9-24-2010

Section 6: First Amendment

Institute of Bill of Rights Law, William & Mary Law School

VI. First Amendment

In This Section:

Snyder v. Phelps

09-751

Ruling Below: Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 2280 (2010).

Appellants, members of the Westboro Baptist Church, picketed at the funeral for Snyder's son as a way to gain media attention for appellants' anti-homosexual message. Snyder filed suit against the protestors alleging various state law tort claims and a jury found in Snyder's favor. The appellants argued that the trial court's judgment against them contravened the right to free speech guaranteed by the First Amendment. The appellate court agreed, holding that (1) although appellants' picket signs, which conveyed messages such as "America is Doomed," "Fag Troops," and "Thank God for Dead Soldiers," were utterly distasteful, they involved matters of public concern, including the issue of homosexuals in the military and the moral conduct of the U.S. and its citizens; (2) no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about the father or his son; (3) the statements were protected by the First Amendment because they asserted non-provable facts and clearly contained imaginative and hyperbolic rhetoric intended to spark debate about issues that concerned appellants; and (4) an "epic" that appellants posted about the family on the church's website, which was aimed at Catholics, was also protected because it was patterned after the hyperbolic and figurative language used on the picket signs.

Questions Presented: (1) Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter? (2) Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly? (3) Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

Albert SNYDER, Plaintiff-Appellee,

v.

Fred W. PHELPS, Sr.; Westboro Baptist Church, Incorporated; Rebekah A. Phelps-Davis; Shirley L. Phelps-Roper, Defendants-Appellants.

United States Court of Appeals for the Fourth Circuit

Decided September 24, 2009

[Excerpt; some footnotes and citations omitted.]

KING, Circuit Judge:

In June 2006, Albert Snyder instituted this diversity action in the District of Maryland against Westboro Baptist Church, Incorporated (the "Church"), and several of its members (collectively, the "Defendants"). Snyder's lawsuit is predicated on two related events: a protest the Defendants conducted in Maryland near the funeral of Snyder's son Matthew (an

enlisted Marine who tragically died in Iraq in March 2006), and a self-styled written "epic" (the "Epic") that the Defendants posted on the Internet several weeks after Matthew's funeral. Snyder's complaint alleged five state law tort claims, three of which are implicated in this appeal: invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress ("IIED"), and civil conspiracy. After a trial in October 2007, the jury found the Defendants liable for $ 2.9 million in compensatory damages and a total of $ 8 million in punitive damages. Although the district court remitted the aggregate punitive award to $ 2.1 million, it otherwise denied the post-trial motions. *See Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008) (the "Post-Trial Opinion"). The Defendants have appealed, contending that the judgment contravenes the First Amendment of the Constitution. As explained below, we reverse on that basis.

I.

A.

The facts of this case as presented at trial are largely undisputed, and they are detailed in the district court's Post-Trial Opinion:

> On March 3, 2006, Marine Lance Corporal Matthew A. Snyder was killed in Iraq in the line of duty. Shortly thereafter, two United States Marines came to the home of the Plaintiff, Albert Snyder, and told him that his son had died. . . . Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.
>
> Defendant Fred W. Phelps, Sr., founded Defendant Westboro Baptist Church, Inc. in Topeka, Kansas, in 1955. For fifty-two years, he has been the only pastor of the church, which has approximately sixty or seventy members, fifty of whom are his children, grandchildren, or in-laws. Among these family members are Defendants Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis. . . . [T]he members of this church practice a "fire and brimstone" fundamentalist religious faith. Among their religious beliefs is that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military. Members of the church have increasingly picketed funerals to assert these beliefs. Defendants have also established a website identified as www.godhatesfags.com in order to publicize their religious viewpoint.
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> * * *
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> Phelps testified that members of the Westboro Baptist Church learned of Lance Cpl. Snyder's funeral and issued a news release on March 8, 2006, announcing that members of the Phelps family intended to come to Westminster, Maryland, and picket the funeral. On March 10, 2006, Phelps, his daughters Phelps-Roper and Phelps-Davis, and four of his grandchildren arrived in Westminster, Maryland, to picket Matthew Snyder's funeral. None of the Defendants ever met any members of the Snyder family.
>
> . . . [Defendants] carried signs which expressed general messages such as "God Hates the USA," "America is doomed," "Pope in hell," and "Fag

troops." The signs also carried more specific messages, to wit: "You're going to hell," "God hates you," "Semper fi fags," and "Thank God for dead soldiers." Phelps testified that it was Defendants' "duty" to deliver the message "whether they want to hear it or not." Lance Cpl. Snyder's funeral was thus utilized by Defendants as the vehicle for this message.

It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral.

Defendants' utilization of Matthew Snyder's funeral to publicize their message continued after the actual funeral on March 10, 2006. After returning to Kansas, Phelps-Roper published an "epic" on the church's website, www.godhatesfags.com. In "The Burden of Marine Lance Cpl. Matthew Snyder," Phelps-Roper stated that Albert Snyder and his ex-wife "taught Matthew to defy his creator," "raised him for the devil," and "taught him that God was a liar." In the aftermath of his son's funeral, Snyder learned that there was reference to his son on the Internet after running a search on Google. Through the use of that search engine, he read Phelps-Roper's "epic" on the church's website.

Snyder v. Phelps, 533 F. Supp. 2d 567, 571-72 (D. Md. 2008).

B.

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II.

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III.

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A.

It is well established that tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 264-65 (1964). Although the Supreme Court in *New York Times* specifically addressed the common law tort of defamation, the Court explained that its reasoning did not turn on the precise "form in which state power has been applied." Accordingly, the Court later applied the First Amendment to other torts not involving reputational damages, and we have applied the Court's controlling principles to other state law torts. Thus, regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech.

Where, as here, the First Amendment is implicated by the assertion of tort claims arising from speech, we have the obligation "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" We review de novo a district court's conclusions of law with respect to a First Amendment issue.

In its *New York Times* decision, the Supreme Court established a rule barring public officials from recovering damages for the common law tort of defamation unless the allegedly defamatory statement was made with "actual malice," and the Court defined such malice as knowing falsity or reckless disregard for the truth. The Court later expanded that constitutional standard to speech concerning "public figures" as well as "public officials."

Nevertheless, in a distinct but related line of decisions, the Court has recognized that there are constitutional limits on the *type* of speech to which state tort liability may attach. Thus, although there is no categorical constitutional defense for statements of "opinion," the First Amendment will fully protect "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."

In *Milkovich*, which is a crucial precedent in our disposition of this appeal, the Supreme Court declined to adopt an artificial dichotomy between "opinion" and "fact," and it specifically eschewed the multifactor tests that several lower courts (including this Court) had utilized to categorize speech. *See* 497 U.S. at 19. In *Milkovich*, the Court assessed whether a newspaper enjoyed First Amendment protection for a column that referred to a wrestling coach as a "liar," based on his allegedly deceitful testimony before a state athletics council. The newspaper maintained that the column merely stated its author's opinion, and was thus subject to categorical First Amendment protection. The Court rejected this contention, ruling instead that the "dispositive question" was "whether a reasonable fact-finder could conclude that the statements in the [newspaper] column imply an assertion that [the coach] perjured himself in a judicial proceeding." Concluding that the column's assertions were "susceptible of being proved true or false," the Court determined that they were not protected by the First Amendment.

In light of *Milkovich*, and as carefully explained by Judge Motz in our *Biospherics* decision, we are obliged to assess how an objective, reasonable reader would understand a challenged statement by focusing on the plain language of the statement and the context and general tenor of its message. *See* Biospherics, 151 F.3d at 184. And we must emphasize the "verifiability of the statement," because a statement not subject to objective verification is not likely to assert actual facts.

There 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. First, the First Amendment serves to protect statements on matters of public concern that fail to contain a "provably false factual connotation." We assess as a matter of law whether challenged speech involves a matter of public concern by examining the content, form, and context of such speech, as revealed by the whole record. "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." In order to be treated as speech involving a matter of public concern, the interested community need not be especially large nor the relevant concern of "paramount importance or national scope."

Second, rhetorical statements employing "loose, figurative, or hyperbolic language" are entitled to First Amendment protection to ensure 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 general tenor of rhetorical

speech, as well as the use of "loose, figurative, or hyperbolic language" sufficiently negates any impression that the speaker is asserting actual facts. We assess as a matter of law whether speech contains rhetorical hyperbole protected by the First Amendment.

* * *

B.

In this proceeding, Snyder was awarded judgment against the Defendants on three of the tort claims asserted in the Amended Complaint: intrusion upon seclusion, IIED, and civil conspiracy. By these claims, Snyder sought damages for injuries to his state of mind only, and not for pecuniary loss. Thus, the verdict in favor of Snyder can only be sustained if it is consistent with the Defendants' First Amendment guarantees. As explained below, the Defendants correctly contend that the district court erred in permitting the jury to decide legal issues reserved to the court, and then by denying the Defendants' request for judgment as a matter of law.

1.

Assuming that the district court otherwise applied the proper legal standards to its analysis of the Defendants' First Amendment contentions, it fatally erred by allowing the jury to decide relevant legal issues. . . .

The district court . . . decided that it was for the jury—not the court—to assess the preliminary issue of the nature of the speech involved, and to then decide whether such speech was protected by the Free Speech Clause. Thus, the jury was erroneously tasked with deciding whether the Defendants' speech was "directed specifically at the Snyder family," and, if so, whether it was so "offensive and shocking as to not be entitled to First Amendment protection." At the least, therefore, the judgment must be vacated and a new trial awarded, in that Instruction No. 21 authorized the jury to determine a purely legal issue, namely, the scope of protection afforded to speech under the First Amendment.

As previously noted, however, a new trial is unnecessary if the Defendants can prevail as a matter of law after our independent examination of the whole record. We are thus obliged to apply the applicable legal framework to the Defendants' various protest signs and written Epic, and decide if the Defendants are entitled to judgment as a matter of law.

2.

The district court also erred when it utilized an incorrect legal standard in its Post-Trial Opinion. In assessing the Defendants' First Amendment contentions, the court focused almost exclusively on the Supreme Court's opinion in *Gertz*, which it read to limit the First Amendment's protections for "speech directed by private individuals against other private individuals." The court therefore assessed whether Snyder was a "public figure" under *Gertz* and whether Matthew's funeral was a "public event."

The Supreme Court has created a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain *types* of speech, and that does not depend upon the public or private status of the speech's target. Thus, even if the district court (as opposed to the jury) concluded that Snyder and his son were not "public figures," such a conclusion alone did not dispose of the Defendants' First Amendment contentions. In focusing solely on the status

of the Snyders and the funeral, and not on the legal issue concerning the nature of the speech at issue, the court failed to assess whether the pertinent statements could reasonably be interpreted as asserting "actual facts" about an individual, or whether they instead merely contained rhetorical hyperbole. Whether a statement can reasonably be interpreted as stating actual facts about an individual is a question of law for the court and the district court failed to consider that issue in its Post-Trial Opinion. Consequently, we must assess the content of the Defendants' protest signs as well as the Epic, and determine whether such speech is entitled to constitutional protection.

a.

The following signs displayed by the Defendants, which are similar in both their message and syntax, can readily be assessed together: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." As a threshold matter, as 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. Such issues are not subjects of "purely private concern," but rather are issues of social, political, or other interest to the community. As explained in one of the amicus submissions, for example, a public firestorm erupted in 2001 after two prominent religious figures, Jerry Falwell and Pat Robertson, alleged that the September 11th terrorist attacks represented God's punishment for our country's attitudes regarding homosexuality and abortion.

Additionally, no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son. The signs reading "God Hates the USA/Thank God for 9/11" and "Don't Pray for the USA," for example, are not concerned with any individual, but rather with the nation as a whole. Other signs (those referring to "fags," "troops," and "dead soldiers") use the plural form, which would lead a reasonable reader to conclude that the speaker is referring to a group rather than an individual. Additional signs are concerned with individuals, such as the Pope, who are entirely distinct from Snyder and his son, or with groups, such as priests, to which neither Snyder nor his son belong. Finally, those signs stating "Thank God for Dead Soldiers" and "Thank God for IEDs" only constitute a reference to Snyder's son if the reader makes the assumption that their only object is Matthew Snyder and not the thousands of other soldiers who have died in Iraq and Afghanistan, often as a result of IEDs.

Even if the language of these signs could reasonably be read to imply an assertion about Snyder or his son, the statements are protected by the Constitution for two additional reasons: they do not assert provable facts about an individual, and they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned. Whether "God hates" the United States or a particular group or whether America is "doomed," are matters of purely subjective opinion that cannot be put to objective verification. The statement "Thank God," whether taken as an imperative phrase or an exclamatory expression, is similarly incapable of objective verification. And, as heretofore explained, a reasonable reader would not interpret the signs that could be perceived as including verifiable facts, such

as "Fag Troops" and "Priests Rape Boys," as asserting actual facts *about* Snyder or his son. To the contrary, these latter statements, as well as others in this category, consist of offensive and hyperbolic rhetoric designed to spark controversy and debate. By employing God, the strong verb "hate," and graphic references to terrorist attacks, the Defendants used the sort of "loose, figurative, or hyperbolic language" that seriously negates any impression that the speaker is asserting actual facts about an individual. Accordingly, we are constrained to agree that these signs—"America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags"—are entitled to First Amendment protection.

b.

The reasonable reader's reaction to two other signs—"You're Going to Hell" and "God Hates You"—also must be specifically addressed, as these two signs present a closer question. We must conclude, however, that these two signs cannot reasonably be interpreted as stating actual facts about any individual. The meaning of these signs is ambiguous because the pronoun "you" can be used to indicate either the second person singular or plural form. A reasonable reader could interpret these signs, therefore, as referring to Snyder or his son only, or, on the other hand, to a collective audience (or even the nation as a whole).

We need not resolve this question of usage, however, because a reasonable reader would not interpret the statements on these two signs as asserting actual and provable facts. Whether an individual is "Going to Hell" or whether God approves of someone's character could not possibly be subject to objective verification. Thus, even if the reasonable reader understood the "you" in these signs to refer to Snyder or his son, no such reader would understand those statements ("You're Going to Hell" and "God Hates You") to assert provable facts about either of them.

Additionally, as with the other signs, both of these signs contain strong elements of rhetorical hyperbole and figurative expression. As we have recognized, the "context and tenor" of the speech at issue, as well as the speaker's use of "irreverent and indefinite language," can serve to negate any impression that he is asserting actual facts about an individual. The general context of the speech in this proceeding is one of impassioned (and highly offensive) protest, with the speech at issue conveyed on hand-held placards. A distasteful protest sign regarding hotly debated matters of public concern, such as homosexuality or religion, is not the medium through which a reasonable reader would expect a speaker to communicate objectively verifiable facts. In addition, the words on these signs were rude, figurative, and incapable of being objectively proven or disproven. Given the context and tenor of these two signs, a reasonable reader would not interpret them as asserting actual facts about either Snyder or his son.

c.

Finally, the written Epic published on the website of the Church is also protected by the First Amendment, in that a reasonable reader would understand it to contain rhetorical hyperbole, and not actual, provable facts about Snyder and his son. The First Amendment issue concerning the Epic presents a somewhat more difficult question, however, because it is entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder." Such a title could lead a reasonable reader to

initially conclude that the Epic asserts facts about this particular soldier. The Epic's subtitle, however, immediately connects its contents to the Defendants' protest and the various signs displayed there: "The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots! This Epic Adventure Took Place on Friday, March 10, 2006." The Epic has a photograph of the funeral protest immediately below its title, followed by nearly two pages of verbatim Bible verses.

The Epic then discusses Matthew's life: "Twenty years ago, little Matthew Snyder came into the world. . . . God created him and loaned/entrusted him to Albert and Julie Snyder." The Epic states that the Snyders "had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil. You taught him that God was a liar." The Epic also focuses on Matthew's upbringing, asserting that "Albert and Julie . . . taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. . . . They also, in supporting satanic Catholicism, taught Matthew to be an idolater." After interspersing additional excerpts from the Bible, the Epic refers to Matthew's service in the military, noting that he fought 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 in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?

Id. The Epic then links Matthew's death to the Defendants' protest activities, stating:

> God rose up Matthew for the very purpose of striking him down, so that God's name might be declared throughout all the earth. He killed Matthew so that His servants would have an opportunity to preach His words to the U.S. Naval Academy at Annapolis, the Maryland Legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.

Notwithstanding the foregoing, the Epic cannot be divorced from the general context of the funeral protest. Indeed, it is patterned after the hyperbolic and figurative language used on the various signs. Again, in assessing the First Amendment issue, we must evaluate a reasonable reader's reaction to the Epic, in light of its context and general tenor. In context, the Epic is a recap of the protest and was distributed through the Church website, which would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein.

The general tenor of the Epic also serves to negate any impression that it was the source of any actual facts. In preparing it, the Defendants interspersed strong, figurative language with verses from the Bible. They 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. Despite referring to the Snyder family by name, the Epic is primarily concerned with the Defendants' strongly held views on matters of public concern. Indeed, the Epic explains that Matthew's death in Iraq gave the Defendants the "opportunity to preach [God's] words to the U.S. Naval Academy at Annapolis [and] the Maryland Legislature," where they

protested on the very day of Matthew's funeral. Finally, the Defendants' extensive funeral picketing activities predated Matthew's funeral and continue to this day throughout the country, with many of the signs displayed at Matthew's funeral also being displayed in other protests.

Thus, even when the Snyders are mentioned in the Epic, a reasonable reader would understand its contents to be primarily focused on the more general message to which their protests are directed. The Defendants assert in the Epic, for example, that the Snyders had incurred God's wrath by raising Matthew as a Catholic and allowing him to serve in the military—assertions a reasonable reader would take as focused on the Defendants' concerns with the policies and activities of the Roman Catholic Church and the military. Furthermore, a reasonable reader would take as rhetorically hyperbolic a text describing the "United States of Sodom" as a "filthy" country, labelling the Catholic Church as a "pedophile machine," and equating the Maryland Legislature with the Taliban. In that context, the reasonable reader would understand the other assertions of the Epic—that the Snyders raised their son "for the devil," and taught him to "defy his Creator, to divorce, and to commit adultery"—as simply "loose, figurative, or hyperbolic language" not connoting actual facts about Matthew or his parents. Thus, a reasonable reader would not understand the Epic to assert actual facts about either Snyder or his son.

C.

Notwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs and Epic are constitutionally protected. To paraphrase our distinguished colleague Judge Hall, judges defending the Constitution "must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people." *Kopf v. Skyrm*, 993 F.2d 374, 380 (4th Cir. 1993).

Nonetheless, the various states and localities, as well as grieving families, may yet protect the sanctity of solemn occasions such as funerals and memorials. Indeed, governmental bodies are entitled to place reasonable and content-neutral time, place, and manner restrictions on activities that are otherwise constitutionally protected. Some "breathing space" for contentious speech is essential, however, under the Free Speech Clause. As the Court long ago emphasized:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy.

Cantwell v. Connecticut, 310 U.S. 296, 310, (1940). Because the judgment attaches tort liability to constitutionally protected speech, the district court erred in declining to award judgment as a matter of law.

IV.

Pursuant to the foregoing, the judgment of the district court is reversed and the various

appeal bonds are hereby discharged.

JUDGMENT REVERSED AND BONDS DISCHARGED.

CONCURRENCE

SHEDD, Circuit Judge, concurring in the judgment:

Although I agree with the majority that the judgment below must be reversed, I would do so on different grounds. As I explain below, I would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims. Because the appeal can be decided on this nonconstitutional basis, I would not reach the First Amendment issue addressed by the majority.

* * *

"Court to Rule on Funeral Pickets"

SCOTUSblog
March 8, 2010
Lyle Denniston

The Supreme Court, taking on the emotionally charged issue of picketing protests at the funerals of soldiers killed in wartime, agreed Monday to consider reinstating a $5 million damages verdict against a Kansas preacher and his anti-gay crusade. This was one of three newly granted cases. The others test the constitutionality of background checks for workers who work for the government under contract, rather than as regular employees, and a case testing the right to sue in state court when a child is injured or dies after receiving a vaccine. All of the cases will come up for review in the Court's next Term, opening Oct. 4.

The funeral picketing case (***Snyder v. Phelps, et al.***, 09-751) focuses on a significant question of First Amendment law: the degree of constitutional protection given to remarks that a private person made about another private person, occurring outside the site of a private event. The family of the dead soldier had won a verdict before a jury, but that was overturned by the Fourth Circuit Court, finding that the signs displayed at the funeral in western Maryland and later comments on an anti-gay website were protected speech. The petition for review seeks the Court's protection for families attending a funeral from "unwanted" remarks or displays by protesters.

In March four years ago, Marine Lance Corporal Matthew A. Snyder was killed while serving in Iraq. His family arranged for a private funeral, with Christian burial, at St. John's Catholic Church in Westminster, Md. When word of the planned funeral appeared in the newspapers, the Rev. Fred W. Phelps, Sr., pastor of Westboro Baptist Church in Topeka, Kan., who has gained notoriety in recent years by staging protests at military funerals, decided to stage a demonstration at the Maryland funeral. In response to such protests, some 40 states have passed laws to regulate funeral demonstrations.

The Rev. Phelps' church preaches a strongly anti-gay message, contending that God hates America because it tolerates homosexuality, particularly in the military services. The church also spreads its views through an online site, www.godhatesfags.com. When the Snyder funeral occurred, the Rev. Phelps, two of his daughters and four grandchildren staged a protest nearby. They carried signs with such messages as "God Hates the USA," "America is doomed," "Pope in hell," "Semper fi fags," and "Thank God for dead soldiers." The demonstration violated no local laws, and was kept at police orders a distance from the church. After the funeral, the Rev. Phelps continued his protest over the Snyder funeral on his church's website, accusing the Snyder family of having taught their son irreligious beliefs.

The soldier's father, Albert Snyder, sued the Rev. Phelps, his daughters and the Westboro Church under Maryland state law, and won a $5 million verdict based on three claims: intrusion into a secluded event, intentional infliction of emotional distress, and civil conspiracy. (The verdict included $2.9 million for compensatory damages and $2.1 million for punitive damages; the punitive award had been reduced from $8 million by

the trial judge.) The Fourth Circuit Court overturned the verdict, concluding that the protesters' speech was protected by the First Amendment because it was only a form of hyperbole, not an assertion of actual facts about the soldier or his family. While finding that the Phelps' remarks were "utterly distasteful," the Circuit Court said they involved matters of public concern, including the issue of homosexuality in the military and the political and moral conduct of the United States and its citizens.

In Albert Snyder's appeal, his lawyers argued that the Supreme Court's protection of speech about public issues, especially the Justices' 1988 decision in *Hustler Magazine v. Falwell*, does not apply "to private individuals versus private individuals." If it does apply, the petition said, "the victimized private individual is left without recourse." The Circuit Court decision, it added, encourages private individuals to use hyperbolic language to gain constitutional protection "even if that language is targeted at another private individual at a private, religious funeral."

Even if the *Hustler* decision does apply to the kind of remarks at issue, the petition asserted, the case also raises the issue of whether those who attend a funeral are like a "captive audience" and thus need protection against intruders who were not invited.

* * *

"At Carroll Funeral, a National Protest"

The Baltimore Sub
March 11, 2006
Gina Davis

The family of Lance Cpl. Matthew A. Snyder, who was killed last week in Iraq, desperately wanted to keep his death from being politicized.

But a group of protesters had other plans. Waving placards declaring such messages as "Thank God for dead soldiers," seven members of the Westboro Baptist Church from Topeka, Kan., picketed Snyder's service yesterday as they have military funerals across the nation.

Assembled on city property adjacent to the St. John Catholic Church in Westminster, the group held signs, some bearing anti-gay slurs, that declared that war casualties are divine retribution—that God is allowing men and women to die in Iraq because of this country's tolerance of homosexuality.

"We're here because we need to help these families connect the dots," said Shirley Phelps-Roper, an attorney and church member, whose father, Fred Phelps, helped establish Westboro in 1955. "God is punishing this nation."

The church—which has about 75 members, roughly 80 percent of whom are relatives by blood or marriage—protests at funerals without regard to the presumed sexual orientation of the late soldier, Phelps-Roper said. It also blames an assortment of disasters—such as Hurricane Katrina, the Sept. 11 attacks and AIDS—on what its members view as the United States' permissive morals in violation of biblical dictates.

The group claims to have led 22,000 demonstrations since 1991 at parades, funerals and other events. It has only recently started picketing at funerals, Phelps-Roper said. It announced the intention to protest at several funerals of fallen soldiers in Maryland in the past year but did not show.

Before arriving at Snyder's funeral yesterday, the members picketed at the Naval Academy in Annapolis to voice opposition to efforts to eliminate the military's "don't ask, don't tell" policy. Tomorrow, they plan protests at military funerals in Colorado and Michigan.

The tactics of the Westboro Baptist Church have offended people and prompted 22 states, including Maryland, to either enact or propose laws to limit the rights of protesters at funerals. Especially offended are military veterans, many of whom showed up in Westminster yesterday on motorcycles to insulate the family members from the protesters.

Some people, however, argue that the soldiers whose funerals are being picketed died to protect the right to free speech, even for groups such as the Westboro Baptist Church.

For legislators—and mourners—it has been a delicate balancing act.

This year, 18 states have introduced legislation to restrict protests of funerals and memorial services, according to Heather Morton, an analyst with the National Conference of State Legislatures. Four states—Missouri, Oklahoma, South Dakota

and Wisconsin—have enacted such laws this year.

Kansas, the church's home state, has had a law that bans picketing at funerals since 1993. Legislators there amended the law in 1995 and are tweaking it again this year, largely in response to court challenges, Morton said.

Morton said many states are passing laws that create "buffer zones," setting a distance within which protesters are not allowed and times during which they cannot picket. They favor these kinds of limitations because similar laws have withstood court challenges, Morton said.

In Minnesota, House legislators passed a bill that requires protesters to stand back at least 1,000 feet. The Senate there is expected to support the bill, too.

In Maryland, Del. Mary-Dulany James, a Harford County Democrat, and Del. Joan Cadden, an Anne Arundel County Democrat, introduced a bill last month that seeks to ban protests within an hour before and after—as well as during—a funeral or memorial service. The bill would require protesters to stay at least 500 feet away and not block mourners' access.

"Even if common decency and respect for the dead cannot overcome the rights of free speech, surely the very real risks of compounding mental anguish and physical ailments with the additional stress and trauma that comes from disruptive protesters should not be ignored," James told the House Judiciary Committee last month.

But David Rocah, an attorney with the American Civil Liberties Union of Maryland, said that however wrong the members of the Westboro Baptist Church might be, their rights to free speech must be protected.

"We believe [the Westboro Baptist Church members] are fundamentally misguided," Rocah said. "People, somewhat understandably, find it incomprehensible that the Westboro Baptist Church is targeting military funerals for their protests. . . . But the government doesn't get to determine whose speech they like and whose speech they don't like."

Legislation is not the answer, Rocah said.

"The answer, frankly, is what happened" at Snyder's funeral, Rocah said. "There was no law preventing the Westboro Baptist Church from spouting its nonsense. And the counterprotesters were there to show their offense. There was no confrontation. This is how it should've happened. That's America."

A spokesman with the Carroll County Sheriff's Department said the protest was "peaceful."

"It went smoothly," said Maj. Thomas H. Long, who added that the Westboro group had contacted Westminster police earlier in the week to request permission to protest. "Everyone was very respectful of each other."

To help shield the family from the protesters, a group of motorcyclists called the Patriot Guard Riders—who show up any time Westboro members plan to picket a military funeral—stood shoulder to shoulder in the church parking lot, waving American flags. They were there as a human buffer to protect the family, said George Martin of Aberdeen, who had taken the day off from

his work at the Aberdeen Proving Ground.

The Patriot Guard Riders organized last fall in response to the Westboro's protests at military funerals and has chapters nationwide.

More than 60 bikers from chapters in Maryland, Virginia and Pennsylvania rode their motorcycles to Snyder's funeral hoping to counter the spectacle of protesters, he said.

"We're here to show respect to the fallen soldier and the family," said Martin, a 23-year Army veteran. "I would like to think someone would do this for my family."

The Snyders—who had been reluctant to do interviews with newspapers and TV stations all week and did not allow any news media into the funeral—said yesterday that the protests would not affect their celebration of Matthew's life and proud service to the Marines.

"Matthew had a wonderful tribute. He deserved the tribute," said his aunt, Cathy Menefee. "Anything the protesters do will not diminish Matthew's impact on this family, his home and his country."

"Court Nixes $5M Verdict Against Anti-Gay Funeral Protesters"

The Associated Press
September 25, 2009
Larry O'Dell

A federal appeals court on Thursday tossed out a $5 million verdict against protesters who carried signs with inflammatory messages like "Thank God for dead soldiers" outside the Maryland funeral of a U.S. Marine killed in Iraq.

A three-judge panel of the 4th U.S. Circuit Court of Appeals said the signs contained "imaginative and hyperbolic rhetoric" protected by the First Amendment. Such messages are intended to spark debate and cannot be reasonably read as factual assertions about an individual, the court said.

A jury in Baltimore had awarded Albert Snyder damages for emotional distress and invasion of privacy. The 2006 funeral of Snyder's son, Marine Lance Cpl. Matthew Snyder in Westminster, Md., was among many military funerals that have been picketed by members of the fundamentalist Westboro Baptist Church in Kansas.

Albert Snyder's attorney, Sean E. Summers, said he and his client were disappointed.

"The most troubling fact is it leaves these grieving families helpless," Summers said. "If you can't use the civil process, you have no recourse."

He said he will appeal the ruling to either the full appeals court or to the U.S. Supreme Court.

"We feel we owe that to Mr. Snyder and other families who have been harassed, humiliated and abused," Summers said.

Shirley Phelps-Roper, whose father is Westboro pastor Fred Phelps, said she was pleased by the ruling.

"They had no case but they were hoping the appellate court would not do their duty to follow the rule of law and the appellate court would not do that," said Phelps-Roper, who was among those named in the lawsuit.

"They didn't change God and they didn't stop us," she said. "What they managed to do was give us a huge door, a global door of utterance. Our doctrine is all over the world because of what they did."

Members of the Topeka, Kan.-based church have used protests at military funerals to spread their belief that U.S. deaths in the Iraq war are punishment for the nation's tolerance of homosexuality. One of the signs at Snyder's funeral combined the U.S. Marine Corps motto with a slur against gay men.

Other signs included "America is Doomed," "God Hates the USA/Thank God for 9/11," "Priests Rape Boys" and "Thank God for IEDs," a reference to the roadside bombs that have killed many U.S. troops in Iraq and Afghanistan.

"As a threshold matter, as 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," Judge Robert King wrote in the appeals court's opinion.

"Additionally, no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son," he wrote.

The court also said a written piece about Snyder's funeral on the Westboro Web site was protected by the First Amendment. Unlike the signs, the Web site piece specifically named the Snyders. Even so, the court said, the missive was "primarily concerned with the Defendants' strongly held views on matters of public concern."

"Dead Marine's Father Ordered to Pay Protesters' Legal Costs"

CNN
March 31, 2010
Emanuella Grinberg

The father of a Marine whose funeral was picketed by the Westboro Baptist Church says an order to pay the protesters' legal costs in a civil claim is nothing less than a "slap in the face."

"By the court making this decision, they're not only telling me that they're taking their side, but I have to pay them money to do this to more soldiers and their families," said Albert Snyder, whose son, Lance Cpl. Matthew Snyder, was killed in action in Iraq in 2006.

Members of the fundamentalist church based in Topeka, Kansas, appeared outside Snyder's funeral in 2006 in Westminster, Maryland, carrying signs reading "You're going to hell," "God hates you" and "Thank God for dead soldiers."

Among the teachings of the church, which was founded in 1955 by pastor Fred Phelps, is the belief that God is punishing the United States for "the sin of homosexuality" through events such as soldiers' deaths.

Margie Phelps, the daughter of Fred Phelps and the attorney representing the church in its appeals, also said the money that the church receives from Snyder will be used to finance demonstrations. But she also said that the order was a consequence of his decision to sue the church over the demonstration.

"Mr. Snyder and his attorneys have engaged the legal system; there are some rules to that legal engagement," said Phelps, a member of Westboro who says she has participated in more than 150 protests of military funerals.

"They wanted to shut down the picketing so now they're going to finance it," she said.

The 4th Circuit Court of Appeals on Friday ordered that Snyder pay more than $16,000 in costs requested by Westboro for copies of motions, briefs and appendices, according to court documents.

In a motion filed in October, Snyder's lawyer, who is representing him for free, asked the court to dismiss the bill of costs, or, alternatively, reduce the 50-cent fee per page or charge Snyder only for copies that were necessary to make their arguments on appeal.

"We objected based upon ability to pay and the fairness of the situation," Sean Summers said.

The mostly pro-forma ruling is the latest chapter in an ongoing legal saga that pits privacy rights of grieving families against the free speech rights of demonstrators, however disturbing and provocative their message.

Snyder's family sued the church and went to trial in 2007 alleging privacy invasion, intentional infliction of emotional distress and civil conspiracy. A jury awarded the family $2.9 million in compensatory damages plus $8 million in punitive damages, which were reduced to $5 million.

Westboro in 2008 appealed the case to the 4th District, which reversed the judgments a year later, siding with the church's claims that its First Amendment rights had been violated.

"The protest was confined to a public area under supervision and regulation of local law enforcement and did not disrupt the church service," the circuit court opinion said. "Although reasonable people may disagree about the appropriateness of the Phelps' protest, this conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law."

The U.S. Supreme Court has agreed to hear the case to address 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.

The justices will be asked to address how far states and private entities such as cemeteries and churches can go to justify picket-free zones and the use of "floating buffers" to silence or restrict speech or movements of demonstrators exercising their constitutional rights in a funeral setting.

Both Phelps and Snyder's attorney said they were surprised that the 4th District chose to weigh in on the issue of legal costs when they could have waited until after the Supreme Court hearing.

Phelps believes the ruling bodes well for her side.

"It is a good harbinger of the fact that the Supreme Court will remind this nation that you don't have mob rule. The fact that so many people hate these words does not mean you can silence or penalize them. That's supposed to be the great liberty that we congratulate ourselves on protecting in this nation. We strut all around the world forcing people to give all the liberties we supposedly have," she said.

Phelps anticipated that a Supreme Court ruling in the church's favor would be unpopular, but she said Westboro's members viewed the potential outcome in Biblical terms.

"When the Supreme Court unanimously upholds the 4th Circuit, it's going to put this country in a rage, and we will be expelled," she said. "But whenever it was time for an epic event in the Bible, the thing that happened right before is the prophets were removed from the land, and that's what's going to happen to us. . . . We're going to sprint to the end of this race."

Snyder claims he is unable to pay any legal costs in the case and is attempting to raise funds on his son's site, http://www.matthewsnyder.org/. He is equally optimistic that he will prevail before the Supreme Court.

"The American people keep my spirits lifted a lot and give me hope. I think most of the country is on my side on this issue," he said. "Too many people have died to protect our rights and freedoms to have them degraded and spit upon like this church does."

"Distress Over Parody Led to First Amendment Case"

USA Today
May 16, 2007
Joan Biskupic

Jerry Falwell's round face and jocular manner, coupled with his inclination for moralistic rhetoric, made him a frequent figure of satire. One extreme example turned into a First Amendment milestone at the U.S. Supreme Court.

In its November 1983 issue, Hustler magazine published a satirical advertisement that depicted Falwell having a drunken, incestuous encounter with his mother in an outhouse.

Falwell sued Hustler publisher Larry Flynt, alleging that the satire had caused severe emotional distress. A jury awarded Falwell $200,000, and an appeals court affirmed the decision.

However, in 1988 the Supreme Court threw out the award and ruled that the First Amendment protects the right to parody public figures, even when the parody is "outrageous." The unanimous opinion, written by Chief Justice William Rehnquist, said a standard tied to outrageousness in political discourse could subject publications to the whims of jurors' tastes or views.

The court in *Hustler Magazine v. Falwell* said public figures could not win money damages for emotional distress unless they could show "that the publication contains a false statement of fact which was made with 'actual malice.'"

By emphasizing the historical value of political satire, the decision became part of a line of cases, dating to *New York Times Co. v.* Sullivan in 1964, that set a high bar for public figures who allege libel and related claims.

"It's one of the true cornerstones of modern First Amendment law," says Rodney Smolla, dean of the University of Richmond law school, who wrote a book on the *Hustler* case. "It says you cannot sue merely because you're the butt of a vicious satire or joke. It has to be a genuine libel."

"On the one hand, this ruling has made a lot of our modern culture possible, everything from Saturday Night Live to Jon Stewart. But on the other hand, to Rev. Falwell and those who supported him, the ruling represents the moral decline of our culture."

Smolla says that after the ruling, Falwell appeared on the lecture circuit with Flynt to debate the case.

"He hated Flynt as a pornographer," Smolla says. "But with Falwell, it really wasn't personal. Larry Flynt used to refer to him in an endearing way as 'my preacher.'"

"*Snyder v. Phelps*: Intentional Infliction of Emotional Distress and the First Amendment"

Concurring Opinions
March 16, 2010
Daniel Solove

In a previous post, I analyzed the intrusion upon seclusion claim in ***Snyder v. Phelps***, 580 F.3d 206 (4th Cir. 2009), a case where the Supreme Court recently granted certiorari.

Snyder involves tort claims against Fred Phelps, pastor of the Westboro Baptist Church, and others arising out of the practice of Church members to picket the funerals of U.S. soldiers. Church members held a protest near the funeral of Albert Snyder's son, who was killed in Iraq. The Church preached anti-gay messages, protesting funerals of dead soldiers as a way to illustrate God's hatred of America for tolerating homosexuality. Some signs said: "God Hates the USA," "Fag troops," and "Thank God for dead soldiers." A jury found for Snyder, awarding him millions of dollars in damages. The Fourth Circuit reversed on First Amendment grounds. ***Snyder v. Phelps***, 580 F.3d 206 (4th Cir. 2009).

In this post, I'll analyze the intentional infliction of emotional distress issues. The tort provides:

> One 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.

Restatement (2nd) of Torts, Sec. 46.

Here are the questions being considered by the Supreme Court:

> 1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?
>
> 2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?
>
> 3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

I'll address each in turn.

1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?

Hustler Magazine, Inc. v. Falwell, 485 U.S. 86 (1988) involved a parody ad consisting of a fake interview between the Reverend Jerry Falwell and his mother, suggesting he had sex with his mother. He won a jury verdict for intentional infliction of emotional distress. The Supreme Court held that the First Amendment barred liability unless Falwell (a public figure) proved actual malice:

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of

> publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i. e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

In ***Snyder v. Phelps***, the district court had applied the standard in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which provides an exception to the actual malice standard for "private figures." But the Fourth Circuit reasoned that Phelps's speech involved a matter of public concern and wasn't directed specifically at Snyder. Whether Snyder was a public or private figure was irrelevant.

Specifically, the court stated:

> In assessing the Defendants' First Amendment contentions, the [district] court focused almost exclusively on the Supreme Court's opinion in *Gertz*, which it read to limit the First Amendment's protections for "speech directed by private individuals against other private individuals." *Snyder v. Phelps*, 533 F. Supp. 2d 567, 577 (D. Md. 2008). The court therefore assessed whether Snyder was a "public figure" under Gertz and whether Matthew's funeral was a "public event." *See id.*17
>
> The Supreme Court has created a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain types of speech, and that does not depend upon the public or private status of the speech's target. *See Milkovich*, 497 U.S. at 16; *Hustler Magazine*, 485 U.S. at 50. Thus, even if the district court (as opposed to the jury) concluded that Snyder and his son were not "public figures," such a conclusion alone did not dispose of the Defendants' First Amendment contentions. In focusing solely on the status of the Snyders and the funeral, and not on the legal issue concerning the nature of the speech at issue, the court failed to assess whether the pertinent statements could reasonably be interpreted as asserting "actual facts" about an individual, or whether they instead merely contained rhetorical hyperbole. *See Milkovich*, 497 U.S. at 20; *CACI*, 536 F.3d at 293. Whether a statement can reasonably be interpreted as stating actual facts about an individual is a question of law for the court.

The court concluded later on:

> A distasteful protest sign regarding hotly debated matters of public concern, such as homosexuality or religion, is not the medium through which a reasonable reader would expect a speaker to communicate objectively verifiable facts. In addition, the words on these signs were rude, figurative, and incapable of being objectively proven or disproven. Given the context and tenor of these two signs, a reasonable reader would not interpret them as asserting actual facts about either Snyder or his son.

I'm inclined to agree. Although I find the speech by Phelps and the others at his church to be despicable, it isn't specifically directed at particular individuals. They picket at particular funerals, but their message is directed more generally at

making anti-gay and anti-US comments, as well as broad attacks against the troops. *Gertz* doesn't fit because it involved a defamatory claim against the plaintiff, and there is no defamation against Snyder here.

Hustler, though, doesn't directly apply because it involved a public figure. Snyder isn't a public figure. Hence the issue before the Supreme Court—what to do in this case, which doesn't fall under *Gertz* or *Hustler*.

I think that the *Hustler* rule should apply here. The speech involved in ***Snyder*** was crude, obnoxious, and ridiculous, but it wasn't directed at specific people and couldn't reasonably be interpreted in making any factual assertions about specific people. It was certainly odious speech and caused Snyder emotional distress. But we tolerate a lot of speech that deeply offends people. I can call you a jerk, an idiot, and express my opinions about you freely, no matter how crude. The fact you might be very upset about this is outweighed by the First Amendment protection of free speech. I might also express views that you find offensive: "All Republicans are selfish idiots" or "All Democrats are weak-minded fools." This speech might be insulting to you, but it's protected by the First Amendment.

Where I start to run into problems is when I invade your privacy or defame you. If I just say something that offends you, it's not enough—and shouldn't be enough—to allow you to prevail in a lawsuit. That's because of the danger that unpopular speech will strike many people as offensive, and it will be easy for juries to be offended to and punish the speaker. If I say that "Yankee fans are morons" in New York City, I certainly wouldn't want to face a jury trial there brought by an offended fan.

In *On Liberty*, John Stuart Mill argues (persuasively in my opinion), that people should be free to say and do what they want so long as they don't harm others (self-regarding acts). He examines the objection that there are few purely self-regarding acts since others might be deeply offended by a person's conduct or speech:

> There are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings; as a religious bigot, when charged with disregarding the religious feelings of others, has been known to retort that they disregard his feelings, by persisting in their abominable worship or creed. But there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it. And a person's taste is as much his own peculiar concern as his opinion or his purse.

I agree with Mill. We need to tolerate a lot of offensiveness in society. There are no purely self-regarding acts, since our behavior will invariably offend some people who hold different values and opinions. But if the law were to recognize being offended as an injury, it would swallow up the category of self-regarding acts. Therefore, the law must not recognize as a cognizable injury merely being offended (or even deeply offended).

On the other hand, we must protect against direct attacks, false rumors, invasions of privacy, and so on. Speech used as a weapon to attack specific people and cause them emotional distress should be actionable. Such speech should rise above mere insults or offensive messages—it should be

defamatory, invasive of privacy, or harassing. A line should be drawn between generally offensive speech and speech that is specifically targeted at particular individuals so as to injure them.

I'd be all for allowing Snyder to recover against Phelps if Phelps invaded the funeral or disrupted it with his speech. But the facts indicate this didn't happen here. Snyder found out about Phelps's speech afterwards, and he became offended (and rightly so). But I think that as offensive as Phelps's speech was, the Fourth Circuit was correct—the speech wasn't directed at Snyder, and therefore the first question posed to the Supreme Court above isn't entirely accurate. This wasn't speech about a private matter—it was speech of public concern directed to the public.

2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?

This is an interesting question, but it doesn't apply to this case. The question would apply if Phelps's protest disrupted the funeral. Suppose Snyder were having a funeral procession out in public, and Phelps made his protest there, disrupting Snyder's event. We would then have Snyder's First Amendment rights to freedom of religion and assembly (a funeral is often religious and a funeral procession can be understood to be a form of assembly) pitted against Phelps's First Amendment rights to the speech. But that isn't this case, as the funeral was held in private and Phelps was far away.

3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

I don't think this question applies to this case since Snyder's family wasn't a captive audience to Phelps's speech. In fact, Snyder didn't even hear or notice Phelps's speech until after the funeral. If he were a captive audience, however, then the First Amendment analysis would have to take that into account.

In short, while Phelps's speech was odious, it was general enough and sufficiently distant from the funeral so as to avoid (1) making specific statements about Snyder and (2) invading or disrupting the funeral. Accordingly, it deserves First Amendment protection.

"Invasion of Privacy and the Freedom of Speech"

The Volokh Conspiracy
March 8, 2010
Eugene Volokh

The ***Snyder v. Phelps*** jury held defendants liable not just for intentional infliction of emotional distress, but also for invasion of privacy. "Invasion of privacy" covers several torts, but the ones alleged here were "intrusion upon seclusion" (because the picketing was outside a funeral, albeit 1000 feet away) and "publicity given to private life" (apparently because of the Phelpsians' statements on their Web site that plaintiff and his wife "raised [the deceased] for the devil," "RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery," "taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity," and "taught Matthew to be an idolator").

Even if the disclosure tort is constitutionally permissible—most lower courts have held it is, though the Supreme Court hasn't opined on this—it has been interpreted quite narrowly, and I don't see anything in this case that involves the sort of disclosure of highly embarrassing personal information (e.g., medical or sexual history) generally required for liability. Both the site and the picketing is offensive because of the viewpoint they express, the harsh language that they use, and their expression of the viewpoint in a way that's personalized to a recently killed soldier—not because it reveals some embarrassing secrets.

The intrusion upon seclusion tort generally focuses on conduct that is offensive regardless of the message it expresses (the Restatement of Torts illustrations are entering a patient's hospital room to take a photograph over the patient's objection, photographing through someone's bedroom window through a telescope, tapping someone's phone, getting someone's bank records using a court order, and calling someone every day for a month at inconvenient times). The tort is constitutional precisely because it's content-neutral. Here, though, the intrusion stemmed not just from the proximity of the picketing to the funeral—there must have been a good deal of speech within 1000 feet of the church at which the funeral service was being conducted, and surely one wouldn't call all of it "highly offensive intrusion upon seclusion"—but also from the message of the picketing.

Applying the intrusion tort here thus raises pretty much the same overbreadth, vagueness, and viewpoint discrimination problems as does apply the emotional distress tort. It may be a little narrower because it at least formally requires some sort of physical proximity with the plaintiffs. But it's also broader because it doesn't even require a finding of outrageousness (only the intrusion's being "highly offensive to a reasonable person"), and in any case the narrowing is pretty slight, if speech within 1000 feet of the funeral qualifies as physical proximity.

And one can easily see how dangerous this tort, if applicable here, could potentially be: It could conceivably lead to massive liability for antiabortion picketing within 1000 feet of abortion clinics (on the theory that people

who are going in for emotionally draining and possibly life-altering medical procedures are just as entitled to "seclusion" as people who are going to a funeral). It could lead to massive liability for protests within 1000 feet of churches (including the Phelpsians), mosques, and synagogues, on the theory that people are entitled to "seclusion" in their ordinary religious services as well as in funeral religious services. It could lead to universities' being allowed to punish students for distributing or posting allegedly offensive materials near dorms; and more.

"Slander not Protected by 1st Amendment"

The Baltimore Sun
March 22, 2010
Nathan Tucker

Do protesters have the constitutionally protected right to picket your fallen soldier's funeral and harass the proceedings? That is the question the Supreme Court will attempt to answer after it agreed to hear ***Snyder v. Phelps***, a case in which the jury awarded a $5 million verdict against a Kansas pastor who has made headlines by protesting the funerals of fallen service members.

Previous court rulings may suggest that the answer is yes. But a careful examination of the wording of the Constitution—not to mention simple common sense—suggests otherwise.

Four years ago, Marine Lance Cpl. Matthew A. Snyder was killed while serving in Iraq, and his family planned for a private funeral at their church in Westminster. The Rev. Fred W. Phelps Sr., the pastor of Westboro Baptist Church in Topeka, Kan., and six of his family members decided to stage a protest at the funeral.

The Westboro Baptist Church believes that God hates America because of its tolerance of homosexuality. During this particular funeral protest, they carried signs stating "God Hates the USA," "America is doomed," "Semper fi fags" and "Thank God for dead soldiers."

The father of the fallen marine, Albert Snyder, sued the protesters for, among other things, intentional infliction of emotional distress. The jury awarded Mr. Snyder $5 million in damages, a verdict that was later overturned by the Fourth Circuit Court of Appeals on the grounds that the protesters' speech was protected by the First Amendment.

The First Amendment, however, provides that, "Congress shall make no law . . . abridging the freedom of speech." But there is no federal, state or local law at issue in this case. No one is arguing that the government tried to suppress Mr. Phelps' speech in any way.

This suit is entirely private in nature. It involved the offensive remarks made by one private individual against another private individual at a private event. In a type of personal injury suit, the aggrieved party sued the harasser in court for emotional damages.

How, then, does the First Amendment apply to this case at all? In cases such as *New York Times v. Sullivan* and *Shelley v. Kraemer*, the Supreme Court attempted to justify the First Amendment's reach into private suits by relying on the tenuous argument that, because the power of the state is used to enforce the verdict (through the court system), the government is suppressing the speech at issue.

In essence, the court reasons that, since the court system coercively transfers money from A to B because of A's speech, that it becomes a government restriction on speech. It is an ingenious but dangerous argument that brings every single court action under the Constitution's orbit. So long as there is a plausible political or social commentary behind one's actions, he is now immune from liability.

If this were the case, a minority resident would have no recourse against his prejudiced neighbors if they decided to demonstrate outside his property every night, day after day. Or a host could not evict a rowdy house guest who was becoming verbally abusive if that guest was doing so as a political commentary. And suits for slander and libel would be impossible.

And taking the court's precedent to its logical conclusion, no one could sue for monetary damages because, if awarded, the court would be depriving the defendant of private property without just compensation, in violation of the 5th Amendment. And no marriage could be dissolved, because the Contract Clause prohibits states from breaking contracts.

Since these results were clearly not intended by the Constitution, the court should use this case to overrule its past precedents and affirm that the mere application of neutral principles to enforce private suits does not constitute government action. The Constitution was intended to only govern public behavior—not private.

"What the Supreme Court Sees in *Snyder v. Phelps*"

York Daily Record
April 12, 2010
Jeff Frantz

In the time since the U.S. Supreme Court agreed to hear ***Snyder v. Phelps***—a Spring Garden Township man's lawsuit against the members of a church who protested his son's military funeral—court watches have wondered why it took up the case and what a ruling might mean.

Albert Snyder won his lawsuit against the Westboro Baptist Church for defamation and invasion of privacy after the Rev. Fred Phelps and other church members held a demonstration 1,000 feet outside the funeral of Snyder's son, Lance Cpl. Matthew Snyder. The Fourth U.S. Circuit Court of Appeals overturned that ruling, saying the Phelps' signs, while offensive, were protected speech.

The Supreme Court rarely takes cases just because it disagrees with a lower court's decision, said Clay Calvert, a First Amendment expert at the University of Florida. Most often, justices seek to mend "splits" in the law, when appeals courts have offered contradictory rulings.

But while there are similar cases with different rulings, the ***Snyder*** case appears unique, without a split to be addressed, Calvert said.

So why, from the 10,000 requests it will receive this year, did the Court agree to hear Snyder's appeal after its term opens October 4?

Law professors offered a number of suggestions based on the three questions Snyder's attorneys asked the court to rule on.

It is important to remember that only four of the nine justices need to favor hearing a case for it to wind up on the Court's docket, said UCLA law professor Eugene Volokh.

The four judges voting to hear a case might have different reasons—two might strongly disagree with the lower court's decision, two might want to explore a constitutional issue, for example—but all that matters is they voted yes.

Question 1: Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?

In 1988, the Court ruled that a Hustler Magazine parody of the Rev. Jerry Falwell was protected speech and did not violate the legal concept of intentional infliction of emotional distress.

The case has widely been used as precedent, Calvert said.

Falwell—a nationally known minister—was legally a public figure, said Christina Wells, a law professor at the University of Missouri. Lance Cpl. Snyder was a private figure. Those are two different standards.

By taking this case, Wells said, the Court might address whether the *Falwell* ruling

applies to private figures.

Some state courts have ruled differently about private figures in somewhat similar cases, Volokh said.

"This is an important issue where the supreme court's guidance could be very helpful," Volokh said.

But it is complicated.

"You have public speech outside a private ceremony," Calvert said. "You have a public setting, but speech about a private figure. But you have speech about public policy."

Westboro wrote about Matthew Snyder on its Web site, but most of the signs it displayed outside his funeral, while offensive, appeared to be more broadly directed, Wells said. The justices will have to account for that.

Question 2: Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?

Volokh and Wells didn't understand the exact intent of this question.

Volokh said Snyder's lawyers might further develop it in their written arguments, but right now it doesn't seem specific enough to pique the Court's interest.

He added that the justice's clerks—highly skilled lawyers who do a great deal of research—will sometimes present a justice with more information about a specific question based upon their own interest and expertise. That might have happened here.

Question 3: Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

Traditionally, courts have given people attending funerals greater protections because they are seen as vulnerable.

That's why lower courts have upheld state bans that require protesters to stand a certain distance from a funeral, provided those bans don't single out one type of speech, Volokh said.

The Westboro protesters followed such a ban, standing 1,000 feet away from Matthew Snyder's funeral as required by Maryland law, which offers one of the most generous buffer zones in the nation, said Wells, who has written about such laws.

The legality of such bans is not in play here, Wells said, and she is not sure how Snyder can argue for state protection.

"That's not really an issue in this case," she said. "The fourth circuit opinion doesn't deal with that in any way."

There's also a question of what makes a person a "captive audience."

Wells noted that Albert Snyder did not see the protestors outside his son's funeral, and only learned about them later from news reports. Can he still qualify as a captive audience? she asked.

Reasonable people might agree Westboro's speech was hateful and offensive, Volokh said, but by staying outside the buffer zone, the church members were making it in a public space.

If the court accepts that bystanders in that public space are a captive audience, Volokh said, then people could be considered a

captive audience for almost any speech.

Funerals will not be the only topic considered when the Court discusses this question, Volokh said.

Some more conservative justices might be more inclined to hear arguments that funerals should be protected, Volokh said, but would have to also consider similar arguments made about women entering abortion clinics.

Protesters outside abortion clinics are much less restricted than funeral protestors, Volokh said, and some conservative justices are on record as saying the clinic restrictions are too broad. A ruling could affect both environments.

Really, Wells said, this question will likely be decided by those types of arguments.

"If you recognize a right to be free of offensive speech in public," Wells said, "it would have great implications for protestors."

Case timeline

Mar. 3, 2006: Marine Lance Cpl. Matthew Snyder, 20, is killed in a Humvee crash in Al Anbar province, Iraq.

Mar. 10, 2006: Matthew Snyder is buried in Westminster, Md., after a funeral at a nearby Catholic Church. The Rev. Fred Phelps and members of his Westboro Baptist Church stage a protest 1,000 feet outside the ceremony, including signs reading "Semper Fi, Semper Fags" and "God hates dead soldiers."

June 5, 2006: Albert Snyder, Matthew Snyder's father, files a defamation suit against Phelps and the Westboro Church in federal court, alleging church members violated the family's right to privacy and defamed Matthew Snyder on its Web site.
Oct. 31, 2007: A jury rules in favor of Albert Snyder and awards a $10.9 million verdict, including $8 million in punitive damages.

Feb. 4, 2008: A judge reduces the verdict to $5 million.

Sept. 24, 2009: The Fourth U.S. Circuit court of appeals rules in favor of Phelps, overturning the verdict.

Mar. 8, 2010: The U.S. Supreme Court agrees to hear Snyder's appeal of the Fourth Circuit's decision when its next term begins in October.

* * *

"Should Protests Be Allowed at Military Funerals?"

U.S. News Weekly
July 2, 2010
Timothy Zick

Free-speech controversies have often involved highly offensive and obnoxious expression: burning the U.S. flag, marching in Nazi regalia in a city populated by Holocaust survivors, and insinuating that a pastor had incestuous relations with his mother in an outhouse. But in each of these cases, the courts upheld the right to communicate the offensive message. Enter the Phelps family, who make up most of the congregation at the Westboro Baptist Church in Topeka, Kan. For years, they have conveyed homophobic and sacrilegious messages near the sites of military funerals. When the family of a Marine killed in action sued over one such protest, a jury thought this speech crossed the line. But a federal court of appeals held that the First Amendment protected the Phelps's noxious speech

The case, ***Snyder v. Phelps***, is not about the dignity or psychic well-being of the father of a fallen Marine. Nor is it solely about the fate of the decidedly unsympathetic speakers. As is often true when a dispute reaches the Supreme Court, the stakes are much higher

On the line is more than half a century of legal precedents holding that governmental neutrality is critical to the functioning of a free marketplace of ideas, and that debate on public matters must be, as the Supreme Court said in *New York Times v. Sullivan*, "uninhibited, robust, and wide open." *Sullivan* involved the potentially crippling imposition of civil liability on a newspaper for making false statements about the conduct of Southern public officials during the civil rights era. The case demonstrated that the civil tort system poses as grave a threat to free speech as any government censor.

For very sound reasons, we have not allowed the government to determine, either through direct regulation or the tort system, which words are too offensive or what conduct too vile to be experienced in public. We have required that those offended avert their eyes, endure the offense, or engage in counter-speech. We have generally demanded that those in public sustain the psychic blows that speech can sometimes inflict. We have done all of this on the theory that tolerance of offense is far preferable to empowering a government censor to dictate a code of public manners or determine what qualifies as suitable discourse in the body politic. This approach makes our First Amendment exceptional among the speech regimes of the world.

If juries are empowered to enforce a code of decency and respect through high damage awards, then we must also permit government officials, high and petty, to haul boorish and insensitive speakers before the constable, the student disciplinary board, or the prosecutor. Do not assume, either, that this threat only applies to a few oddballs carrying on within eyesight or earshot of funeral ceremonies. Once the line of public decency is drawn, any speaker who crosses it may be punished. Further, the Web, where uninhibited discourse has been the norm, may be the next space slated for cleansing

(indeed, the jury verdict in *Snyder* was based in part on a Web posting).

The speech activities of the Westboro church are undeniably repugnant. However, there are limits to what lawmakers can do to make the rest of us comfortable when we venture outside or online. A society that allows the imposition of million-dollar judgments for waving placards and posting opinions because a jury or judge finds them to be outrageous or offensive has lost confidence in its ability to shoulder the burdens that accompany freedom of speech. The ignominious Phelps family has reminded us that free speech is not free.

"Should Protests Be Allowed at Military Funerals?"

U.S. News Weekly
July 2, 2010
Walter Dellinger

In recent years, a family associated with a Kansas church has taken to organizing protests at the private funerals of fallen American soldiers around the country with hateful messages like "Thank God for Dead Soldiers" and "Semper Fi Fags." Later this year, the Supreme Court will hear a case based on one such protest, concerning a jury verdict awarded to the father of a soldier. The funeral protesters claim that their conduct is absolutely protected by the First Amendment. In that case, at the request of Senate Majority Leader Harry Reid, I filed a pro bono, friend-of-the-court brief, supported by 58 senators, urging the court to conclude that laws safeguarding families from disruptive protests at funerals are consistent with the First Amendment

Proper burials play a crucial role in helping the bereaved mourn the dead. The disruption of a funeral interferes with the necessary emotional process of grieving and can inflict severe psychological, and even physical distress, on the bereaved. In recognition of the vulnerability of mourners, American courts have long recognized a "right" to a decent burial. As one court said over 100 years ago, "[w]e can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and unobstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency; certainly none where the law need less hesitate to impose upon a willful violator responsibility for the uttermost consequences of his act."

Congress and 46 different state legislatures have enacted laws to minimize picketing and other forms of disruptive activity in or near cemeteries during a funeral. The details of these laws vary, but they generally prohibit all demonstrations during, and in the time immediately before and after, a funeral at the cemetery and in a narrow buffer zone around it. The Respect for America's Fallen Heroes Act, which Congress enacted in 2006, is representative. It prohibits demonstrations at national cemeteries, including Arlington National Cemetery, for an hour before and after a funeral or memorial service, as well as noisy disturbances of the peace within 150 feet of a road into or out of the property.

Congress carefully crafted the law to comport with the First Amendment. The Supreme Court has held that laws governing the time, place, and manner of speech are permissible, so long as the laws don't discriminate based on the subject of the speech, serve a significant public interest, and are carefully designed to leave open alternative means for communication of the information.

The federal and state laws regulating protests at funerals do just that. They prohibit any type of disruptive speech or conduct at a funeral, not just a particular message. They serve the important purpose of safeguarding the rights of the bereaved to a solemn occasion to bury their dead. And they leave open numerous alternative options for protests: The protesters in the case before the court have staged

demonstrations at state capitols and other government facilities on the same day they have protested at funerals.

The right to speak freely about matters of public concern does not encompass abusive conduct intended to invade a private memorial ceremony and injure its participants. Protesters are free to convey their message in virtually any public manner they choose. But they are not free to hijack a family's private funeral as a vehicle for expression of their own hate. Nothing in the First Amendment requires otherwise.

"Cuccinelli Says Funeral Protest Case Could Curtail Free Speech"

The Washingon Post
June 1, 2010
Rosalind Helderman

Post Supreme Court reporter Robert Barnes wrote this morning about the case ***Snyder v. Phelps***, including Virginia Attorney General Ken Cuccinelli's decision not to write a friend of the court brief on behalf of plantiff Albert Snyder. Virginia and Maine are the only two states in the country who haven't joined the suit, which will be heard by the court this fall, on behalf of Snyder, who is suing the Westboro Baptist Church in Topeka, Kan., and its founding pastor, Fred W. Phelps Sr. for disrupting the funeral of his late son, Marine Lance Cpl. Matthew Snyder.

The Kansas church has made a show of picketing funerals of military personnel killed in Iraq and Afghanistan, arguing military deaths are America's punishment for tolerating homosexuality. Cuccinelli spokesman Brian Gottstein told Barnes that Virginia's attorney general chose not to get involved with the case because he is afraid of setting a precedent to allow free speech to be curbed if it causes "emotional distress," as Snyder's lawyers have argued.

Through Gottstein, Cuccinelli has just issued a fuller explanation of his decision not to write a friend of the court brief. In a statement, Gottstein said the attorney general "deplores the absolutely vile and despicable acts of Fred Phelps and his followers" and has great sympathy for the Snyder family and family of other military personnel disrupted by the church protests. But he reiterated Cuccinelli is concerned about the precedent that could be set in the case.

In a statement he said:

> If protesters—whether political, civil rights, pro-life, or environmental—said something that offended the object of the protest to the point where that person felt damaged, the protesters could be sued. It then becomes a very subjective and difficult determination as to when the line is crossed from severely offensive speech to that which inflicts emotional distress. Several First Amendment scholars agree.
>
> Virginia already has a statute that we believe balances free speech rights while stopping and even jailing those who would be so contemptible as to disrupt funeral or memorial services. That statute, 18.2-415(B), punishes as a class one misdemeanor (up to one year in jail and a fine of up to $2,500) someone who willfully disrupts a funeral or memorial service to the point of preventing or interfering with the orderly conduct of the event. We do not think that regulation of speech through vague common law torts like intentional infliction of emotional distress strikes the proper balance between free speech and avoiding the unconscionable disruption of funerals. We think our statute does. So long as the protesters stay within the letter of the law, the Constitution protects their right to express their views. In Virginia, if Phelps or

others attempt this repugnant behavior, cross the line and violate the law, the attorney general's office stands ready to provide any assistance to local prosecutors to vindicate the law.

"A Call for Justice"

Marine Corps Times
April 5, 2010
Dan Lamothe

Albert Snyder's eyes well up with tears when recalling his son's funeral.

More than 1,200 people packed St. John Catholic Church in Westminster, Md., on March 10, 2006, to pay their respects to 20-year-old Marine Lance Cpl. Matthew Snyder, who died when his Humvee rolled over in Iraq's Anbar province while he manned the vehicle's gun turret.

On the trip from the church to a nearby veterans cemetery, small-town patriotism was on full display. Cars pulled over and allowed the funeral procession to pass. Strangers on the street saluted.

"I've never seen a funeral like this in my life," Snyder said, his voice wavering. "It was just amazing to see."

The funeral was marred, however, by seven uninvited guests—members of the Westboro Baptist Church flew in from their headquarters in Topeka, Kan., to picket outside the church service.

Carrying signs reading "Semper Fi Fags," "Thank God for Dead Soldiers" and "Thank God for IEDs," the church members infuriated passersby and mourners just as they have at hundreds of military funerals nationwide.

Led by founder Fred Phelps, the group maintains that God kills U.S. troops as punishment for the country's tolerance of homosexuality, greed and abortion.

Snyder just wasn't going to let the group disparage his fallen warrior. He sued the church.

Four years after his son's death, the automation equipment salesman received word that his case will be heard by the Supreme Court in October.

A small team of lawyers representing Snyder will argue that Phelps' right to free speech does not supersede mourners' rights to lay their family members to rest without facing an insulting public protest.

Snyder is seeking $5 million in emotional and punitive damages from Westboro Baptist and members of the Phelps family, and hopes a legal victory will spare others the torment he and hundreds of other military families have been forced to endure.

"I knew these people were going to be at Matt's funeral, but in my mind, this day was about Matt, and that's strictly what it was about," Snyder said. "People think that these were seven people who showed up with little signs. There were people flipping them the finger, yelling at them from cars. And this is the way you're going to bury someone who died for their country?"

Fighting back

Snyder took on the church three months after he buried his son.

On June 5, 2006, Snyder sued the Westboro church for defamation, invasion of privacy and intentional infliction of emotional distress.

His suit charged that a screed posted on one

of the church's Web sites defamed the Snyders. Titled "The Burden of Marine Lance Cpl. Matthew A. Snyder," the rant accused his parents of raising their son "for the devil" and of teaching him to commit adultery and divorce and to "support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity."

Snyder made the invasion of privacy claim because the Westboro group "intentionally entered upon the solitude and seclusion of the plaintiff and his family members" and "intruded upon the plaintiff's private affairs and concerns."

Finally, Snyder argued the church meant to harm him and his family emotionally.

Snyder did not ask for a specific amount of money but said the Westboro members should have to pay both emotional damages, his court costs and punitive damages for their "reprehensible actions."

Snyder was torn over whether to sue the church. He had to endure hours of medical and psychiatric testing, to validate claims he had been harmed by the protests. His doctors later said his diabetes and depression worsened after he found the screed.

"I thought about it and about what they did to me, and how Matt would have felt if somebody had done this to one of his brothers from Iraq," he said. "And I decided, 'I'm going to go through with this.'"

The church sought to quash the lawsuit, arguing during a trial in Baltimore in October 2007 that its members did not intend to cause emotional distress. Their protest was kept 1,000 feet from the church's doors, they pointed out. They needed to preach to "doomed America" in public places to let it be known the acceptance of homosexuality is wrong, they said.

On Oct. 31, 2007, the jury ruled in favor of Snyder, awarding him $10.9 million in damages—enough to effectively bankrupt the 70-member church.

Snyder conducted dozens of media interviews that week, reflecting on the way he had once been pushed around by many people in his life, only to latch on to the church's actions and stand up for himself.

'An insult'

The Westboro group immediately appealed the decision, and legal experts and scholars wondered aloud whether the case would stand up before a higher court.

In February 2008, a federal judge in Baltimore reduced the damages to $5 million. The church appealed to the Supreme Court, but the justices declined to hear the case. It then turned to the 4th U.S. Circuit Court of Appeals.

A three-judge panel for the Virginia-based court overturned the original decision, ruling placards and Internet screed were protected as free speech under the First Amendment."

"As 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," Judge Robert King wrote in the court's opinion.

Snyder struggled with his next step, too.

In an interview, Snyder said balancing the

legal battle, media requests and day-to-day life has been costly—both emotionally and financially.

Snyder has about $50,000 in legal bills, even though his attorneys do not charge him for their time. He launched a Web site, www.matthewsnyder.org, to help offset the bills but is "still a long way off" from paying for everything.

"I don't want to take anyone's free speech away," Snyder said. "But I don't want anybody to do anything to the people who gave us that free speech. Too many people have died to protect it, and for someone to hide behind it and abuse it is an insult."

Legal experts are uncertain how the case will play out. They question whether the court will rule in favor of Snyder if it means the right to free speech will be limited in any way. Yet the Supreme Court's willingness to take up the case has raised plenty of questions about what it could do.

One possibility is that the court wants to establish a clear definition of the emotional distress tort, a body of laws that address how behavior that results in extreme emotional distress should be handled in the justice system, said Eugene Volokh, an expert on free speech and religious freedom laws at the University of California, Los Angeles.

One famous case that addressed emotional distress, *Hustler Magazine Inc. v. Falwell*, is referenced specifically in Snyder's request to the Supreme Court. In 1988, the Supreme Court ruled that Jerry Falwell, a nationally known televangelist, could not collect emotional damages from the publication for printing a fictional parody that described him having a drunken sexual encounter with his mother in an outhouse.

Since Falwell was a well-known public figure, the burden was on him to prove Hustler specifically meant to cause him harm. Snyder's lawyers question whether the same principle should apply to the grieving father of a fallen Marine.

Hard feelings

At the other end of the legal proceedings is the Phelps family, which has challenged state laws limiting picketing at funerals in the past. They are unapologetic for their actions and remain antagonistic toward the military.

In an interview, Shirley Phelps-Roper, a lawyer and one of the seven picketing outside Lance Cpl. Snyder's funeral, said the destruction of the world is imminent, and the military won't be able to save it. In fact, she says service members will turn into cowards.

"At the front of the pack is going to be those military brutes," she said. "They're young and strong and can outrun the rest of the rebels. And they're [not] going to give a hoot" about everyone else.

She then took a direct swipe at Marines: "It ain't going to be about the badass Marine because first, they're not badass. They think they're badass. If they're so badass, how come they keep getting killed?"

The Westboro group cannot picket every funeral because of its small number so it "relies on God" for guidance, she said. Each month, the members announce the events they plan to picket and change their schedule if another event with a higher profile presents itself.

One example: In February, Phelps family

members decided to picket for three days outside a conference in Southern Virginia held by the Joint Improvised Explosive Device Defeat Organization, a Defense Department organization launched to develop technology and tactics to defeat roadside bombs. But they pulled away when they realized they could picket outside the Johnstown, Pa., funeral of Rep. John Murtha, D.-Pa., a former Marine.

"We said instead of going back over to the JIEDDO conference, we'll kick that piece to the curb and instead picket Murtha, because he, after all, is a dead soldier," Phelps-Roper said.

Snyder acknowledges the police kept the Phelpses at a distance at his son's funeral and he didn't see their placards until he turned on the television later.

Nonetheless, he said, the Phelpses' actions forced him to worry about what his daughters might see when he should have been allowed to simply mourn and observe the loss of his son.

"They're really just sick people," Snyder said of the Phelps family. "They came to my church. I didn't go to theirs. They came from Kansas with a specific purpose, and that was to get their message out. And they didn't care who it hurt."

Snyder v. Phelps

The Supreme Court could review three major topics in Albert Snyder's case against the Westboro Baptist Church. The topics: Speech and privacy. Snyder contends the 4th U.S. Circuit Court of Appeals in Richmond, Va., was wrong in protecting the church's speech since it attacked a "private" figure, Snyder, concerning a private matter, the funeral. The chuch argues that Snyder is not a private figure with regard to his son's death because he had already granted media interviews and that its protests are focused on public issues, making them protected speech.

Speech and religion. Snyder contends the First Amendment, used to overturn Snyder's initial settlement, allows the Phelpses' freedom of speech to trump Snyder's right to mourn his son in a private religious ceremony. The church has countered by saying its members picketed on a public street, on issues that were of public interest.

Funeral attendees' rights. Even if the appellate court's decision to uphold the Phelpses' free speech was appropriate, according to Snyder's lawyers, it failed to consider that Snyder was a "captive audience" at his son's funeral. A federal appeals court already has ruled in another case involving the church that the government is allowed to protect private citizens from unwanted communication when they cannot avoid it, Snyder points out. The Phelpses counter that the argument is not relevant, since the previous case focused on whether a state law banning picketing within 300 feet of a funeral was constitutional—a separate issue.

"Free (Hate) Speech"

Newsweek
March 17, 2010
Krista Gesaman

In early March 2006, two Marines arrived at Al Snyder's Westminster, Md., home and told him that his 20-year-old son, Lance Cpl. Matthew A. Snyder, had been killed while serving in Iraq. Though the shock and grief of his loss were powerful, Al Snyder wanted to honor his son in the best way he could: with a peaceful, respectful funeral.

But he didn't get that. A group of church members from Westboro Baptist Church in Topeka, Kans., flew to Maryland to protest at Matthew's funeral. Fred Phelps, founder of the church (note: link may not be safe for work), picketed near the church with his two daughters and four grandchildren. They carried signs that read THANK GOD FOR DEAD SOLDIERS, SEMPER FI FAGS, and FAG TROOPS.

The members of Westboro Baptist Church didn't know anything about Matthew, nor were they claiming that he was gay. They were simply using his funeral as a vehicle to spread their message—that God is punishing the United States for tolerating homosexuality. The church, which has about 70 members—50 of whom are children, grandchildren, or in-laws of Phelps—sends small groups to unrelated events to publicize their views. And military funerals are a popular venue.

"It's pretty bad when you go to your son's funeral and there are pictures of two men having anal intercourse," Snyder says. "It's hard enough to bury a 20-year-old soldier, but to go through this at the same time is like kicking you in the face while you are lying on the ground."

Snyder sued the Phelpses for defamation, intentional infliction of emotional distress, intrusion, and publication of private facts. Initially, a jury favored Snyder's position, awarding him $10 million in damages. (A trial judge later reduced the amount to $5 million.) But then the Fourth Circuit Court overturned the lower court's decision on appeal, ruling that although the speech was "utterly distasteful," it should be considered protected political speech.

Snyder wasn't willing to stop there. "As long as we have military people dying, I will fight," he says. Now, the U.S. Supreme Court will hear the case, evaluating whether the protests should be considered protected speech under the First Amendment.

It has been difficult for opponents of the Westboro Church's protests to stop the Phelpses from spreading their message because the family is meticulous about following the law. At trial, it was undisputed that the family complied with all local ordinances and police directions. They contacted the police before picketing and stayed a specific distance away from the church. Still, even though every action the Phelpses have taken has been legal, more than 40 states and the federal government have enacted laws in response to limit protesting at funerals. But Margie Phelps—daughter of Fred Phelps, and a licensed attorney who's representing the family in the case—and her family have successfully challenged several of these statutes.

Josh Wheeler, associate director of the Thomas Jefferson Center for the Protection of Free Expression, says even though the

speech at issue is "repugnant," it still deserves protection. This isn't an easy conclusion for Wheeler, especially because he disagrees with the Phelpses' message—his brother was gay. "This case [has] tested me," he says. "But it's important that Americans have the freedom to express issues of public concern without the fear of being sued for $5 million."

Several legal scholars consulted for this story speculated that the outcome of this case might shock the general public, particularly because Snyder's position is likely to be broadly popular among Americans. The high court traditionally supports free-speech arguments, even when the speech is offensive. "We have to look beyond the actual speech at issue and focus on the larger principal—the ability to censor or prevent the expression of another individual," Wheeler says.

But the specific facts of this case might be too extreme for a few of the justices. "Would it really bother any intelligent person to say that you can't protest at a funeral? What's next? They don't like the Catholic Church, so are they going to protest a wedding or a baptism?" Snyder says.

Margie Phelps and her family see funerals as the perfect outlet for their message. "I remember watching the news, and all of its pomp and circumstance. These funerals are a major public platform and no one is telling the truth," she says.

Although this suit has the ability to curtail free speech, some legal scholars say it's worth it. "What the church people want is the right to make any private individual the target of their assault. The court would be creating an incentive for religious speakers to be abusive [if it ruled in the Phelpses' favor]," says Jeffrey Schulman, a law professor at Georgetown University who drafted an amicus brief in Snyder's favor.

When asked how she would react if someone were to protest at a funeral of one of her loved ones, Margie Phelps's response was immediate: "Do you think I would give a rat's backside? My focus would 100 percent be, what did I do wrong and how do I get right with God?" The Phelpses have picketed about 600 military funerals and don't plan to stop any time soon, she says.

Snyder's passion is just as intense. Even though he struggles to pay the legal bills in the case on his modest, 40-hour-a-week salary, he won't quit the fight. "As long as we have two wars going on, I can't stop this. I won't stop it, because no military family should be subject to what my family was subjected to," he says.

"God's Squad"

The Guardian
March 31, 2007
Louis Theroux

In the annals of strange religious groups, the Westboro Baptist Church of Topeka, Kansas, occupies a place of some distinction. Just 71 strong, its congregants made their name in the mid-90s by picketing gay pride rallies and the funerals of Aids sufferers, waving placards of unbelievable insensitivity ("Fags Eat Poop", "God Hates You"). More recently, they've ratcheted up their ministry of hate by taking the pickets to the funerals of soldiers killed in Iraq and Afghanistan ("Fag Military", "Thank God For Dead Soldiers").

Note these aren't gay dead soldiers (which, while no less hateful, would at least have a scintilla of logic). Any soldier's funeral will do. Their reasoning is that America is so depraved anyone who fights under her flag is a "fag enabler", and thus, an enemy of God.

The Phelps family consider these practises the true definition of Christian love, proving that what they lack in compassion they more than make up for in creative exegesis. For three weeks, I lived with the Phelps, attempting to get to know the people responsible for such a poisonous ministry. The pastor of the church, and the originator of the picketing concept, is Fred Phelps. He's also the patriarch of the family. But Gramps (as he's known in the family) is getting on in years, and these days it's his daughter Shirley who does most of the organising and the media appearances.

Shirley is in her 40s, a lawyer and mother of 11 children, and she has a kind of genius for religious invective. Several times I was on the receiving end of one of her biblical smackdowns, in which she heaped scriptural opprobrium on my head, then provided a graphic account of what it would be like for me to burn in hell for all eternity. It was a little like being waterboarded by John the Baptist.

Naturally part of my regimen was joining the Phelps on their pickets. These take place several times daily. As well as soldier's funerals, they also target local churches, civic buildings, visiting dignitaries, concerts by pop bands... In fact, there's almost nothing that the Phelps can't construe as part of the general climate of iniquity, and therefore a legitimate target. One weekly picket targets a hardware store that sells Swedish vacuum cleaners.

Apparently, Swedish authorities imprisoned a local pastor for preaching against homosexuality, thereby making the whole nation a target. For the newcomer, these pickets are bizarre not simply because of the outrageousness of the signs, but also because of how they clash with the banality of the family's interaction. For the Phelps, it's another day at the office—there's a watercooler ambience of relaxed chit-chat. Meanwhile, everyone—even the youngest children—carries placards saying "Thank God For 9/11" and "Your Pastor Is A Whore".

And yet, away from the pickets, they were - much of the time—very, very normal. Not just normal, but intelligent and urbane. They're not hillbillies, they're urban professionals—several work as lawyers in Topeka. The young members look like kids you'd run into at the mall. Weird Christian

women are supposed to have sallow skin and dress in headdresses, but the Phelps girls were all-American, with long hair and good teeth. They listened to indie bands like the Killers and the Kooks and could banter humorously on non-biblical subjects. If anything, the hostility they've created seems to have forced them closer together, and, among themselves at least, they're a warm, loving family (which explains why the younger members don't all flee the minute they can afford a bus ticket).

As for Gramps, I had two interviews with the man. In my first encounter, I asked him how many children he had. For some reason he took exception to this, which set the tone for the second encounter. This took place in church one Sunday at the end of one of his sermons, preached on the subject of America's coming tribulations. "You're going to eat your babies!" he bellowed. Gramps still had the remnant of a folksy, plain-spoken charm, but the dominant note in his personality was a bitter contempt for humanity in general and me specifically. In an effort to keep the conversation going, I trotted out some bible quotes I'd memorised the night before. The interview was over in about five minutes. It seemed I was a hell-bound sinner. At least I was in good company.

Did I make any headway? A little, with the girls. In challenging circumstances, I console myself with the thought, expressed by Friedrich Nietzsche, that "Even when you lie, you nevertheless tell the truth with the shape your mouth makes when you are doing so." Being young and hopped up on hormones, the junior Phelps couldn't help telling a story with the shape of their mouths. One girl appeared to short-circuit when pressed on the subject of boyfriends, and later expressed angry bafflement that the Phelps' "caring" ministrations were so little appreciated by the locals. Even Shirley showed signs of empathy on the way to a soldier's funeral, though she quickly stifled them with a flight of bible talk.

I found a lot to like about the Phelps. They have a strong family unit, and Gramps aside, they were open and hospitable. It was fascinating to see the power of a family to create its own bizarre ideology and pass it down through the generations. But I guess I'll be seeing you all in hell.

Ariz. Christian Sch. Tuition Org. v. Winn

09-987

Garriott v. Winn

09-991

Ruling Below: Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, Ariz. Christian Sch. Tuition Org. v. Winn, 2010 U.S. LEXIS 4343 (2010), Garriott v. Winn, 2010 U.S. LEXIS 4279 (2010).

Arizona's Revised Statute § 43-1089 grants income tax credits restricted to taxpayers who make contributions to nonprofit organizations that award private school scholarships to children. Plaintiffs, certain Arizona taxpayers, allege that the statute, as applied, violates the Establishment Clause of the First Amendment because some of the organizations funded under this program restrict the availability of their scholarships to religious schools. Plaintiffs alleged that the disparities in the availability and amount of scholarships for use at religious and secular schools showed that the structure of § 43-1089, as applied, favored religious schools over secular schools. The district court dismissed the plaintiff's claim under Fed. R. Civ. P. 12(b)(6), but the appellate court reversed and held that the plaintiffs had U.S. Const. Art. III standing to challenge the application of § 43-1089. The appellate court rejected defendants' suggestion that the money was not publicly subsidized simply because it did not pass through the treasury. The court also held that plaintiffs' complaint sufficiently alleged that Arizona's tax-credit funded scholarship program lacked religious neutrality and true private choice in making scholarships available to parents. Although scholarship aid was allocated partially through the individual choices of Arizona taxpayers, overall the program in practice carried with it the imprimatur of government endorsement. Thus, plaintiffs' allegations, if accepted as true, were sufficient to state a claim that Arizona's tax credit program, as applied, violated the Establishment Clause of U.S. Const. Amend. I.

Questions Presented: (1) Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds? (2) Is the Respondents' alleged injury—which is solely based on the theory that Arizona's tax credit reduces the state's revenue—too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income? (3) Given that the Arizona Supreme Court has authoritatively determined, under state law, that the money donated to tuition granting organizations under Arizona's tax credit is private, not state, money, can the Respondents establish taxpayer standing to challenge?

Kathleen M. WINN, an Arizona taxpayer; Diane Wolfthal, an Arizona taxpayer; Maurice Wolfthal, an Arizona taxpayer Lynn Hoffman, an Arizona taxpayer, Plaintiffs-Appellants,

v.

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; Arizona School Choice Trust; Luis Moscoso; Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue; Glenn Dennard, Defendants-Appellees.

United States Court of Appeals for the Ninth Circuit

Filed April 21, 2009

[Excerpt; some footnotes and citations omitted.]

FISHER, Circuit Judge:

Arizona law grants income tax credits restricted to taxpayers who make contributions to nonprofit organizations that award private school scholarships to children. Plaintiffs, certain Arizona taxpayers, allege that some of the organizations funded under this program restrict the availability of their scholarships to religious schools, and that the program in effect deprives parents, the program's aid recipients, of a genuine choice between selecting scholarships to private secular schools or religious ones. We conclude that the plaintiffs' complaint, which at this stage of the litigation we must view in the light most favorable to the plaintiffs, sufficiently alleges that Arizona's tax-credit funded scholarship program lacks religious neutrality and true private choice in making scholarships available to parents. Although scholarship aid is allocated partially through the individual choices of Arizona taxpayers, overall the program in practice "carries with it the *imprimatur* of government endorsement." We therefore hold, contrary to the district court, that plaintiffs' allegations, if accepted as true, are sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause of the United States Constitution.

BACKGROUND

Plaintiffs allege that Arizona's Revised Statute § 43-1089 ("Section 1089"), as applied, violates the Establishment Clause of the First Amendment. Section 1089, first enacted by the Arizona legislature in 1997, gives individual taxpayers a dollar-for-dollar tax credit for contributions to "school tuition organizations" ("STOs"). A STO is a private nonprofit organization that allocates at least 90 percent of its funds to tuition grants or scholarships for students enrolled in "a nongovernmental primary or secondary school or a preschool for handicapped students" within the state. STOs may not provide scholarships to schools that "discriminate on the basis of race, color, handicap, familial status or national origin," but nothing in the statute precludes STOs from funding scholarships to schools that provide religious instruction or that give admissions preferences on the basis of religious affiliation. Individual taxpayers can claim a tax credit of up to $500 for such contributions and married couples filing jointly can claim a credit of up to $1,000, provided the allowable tax credit does not exceed the taxes otherwise due. Taxpayers may designate their contribution to a STO

that agrees to provide a scholarship to benefit a particular child, so long as the child is not the taxpayer's own dependent. The tax credit is available to all taxpayers in Arizona, regardless of whether they are parents of school-age children or pay any private school tuition themselves.

Section 1089 requires STOs to provide scholarships or tuition grants to children "to allow them to attend *any* qualified school of their parents' choice," but also states that STOs may not provide scholarships while "limiting availability to only students of one school." On its face, then, Section 1089 could have been interpreted to require all STOs to provide scholarships to any qualified private school in the state, or to permit STOs to provide scholarships to a limited set of schools, so long as that set was greater than one. In practice, plaintiffs allege, many STOs have opted to limit the schools to which they offer scholarships, and a number of STOs provide scholarships that may be used only at religious schools or schools of a particular denomination. For example, plaintiffs allege that Arizona's three largest STOs, as measured by the amount of contributions reported in 1998, each restricts its scholarships to use at religious schools. . . .

Arizona does not specify scholarship eligibility criteria or dictate how STOs choose the students who receive scholarships, and STO-provided scholarships therefore vary considerably. Although STOs may choose to award scholarships primarily based on financial need, Section 1089 does not require it. The availability of scholarships to particular students and particular schools thus depends on the amount of funding a STO receives, the range of schools to which it offers scholarships and the STO's own scholarship allocation decisions and eligibility criteria. Therefore, plaintiffs allege, because the largest STOs restrict their scholarships to sectarian schools, students who wish to attend non-religious private schools are disadvantaged in terms of the STO-provided scholarships available to them. Thus, plaintiffs argue, the disparities in the availability and amount of scholarships for use at religious and secular schools show that the structure of Section 1089, as applied, favors religious over secular schools, and thereby violates the Establishment Clause.

. . . Plaintiffs do not contest the facial validity of Section 1089, but rather assert that it violates the Establishment Clause as applied. The district court dismissed the suit as barred by the Tax Injunction Act. We reversed the dismissal and the Supreme Court affirmed our decision. On remand, the district court allowed two STOs, the Arizona Christian School Tuition Organization ("ACSTO") and Arizona School Choice Trust ("ASCT"), and two parents of ASCT scholarship recipients, Glenn Dennard and Luis Moscoso, to intervene as defendants. ACSTO provides scholarships only to religious schools and the ASCT provides scholarships to any private school of the parents' choice. Defendants again moved to dismiss, contending that plaintiffs lacked standing, that the suit was barred by res judicata and that plaintiffs had failed to state a claim under the Establishment Clause. The district court granted defendants' motion to dismiss for failure to state a claim and plaintiffs appealed. We have jurisdiction under 28 U.S.C. § 1291 and we reverse and remand for further proceedings.

STANDARD OF REVIEW

* * *

ANALYSIS

I. Taxpayer Standing

Plaintiffs' only allegation of injury from the allegedly unconstitutional operation of Section 1089 arises from their status as Arizona taxpayers. It is well established that individuals do not generally have standing to challenge governmental spending solely because they are taxpayers, because "it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm." This rule applies with equal force to taxpayer suits challenging an allegedly unconstitutional state action and those challenging federal action. The Supreme Court, however, has long recognized "a narrow exception to the general constitutional prohibition against taxpayer standing" when a plaintiff contends that a use of funds violates the Establishment Clause. Because plaintiffs have alleged that the state has used its taxing and spending power to advance religion in violation of the Establishment Clause, we hold that they have standing under Article III to challenge the application of Section 1089.

* * *

Section 1089 gives Arizona taxpayers a tax credit for amounts they donate to STOs, up to the statutory cap of $500 for individuals or $1,000 for married couples filing jointly or the taxpayers' entire state tax liability. Tax credits are deducted *after* taxpayers' tax liability has been calculated, thereby giving taxpayers dollar-for-dollar "credits" against their state taxes for sums paid to STOs. Tax credits therefore operate differently from tax deductions; whereas tax deductions allow taxpayers only to reduce their income subject to taxation, tax credits allow individuals to make payments to a third party *in satisfaction* of their assessed tax burden. As the Supreme Court explained, "[i]n effect, § 43-1089 gives Arizona taxpayers an election" to direct a portion of the money they owe the state to either a STO or to the Arizona Department of Revenue. Accordingly, "[a]s long as donors do not give STOs more than their total tax liability, their . . . contributions are costless." Tax credits are therefore a powerful legislative device for directing money to private organizations.

Defendant-intervenors argue that plaintiffs do not have standing to challenge Section 1089 even under the *Flast* exception, because the money directed by taxpayers to STOs under the tax credit program does not pass through the state treasury and therefore the program cannot be characterized as involving any "expenditure" of public funds. The Supreme Court has recognized, however, that state tax policies such as tax deductions, tax exemptions and tax credits are means of "channeling . . . [state] assistance" to private organizations, which can have "an economic effect comparable to that of aid given directly" to the organization. . . . In effect, Section 1089 works the same as if the state had given each taxpayer a $500 check that can only be endorsed over to a STO or returned to the state. Because Section 1089 does not allow taxpayers to keep the money under any circumstance—and because it directs how the money will be spent if it is not surrendered to the state—we reject the suggestion that this money is not publicly subsidized simply because it does not pass through the treasury.

Nor does Section 1089 lack "a sufficient nexus between the taxpayer's standing as a taxpayer and the . . . [legislative] exercise of taxing and spending power" just because the Arizona legislature does not transfer money to STOs or religious schools directly. . . . By giving taxpayers a dollar-for-dollar credit for contributions to STOs and then requiring STOs to "allocate[ ] at least ninety percent of . . . [their] annual revenue for educational

scholarships or tuition grants to children," the state legislature has provided only two ways for this money to be spent: taxpayers *will* either give the dollar to the state, or that dollar (or at least 90 percent of it, after allowable STO administrative expenses) will end up in scholarships for private school tuition.

* * *

Consistent with these principles, the Supreme Court has repeatedly decided Establishment Clause challenges brought by state taxpayers against state tax credit, tax deduction and tax exemption policies, without ever suggesting that such taxpayers lacked Article III standing. The Supreme Court has also repeatedly decided challenges brought by state taxpayers to indirect aid programs—where the ultimate decision to confer aid rested with a private individual and not the government—and again never suggested that taxpayers lacked standing. . . . We therefore hold that plaintiffs have standing as taxpayers to challenge Section 1089 for allegedly violating the Establishment Clause.

II. The Establishment Clause

"The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."

[The court determines that *Kotterman v. Killian*, which upheld Section 1089 on a facial challenge before the statute was implemented, has no preclusive effect on the instant as-applied challenge.]

A. Secular Purpose

The first prong of this standard requires us to consider whether the statute was "enacted for . . . [a] valid secular purpose." "[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."

The legislative history of Section 1089 shows that its primary sponsor's concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents. Plaintiffs do not contest that this purpose, if genuine, is both secular and valid. Plaintiffs argue, however, that Section 1089's design and scope reveal this purpose to be a sham. Specifically, plaintiffs argue that Section 1089's operation shows that the program, which provides aid only to students who attend private schools, was enacted not to give low-income children a meaningful opportunity to attend those schools, but to advance the legislature's religious aims.

Plaintiffs are correct that the nature of a program's operation may, in some instances, reveal its ostensible purpose to be a sham. As the Court held in *McCreary* [*County, Ky v. ACLU*], the inquiry whether a program's putative purpose is genuine and "not merely secondary to a religious objective," is undertaken from the perspective of "an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." Plaintiffs' allegations concerning Section 1089's operation are therefore relevant to whether the program has a genuine secular purpose.

As we discussed above, for example, Section 1089 could, on its face, be interpreted to require each STO to provide

scholarships for use at any qualified private school, religious or secular. Plaintiffs allege, however, that in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools. Such allegations, if proved, could belie defendants' claim that Section 1089 was enacted primarily to provide Arizona students with equal access to a wide range of schooling options.

At the same time, we are mindful of the Supreme Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." The Court has held that programs that direct benefits *exclusively* to private schools, as Section 1089 does, may be "adequately supported by legitimate, nonsectarian interests," including "promoting pluralism and diversity among [the state's] public and nonpublic schools." The question before us, however, is not whether Section 1089 in fact has a genuine, secular purpose, but whether plaintiffs could prove, on the facts alleged in the complaint, that it does not. Accordingly, we conclude that plaintiffs' allegations, if accepted as true, leave open the possibility that plaintiffs could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense.

B. Effect

We next consider whether Section 1089 "has the forbidden 'effect' of advancing or inhibiting religion." In "refin[ing] the definition of governmental action that unconstitutionally advances religion," the Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." Guided by the Court's opinion in *Zelman* [*v. Simmons-Harris*], we conclude, for reasons set forth below, that plaintiffs have alleged facts sufficient to state an as-applied Establishment Clause claim under this endorsement test.

Section 1089 is an indirect aid program, under which the state gives tax credits to individuals who contribute to STOs, which in turn use the money to provide private school scholarships. Plaintiffs allege that many of these STOs in fact exist to promote the funding of religious education. If the state of Arizona were to allocate funds directly to these religious STOs, the state would plainly violate the Establishment Clause. As defendants correctly argue, however, STOs are private charitable organizations—albeit funded by taxpayer contributions that the state will reimburse through dollar-for-dollar tax credits.

We nevertheless hold that if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause by delegating to taxpayers a choice that, from the perspective of the program's aid recipients, "deliberately skew[s] incentives toward religious schools." In practice, plaintiffs allege, the choice delegated to taxpayers under Section 1089 channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools. The scholarship program thus skews aid in favor of religious schools, requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education. Accordingly, Section 1089's delegation to taxpayers operates to deprive these parents, as the program's aid recipients, of "genuinely independent and private choices" to direct the program aid to secular schools.

Unlike indirect aid programs the Supreme Court has upheld, Section 1089 is not a "neutral program of private choice," and a reasonable observer could therefore conclude that the aid reaching religious schools under this program "carries with it the *imprimatur* of government endorsement."

Defendants dispute this conclusion on two grounds: First, that as private institutions who do not receive direct government funding, they are no different from other nonprofit, religious institutions that are funded through tax-deductible contributions. Second, that under the program, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." We address each of these arguments in turn.

1. Aid to Private Institutions

Defendants first argue that because STOs do not receive direct government funding, Section 1089 is no different from other programs that accord tax benefits to individuals who contribute to nonprofit, religious institutions. As with any program of government aid, however, whether such programs violate the Establishment Clause depends on whether they have "either . . . the purpose or effect of 'endorsing' religion." The parallels defendants contend exist between Section 1089 and tax deduction programs that the Supreme Court has held "easily pass[ ] constitutional muster" are therefore instructive, but only to the extent they shed light on the secular objectives, if any, that Section 1089 was enacted to promote.

The secular objectives defendants argue Section 1089 promotes differ significantly from those advanced by tax deduction programs the Supreme Court has upheld. The federal system addressed in *Hernandez* [*v. Comm'r*], for example, permits tax deductions for "any charitable contribution" to a qualified entity "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition." This system, the Court held, makes deductions available for contributions to an array of religious and secular organizations, and thus has "the primary effect of . . . encouraging gifts to charitable entities, including but not limited to religious organizations." Section 1089, by contrast, offers narrowly targeted, dollar-for-dollar tax credits designed to fully reimburse contributions to STOs, most of which restrict recipients' choices about how to use their scholarships. Although defendants contend these credits were enacted to provide Arizona schoolchildren equal access to a wide range of schooling options, defendants do not—and could not—suggest the credits are designed to promote donations of individual wealth or charitable giving to a broad array of institutions. Likewise, defendants do not suggest that Section 1089 has a secular purpose in common with laws granting tax exemptions to a broad range of nonprofit organizations, including churches. Thus, we are not persuaded that Section 1089 conforms with the Establishment Clause simply because it bears some superficial resemblance to programs that do.

2. Private Choice

The Supreme Court has "drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." Defendants argue that Section 1089, like other religiously neutral educational assistance programs the Supreme Court has

found constitutional, is a "program of true private choice . . . and [is] thus constitutional."

The nature of the choices provided under Section 1089, however, differs significantly in structure from those under educational assistance programs the Court has held to be "programs of true private choice." In each of those programs, the government "provid[ed] assistance directly" to parents or individual students, "who, in turn, direct[ed] the government aid to religious schools wholly as a result of their own genuine and independent private choice." Under the voucher program upheld in *Zelman*, for example, the state distributed tuition aid directly to eligible parents, who were free to use the aid to send their children to any participating public or private school, and those wishing their children to remain enrolled in public school received tutorial aid to accommodate that choice.

Under Section 1089, by contrast, the state does not provide aid directly to parents. Instead the aid is mediated first through taxpayers, and then through private scholarship programs. Under Section 1089, all Arizona taxpayers are eligible for a tuition tax credit, and those whose tax liability is large enough to use the credit may apply it toward a contribution to any STO, regardless of whether that STO provides scholarships exclusively for use at religious schools. In turn, any Arizona parent who wishes to send her child to a private school may apply for a STO scholarship, provided that the child meets the STO's eligibility criteria for the use of that scholarship.

Unlike parents' choices under the program in *Zelman*, or aid recipients' choices under other programs the Court has upheld, parents' choices are constrained by those of the taxpayers exercising the discretion granted by Section 1089. . . . Thus, it is taxpayers who decide which STOs to fund and, consequently, who is eligible to receive STO-provided scholarships according to the criteria of the designated STO.

Defendants acknowledge the differences between parents' choices under Section 1089 and those afforded under indirect aid programs that the Supreme Court has previously upheld. They contend, however, that because Section 1089 offers "genuine and independent choices" to the taxpayers who fund STOs, these differences are irrelevant to whether Section 1089 violates the Establishment Clause. We disagree.

a. Parental choice

The parties do not contest that notwithstanding its structural differences from indirect aid programs the Court has upheld, Section 1089 would satisfy the Establishment Clause if the program made scholarships available to parents on a religiously neutral basis and gave them a true private choice as to where to utilize the scholarships. Plaintiffs allege, however, this is not how the program works in practice. In *Zelman*, the Court identified several circumstances relevant to whether the indirect aid program at issue, which gave tuition grants to parents to apply toward private and fee-charging public schools, was "a program of true private choice . . . and thus constitutional . . . ."

* * *

Under this rubric, Section 1089 falls short. The vast majority of the scholarship money under the program—over 85 percent as of the time of plaintiffs' complaint—is available only for use at religious schools. Because this aid is available only to parents who are willing to send their children to a religious school, the program fails to

"confer[ ] educational assistance directly to a broad class of individuals defined without reference to religion." Moreover, because a disproportionate amount of the program aid is earmarked for use at religious schools *before* parents receive the aid, Section 1089 is not, from the parents' perspective, "neutral in all respects toward religion" and does not equally "permit[] the participation of *all* schools . . . religious or nonreligious" in the program. Additionally, because Section 1089 does not make aid equally available to parents "on the basis of neutral, secular criteria that neither favor nor disfavor religion," the program creates "financial incentive[s]" for parents that "'ske[w]' the program toward religious schools." Thus, parents who wish to place their children in a private secular school, but who could not otherwise afford to do so, are at a disadvantage compared to parents who are willing to accept a scholarship for private religious schooling—either by choice or out of financial necessity. Although parents would, of course, have the option of leaving their children in public school, we reject the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice. For parents wait-listed for scholarships to secular schools, the range of educational choices the STO-administered scholarship programs offer do not realistically include "obtain[ing] a scholarship and choos[ing] a nonreligious private school." Section 1089, as applied, thereby creates incentives that pressure these parents into accepting one of the scholarships that are readily available under the program for use at a religious school. Therefore, Section 1089, as applied, "fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children."

b. Taxpayer choice

Defendants argue that despite this failure, Section 1089 does not violate the Establishment Clause because it provides a tax credit to all Arizona *taxpayers*, without respect to religion, and gives taxpayers a genuine choice between directing their money to religious or secular STOs. Therefore, as *Zelman* requires, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." Plaintiffs do not contest that Section 1089 is neutral with respect to the taxpayers who direct money to STOs, or that any of the program's aid that reaches a STO does so only as a result of the genuine and independent choice of an Arizona taxpayer. Plaintiffs argue, however, that Section 1089 violates the Establishment Clause precisely *because* the individual taxpayers' choices available under the program serve to restrict parents' opportunities to select secular educational options for their school-age children, skewing parents' incentives to send their children to religious schools. As such, the program is not "neutral in all respects toward religion" and, concomitantly, is not a "program of true private choice."

Defendants argue that it is irrelevant, under *Zelman*, whether an indirect aid program offers true private choice to parents, or instead, like Section 1089, offers true private choice to another broadly defined class of individuals. In describing what constitutes "true private choice," however, the Court in *Zelman* frequently emphasized that the choice is one offered, on a neutral basis, to *parents* or *students*, as the beneficiaries of the program's aid. Defendants contend this emphasis is simply because parental choice was the *only* private choice offered under

those programs.

Defendants' argument, however, disregards the Court's analysis of *how* the true private choice described in *Zelman* ensures that government aid flowing to religious institutions does not have "the forbidden 'effect' of advancing . . . religion'" even though the aid would have such an effect under a program of direct funding. The function of true private choice, the Court explained, is to eliminate the perception that the government is endorsing religion through the money that is channeled to sectarian institutions: "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." The Court expressly linked its "true private choice" analysis to the "reasonable observer" inquiry as to whether the government is perceived to endorse the religious organizations that benefit from its aid.

In drawing this link, the Court adopted Justice O'Connor's position in *Mitchell v. Helms* that "[i]n terms of public perception, a government program of direct aid to religious schools . . . differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools." Under this framework, the question central to the endorsement inquiry is whether "the reasonable observer would naturally perceive the aid program [in question] as *government* support for the advancement of religion." "'[T]he reasonable observer in th[is] endorsement inquiry must be deemed aware' of the 'history and context' underlying a challenged program." We impute this knowledge to the reasonable observer because "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort," but instead concerns "the political community writ large."

Accordingly, to assess whether the taxpayer choice offered under Section 1089 has the same constitutional effect as the parental choice *Zelman* upheld, we must consider the Court's application of the reasonable observer inquiry to the program at issue in that case. Specifically, we must consider the circumstances the Court deemed relevant to *why* a reasonable, informed observer looking at the program upheld in *Zelman* would conclude that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message" resulting from a program "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." The Court's guidance in earlier cases also sheds light on two circumstances that seemed particularly important to the reasonable observer analysis in *Zelman*.

First, a reasonable, informed observer would consider what role the person making the choice occupies in the structure of the program. In *Larkin* [*v. Grendel's Den, Inc.*], the Court determined there was no "effective means of guaranteeing" the veto power delegated to churches over liquor licenses "[would] be used exclusively for secular, neutral, and nonideological purposes." "In addition," the Court continued, "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." Of course, the delegation of scholarship funding to individual taxpayers, such as in Section 1089, does less to promote religion than the delegation of zoning authority to churches. *Larkin's* holding, however, illustrates that when a

statute delegates "a power ordinarily vested in agencies of government" to a private party without reasonable assurance that the party's choices will advance the secular purposes of the statute, any ensuing "perceived endorsement of a religious message" may be "reasonably attribut[ed]" to the government.

By contrast, the educational assistance programs addressed in *Zelman* were structured so that parents were permitted to choose how to best use the program aid to assist *their* children. The parents' decisive role in the program gave them incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations, such as whether to promote the religious mission of a particular school. Accordingly, by delegating a choice that "ensured that parents were the ones to select a religious school as the best learning environment" for their children, the government did not appear to endorse religion.

Second, a reasonable, informed observer would consider whether the choice delegated under a program has the effect of promoting, or hindering, the program's secular purpose. In *Larkin*, the Court recognized that the statute delegating veto power to churches and schools had the valid secular purpose of "protect[ing] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." The Court noted, however, that "these valid secular objectives can be readily accomplished by other means" and that the veto power conferred by the statute could "be used by churches to promote goals beyond insulating the church from undesirable neighbors." The Court concluded that the delegation could "be seen as having a 'primary' and 'principal' effect of advancing religion." Similarly, in [*Comm. for Pub. Educ. & Religious Liberty v.*] *Nyquist*, the Court invalidated a program providing tuition grants and tax credits to parents sending their children to private schools because, although the program had a valid secular purpose, "the effect of the aid [wa]s unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Nyquist* illustrates that if an educational assistance program provides individual choice through tax credits, but those tax credits hinder the program's ability to achieve its valid secular goals, a reasonable observer could well conclude that the tax credits are simply masking an Establishment Clause violation.

The choices delegated to parents under *Zelman*, by contrast, may have advanced—and at least did not thwart—the secular purpose of the program, which was to "provid[e] educational assistance to poor children in a demonstrably failing public school system." The best educational environment for a particular child within a failed school system may depend on qualitative considerations that could not easily be assessed at a policymaking level. The choice offered under the program may have therefore helped ensure that the program achieved its secular aims by delegating funding decisions to a class of persons—parents—who were better positioned than a state policymaking body to make educational choices for individual students in a failing school system.

Drawing upon these two circumstances—the role the person making the choice occupies in the structure of a program and whether delegating the choice promotes the secular purpose of the program—we turn to defendants' argument that the individual, *taxpayer* choice provided under Section 1089 necessarily has the same constitutional effect as the parental choice upheld in *Zelman*. Under Section 1089, individual taxpayers may constrain the scholarship

options of other parents' children by choosing to direct their state-reimbursed contributions to sectarian STOs. Yet unlike parents, whose choices directly affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which a STO restricts aid, rather than for sectarian reasons, such as the religious mission of a particular STO. Thus, the taxpayers' position in the structure of Section 1089 provides no "'effective means of guaranteeing'" that taxpayers will refrain from using the program for sectarian purposes. Significantly, plaintiffs' allegations suggest the taxpayers' role in the structure of Section 1089, as applied, *encourages* them to use the tax credits to promote sectarian goals, and that taxpayers have in fact used the program aid to this end.

Relatedly, the taxpayer choice provided under Section 1089 does little to advance—indeed, it appears to thwart—the secular purpose of the program, which is to provide equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents. Defendants do not suggest taxpayers are better positioned than government administrators to allocate program aid in a manner that will expand schooling options, and plaintiffs' allegations suggest the demand for STO-provided scholarships available for use at secular schools markedly outstrips their supply. This misalignment between parents' interests and taxpayers' desires suggests that by vesting individual taxpayers with funding authority, Section 1089's design works against its purpose of providing Arizona students with *equal* access to a wide range of schooling options. Although Section 1089 leaves individual parents free to create new STOs that cater to their educational preferences, this freedom provides little benefit to parents who do not have the time or capital to get others to support their STO, given that these parents cannot use their tax credits to fund scholarships for their own children.

Accordingly, we conclude that there is a meaningful constitutional distinction between the individual, taxpayer choice provided under Section 1089 and the parental choice upheld in *Zelman*. Section 1089, as claimed to operate in practice, is not a program of true private choice, immune from further constitutional scrutiny. We therefore hold that plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause even though the state does not directly decide whether any particular sectarian organizations will receive program aid.

The district court's order dismissing plaintiffs' complaint is reversed and remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED for further proceedings.

"High Court to Hear Arizona School Case"

The Associated Press
May 24, 2010
Paul Davenport

The U.S. Supreme Court will consider ending a lawsuit that challenges Arizona's tax breaks for donations for thousands of private school scholarships.

The Washington-based court on Monday said it will hear two appeals filed by the state and supporters of the 13-year-old program that provides dollar-for-dollar state income tax breaks for donations to school tuition organizations.

The action "is terrific news for the thousands of families who desperately need scholarship assistance to send their children to the school of their choice," said Tim Keller, executive director of the Institute for Justice's Arizona chapter.

The institute was one of several groups defending the program.

A lawyer for the challengers said he hopes the justices' action doesn't mean the Supreme Court intends to open the door for broad state funding of religious instruction.

"I hope they didn't take this case to say that," said attorney Paul Bender.

The American Civil Liberties Union and others challenged the program as unconstitutional because religious organizations award most of the scholarships and require children to enroll in religious schools. The suit says the program amounts to an unconstitutional state endorsement of religion.

The Arizona Supreme Court previously upheld the constitutionality of the 1997 law as written, but the current case being considered by federal courts challenges how the program has been implemented.

A U.S. District Court judge dismissed the current case, but the federal appeals court in San Francisco last year ruled that the lawsuit could proceed. In that ruling, a 9th U.S. Circuit Court of Appeals panel said the program could be unconstitutional because parents seeking scholarships didn't have a realistic range of education choices for students to attend nonreligious schools.

In 2002, the U.S. Supreme Court upheld school voucher programs. Supporters of the Arizona aid program say it is no different from the Cleveland program upheld in 2002 because in both cases, government does not direct any money to religious schools.

The court will hear arguments in the fall on the two cases it consolidated into one appeal.

The state Department of Revenue said in an April report that 73,391 donations totaling $50.8 million were reported for 2009. School tuition organization groups reported providing 27,582 scholarships totaling $52.1 million for students attending 370 private schools in the same year, the department said.

Other states with versions of tuition tax credit programs include Florida, Georgia, Iowa, Pennsylvania and Rhode Island.

Lawrence C. Mohrweis, a Northern Arizona University accounting professor who has studied tuition tax credit programs, said

those states other than Florida share features with Arizona's program that could make them vulnerable to constitutional challenges.

The two cases being consolidated into one appeal are ***Arizona Christian School Tuition Organization v. Winn***, 09-987, and ***Garriott v. Winn***, 09-991.

"Slow Learners at the 9th Circuit"

The Washington Post
Mar 19, 2010
George F. Will

The 9th U.S. Circuit Court of Appeals is a stimulus package for the Supreme Court, which would rather not have one. The 9th Circuit, often in error but never in doubt, provides the Supreme Court with steady work: Over the past half-century, the 9th has been reversed almost 11 times per Supreme Court term, more than any other circuit court. This week, the Supreme Court should spank it again and ask: Is it too much to ask that you pay some attention to our precedents?

On Thursday at 9:30 a.m., the justices are expected to meet to decide whether to dignify the 9th's latest misadventure—an impertinence, actually—with a full hearing, including additional briefing and oral arguments, or whether to summarily reverse it. They should do the latter by 9:35 a.m.

The case[, ***Arizona Christian School Tuition Organization v. Winn*** and ***Garriott v. Winn***,] concerns an Arizona school choice program that has been serving low- and middle-income families for 13 years. The state grants a tax credit to individuals who donate to nonprofit entities that award scholarships for children to attend private schools—including religious schools. Yes, here we go again.

The question—if a question that has been redundantly answered remains a real question—is whether this violates the First Amendment proscription of any measure amounting to government "establishment of religion." The incorrigible 9th Circuit has declared Arizona's program unconstitutional, even though there is no government involvement in any parent's decision to use a scholarship at a religious school.

Surely this question was settled eight years ago in a decision that was the seventh consecutive defeat for the disgustingly determined people who are implacably opposed to any policies that enable parents who are not affluent to exercise the right of school choice that is routinely exercised by more fortunate Americans. It sometimes takes time for news of the outside world to penetrate San Francisco, where the 9th Circuit is headquartered, but surely by now that court has heard that in 2002, in a case coming from Cleveland, the Supreme Court upheld a program quite like Arizona's but arguably more problematic.

It was created after Cleveland's school district flunked 27—out of 27—standards measuring student performance, and the state declared the district an "academic emergency." The program empowered parents to redeem publicly funded vouchers at religious as well as nonreligious private schools.

In an opinion written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy and Thomas, the court held that Cleveland's program has the "valid secular purpose" of helping children who are trapped in the failing schools for which Cleveland is responsible. The court also held that the program satisfied the court's previously enunciated standard of "true private choice" because government aid goes directly to parents, who use it at their

unfettered discretion.

So, Rehnquist wrote, public money "reaches religious schools only as a result of the genuine and independent choices of private individuals." Therefore any "advancement of a religious mission" is merely "incidental" and confers "no imprimatur of state approval . . . on any particular religion, or on religion generally." These standards had been developed in various prior cases.

The Supreme Court has been splitting and re-splitting constitutional hairs about this for decades, holding, for example, that it is constitutional for public funds to provide parochial school pupils with transportation to classes—but not to field trips. To provide parochial schools with nurses—but not guidance counselors. To provide religious schools with books—but not maps. This last split hair caused the late Sen. Pat Moynihan to wonder: What about atlases, which are books of maps?

The court has ruled that public funds can provide a sign language interpreter to a deaf child at a religious school and can provide rehabilitation assistance at a religious college. The court has held that a state can offer tax deductions to parents paying tuition to religious schools. Can the 9th Circuit see a pattern here?

Scores of thousands of children have benefited from Arizona's scholarship program, which, unlike Cleveland's, does not involve any government funds that might otherwise go to public schools. Rather, Arizona's program infuses substantial additional funds into the state's K-through-12 educational offerings.

Democracy demands patience. In its political discourse, repetition is required because persuasion takes time. But the Supreme Court should not have to cajole lower courts into acknowledging its rulings. This term, the court has issued 11 summary reversals. Thursday morning it should use its 12th on the 9th Circuit, a slow learner.

"Supreme Court to Weigh Arizona Tuition Tax Credits"

Education Week
Mar 25, 2010
Mark Walsh

In a move welcomed by school choice supporters, the U.S. Supreme Court has agreed to weigh the constitutionality of a 13-year-old Arizona program offering tax credits for donations made to organizations that provide scholarships for children to attend private schools.

The case accepted May 24 involves a ruling by a federal appeals court last year that Arizona's tax-credit program is likely to impermissibly advance religion in violation of the First Amendment's prohibition against any government establishment of religion.

A three-judge panel of the U.S, Court of Appeals for the 9th Circuit, in San Francisco, in an April 2009 opinion found that the majority of those Arizona scholarships go to students attending religious schools, and that some of the "school tuition organizations," or STOs, restrict their scholarships to that purpose.

"We conclude that the plaintiffs' complaint . . . sufficiently alleges that Arizona's tax-credit-funded scholarship program lacks religious neutrality and true private choice in making scholarships available to parents," the panel said.

The court said the program could be distinguished from the Ohio private-school-voucher program upheld by the U.S. Supreme Court in 2002 in *Zelman v. Simmons-Harris*.

The state of Arizona and two groups that provide scholarships under that state's program appealed to the U.S. Supreme Court, which granted two of the three petitions for review—***Arizona Christian School Tuition Organization v. Winn*** (Case No. 09-987) and ***Garriott v. Winn*** (No. 09-991). The court put the third appeal aside for now.

Andrew R. Campanella, a spokesman for the Alliance for School Choice, a Washington-based advocacy organization, is hoping the Supreme Court will overturn the 9th Circuit ruling, saying the Arizona program provides a "free open market for opportunities," because taxpayers decide to which scholarship organizations they want to give their money.

"Many that provide scholarships go to nonreligious schools," Mr. Campanella said.

Clint Bolick, the litigation director at the Goldwater Institute, a think tank based in Phoenix that is supportive of the state tax-credit program, said it should be easy for the Supreme Court justices to decide to uphold the program, because a ruling in 1983, in *Mueller v. Allen*, sets a precedent for them to do so.

In that case, Mr. Bolick said, Minnesota taxpayers received state tax deductions for private school tuition of their own children, and 97 percent of the funds were going to religious schools. With the Arizona program, he said, "the relationship between the state and religious schools is even less direct because the state is providing credits for people who are contributing scholarships for other children."

However, Kevin G. Welner, a professor and the director of the Education and the Public Interest Center at the University of Colorado at Boulder, said that Arizona's tax-credit program is very different from conventional voucher systems like the one that the Supreme Court upheld in 2002.

Mr. Welner, who has voiced concern about tax-credit programs, said that instead of a state having created a neutral system that permits parents to select from participating private schools, whether religious or secular, Arizona has created a system that "tells wealthier taxpayers that they can choose which private schools will be available to parents."

"The key question framed for the court is whether the state can effectively delegate to its wealthier taxpayers a decision process that, as applied, favors some religious institutions over others," Mr. Welner said in an e-mail.

Push for Review

Although the full 9th Circuit court declined in October to rehear the Arizona case, eight members of that court dissented, with U.S. Circuit Judge Diarmuid F. O'Scannlain saying, "The panel's holding casts a pall over comparable educational tax-credit schemes in states across the nation."

Eight states filed a friend-of-court brief on the side of Arizona urging the Supreme Court to take the case, arguing that the 9th Circuit panel's ruling raises doubts about tuition tax credits elsewhere.

The eight—Florida, Indiana, Louisiana, Michigan, New Jersey, Pennsylvania, South Carolina, and Utah—argue that "promoting charitable giving through tax incentives is an efficient and legitimate way to achieve the states' goal of improving the quality and accessibility of private schools."

The appeal from Arizona points out that the state's program was enacted in 1997 and has been upheld under the federal Constitution by the Arizona Supreme Court. Taxpayers can receive a dollar-for-dollar credit of up to $500 (or $1,000 for married couples) for donations to school tuition organizations.

The STOs must spend at least 90 percent of their annual revenues on scholarships or tuition grants. The organizations may not limit their grants to a single school, but they may limit them to religious schools, as several of the groups do.

The Arizona Department of Revenue said in an April report that 73,391 donations totaling $50.8 million were reported for 2009. School tuition organizations reported providing 27,582 scholarships totaling $52.1 million for students attending 370 private schools in the same year, the department said.

The appeal by the Arizona Christian School Tuition Organization argues that under the tax-credit program, "the private choices of taxpayers, the STOs, and parents direct tuition funds to students. The taxpayer chooses to donate or not, and if he donates, to which STO. The privately formed, nonprofit STOs raise money to award scholarships to schools of their choice."

But a brief filed on behalf of the taxpayers who challenged the tax credits argues that the Arizona program uniquely relies on religious organizations to award most of the scholarships, and it permits those organizations to require parents to enroll their children in religious schools.

"The Arizona program is neither based on financial or academic need nor neutral with respect to religion," said the taxpayers'

brief. "Instead, it awards most of its scholarships to the children of middle-class and wealthy parents on the basis of religion."

The Arizona case has been to the U.S. Supreme Court once before, on a narrow question of whether federal courts were barred from hearing such challenges to a state tax law under a 1937 federal law, the Tax Injunction Act. In 2004, in *Hibbs v. Winn*, the justices ruled 5-4 that the federal law did not bar the suit as federal courts had heard challenges to tax breaks for private school tuition going back for roughly 50 years. ("Justices Allow Suit Challenging Tax Credits," June 23, 2004.)

"U.S. Supreme Court to Weigh Arizona's Tax Credit Law"

The Arizona Republic
Mar 25, 2010
Pat Kossan & Ronald J. Hansen

The U.S. Supreme Court on Monday agreed to review the constitutionality of an Arizona program that diverts state tax revenue into private-school scholarships [in ***Arizona Christian School Tuition Organization v. Winn***, 09-987, and ***Garriott v. Winn***, 09-991].

The court's acceptance of the case may bode well for the tuition tax-credit program, some legal experts said, because a majority of Supreme Court justices have ruled in favor of programs that provide parents with public money to help pay for tuition at private schools.

If that trend continues, the court could declare Arizona's program constitutional, ending a decade long court battle in the state's federal courts. Or it could send the original lawsuit back to be heard in a lower court if it agrees that constitutional questions exist.

The Supreme Court will review the case in the fall, and a decision is expected before next spring.

Opponents of the tax-credit program say the high court could still rule against Arizona's law because, unlike other school-choice programs, it distributes most of the money to students at religious schools through organizations linked to religious schools.

Arizona's private-school tuition tax-credit program gives donors a dollar-for-dollar reduction in state income taxes for annual contributions of up to $1,000. Non-profit organizations called school-tuition organizations collect the money and distribute it in the form of scholarships. Many school-tuition organizations are closely linked to a certain religion and give the majority of scholarships to schools tied to that faith or denomination.

An analysis of 2008 scholarships by *The Arizona Republic* found that religious schools received 93 percent of the $54 million collected by school-tuition organizations that year. In 2009, at least 91.5 percent of $52 million collected went to religious schools.

Pros and cons

At issue for the court is the way Arizona's tuition tax-credit program is carried out.

Opponents say the reality of the program is that it redirects public tax money to private, mostly religious organizations and schools, which is unconstitutional.

They were buoyed by rulings last year by the 9th U.S. Circuit Court of Appeals, which said the state's program may not meet the criteria for more secular tuition tax-credit programs already approved as constitutional by the U.S. Supreme Court. The 9th Circuit returned the program to the U.S. District Court for a full hearing, but the Supreme Court stepped in on Monday to take up the case.

"Most of the money in Arizona is awarded by school-tuition organizations affiliated

with religious schools and is usable only at religious schools," attorney Paul Bender said.

The school-choice programs that the Supreme Court has ruled as constitutional were religiously neutral, said Bender, former dean of the Arizona State University law school and lead attorney for the American Civil Liberties Union, one of the advocacy groups opposing the tax-credit program.

In Ohio, for example, the Supreme Court in 2002 approved a voucher program in which the state distributes tax money to needy parents and the parents can use the money to send their child to any private school.

"The Arizona school program is religious-specific," Bender said. "You have a thumb on the scale to push the parents to send their kid to a religious school."

Supporters of the tuition tax-credit program say the tax money does not go directly to private and religious schools. Instead, donors can contribute to a variety of private-school-tuition organizations, including some secular ones, and parents decide which schools their child attends, said Jeremy Tedesco, an attorney with the Alliance Defense Fund, a Christian legal group that is helping defend the Arizona program.

"It's, 'This is where I want my money to go, and this is where I want my child to attend school,'" Tedesco said. "You also have private organizations dispensing the money."

This type of program will give the Supreme Court a chance to solidify its support of school-choice programs in other states, Tedesco said.

How we got here

Alan Brownstein, a constitutional-law professor at the University of California-Davis, said retired Supreme Court Justice Sandra Day O'Connor was the swing vote in church-state cases in years past. Her replacement, Samuel Alito, seems more inclined to support government aid for religious organizations, he said.

The current court seems "very favorable" toward indirect-aid programs, Brownstein said.

Arizona's program seems to fit that description. The tax credits go to donors, not churches or private schools. Also, donations go to school-tuition organizations, a third party that must by state law give to more than one school.

One factor that likely influenced the Supreme Court was a strong dissent by eight of the 27 judges on the 9th Circuit. The dissenters said that the scholarship money reaches religious schools only because many taxpayers make individual decisions and that the state does not encourage individuals to give direct aid to religious schools.

Bender acknowledged that "it would have been close to a miracle" if the Supreme Court had ignored that dissent.

But "I'm hopeful we can get the Supreme Court to be clear and say, 'Look, you cannot let religious organizations take tax revenue and distribute it on the basis of religion and tell parents you can only use it to send the kid to a religious school,'" he said.

"Big New Establishment Clause Case, on Religious Groups' Participating in Evenhanded Government Funding Programs"

The Volokh Conspiracy
May 24, 2010
Eugene Volokh

The Supreme Court just agreed to hear ***Arizona Christian School Tuition Organization v. Winn*** and ***Garriott v. Winn***, which are the latest cases to deal with the question: When may religious institutions—here, schools—participate in government funding programs that are equally open to secular institutions and religious institutions (or, as here, to groups that pay for tuition at secular schools and groups that pay for tuition at religious schools)?

I think the answer is that such programs should almost always be constitutional, regardless of what fraction of the money ends up going to religious schools. That's true whether the programs are the GI Bill (which funded veterans' college education, whether at religious universities or secular universities), a funding system for vocational training for the blind (which included training for would-be ministers as well as for other trades and professions), the school choice program in *Zelman v. Simmons-Harris*, or the tax credit system at issue in this case, where taxpayers can get a tax credit for contributing to scholarship-giving organizations, regardless of whether the organizations chosen by the taxpayers give scholarships only for religious schools, only for secular schools, or for a mix of religious and secular schools. I discuss this in considerably more detail in my *Equal Treatment Is Not Establishment* article.

But in any event, the Court's decision here may be pretty significant, and may strengthen the *Zelman* principle to make clear that these sorts of programs are indeed constitutional. Justice O'Connor joined the *Zelman* majority, but wrote a concurrence that could be read as expressing a somewhat narrower position than the majority's, and took a different view from Justices Rehnquist, Scalia, Kennedy, and Thomas in the related field of evenhanded per-capita aid programs. I suspect that Chief Justice Roberts is at least as supportive of religious groups' participation in a wide range of evenhanded funding programs as Chief Justice Rehnquist was, and that Justice Alito is more supportive of it than Justice O'Connor was. So unless the case is decided on standing grounds, I expect the opinion to be a pretty solid win for the Arizona program and for other such programs more generally (so long as they are legally equally open to secular and religious institutions).

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"An Appealing School Choice"

The Washington Post
May 20, 2010
Eric Robinson

Most people know when the U.S. Supreme Court issues a ruling, it is considered the final say for that case. Unfortunately, the U.S. Court of Appeals for the Ninth Circuit has tried to overstep the Supreme Court in no less than four cases dealing with parental choice in education.

In direct conflict with Supreme Court precedent and to the detriment of more than 28,000 Arizona schoolchildren, the Ninth Circuit recently declared that Arizona's educational tax credit program is unconstitutional. On May 20, the Supreme Court can correct the Ninth Circuit [in ***Arizona Christian School Tuition Organization v. Winn***, 09-987, and ***Garriott v. Winn***, 09-991], and there are compelling reasons for it to do so.

Phoenix resident Glenn Dennard is an inner-city pastor and father. He and his wife, Rhonda, used to make a long drive each day to save their oldest daughter from the failing school district they lived in. Yet, they were still not satisfied. Through the Arizona tax credit program, they secured scholarships that ensured access to a quality, individualized education for each of their five children. If the Supreme Court does not intervene in this case, however, the Dennard family may be forced to move in order to find a better education for their children.

The Establishment Clause requires government to stay neutral with regard to religion, meaning it cannot pass laws that prefer one religion over another, or religion over nonreligion, or, as the American Civil Liberties Union (ACLU) advocates, nonreligion over religion. The ACLU is challenging Arizona's tax credit because it allows taxpayers to claim a dollar-for-dollar tax credit for donations to scholarship-granting charities, including religiously affiliated organizations. These charities, known as School Tuition Organizations (STOs), give scholarships to families to send their children to the private school of their choice.

But the tax credit is entirely religiously neutral; it neither favors nor discriminates against people who select religious school options. Private actors—not government bureaucrats—decide which charities receive donations to fund the private school scholarships. As Judge Diarmuid O'Scannlain said in a powerful dissent to the Ninth Circuit's decision, the government is at least four steps removed from these charities. A private citizen must first create an STO, and then they must decide whether to provide scholarships to religious schools. This is followed by the taxpayer's decision to donate to that STO. Finally, a parent must then decide to apply for a scholarship for their child. Four separate choices by three private citizens do not equal government action.

Moreover, the Ninth Circuit decision is in direct conflict with an Arizona Supreme Court decision upholding the program under the Establishment Clause. The Arizona Supreme Court found that the program aided a "broad spectrum of citizens" and that it "allow[ed] a wide range of private choices." Indeed, there are 55 such STOs, at least 30 of which have no obvious religious affiliation.

Arizona leads the nation in offering educational choices to families. The overall breadth of choice is an important factor that the U.S. Supreme Court should look at in determining whether the program being challenged coerces parents to choose religious schools. Arizona has more than 10 percent of the nation's charter schools, in addition to magnet schools, homeschooling and an open-enrollment policy.

Finally, should the Ninth Circuit's decision stand, a cloud of uncertainty would be cast over similar tax credit programs in other states. The decision could jeopardize thousands of scholarships, forcing children nationwide out of their current private schools.

Already-full public schools could be forced to enroll thousands of new students in the next few years, further burdening an already weakened system. Children who are succeeding in their current schools could be uprooted and their educational futures placed in jeopardy.

The Supreme Court should reverse the Ninth Circuit's decision so parents can rest assured their children's educational future is secure. After all, the Supreme Court has already ruled parents, not politicians, know what is best for their own children. The Ninth Circuit's decision to strike down Arizona's school voucher program has harmed the most vulnerable (in this case, Arizona school kids). The Supreme Court once again can step in and come to the aid of thousands of parents who want to provide a better education for their children.

Eric Robinson is a law clerk at the Institute for Justice, which is defending Arizona's tuition tax credit program.

"A No-Decision in Tuition Tax Credit Case"

SCOTUSblog
August 20, 2010
Lyle Denniston

A group of Arizona taxpayers, in a new filing in the Supreme Court, has suggested that the Justices consider avoiding a ruling in a major case on tuition tax credits for parents of parochial school students, at least until the impact of a new Arizona state law has been assessed, first by lower courts. The Court in May granted review of two cases; that was before it was told about new legislation in the state. The supporters of the tax credit program presumably will get a chance to respond before the Court takes any action on the new development.

The Court has not yet scheduled oral argument in the consolidated cases (***Arizona Christian School Tuition Organization v. Winn,*** 09-987, and ***Garriott v. Winn,*** 09-991). These are appeals by state officials (in 09-991) and by a private tuition scholarship program in the state, seeking to scuttle the constitutional challenge to the program, first enacted in 1997. (Briefing on the merits has not yet been completed. All of the filings so far in the case are available on ScotusWiki. . . .)

Under the Arizona program, individual taxpayers in the state get a dollar-for-dollar tax credit when they make contributions to private, non-profit groups known as "school tuition organizations." Such an organization provides funds to cover scholarships or grants to students enrolled in private schools, up through high school. Contributions to such organizations have risen into the tens of millions of dollars.

The new brief, filed in the Supreme Court on Tuesday, is by the taxpayers who have challenged the program as a violation of the Constitution's Establishment Clause, on the theory that the largest tuition organizations in the state had restricted their scholarships or grants to students attending specified parochial schools only. Supporters of the program, the challengers' new filing said, "have maintained, throughout this litigation, that Arizona's tax-credit program is a program of private charity that need not comply with the Establishment Clause. Arizona's new legislation demonstrates conclusively that the program is not a program of private charity, but rather a governmental spending program that uses [school tuition organizations] as the state's surrogates to distribute government tax revenues for the government's educational purposes."

The brief noted that the supporters had mentioned the new law in footnotes in their briefs on the merits and had argued that they were not relevant to this case. But, the brief of the challengers argued, the changes bear directly on the issues in the case. Neither lower court in ruling in the case had a chance to assess the impact of the new legislative changes, the brief said.

After cataloging the changes, the brief suggested that the Court might wish to consider sending the case back to lower courts "for further proceedings that would take account of the extensive statutory changes" after the lower courts had ruled.