

No. 10-1985

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

BENTON KEATLEY,

Petitioner,

v.

ANDREW FINNICUM, ET AL.,

Respondent.

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR THE RESPONDENT

September 19, 2010

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Counsel for Respondent

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STATEMENT OF THE CASE

The respondents in this case, Andrew D. Finnicum, Victoria Finnicum-Corder, and Rebecca Finnicum-Clinton, are all members of the Sydney Lewis Church of God in Leetown, Indiana, where Mr. Finnicum has been a minister for over forty years. Members of the Sydney Lewis Church of God are known for their deeply-held and unpopular religious beliefs. In particular, church members believe that God is punishing America for its tolerance of homosexuality, particularly in the United States military.

As part of their religious practice, church members regularly travel to picket at funerals of military service members killed in the line of duty. The purpose of these demonstrations is to draw attention to their cause and spread their political and religious beliefs throughout the country.

On March 10, 2006, Respondent Andrew D. Finnicum, his adult daughters, Victoria Finnicum-Corder, Rebecca Finnicum-Clinton, and four of Mr. Finnicum's grandchildren conducted one such a protest near the funeral of Lance Corporal Keatley in Lex Vegas, South Virginia. Prior to arriving in Lex Vegas, Respondents notified local police of their intention to protest near the funeral. The picketers complied with all police instructions during the demonstration, which took place directly across the street from the main entrance to St. Rodney's Church where Corporel Keatley's funeral was held. At no time did the protestors enter the church or directly interfere with the funeral service.

Respondents brought and carried pre-made signs expressing messages such as "God Condemns Homosexuals," "Gay Troops Cause War," and "American Will Perish." They also carried signs stating: "God Killed You," "Marine Corps Gays Should Die," "Burn in Hell Andrew," and "Andrew Drove a Gay Car." As they were entering and exiting the church,

Petitioner Keatley and other funeral attendees saw the protest and heard picketers chants of "God Hates Fags."

Members of the local media were present and covered the demonstration. A special report about the protest aired that night on the evening news. The report featured footage of the protest and an interview with Respondent Andrew Finnium. In the interview, Finnium spoke of the deeply-held religious and political views that motivated the demonstration.

In June 2006, Petitioner Benton Keatley sued Respondents Andrew D. Finnium, the Sydney Lewis Church of God, Victoria Finnium-Corder, and Rebecca Finnium-Corder in South Virginia General District Court on two state torts: intrusion upon seclusion (S.VA. CODE § 12.8) and intentional infliction of emotional distress (S.VA. CODE § 12.8). Respondents removed the case to federal court for the District of South Virginia.

The District Court denied Respondents' motion for judgment as a matter of law on the IIED claim and the intrusion upon seclusion claim. *Keatley v. Finnium*, 300 F.Supp. 3d 1, 5 (D.S. Va. 2008). After reviewing the record, the District Court determined that Respondents' conduct "shocked the conscience" because of the historical importance of funerals and because it determined that Respondents' conduct "went far beyond the pale of human decency." *Id.* at 4. The District Court also denied Respondents' motion for judgment as a matter of law on the intrusion upon seclusion claim because the District Court decided that the funeral attendees were a "captive audience" of the protestors, and thus the protestors had "intentionally interfered with Mr. Keatley's grieving process in an intolerable manner." *Id.* at 5. The jury ruled in favor of Petitioners and awarded over \$1 million in damages.

The Circuit Court reversed the District Court decision, reasoning that Respondents' picketing was protected by the First Amendment. *Keatley v. Finnium*, 200 F.3d 1, 5 (12th Cir.

2009). The court explained that no reasonable person could interpret the speech as stating actual facts about Mr. Keatley or his son. *Id.* at 3–4. Because the IIED and intrusion upon seclusion claims unconstitutionally attached tort liability to the protestors "constitutionally protected speech," the Circuit Court found that the District Court erred in denying Respondents' motion for judgment as a matter of law. *Id.* at 5.

SUMMARY OF THE ARGUMENT

The First Amendment to the United States Constitution protects freedom of speech and of the press. Without this strong Constitutional guarantee, vigorous public debate could not exist in our society. Such debate is "an opportunity essential to the security of the Republic, [and] a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

In an effort to protect this essential attribute of a free society, the Supreme Court has held that plaintiffs must prove actual malice to recover tort damages based on speech. *Hustler Magazine v. Falwell*, 485 U.S. 46, 48 (1988); *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964). In *Gertz v. Robert Welch, Inc.*, the Court declined to extend the actual malice rule to an private plaintiff seeking to recover compensatory damages for libel. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The speech at issue in *Gertz* was false statement of fact, a type of speech not valued by the First Amendment. *Id.* The court balanced the value of this type of speech against the state interest in compensating a private individual for reputational damages that occur when one is a victim of libel. *Id.* Because the interests on both side of the scale in *Gertz* are different than those in IIED cases, it would be improper to blindly extend the *Gertz* rule to the case at hand based solely on the category of the plaintiff. A proper balancing of the interests at stake on both sides of the scale shows that this case properly falls under the *Hustler*;

therefore, petitioners should be required to prove actual malice in order to recover damages for IIED based on respondents' free exercise of expression.

Petitioners should not be permitted to recover under the Intrusion Upon Seclusion statute, S.VA. CODE § 12.8, because the statute is unconstitutional as applied to the facts of this case. The statute is subject to strict scrutiny because the challenged speech occurred on a public sidewalk, a traditional public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Because the application of IIED to respondents' speech is a content-based restriction of speech in a public forum, the statute as applied is subject to strict scrutiny review. *Id.*

The state regulation fails a strict scrutiny analysis because it does not serve a compelling state interest and it is not narrowly tailored to effectuate that interest. The state interest in protecting Petitioners' privacy is not compelling because privacy interests are outweighed by Respondents' First Amendment rights. Even if the statute did serve a compelling state interest, it would still fail strict scrutiny analysis because the statute is not narrowly tailored to serve the interest in protecting privacy at funerals. The burden on speech caused by the intrusion upon seclusion tort as applied is greater than necessary to protect petitioners' interest in privacy, and therefore the statute cannot stand under strict scrutiny and the First Amendment. *Id.*

ARGUMENT

I. A PLAINTIFF MUST PROVE ACTUAL MALICE IN ORDER TO RECOVER FOR INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS BASED ON SPEECH.

"At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler*, 485 U.S. at 50. In keeping with this principle, the Supreme Court has held that a public plaintiff cannot recover damages for intentional infliction of emotional distress based on speech unless he or she

has shown that the challenged expression contained a false statement of fact made with actual malice. *Id.* at 56

The actual malice standard was first set forth by the Supreme Court in the watershed case *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964). In *Sullivan*, the Court held that a public official could not recover damages for defamation unless he or she has shown that the challenged expression contained a false statement of fact made with actual malice. *Sullivan*, 376 U.S. at 279–80. To prove actual malice, a plaintiff must demonstrate that the speaker knew the challenged statement was false, or recklessly disregarded the possibility that it could be false. *Id.* at 280. The actual malice requirement was later extended to plaintiffs who are public figures as well as public officials. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

The Court has extended the actual malice requirement beyond defamation torts to IIED. *Hustler*, 485 U.S. at 48. In *Hustler*, the Court held that a nationally renowned minister could not sue a magazine for publication of an ad parody that included a caricature depicting him as "drunk and immoral." *Id.* at 48. The Court explained that the actual malice standard was "necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* at 56.

The Supreme Court has carved out a narrow exception to the actual malice requirement in the case of a private plaintiff seeking to recover compensatory damages for defamation. In *Gertz*, the Court held that an attorney who was falsely accused of involvement in a Communist conspiracy was not required to prove actual malice in order to recover compensatory damages in a libel suit. *Id.* at 350. The result in *Gertz* is the product of an effort to balance competing interests at stake in libel cases involving private plaintiffs. Having carefully considered both the constitutional value of the challenged speech and the state's interest in providing compensation

to private victims of defamation, the Court reached a conclusion tailored specifically to libel cases. *Id.* at 343.

A. The Public-Private Plaintiff Distinction in *Gertz* Only Applies to Libel Cases.

Petitioner asks this Court to extend *Gertz* to a type of tort that does not logically fall within the opinion's rationale: IIED. Because the competing interests in an IIED case are vastly different than those at stake in a defamation action, it would be improper to extend *Gertz* to cases involving an IIED suit, regardless of the status of the plaintiff. *See Gertz*, 418 U.S. at 344 ("[W]e have no difficulty in distinguishing among *defamation* plaintiffs.") (emphasis added).

By definition, defamation involves a false statement of fact, a type of speech that has no value under the First Amendment. *See id.* at 340 ("But there is no constitutional value in a false statement of fact."). This Court has stated: "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, wide-open' debate on public issues." *Id.* at 340. False speech is tolerated only because it is impossible to avoid without impermissibly restricting all speech. *Id.* at 340 (stating that false speech is "inevitable in free debate" largely because "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.").

Political speech, however, is on the opposite end of the spectrum. In contrast with valueless falsehood, political speech is "central to the meaning and purpose of the First amendment," and therefore is entitled to the highest level of constitutional protection. *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 881–82 (2010).

Admittedly, the contested speech in this case is different from typical political speech. The picketers' viewpoints are outlandish, extreme, and even likely to offend the average listener. Nonetheless, they are protected by the First Amendment. As the Court made clear in *Hustler*,

"the fact that society may find speech offensive is not a sufficient reason for oppressing it." *Hustler*, 485 U.S. at 55 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978)). One of the most important purposes of the First Amendment is preservation of a speaker's right to express an unpopular and controversial minority viewpoint, even those viewpoints which are considered offensive. *See Hustler*, 485 U.S. at 55 ("Indeed if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (quoting *Pacifica*, 438 U.S. at 745–46)). The Court has been clear: "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Gertz*, 418 U.S. at 339–40. However misguided the picketers' statements and beliefs may be, the First Amendment protects their place in public debate. Therefore, it would be improper to lump the challenged political speech at issue here in the same category as valueless falsehood.

Moreover, Petitioner in this case has not suffered the type of reputational injury that formed the basis for the legitimate state interest in *Gertz*. *Id.* at 341. The state's interest in compensating individuals who have suffered reputational injury as a result of defamation is particularly strong. The *Gertz* opinion relies heavily on this important interest, emphasizing that "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion)). *See also Gertz*, 418 U.S. at 343 (concluding that "the state interest in compensating injury to the *reputation* of private individuals requires that a different rule should obtain with respect to them.") (emphasis added). The Court's decision to create a public-private plaintiff dichotomy in *Gertz* was based on its understanding that private plaintiffs are both "more

vulnerable to injury" and "more deserving of recovery" than those who have assumed the risk of reputational damage by becoming involved in public affairs and controversies. *Id.* at 344.

Neither of these rationales apply with the same force in the absence of a false statement of fact. There is no indication that media "self-help" is of any use to an emotionally distressed plaintiff, public or private, because there is no false statement in need of correction and no reputational damage to mitigate. Therefore, there is no reason to believe that a public plaintiff will be any less vulnerable to emotional distress than any other individual. And while it may be possible to view a public plaintiff as having "assumed the risk" of emotional distress in the same way that he or she assumed the risk of reputational damage, this Court has never explicitly adopted such a view. *See id.* at 344–45 (speaking specifically in terms of reputational damage caused by defamation). And even if the Court were to do so, the state's interest in protecting individuals from emotional distress is simply not as strong its interest in protecting individuals from the reputational damage caused by libelous falsehood.

As Supreme Court precedent makes clear, the distinct elements of the IIED tort relied on by Petitioners—intentionality and outrageousness—do not cure the constitutional problem. As this Court explained in *Hustler*, a speaker's motive does not by itself remove speech from First Amendment protection. *Hustler*, 485 U.S. at 53. If it did, no one could debate public issues without running the risk that he or she would be taken into court to prove his or her motive. And according to the Court, even statements made out of hatred "contribute to the free interchange of ideas and ascertainment of truth," so long as the speaker honestly believes what he or she says. *See id.* ("But even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964))).

Nor does the fact that a jury found the picketer's speech "outrageous" eliminate the First Amendment problem. Unpopular minority viewpoints on political hot-button issues such as war and gay marriage are the very types of expression the First Amendment was designed to protect. The Court in *Hustler* clearly rejected an "outrageousness" standard, stating that such a rule "runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotion impact on the audience." *Id.* at 55. Outrageousness is a vague and undefined concept that is too subjective to provide a meaningful distinction between protected and unprotected speech. *Id.*

Because both the state interests and character of the speech at issue in this case more closely align with the rationale behind *Hustler* than that of *Gertz*, the plaintiff seeking damages for intentional infliction of emotional distress based on protected speech should be required to prove actual malice.

B. The Challenged Speech is the Type of Rhetorical Hyperbole No Reasonable Person Would Interpret as Asserting Actual Facts.

Petitioners seek to bring the challenged speech under *Gertz* by claiming that some of the challenged statements actually were statements of fact. The Supreme Court considers the type of speech at issue when determining the First Amendment protection in state tort cases. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990). In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court determined that the First Amendment does not protect assertions that are not "susceptible of being proved true or false." *Id.* at 21. However, the Court has recognized that the First Amendment protects speech that "cannot 'reasonably be interpret[ed] as stating actual facts' about an individual." *Hustler*, 485 U.S. at 50. First Amendment protection applies to speech that cannot be interpreted by a reasonable person as stating actual facts about an individual because such speech is an essential attribute of open public debate. *Milkovich*, 497

U.S. at 20. Specifically, the Court determined that hyperbolic language and satire is essential to open public discourse. *Hustler*, 485 U.S. at 53.

In determining whether a reasonable person would interpret speech as asserting actual facts about an individual, a court must examine the tenor and context of the speech and the verifiability of the assertion. *Milkovich*, 497 U.S. at 18. Additionally, in *Milkovich*, the Court considered whether the speech was "the sort of loose, figurative, or hyperbolic language that would negate the impression that" the speaker was making a factual assertion. *Id.* at 21.

The speech at issue in this case is exactly the type of loose, figurative, hyperbolic language that no reasonable viewer would interpret as a factual statement. Respondents held signs stating "Gay Troops Cause War" and "America Will Perish," language intended to raise controversy and draw attention to the protest. The use of such inflammatory language was intended to shock the reader and inflame public opinion, but these statements were general in nature and clearly not directed at any individual.

Furthermore, no reasonable person would believe that the signs stating "God Killed You," "Marine Corps Gays Should Die," and "Andrew Drove a Gay Car" asserted actual facts about Andrew or his family. The harsh language contained on the signs and the context of a political protest make clear that Respondent's speech was loose and hyperbolic. As such, it would not be understood as an assertion of fact and is protected under the First Amendment even if listeners find it offensive. *Id.* at 20; *Pacifica*, 438 U.S. at 745–46.

Even if the statements at issue could be reasonably interpreted as false statements of fact, Petitioner plaintiff still should be required to prove actual malice in an IIED action involving speech. Because falsity is not an element of IIED, eliminating the actual malice requirement would permit a plaintiff to bring an IIED action to avoid the falsity requirement of a defamation

suit. Such a system would permit a plaintiff to recover damages based on a speaker's *true* statements about matters of public concern, and cannot be squared with First Amendment precedent. *Philadelphia v. Hepps*, 475 U.S. 767, 772 (1986).

II. SOUTH VIRGINIA'S INTRUSION UPON SECLUSION STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE.

A. The Statute as Applied Creates a Content-Based Restriction on Speech in a Public Forum and Therefore is Subject to Strict Scrutiny.

When determining the extent of protection that Respondents' speech is afforded under the First Amendment, the court must consider the place where the speech took place. The Supreme Court emphasized in picketing cases that "[b]ecause of the importance of 'uninhibited, robust, and wide-open debate on public issues, [the Supreme Court has] traditionally subjected restrictions on public issue picketing to careful scrutiny.'" *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). In this case, Respondents picketed Corporal Keatley's funeral from across the street. Public streets are viewed by the Court as a traditional public forum. *Id.* at 480. Any governmental regulation of speech in a traditional public forum must be carefully scrutinized. *Id.* at 481. While content-neutral time, place and manner regulations are permitted even in public forums, content-based regulation of speech is always subject to strict scrutiny. *Perry Educational Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983).

In general, the intrusion upon seclusion tort does not create a First Amendment problem because the tort allows recovery for conduct rather than expression. *See, e.g., Sanders v. Am. Broad. Co., Inc.*, 20 Cal.4th 907, 924–25 (Cal. 1999). Here, however, the intrusion relied upon is the speech—indeed, the message—of the protestors. *See, e.g., Bartnicki v. Vopper* 532 U.S. 514, 524 (2001) (recognizing that a statute may be unconstitutional as applied to the facts of a particular case). Respondents did not physically intrude by entering the church or placing unauthorized recordings in the church building. They complied with the instructions of police

officers, who never saw need to interfere. The physical location of the protestors is not what Petitioners objected to, nor was it the simple fact that the individuals were picketing. The intrusion here was the offensiveness of the message that the speakers conveyed. Had the protestors been carrying inane, inoffensive signs, it is clear that no tort liability would attach. Instead, the tort as applied to the facts of this case punishes the protestors based on the content and viewpoint of their message. Therefore, it is a content-based regulation and subject to strict scrutiny under the First Amendment. *Perry Educators*, 460 U.S. at 45.

B. South Virginia's Intrusion Upon Seclusion Statute Does Not Withstand Strict Scrutiny.

When governmental action implicates a fundamental right or suspect classification, strict scrutiny applies. Strict scrutiny involves an evaluation of the government's ends and means. *Perry Educators*, 460 U.S. at 45. To withstand strict scrutiny, a statute must be narrowly tailored to serve a compelling government interest. *Id.*

1. The Intrusion Upon Seclusion Statute Does Not Serve a Compelling Government Interest as Applied to this Case.

South Virginia does not possess a compelling interest in S.VA. CODE § 12.4. Authority is limited on whether a state has a "significant interest" in sheltering funeral attendees from certain speech. *Phelps-Roper v. Strickland*, 539 F.3d 356, 362 (6th Cir. 2008). However, when the state's interest in protecting individual's privacy interest in funerals is weighed against a protestors' right to speak, the individual's speech interest must be afforded greater weight. *See Olmer v. Lincoln*, 192 F.3d 1176, 1178 (8th Cir. 1999) ("[P]rotection of such robust debate is at the core of the First Amendment."). Historically, when balancing privacy interests and First Amendment interests, the Supreme Court has given greater weight to First Amendment interests. *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 497 (1975) (finding that the First Amendment barred an invasion of privacy action brought by the father of a deceased rape

victim); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (deciding that First Amendment protections of the press applied to a New York privacy statute). Even if Respondents' speech is repulsive to the general public, that fact does not diminish their First Amendment right to make such statements. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . ."). Furthermore, the Eighth Circuit held that in a preliminary injunction analysis a plaintiff had "a fair chance of proving any interest the state has in protecting funeral mourners from unwanted speech is outweighed by the First Amendment right to free speech." *Phelps-Roper v. Nixon*, 509 U.S. 480, 487 (8th Cir. 2007). Based on the Court's previous handling of privacy and First Amendment interests, Respondents' First Amendment interest in picketing outweighs the petitioners' privacy interest. Thus, South Virginia does not have a compelling interest in S.VA. CODE § 12.4.

2. The Intrusion Upon Seclusion Statute Is Not Narrowly Tailored.

In evaluating whether a statute is narrowly tailored to serve a compelling governmental interest, the a court must "question whether the scope of the restriction . . . is substantially broader than is necessary" to serve the compelling governmental interest. *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). A statute is narrowly tailored only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to eliminate." *Frisby*, 487 U.S. at 485. In this case, the use of the intrusion upon seclusion statute to protect citizens from offensive speech prohibits more than only the "evil" that the statute seeks to protect against. If South Virginia wishes to protect the privacy interest of funeral-goers, it could enact a statute specifically for that purpose. Such a statute could set forth exact requirements that would permit protestors to conform their behavior to the law without

running the risk of tort liability. The Twelfth Circuit emphasized this point when it stated that South Virginia could protect funerals by enacting a statute designed to protect such events.

Keatley, 200 F.3d at 5.

South Virginia's intrusion upon seclusion statute does not delineate when and where it is acceptable for the protests to occur, and it does not specify that the speech must be directed at the funeral. S.VA. CODE § 12.4. Any person holding a sign considered offensive near the funeral could be subject to liability under S.VA. CODE § 12.4 if the person "intentionally intrudes" into another's seclusion and if the intrusion is highly offensive. *Id.* Clearly, South Virginia could protect an individual's privacy interest in a family member's funeral through a statute specifically designed to protect that interest. *See, e.g., Strickland*, 539 F.3d at 373. S.VA. CODE § 12.4 burdens more speech than necessary to protect an individual's privacy interest in a family member's funeral, and thus it is not narrowly tailored to serve a compelling governmental interest. *Bd. of Tr. State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989); *Nixon*, 509 F.3d at 487 ("For a statute to be narrowly tailored, it must not burden substantially more than necessary to further the state's legitimate interests.").

A specific, content-neutral statute could be designed to protect the privacy interests of funeral-goers with only a minimal impact on speech. The current statute is vague and overbroad, impermissibly restricting speech beyond what is necessary to protect the state interest in the privacy of funeral-goers. Therefore, it is not narrowly tailored to serve a compelling state interest, and is invalid under the First Amendment.

CONCLUSION

For the foregoing reasons, Respondents request this Honorable Court affirm the decision of the 12th Circuit.