dispositive question as “whether a reasonable factfinder could conclude that the statements in the . . . column imply an assertion that Milkovich perjured himself in a judicial proceeding.”<sup>37</sup> The Court reasoned that because the column’s assertions were “susceptible of being proved true or false,” they were not protected by the First Amendment.<sup>38</sup> The Fourth Circuit applied *Milkovich* in *Snyder* to determine that the Phelps’ speech and epic were constitutionally protected because they fell within the two subcategories of speech that “cannot be reasonably interpreted as stating actual facts about an individual.”<sup>39</sup> *Milkovich* stated that the First Amendment protects statements on matters of public concern and rhetorical statements or hyperbolic language.<sup>40</sup>

While *Milkovich* was undoubtedly “crucial precedent” to the disposition in *Snyder*, *Hustler Magazine, Inc. v. Falwell*<sup>41</sup> is the case at the core of what will ultimately become a final decision on *Snyder* by the highest court in the land. Petitioners presented and were granted certiorari on three questions.<sup>42</sup> The first

<sup>30</sup> *Snyder*, 580 F.3d at 218 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964)).

<sup>31</sup> See, e.g., *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967).

<sup>32</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>33</sup> *Id.* at 344–347.

<sup>34</sup> *Snyder*, 580 F.3d at 222.

<sup>35</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

<sup>36</sup> *Id.* at 4–5.

<sup>37</sup> *Id.* at 21.

<sup>38</sup> *Id.*

<sup>39</sup> *Snyder*, 580 F.3d at 219.

<sup>40</sup> *Milkovich*, 497 U.S. at 21.

<sup>41</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>42</sup> Petition for Writ of Certiorari at 5, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

question<sup>43</sup> presented was “whether *Hustler Magazine, Inc. v. Falwell* is applicable to private individuals versus private individuals.”<sup>44</sup>

*Hustler* arose when Jerry Falwell sued *Hustler* magazine and Larry Flint to recover damages for libel, invasion of privacy, and IIED after a “parody” of an advertisement insinuating that Falwell had drunken incestuous relations with his mother was published by *Hustler* in November, 1983.<sup>45</sup> The Supreme Court reversed the Fourth Circuit’s judgment against petitioners, stating that “[t]he State’s interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection. . . .”<sup>46</sup> The Court reached this conclusion by reasoning that Falwell was a public figure for First Amendment purposes and *Hustler’s* parody was not reasonably believable.<sup>47</sup>

In their Petition for Writ of Certiorari, Petitioners argued that if *Hustler* magazine is applied to cases involving private individuals versus private individuals, “the victimized private individual is left without recourse.”<sup>48</sup> In their Brief in Opposition to Petition of Writ of Certiorari, Respondents stated that “[t]he outcome of Falwell . . . should have come as no surprise; and . . . this outcome should be the same whether a plaintiff claims private status or public figure status. . . .”<sup>49</sup>

In granting certiorari, the Supreme Court felt that the questions presented in *Snyder* need to be resolved. However, as Judge Shedd cleverly pointed out, “it is not a habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”<sup>50</sup> Since this case involves whether the elements of the torts intrusion of privacy and IIED were proven, *Snyder* is not a First Amendment issue and should not be treated as such.<sup>51</sup>

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<sup>43</sup> The second question presented was, “Does the First Amendment’s freedom of speech tenet trump the First Amendment’s freedom of religion and peaceful assembly?” The third question addressed whether an individual attending a family member’s funeral constitutes a captive audience who is entitled to state protection from unwanted communication. *Id.*

<sup>44</sup> Petition for Writ of Certiorari at 5, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>45</sup> *Hustler*, 485 U.S. at 47-48.

<sup>46</sup> *Id.* at 46.

<sup>47</sup> *Id.*

<sup>48</sup> Petition for Writ for Certiorari at 5, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>49</sup> Brief in Opposition to Petition of Writ of Certiorari at 27, *Snyder v. Phelps*, No. 09-751 (U.S. Jan. 20, 2010).

<sup>50</sup> *Snyder v. Phelps*, 580 F.3d 206, 227(4th Cir. 2009)

<sup>51</sup> Posting of Daniel Solove to Concurring Opinions Blog (Mar. 16, 2010, 10:58 AM), <http://www.concurringopinions.com/archives/2010/03/snyder-v-phelps-funeral-picketing-the-first-amendment-and-the-inrusion-upon-seclusion-tort.html>.

A. *The Reasoning Behind the Majority's Ruling*

The Fourth Circuit reasoned that because the defendants did not challenge the sufficiency of the evidence presented against them at the circuit court level, the issue was waived, though the defendants raised the issue at the district court level, and amicus raised it at the circuit court level.<sup>52</sup> Subsequently, the circuit court only addressed the Defendant's contention that the district court's judgment contravened their First Amendment rights.<sup>53</sup>

Drawing from the Court's determination in *Milkovich* that speech on matters of public concern involving rhetoric are protected forms of Free Speech,<sup>54</sup> the majority held that the Phelps' signs and epic were constitutionally protected expressions of their free speech.<sup>55</sup> The court ruled that because the signs "involve[d] matters of public concern" that "no reasonable reader could [have] interpret[ed] . . . as asserting actual and objectively verifiable facts about Snyder or his son," they were entitled to First Amendment protection.<sup>56</sup>

Although the epic was titled "The Burden of Marine Lance Cpl. Matthew A. Snyder," the court reasoned that, "in light of its context and tenor," a reasonable person would not believe that actual facts were being asserted in it.<sup>57</sup> Finally, the court held that Phelps-Roper's use of "atypical capitalization" and "exaggerated punctuation" indicated the use of "loose, figurative or hyperbolic language not connoting actual facts about Matthew or his parents."<sup>58</sup>

B. *Why the Concurrence Is Correct: Snyder Is not a First Amendment Issue.*

The rule that, ordinarily, an issue is waived when a party fails to raise an issue in its opening brief is not absolute.<sup>59</sup> For example, in *Independent Insurance Agents of America, Inc. v. Clark*,<sup>60</sup> the Supreme Court granted a writ of certiorari, stating "the circuit court did have the authority to raise and decide an issue not raised by the parties." Writing for the majority in *Snyder*, Judge King even said ". . . we acknowledge that the Supreme Court has seen fit . . . to address . . . an

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<sup>52</sup> *Snyder*, 580 F.3d at 216.

<sup>53</sup> *Id.*

<sup>54</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

<sup>55</sup> *Snyder*, 580 F.3d at 223.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 225.

<sup>58</sup> *Id.* at 225–226.

<sup>59</sup> *Id.* at 227 (Shedd, J., concurring).

<sup>60</sup> *Independent Ins. Agents of America, Inc. v. Clarke*, 965 F.2d 1077, 1078 (D.C. Cir.1992).

issue raised solely by an amicus.”<sup>61</sup> Judge Shedd was correct in his concurrence when he pointed out that The Thomas Jefferson Center for the Protection of Free Expression raised the issue in their amicus brief.<sup>62</sup> Subsequently, the Fourth Circuit should have evaluated the district court’s ruling on the state tort law claims, and not on the First Amendment issue.<sup>63</sup>

### 1. Snyder Failed To Prove that Phelps Committed the Tort of Inclusion Upon Seclusion.

Judge Shedd correctly argued that Snyder failed to prove the elements necessary to establish Phelps’ liability for intrusion upon seclusion.<sup>64</sup> The tort intrusion upon seclusion provides, “one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”<sup>65</sup> In general, intrusion involves actions such as snooping, trespassing, and surveillance, but not speech.<sup>66</sup>

Snyder claimed that Phelps committed intrusion upon seclusion because of the Phelps’ protest outside the funeral and the “epic” which was posted on the Church’s website.<sup>67</sup> “Under Maryland law, an intrusion occurs when there has been some act that interferes into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or his affairs.”<sup>68</sup> In *Snyder*, the funeral took place at a public location and the protest occurred more than 1,000 feet away from the funeral.<sup>69</sup> Clearly, there was no intrusion because the actual funeral service was not interrupted.<sup>70</sup> Further, Phelps stopped protesting when the church ceremony began and never confronted Snyder while there.<sup>71</sup> *Even if* the funeral service was interrupted, Snyder failed to prove that

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<sup>61</sup> *Snyder*, 580 F.3d at 217.

<sup>62</sup> *Id.* at 228 (Shedd, J., concurring).

<sup>63</sup> *Id.* at 227.

<sup>64</sup> *Id.* at 228–229.

<sup>65</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

<sup>66</sup> Posting of Daniel Solove to Concurring Opinions Blog (Mar. 16, 2010, 10:58 AM), <http://www.concurringopinions.com/archives/2010/03/snyder-v-phelps-funeral-picketing-the-first-amendment-and-the-inrusion-upon-seclusion-tort.html>.

<sup>67</sup> *Snyder*, 580 F.3d at 229 (Shedd, J., concurring).

<sup>68</sup> *Id.* (citing *Furman v. Sheppard*, 130 Md. App.67, 744 A.2d 583,586 (2000))(internal quotations omitted).

<sup>69</sup> Posting of Daniel Solove to Concurring Opinions Blog (Mar. 16, 2010, 10:58 AM), <http://www.concurringopinions.com/archives/2010/03/snyder-v-phelps-funeral-picketing-the-first-amendment-and-the-inrusion-upon-seclusion-tort.html>.

<sup>70</sup> *Snyder*, 580 F.3d at 230 (Shedd, J., concurring).

<sup>71</sup> *Id.*



the funeral was private. "Unlike most civilian funerals, military funerals include a public dimension. Funerals for soldiers killed in war generate greater publicity."<sup>72</sup> Considering that the Phelps' protest did not interrupt the funeral, which took place in a public location, Snyder's claim that he was the victim of invasion of privacy by intrusion upon seclusion fails.<sup>73</sup>

Likewise, Snyder's claim that Phelps-Roper is liable for invasion of privacy by intrusion upon seclusion because of the "epic" posted on the Church's website is also inadequate.<sup>74</sup> In order for Snyder to have prevailed, he would have had to prove that Phelps-Roper actually took action in intruding into his private life. Upon posting her epic, Phelps-Roper did not take any action specifically directed at Snyder.<sup>75</sup> In *Doe 2 v. Associate Press*,<sup>76</sup> the Fourth Circuit said that in order to be liable for wrongful intrusion, "a defendant must have engaged in conduct that resembles 'watching, spying, prying, besetting, or overhearing.'"<sup>77</sup> In posting her epic, Phelps-Roper did none of these things. In fact, the only reason Snyder found out about the epic was through his very own behavior of searching the Internet.<sup>78</sup> Any intrusion that Snyder might have experienced resulted from his own actions.<sup>79</sup> By posting an epic on a Church's website without having engaged in any of the recognized intentional behavior that the Fourth Circuit has determined to be "intrusive," Phelps-Roper did not commit the tort of intrusion upon seclusion.

As a matter of public policy, Phelps should not have been held liable for intrusion upon seclusion for the epic.<sup>80</sup> "If a valid cause of action arises every time someone sees himself referenced in an opinion expressed on the Internet—where millions of people express their honest opinions of people every day—or on television, and the opinion is non-defamatory, the floodgates of litigation could burst with potential lawsuits."<sup>81</sup> Summarily, the Fourth Circuit should have reviewed and reversed the district court's judgment in favor of Snyder on his claim for invasion of privacy by intrusion upon seclusion.

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<sup>72</sup> Njeri Mathis Rutledge, *A Time To Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295 (2008).

<sup>73</sup> *Snyder*, 580 F.3d at 231 (Shedd, J., concurring).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Doe 2 v. Associate Press*, 331 F.3d 417, 422 (4th Cir. 2003).

<sup>77</sup> *Doe 2*, 331 F.3d at 422 (quoting *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989)).

<sup>78</sup> *Snyder*, 580 F.3d at 231 (Shedd, J., concurring).

<sup>79</sup> *Id.*

<sup>80</sup> Jason M. Dorsky, *A New Battleground for Free Speech: The Impact of Snyder v. Phelps*, 7 PIERCE L. REV. 235 (2009).

<sup>81</sup> *Id.*

## 2. Snyder Failed To Prove that Phelps Committed the Tort of Intentional Infliction of Emotional Distress.

The Phelps were also incorrectly held liable for the tort of intentional infliction of emotional distress.<sup>82</sup> The tort provides, “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”<sup>83</sup> IIED is a tort that “is to be used sparingly and only for opprobrious behavior that includes truly outrageous conduct.”<sup>84</sup> Maryland courts have frequently refused to uphold IIED in the context of egregious behavior.<sup>85</sup> As such, had the Fourth Circuit analyzed the district court’s ruling that Phelps was liable for IIED, the decision would have likely been reversed.

The Fourth Circuit should have addressed and reversed the district court’s judgment in favor of Snyder on this issue for both legal and public policy reasons. Snyder claimed that he was a victim of IIED because his grieving process was interrupted by the Phelps’ behavior and the media attention resulting from it.<sup>86</sup> Snyder also contended that he was the victim of IIED because he was burdened with having to shelter his young daughters from the media coverage of the protests at Matthew’s funeral.<sup>87</sup> While the additional burden of having to shelter his daughters from the Phelps’ protest might have been an annoyance to Snyder and his family, particularly at a time of grieving the death of their young son, “the law is clear that mere insults or annoying behavior will not satisfy [the extreme and outrageous] element of the tort; in fact, even epithets, profanity, and racial slurs may not suffice. . . .”<sup>88</sup> As distasteful as the signs presented at the protest might have been, the Phelps’ conduct at Matthew’s funeral “simply d[id]not satisfy the heavy burden required for [IIED] under Maryland law.”<sup>89</sup>

Public policy reasons provide additional weight to the argument that the Fourth Circuit should have evaluated and reversed the district court’s judgment

<sup>82</sup> *Snyder*, 580 F.3d at 231 (Shedd, J., concurring).

<sup>83</sup> RESTATEMENT (SECOND) OF TORTS § 46(1965).

<sup>84</sup> *Snyder*, 580 F.3d at 231 (Shedd, J., concurring).

<sup>85</sup> *See, e.g.*, *Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992) (ruling that defendant’s conduct failed to satisfy the high standard for extreme and outrageous conduct); *see also* *Mitchell v. Baltimore Sun Co.*, 164 Md. App. 497, 883 A.2d 1008 (2005) (ruling that reporter’s behavior was not extreme and outrageous enough for her to be held liable for IIED).

<sup>86</sup> *Snyder*, 580 F.3d at 231 (Shedd, J., concurring).

<sup>87</sup> *Id.* at 232 (Shedd, J., concurring).

<sup>88</sup> Brief for the State of Kansas, 47 Other States, and the District of Columbia as Amici Curiae in Support of Petitioner at 21, *Snyder v. Phelps*, No. 09-751 (U.S. Jan. 23, 2010).

<sup>89</sup> *Snyder*, 580 F.3d at 231 (Shedd, J., concurring).

on the issue of IIED liability. While the “defendants’ speech . . . is uncommonly contemptible . . . many more ideas than just the Phelpsians’ would be endangered if the Court allowed the intentional infliction of emotional distress tort to cover the expression of offensive ideas.”<sup>90</sup> Holding Phelps and the Church members liable for IIED when all they did was join the “massive public discussion”<sup>91</sup> about the war, the soldiers and their deaths would be to open the floodgates to IIED litigation.

The Fourth Circuit erred in failing to evaluate the district court’s judgment on the state-based torts of invasion of privacy through inclusion upon seclusion and IIED.

#### IV. CONCLUSION

In violation of the doctrine of constitutional avoidance, the Supreme Court has unnecessarily charged itself with the difficult task of choosing to either expand or limit the application of *Hustler* to cases involving private parties versus private parties. On the one hand, if the Court expands *Hustler* to apply to private parties, it will severely restrict the remedies available to private parties.<sup>92</sup> On the other hand, if the Court restricts publically disdained speech outside of public places, such as funerals, this could potentially begin a trend in the courts towards limiting freedom of speech. Because this appeal could have been decided on a non-constitutional basis<sup>93</sup> it is both astounding and disappointing that the Supreme Court granted certiorari in this case.

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<sup>90</sup> Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, *Cardozo L. Rev. de novo* (forthcoming 2010).

<sup>91</sup> “A massive public discussion is underway in this nation. . . [e]veryone is using the occasion of the soldiers’ deaths to comment. . . WBC joined that discussion, on the same sidewalks where others were standing engaged in the discussion. . . .” Brief in Opposition to Petition of Writ of Certiorari at 60, *Snyder v. Phelps*, No. 09-751 (U.S. Jan. 20, 2010).

<sup>92</sup> Petition for Writ for Certiorari at 5, *Snyder v. Phelps*, No. 09-751 (U.S. Dec. 23, 2009).

<sup>93</sup> *Snyder*, 580 F.3d at 227 (Shedd, J., concurring).