No. 09-751

IN THE

Supreme Court of the United States

ALBERT SNYDER,
Petitioner,

v.

FRED W. PHELPS, SR., *et al*.,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND LAW PROFESSORS ASH BHAGWAT, DAVID POST, MARTIN REDISH, NADINE STROSSEN, AND EUGENE VOLOKH

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INTEREST OF *AMICI CURIAE* [1]

Pursuant to Rule 37 of the Supreme Court Rules, the Foundation for Individual Rights in Education ("FIRE") and law professors submit this brief as *amici curiae* in support of respondents.

FIRE is a national secular, non-partisan, 501(c)(3) non-profit educational and civil liberties organization working to defend and promote individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious freedom, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE believes that, for our nation's colleges and universities to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of student rights. During its more than ten years of existence, FIRE has advocated on behalf of the fundamental liberties of campus organizations in multiple states and on multiple campuses.

Ash Bhagwat is Professor of Law at the University of California, Hastings College of the Law. From 2002 to 2004, he served as Associate Academic Dean at Hastings. Professor Bhagwat teaches and writes in the field of constitutional law, with a special interest in the First Amendment. As an educator, former public university administrator, and free speech

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[1] All parties have consented to the filing of this brief. Counsel of record for all parties received notice, at least 10 days prior to the due date, of the *amici curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

scholar, he has a special interest in questions involving freedom of speech on public university campuses.

David G. Post is the I. Herman Stern Professor of Law at the Beasley School of Law at Temple University. He is the author of two books and numerous scholarly and popular articles focused on the new regulatory challenges posed by the emergence of the Internet as a global communications forum, and in particular on means of protecting and preserving the freedoms of expression, association, and thought in the face of those challenges.

Martin H. Redish is the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law. For the past 40 years, he has published numerous articles and three books on the theory and doctrine of free expression.

Nadine Strossen is Professor of Law at New York Law School. She served as President of the American Civil Liberties Union from 1990 to 2008, and she has also served in leadership positions in other organizations that focus on freedom of speech issues. She teaches, writes, and lectures extensively on constitutional law issues, with a special focus on freedom of speech, including on public university campuses.

Eugene Volokh is Gary T. Schwartz Professor of Law at UCLA School of Law, and the author of *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments* (3d ed. 2008) as well as many articles on First Amendment law.

Both FIRE and the assembled law professors believe that were the Court to hold that "outrageous" speech may lead to liability (setting aside situations

where the speech falls within a well-established First Amendment exception), the already significant problem of censorship on our nation's campuses would worsen dramatically.

SUMMARY OF ARGUMENT

The vast majority of Americans find respondents' speech in this case to be uncommonly contemptible. But many more ideas than just the Phelpsians' would be endangered if the decision in this case allows the speech to be restricted on the grounds that it is outrageous and distressing. This danger is likely to be especially great on college campuses.

If the government acting as sovereign may impose liability on allegedly outrageous and severely distressing speech, even when it relates to matters of public concern, then public universities would be equally able to discipline their students for allegedly outrageous commentary. Student speech in newspapers, Web pages, demonstrations, leaflets, and conversations would become subject to restriction, based on its content and the viewpoint that it expresses. This would dramatically endanger free discussion at academic institutions.

Nor will this danger be eliminated if a new "outrageous and distressing" speech exception covers only speech that deals with private figures, speech that happens near (in time or place) to religious rituals, or speech that involves a supposedly captive audience. The danger can only be avoided if the Court reaffirms that, because "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow [government actors] to impose liability on the basis of the [actors'] tastes or views," "[a]n 'outrageousness' standard thus

runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

ARGUMENT

I. Allowing Liability for Supposedly Outrageous and Emotionally Distressing Speech Would Threaten Free Debate on University Campuses

A. If Speech May Lead to Legal Liability, It May Lead to University Discipline

Allowing tort liability for allegedly outrageous and emotionally distressing speech would allow universities to discipline students for such speech as well. Speech that is unprotected even against the government as sovereign is *a fortiori* unprotected against the government as educator. *See, e.g.*, *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1012 (N.D. Cal. 2007).

Already, university speech codes routinely forbid student speech that falls within existing First Amendment exceptions, such as libel and fighting words.[2] If this Court holds that "outrageous" speech that recklessly or purposefully inflicts severe emotional distress may lead to liability, many universities will likely add this category of speech to the prohibitions in their speech codes. And in fact

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[2] *See, e.g.*, Jackson State University, *Student Decorum Policy* at 2, http://www.jsums.edu/studentlife/pdf/decorum.pdf (prohibiting "illegal speech," including libel, defamation, and fighting words).

some universities have already borrowed concepts from the intentional infliction of emotional distress tort in crafting their speech codes, likely under the assumption that *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), leaves room for such speech restrictions in cases not involving public figures.[3]

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[3] *See, e.g.*, *McCauley v. Univ. of Virgin Islands*, No. 2005-188, 2009 WL 2634368, at *19 (D.V.I. Aug. 21, 2009), *appeal pending*, No. 09-3735 (3d Cir.) (discussing and upholding against a First Amendment challenge a university speech code that restricted speech that "causes emotional distress"); WASH. ADMIN. CODE § 504-26-222 (LexisNexis 2010) (Washington State University student conduct policy, which bars all "[c]onduct by any means"—which would include speech—"that is severe, pervasive, or persistent, and is of such a nature that it would cause a reasonable person in the victim's position [and actually does cause the victim] substantial emotional distress and [would and does] undermine his or her ability to work, study, or participate in his or her regular life activities or participate in the activities of the university"); Univ. of Okla., Student Code: 2009–2010 tit. 16, ¶ 21, (2009), http://judicial.ou.edu/images/stories/student_codebook20092010.pdf (banning, among other things, "[m]ental harassment, being intentional conduct extreme or outrageous . . . of such a nature that a reasonable person would not tolerate it"); S.D. Bd. of Regents, Student Conduct Code § 2.B.6.a.ii (2009), http://www.sdbor.edu/policy/3-Student_Affairs/documents/3-4.pdf (banning "conduct that is extreme and outrageous exceeding all bounds usually tolerated by polite society and that has the purpose or the substantial likelihood of interfering with another person's ability to participate in or to realize the intended benefits of an institutional activity, employment or resource"). Likewise, concepts borrowed from the emotional distress tort are already part of the academic arguments in favor of speech codes. *See, e.g.*, Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345, 381–82 (1991) ("A student who intentionally or recklessly uses hate speech [any word, gesture, graphic representation, or symbol which reflects hatred, contempt, or

Yet allowing universities to restrict supposedly outrageous student speech (outside the existing exceptions, such as threats) would greatly jeopardize free debate at academic institutions, for six interrelated reasons.

B. The Practical Obstacles to Bringing Emotional Distress Claims Are Lower in University Proceedings

First, while emotional distress lawsuits are expensive for the plaintiffs to litigate and therefore comparatively rare, this constraint does not apply to disciplinary actions by universities. Students, faculty members, or administrators who are outraged and distressed by another student's speech can file complaints that trigger the disciplinary process, without any financial cost to themselves.

Complaints based on supposedly outrageous expression are unfortunately already commonplace on campuses.[4] For example, San Francisco State

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stigmatization by reason of race, ethnicity, national origin, gender, religion, handicap or sexual orientation], under such circumstances that another student is likely to suffer serious emotional distress or be intimidated from full participation in any university activity or program, shall be disciplined. A student shall not be disciplined under this Policy for any conduct which s/he demonstrates has serious literary, artistic, political or scientific value.").

[4] *See*, *e.g.,* ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1998) (describing the arbitrary and unconstitutional administrative review procedures and speech policies used to punish university students); DONALD ALEXANDER DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS (2004) (examining university policies that deprive students of their right to free speech); Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of*

University's College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags, which contain the word "Allah" in Arabic.[5] Offended students filed charges of "attempts to incite violence and create a hostile environment" and "actions of incivility," prompting a university "investigation" that lasted five months.[6]

Likewise, an undergraduate at the University of Central Florida was charged with "personal abuse" and "harassment" for engaging in electronic communication "intended to . . . cause severe emotional distress" after calling a candidate for student government "a Jerk and a Fool" on social networking website Facebook.com.[7] The student

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Campus Speech Codes, 7 GEO. J.L. & PUB. POL'Y 481 (2009) (analyzing the use of campus speech codes to censor and punish protected student speech); Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C.U.L. 385 (2009) (discussing the abuse of peer harassment law to restrict students' freedom of speech); Greg Lukianoff, *P.C. Never Died*, REASON, Feb. 2010, *available at* http://reason.com/archives/2010/01/11/pc-never-died (detailing a university finding—which was later overturned after a public outcry—that an Indiana University-Purdue University Indianapolis student-employee engaged in "racial harassment" by bringing to his workplace a book about the Ku Klux Klan, which as it happens described the defeat of the Klan by Notre Dame students in a 1924 street fight).

[5] *Reed*, 523 F. Supp. 2d at 1007.

[6] *Id.* at 1009.

[7] Foundation for Individual Rights in Education, *University of Central Florida Notification of Charge Against Matthew Walston*, http://www.thefire.org/article/6858.html (letter from Office of Student Conduct detailing charges against student for electronic speech); University of Central Florida, *Rules of*

editor-in-chief of the *Rocky Mountain Collegian*, a Colorado State University student newspaper, was subjected to a formal hearing after using an expletive in an editorial critical of President George W. Bush.[8] At Grand Valley State University in Michigan, members of the College Republicans were charged with "discrimination" following student complaints after the group held a satirical "affirmative action bake sale" on campus.[9] The university's Director of Student Life told *The Grand Rapids Press* that "[t]o do something this offensive is not appropriate."[10]

These are just a few examples of the attempts to silence protected student speech via campus disciplinary proceedings simply because some on campus were outraged by its content; FIRE has seen hundreds more such university actions. If a new "outrageous and distressing speech" exception is recognized, there is good reason to expect that disciplinary complaints based on such speech will become even more routine weapons in university controversies.

Conduct, http://www.osc.sdes.ucf.edu/?id=process_roc (prohibiting "behavior (including written or electronic communication) that could cause severe emotional distress").

[8] Bruce Finley, *CSU Editor Will Face Hearing*, DENVER POST, Sep. 28, 2007.

[9] John Leo, *Baking With Fire*, U.S. NEWS & WORLD REPORT, Apr. 18, 2005.

[10] Jennifer Ackerman-Haywood & Barton Deiters, *Offended Students Find GOP Bake Sale Tasteless*, GRAND RAPIDS PRESS, Mar. 25, 2005.

C. A Wide Range of Speech Might Outrage Administrators or Student Disciplinary Committee Members

Second, a great deal of speech might be labeled "outrageous" by a university administrator, or by a student disciplinary committee staffed by students who volunteer for the task. Publishing the Mohammed cartoons provokes outrage.[11] So does burning an American flag. So might stepping on a Hamas flag, which contains a passage from the Koran. *See supra* Part I.B; Jason Shuffler, *ASI Passes Resolution Against Flag Stomping*, GOLDEN GATE [X]PRESS, Nov. 28, 2006, *available at* http://xpress.sfsu.edu/archives/news/007652.html (reporting on San Francisco State University student government's resolution condemning this as "hateful religious intolerance").

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[11] The Mohammed cartoons have been the subject of continued controversy on campuses across the country. *See, e.g.*, Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, N.Y. TIMES, Aug. 12, 2009 (reporting on Yale University's decision to remove Mohammed cartoons from forthcoming Yale University Press book); Nat Hentoff, *'Free Speech' Cries Ring Hollow on College Campuses and Beyond*, USA TODAY, Apr. 18, 2006 (reporting on censorship of Mohammed cartoons at New York University and Century College); Aaron Brown, *Prophet Cartoon on Door Prompts Action*, CHICAGO MAROON, Feb. 17, 2006 (reporting on disciplinary investigation of a student who posted Mohammed cartoon on his dormitory door); David Mendell, *2 Illini Editors Are Suspended,* CHICAGO TRIBUNE, Feb. 15, 2006 (reporting on suspension of student editors of University of Illinois at Urbana-Champaign student newspaper for publishing Mohammed cartoons). It is easy to imagine an exception for "outrageous and severely distressing" speech being invoked to silence such publications.

So might saying that "affirmative action results in a situation where minorities are competing with people who are better prepared to be there," Editorial, *Smith's Challenge; New Justice Now Has a Broader Constituency*, DALLAS MORNING NEWS, Nov. 18, 2002, at 16A (condemning this statement as "outrageous"), especially since this statement could be seen as applying to an offended person personally and not just to minorities generally. So might arguing that a government program director is unfit for a job because she is not a U.S. citizen. *See Dominguez v. Stone*, 638 P.2d 423, 426–27 (N.M. Ct. App. 1981) (concluding that such speech may lead to liability under the intentional infliction of emotional distress tort). So might staging a student musical parodying *The Passion of the Christ*,[12] or holding a student performance of a play that depicts Jesus Christ as a gay man.[13] So might constructing a symbolic "graveyard" of miniature crosses to protest abortion.[14]

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[12] *Plays* [sic] *Sparks Controversy at WSU*, ASSOC. PRESS, July 17, 2005, *available at* http://www.wenatcheeworld.com/news/2005/jul/17/plays-sparks-controversy-at-wsu/ (reporting on student protests against satirical "Passion of the Musical" performed by Washington State University student).

[13] *Threats Teach Tarleton State Students the Wrong Lesson*, FORT WORTH STAR-TELEGRAM, Mar. 28, 2010 (reporting on cancellation of student production of "Corpus Christi" after threats were received).

[14] Lindsay VanQuaethem, *Pro-Life Display Vandalized*, MISSOURI STATE STANDARD, Oct. 7, 2008, *available at* http://media.www.the-standard.org/media/storage/paper1059/news/2008/10/07/News/ProLife.Display.Vandalized-3473334.shtml (reporting on student vandalism of campus pro-life group's cross display).

So might a letter to a newspaper in favor of a government policy of retaliating against civilians in a war zone. *See Citizen Publ'g Co. v. Miller*, 115 P.3d 107 (Ariz. 2005) (reversing a lower court decision that refused to dismiss an emotional distress tort claim based on such a letter). So might harsh, *Hustler-v.-Falwell*-like ridicule of a university professor, a student activist, or someone who was convicted of a crime but is nonetheless viewed sympathetically by the university disciplinary authority, perhaps because of the political valence of the crime.

The speakers in any of these examples might know that their statements are likely to inflict such distress. If liability for supposedly outrageous statements that recklessly inflict severe emotional distress is allowed, then all the speech mentioned above could therefore lead to suspension or expulsion. Further, every student punished or threatened with punishment would serve as a stark warning to other students against engaging in speech that the disciplinary authorities might view as "outrageous" and "distressing."

Students will quickly learn that arguments that some view as "outrageous" are too dangerous to make. Yet this is inconsistent with the First Amendment's protection of freedom in higher education. "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation," because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

D. Restricting Some Speech on the Grounds That It Is "Outrageous" Leads to Pressure to Restrict Other Speech That Outrages Other People

Third, if some forms of speech were held to be constitutionally unprotected because of the outrageousness of their message, this would increase the pressure on universities to restrict other allegedly outrageous speech.

Say that some Muslim students, for instance, are outraged and severely distressed by publication of the Mohammed cartoons in a student group newspaper, or the display of such a cartoon in a flyer promoting a debate about the cartoons. Today, the university can justify its refusal to punish such a cartoon by pointing out that even outrageous ideas are constitutionally protected. And this recognition that all outrageous ideas are treated equally might make the Muslim students less offended. They might continue to be outraged by the cartoons, but they could make peace with the university's decision to tolerate the cartoons.

But if the Phelpsians' picketing were found to be so outrageous that it is stripped of First Amendment protection, the Muslim students would be more likely to demand that the same protection be extended to their feelings. And the university may therefore feel increasing pressure to restrict the publication of the cartoons as well. After all, allowing the cartoons would at that point be doubly outrageous to the students. First, it would be outrageous because of the content of the cartoons. And, second, allowing the cartoons would be outrageous because of the university's failure to give the students' feelings the

same protection that the legal system would give Snyder's feelings.

E. Recognizing an "Intentional Infliction of Emotional Distress" Exception to the First Amendment May Pressure Universities to Restrict Allegedly Outrageous Speech, for Fear of Lawsuits by Offended Students and Employees

Likewise, say that today offended students, staff, or faculty threaten to sue a university on the grounds that the university's tolerance for student publication of the Mohammed cartoons creates a religiously hostile educational or work environment. Under current law, the university can be relatively confident that the lawsuit will be quickly dismissed. *See, e.g.*, *Rodriguez v. Maricopa County Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) (rejecting a hostile work environment harassment lawsuit brought by employees who were upset by racially offensive speech circulated by a faculty member). If the cartoons are constitutionally protected, then the university has neither the right nor the obligation to suppress them.

But say that the Phelpsians' picketing is stripped of First Amendment protection because it falls within a new exception for outrageous and severely distressing speech, and say that students or employees outraged by the Mohammed cartoons then threaten to sue if the cartoons are not suppressed. A university may well feel pressure to accommodate the demands, because it might worry that the cartoons would be found so "outrageous" that they are constitutionally unprotected. *See* 29 C.F.R. § 1604.11(e) (stating that an employer may be responsible on a workplace harassment theory even when the alleged harassment comes from "non-employees"—a category

that would include students—when the employer learns of the alleged harassment "and fails to take immediate and appropriate corrective action"); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (holding that an educator may be liable if students are found to have created a hostile educational environment for other students); *id.* at 667 (Kennedy, J., dissenting) (noting that "[a] university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment," reasoning that would not apply to speech that falls within a First Amendment exception).

Moreover, hostile environment liability could yield a verdict in the hundreds of thousands of dollars (plus fees). A First Amendment lawsuit brought by a student whose constitutionally protected speech is erroneously punished would generally lead to an award of only nominal damages (plus fees). *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 306 (3d Cir. 2008).

A university faced with a claim that the display of the cartoons is outrageous and so distressing that it creates a hostile work or educational environment—and is therefore constitutionally unprotected under some new First Amendment exception for outrageous speech—may therefore be likely to err on the side of caution and punish the speech. And that is true even if the university believes that, in the event the student speaker goes to court to challenge the discipline, the speech might well not be found outrageous (under the subjective and unpredictable outrageousness test) and therefore would be held to be constitutionally protected. *Compare, e.g.*, *Henderson v. City of Murfreesboro*, 960 F. Supp. 1292

(M.D. Tenn. 1997) (holding unconstitutional a city's application of a sexual harassment policy to remove from a designated public forum an impressionist painting depicting a nude woman), *with* Sharon H. Fitzgerald, *Free Speech Wins,* TENN. TOWN & CITY, Apr. 14, 1997, at 1 (quoting the City Attorney responding to that decision, and defending the city's earlier actions by saying, "'Sexual harassment is a very dangerous area for any employer today. You really can't be too cautious[.]' . . . 'This judgment was for $1 and costs. A sexual harassment judgment usually has six zeros behind it. Quite frankly, I'm an advocate of the First Amendment, but a very conservative lawyer when it comes to giving advice.'").

F. The Chilling Effect of the "Outrageousness" Standard is Exacerbated by Its Inherent Vagueness

The risk that the "outrageousness" standard will deter student speech is further exacerbated by the standard's vagueness. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (footnotes omitted).

What is true as to vague statutes is equally true as to the vague outrageousness-based emotional distress tort, or vague outrageousness-based speech codes. Many students will be reluctant to express certain views if they fear sanctions under an "outrageousness" test—even if it is possible that the university will ultimately find that the speech was not outrageous enough to be punishable. And that is

especially so if certain student groups make a habit of filing complaints against those who express views that outrage them.

G. An "Outrageousness" Standard Makes It Likely That Speech Will Be Restricted Because of Its Viewpoint

Finally, as this Court explained well in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), any outrageousness standard is likely to end up being unacceptably viewpoint-based, as well as too broad:

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

Id. at 55.

To be sure, some view the subjectivity of the "outrageousness" standard as a virtue: "The determination of when [funeral picketing] crosses the line into *outrageous* conduct is rightly left up to a jury that will apply its own notions of reasonableness to decide what conduct should rise to the level of liability." Chelsea Brown, Note, *Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 232 (2009). "Civil action judgments 'reflect social conventions and tend to

reflect what the majority believes to be acceptable behavior.'" *Id.* at 232 n.144 (citation omitted). Likewise, university disciplinary committee judgments tend to reflect what administrators or students believe to be acceptable speech.

But this Court has long, and correctly, held that such vague speech restrictions are not permitted under the First Amendment:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108–09 (footnote omitted). Delegating such matters to university administrators or student conduct committee members is no better.

II. *Hustler v. Falwell* Should Be Applied Even to Speech About Private Figures, a Category That Includes Many of the People Whom University Students Might Have Reason to Criticize

The underlying rationale of *Hustler v. Falwell* applies to all speech on matters of public concern—whether the plaintiff is a public figure or a private figure, and whether the speech is about a public figure, a private figure, or no particular person at all. This is especially important on university campuses.

A. The Public/Private Figure Distinction Makes First Amendment Sense Only as to Constitutionally Unprotected False Statements of Fact

Speech about private figures is generally constitutionally protected. Libel law, in which the public figure/private figure distinction is legally relevant, is constitutional only because of this Court's judgment that "there is no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), regardless of who the plaintiff might be. (When false statements are protected, they are protected only because of the danger that restricting some unintentional falsehoods might deter even true statements. *Id.* at 341.) The public/private figure distinction thus bears only on the degree of culpability required to allow compensatory damages for those constitutionally valueless false statements of fact. The distinction does not justify liability for statements that fall outside the valueless category of false statements of fact.

In fact, in the same passage where this Court said that false statements of fact have no constitutional value, the Court also concluded that "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." *Id.* at 339–40. Even outrageous and rightly morally condemned ideas are thus constitutionally protected. And that too is true regardless of who is mentioned in the exposition of the idea. Private figure complainants in university disciplinary proceedings should be unable to suppress outrageous ideas, just as under *Hustler* public figures are unable to do so.

B. Much Speech on Matters of Public Concern on University Campuses Relates to Private Figures

Protecting even allegedly outrageous ideas about private figures is especially necessary because the category of private figures includes many people—civil rights lawyers, authors, civic group officers, professors, criminals, and more—who are involved with matters of public concern. And that is especially true at universities, where many important debates may refer to people who are not public figures under this Court's libel precedents.

For instance, a lawyer who had "long been active in community and professional affairs," "served as an officer of local civic groups and of various professional organizations," and "published several books and articles on legal subjects," was held to be a private figure, even with regard to a politically charged civil rights lawsuit in which he represented the plaintiffs. *Gertz*, 418 U.S. at 339–40. Likewise, a student group activist would likely qualify as a private figure. If *Hustler* were limited to public figures, a university would thus be free to punish supposedly outrageous and emotionally distressing speech that criticizes such activists. *See* John Schwartz, *Some On-Line Guidelines Are Out of Line With Free Speech Rights*, WASH. POST, Oct. 3, 1994, at F25 (discussing the U.S. Department of Education Office for Civil Rights investigation of a community college that declined to suppress speech harshly critical of a controversial student activist, and the Department's pressuring the college into paying a $45,000 settlement to the activist and two other students, and instituting an online speech code that would punish future instances of such speech); Letter from John E.

Palomino, Regional Civil Rights Director of the United States Department of Education Office for Civil Rights, to Dr. Robert F. Agrella, President of Santa Rosa Junior College, in case no. 09-93-2202 (June 23, 1994), *available at* http://www.law.ucla.edu/volokh/harass/santarosa.pdf at PDF pp. 5–6, 14–15 (setting forth the Office for Civil Rights' position, and noting that the offending speech harshly criticized complainant LA because LA had organized a boycott of the student newspaper for running an ad with "a picture of the rear end of a woman in a bikini").

A director of research at a state mental hospital who was an adjunct university professor was also held to be a private figure, even with regard to a controversy stemming directly from his research. *Hutchinson v. Proxmire*, 443 U.S. 111, 114–17 (1979). If *Hustler* were limited to public figures, a university would be free to punish a student journalist or blogger who ridicules an allegedly foolish, rude, or narrow-minded professor or administrator, or who argues that a noncitizen should be removed from some university position because that position should be limited to citizens, *see Dominguez v. Stone*, 638 P.2d 423 (N.M. Ct. App. 1981) (concluding that such speech about a city official may constitute intentional infliction of emotional distress).

This Court has also held that even a "person who engages in criminal conduct" may remain a private figure, even with regard to "issues relating to his conviction." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 162–68 (1979). If *Hustler* were limited to public figures, a university would be free to punish a student who writes a newspaper article harshly condemning a student, faculty member, or staff member for committing a crime. (This is especially

likely if the crime is likely to arouse sympathy among the students or administrators who make up the disciplinary committee—for instance, if the crime is illegal entry by an alien into the U.S., marijuana use, or criminal copyright infringement.)

We do not quarrel here with this Court's decisions limiting the public figure category, and allowing a wide range of people to recover compensatory damages for defamation based on a showing of the defendant's negligence in investigating the facts. Defamation claims involve constitutionally valueless false statements of fact that could wrongfully ruin someone's career or break up a family. But that such private figures may be protected against negligent falsehoods does not mean that they should be protected against supposedly outrageous expressions of opinion, especially on political, religious, or social matters.

III. Liability Based on the "Outrageousness" of Speech Is Impermissibly Content- and Viewpoint-Based

A content-neutral rule that restricts demonstrations in a narrow zone outside a funeral, whether the funeral is of a private figure or a public figure, might well be constitutional. The same would be true of similar content-neutral rules at a university, aimed at protecting the quiet of libraries, classrooms, memorial services, and the like. But this case does not involve a challenge to such a law; it involves an "outrageousness" standard that is neither content-neutral nor narrowly limited to funerals. *See Holder v. Humanitarian Law Project*, 2010 WL 2471055, at *19 (U.S. June 21, 2010) (concluding that even a law that is generally "directed at conduct, as the law in *Cohen* [*v. California*] was directed at breaches of the

peace" must be treated as content-based when "the conduct triggering coverage under the statute consists of communicating a message"); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286–1311 (2005) (arguing that harm-based laws such as the emotional distress tort must be understood as content-based when they are applied to speech because of the harm supposedly caused by its content).

Nothing in the emotional distress tort, or in the instructions such as the ones that the *Snyder* jury was given, constrains the decisionmaker to focus only on time, place, and manner, to the exclusion of viewpoint. *See* Jury Instructions, at 27, *Snyder v. Phelps*, No. 1:06-cv-01389-RDB, PACER docket entry 198 (D. Md. Nov. 2, 2007), *available at* http://www.law.ucla.edu/volokh/snyderjuryinstructions.pdf (Court's Instruction No. 21).[15] The jury may well have

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[15] The instruction does say, near the beginning, that "[t]he Defendants have the right under the First Amendment to engage in picketing, and to publish their religious message, no matter how much you may disagree with that message." *Id.* But it then goes on to say that "[s]peech that is '"vulgar', 'offensive', and 'shocking' . . . is not entitled to absolute constitutional protection under all circumstances.'" *Id.* Nothing in that sentence suggests that the offensiveness of speech, and its shocking nature, must be determined without regard to the viewpoint of the message.

Likewise, later in the instruction, the court says, "When speech gives rise to civil tort liability, the level of First Amendment protection varies depending on the nature and subject matter of the speech," and "you must then determine whether [defendants'] actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to

concluded that the outrageousness stems not just from the time and place of the speech, but also partly from the viewpoint: from the anti-American nature of the message, the approbation of the death of an American soldier, the message of hatred (not just moral disapproval) of gays, or the sacrilegious suggestion that God endorses the speakers' hatred.

If the picketing and online criticism had been triggered by the funeral of a recently killed enemy fighter—for instance, an American traitor who went to Iraq to kill other Americans but was brought back to America for burial—it is far from certain that the jury would have found the speech to be "outrageous." After all, the instructions' reference to "outrageousness" invited jurors to consider all the factors that can make speech outrageous, and to many people that may well include the viewpoint that the speech expresses. Likewise, a campus speech code written in terms of "outrageousness" would invite disciplinary committee members to consider whether a student's speech was expressing an outrageous viewpoint, and not just whether its time, place, or manner was outrageous.

Perhaps First Amendment specialists, steeped in the First Amendment insistence on viewpoint neutrality, might set aside the viewpoint of speech in deciding whether the speech is outrageous. Or perhaps even they would fall prey to the "inherent subjectiveness" of the outrageousness standard, and be tempted "to impose liability on the basis of [their]

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not be entitled to First Amendment protection." *Id.* at 27–28. Nothing in those phrases suggests that "the nature" of the speech, or whether it is "extreme and outrageous" or "offensive and shocking," must be determined without regard to the viewpoint that the speech expresses.

tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler*, 485 U.S. at 55.

But in any event there is no reason to be confident that a lay juror, university administrator, or student disciplinary committee member will decide whether speech is outrageous without regard to the viewpoint of the speech. "If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Likewise, if a test's reference to "outrageousness" can be read as either authorizing the consideration of the viewpoint or as limiting the jury or a university disciplinary committee to other factors, there's no reason to assume that this ambiguity will be resolved in favor of viewpoint neutrality.

In fact, the states' *amici* brief in support of Snyder suggests that the result in this very case might have been different if the Phelpsians' ideas were different. "The Phelpses are not war protesters . . . . It is important for the Court to recognize and appreciate that the Phelpses' methods are unprecedented in American history; do not mistake them for Vietnam War protesters . . . ." Brief for the State of Kansas, 47 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 6, *Snyder v. Phelps*, No. 09-751. The states' argument is apparently aimed at persuading this Court that the emotional distress tort can supposedly be limited to a narrow set of speakers. But in the process the argument simply highlights that any such

narrowing would likely be achieved through viewpoint discrimination.

IV. Allowing the Suppression of "Outrageous" Speech in the Name of Protecting Its Targets' Religious Freedom Would Jeopardize Freedom of Debate at Universities

Petitioner argues that the verdict properly protects his own freedom to conduct a religious ritual—a funeral—without interference. But this argument is likewise unsound.

First, nothing in the emotional distress tort limits liability to such situations. Nothing in these jury instructions instructed the jurors to impose liability only if they found that the speech interfered with a religious ritual. And the picketing and the Web page in this case did not audibly or physically interrupt the funeral.

At most, the speech was implicitly critical of the religious service, and might have made the religious service less psychologically satisfying even for someone—like the petitioner—who first saw the picketing on television after the funeral. *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009). That is hardly a legally cognizable interference with petitioner's religious practices.

Second, if the speech here were treated as a punishable interference with others' religious practices, then the threshold for such interference would have to be set so low that a wide range of other speech would likewise become restrictable. Publishing the Mohammed cartoons could lead to liability or university discipline on the theory that the cartoons

interfere with Muslims' religious practices, because the memory of them disturbs Muslims' prayers at mosque or undermines the tranquility of Muslims' observance of their holy days. The same could be said of harsh condemnation or mockery of Christianity, or of Scientology.

Yet this is the sort of heated debate about ideas, including religious ideas, that often takes place at universities, as well as elsewhere. This Court's precedents rightly counsel against allowing government suppression of such debate. *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Kunz v. New York*, 340 U.S. 290 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

V. Treating Petitioner as a "Captive Audience" to Respondents' Speech Would Jeopardize Freedom of Debate at Universities

Petitioner also argues that respondents' speech should lose First Amendment protection because he was a "captive audience" to such speech. This is so even though the respondents were picketing 1000 feet away from the funeral; petitioner saw the picket signs only on television, after the funeral; and much of the basis for the jury verdict consisted of speech on a Web site, to which no one can be captive.

And if the normal First Amendment constraints on vague, content-based, and potentially viewpoint-based speech restrictions are relaxed because petitioner was supposedly a "captive audience," then the same relaxation would affect speech on college campuses. College students confronted with speech on college campuses are generally considerably more "captive" than petitioner was, in the sense of being

repeatedly and unavoidably confronted with the speech.

College students might see supposedly "outrageous" demonstrators, signs, or leaflets on their way to and from their classes, their homes in the dormitories, their on-campus jobs, or their on-campus religious services. They might see such speech several days in a row. And they would be unable to avoid seeing such speech unless they were willing to sacrifice their educational and professional opportunities, at considerable personal cost.

In fact, campus speech codes have often been justified on the grounds that students are a "captive audience" to offensive speech. *See, e.g.*, Mari Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2372 (1989) ("Students are analogous to the captive audience that is afforded special first amendment consideration in other contexts."); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 437 (1990) ("I also urge the regulation of racial epithets and vilification that do not involve face-to-face encounters—situations in which the victim is a captive audience and the injury is experienced by all members of a racial group who are forced to hear or see these words . . . ."). Yet despite such arguments, courts have routinely and correctly struck down speech restrictions imposed by public universities. *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ("discriminatory harassment" policy); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (overturning university sanctions against

fraternity for allegedly creating hostile environment); *Smith v. Tarrant County Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) ("cosponsorship" policy); *Lopez v. Candaele*, No. CV 09-0995 (C.D. Cal. Sept. 16, 2009), *available at* http://ia311029.us.archive.org/1/items/gov.uscourts.cacd.437120/gov.uscourts.cacd.437120.61.0.pdf, *appeal pending*, No. 09-56238 (9th Cir.) (sexual harassment policy); *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (free speech zone; sexual harassment policy); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) ("racism and cultural diversity" policy); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (sexual harassment policy); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) ("discriminatory harassment" policy); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) ("discrimination and discriminatory harassment" policy); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) ("harassment by personal vilification" policy). That many students might be unable to avoid speech that emotionally distresses them, or even outrages them, cannot justify content-based restrictions on such speech.

Or at least that is the rule today. It might no longer be the rule if the decision in this case upholds petitioner's radically broad view of when speech may be restricted to protect a "captive" audience. We urge the Court to avoid this grave threat to freedom of expression and debate, lest an exception for "outrageous and distressing" speech swallow the long-standing rule of free speech on our nation's campuses.

VI. The Court's Precedents Recognizing Constitutional Constraints on Tort Liability Are Consistent with the Original Meaning of the First and Fourteenth Amendments

The states' *amici* brief says that, "Until the Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the First Amendment generally placed no limits on state tort law." Brief for the State of Kansas, 47 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 3, *Snyder v. Phelps*, No. 09-751. This is literally true as to the First Amendment, since by 1964 the Amendment had only been used to restrict state government action (via the Fourteenth Amendment) for a little over three decades, and the Court had not squarely dealt with First Amendment arguments for limiting state tort law. But the states' assertion could also be read as suggesting that until 1964 American law had generally refused to view constitutional free speech protections as applicable to tort lawsuits. And such a suggestion would be mistaken.

In fact, tort liability was at issue in the very earliest cases that protected speakers based on state constitutional analogs to the First Amendment: In 1802 and 1806, the Vermont Supreme Court and the South Carolina Constitutional Court of Appeals reversed libel verdicts for the plaintiffs, holding that the state equivalents of the Petition Clause barred recovery for alleged libels in petitions to the legislature. *Harris v. Huntington*, 2 Tyl. 129 (Vt. 1802); *Reid v. Delorme*, 4 S.C.L. 76 (Const. Ct. App. 1806). In 1818, the South Carolina Constitutional Court of Appeals applied the same reasoning as to the freedom of speech and press more broadly.

Mayrant v. Richardson, 10 S.C.L. 347 (Const. Ct. App. 1818).

In other early cases, courts acknowledged that the freedom of speech and press may apply to civil lawsuits as well as to criminal prosecutions, but reasoned that libelous speech was a constitutionally unprotected abuse of the freedom and could thus lead to civil liability as well as to criminal punishment. *See, e.g.*, CONSTITUTIONAL DIARY (Philadelphia, Penn.), Dec. 14, 1799, at 3 (reporting on a jury instruction given by the Pennsylvania Supreme Court in *Rush v. Cobbett*); *Runkle v. Meyer*, 3 Yeates 518, 520 (Pa. 1803). Early commentators, including St. George Tucker, Chancellor Kent, and Justice Joseph Story, likewise treated civil liability the same as criminal punishment when it came to constitutional speech and press protections. JAMES SULLIVAN, A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 27–28 (1801); 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA App. 29–30 (1803); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *18 (1827); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1882 (1833). The commentators concluded that libel was generally an exception to free speech protection, with regard to both civil liability and criminal punishment; but they did not deny that damages liability involved state action and was thus generally subject to constitutional constraints.

Some of the cases were brought by government officials; but they were suing as citizens defending

their private rights, not as officials. And other cases were not brought by government officials. *See, e.g.*, *Mayrant*, 10 S.C.L. 347 (lawsuit brought by a candidate for office); *Runkle*, 3 Yeates 518 (lawsuit brought by a private party). The premise of the court decisions was that judicial action imposing liability for speech is covered by constitutional free speech provisions, regardless of whether the plaintiff himself was acting for the state. *See generally* Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626294 (discussing the subject in more detail and citing more sources).

These sources relied on state constitutional provisions, but this is because tort liability in the early Republic was almost entirely a matter of state law. And by the time the Fourteenth Amendment incorporated the First Amendment against state government action, the freedom of speech and press had been understood for decades as applying to civil tort liability as well as criminal punishment. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 422 (1868). The Court's conclusion in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), that "[i]t matters not that [a speech restriction] has been applied in a civil action and that it is common law only, though supplemented by statute[,]" is thus entirely consistent with American legal traditions from the Framing to the present.

CONCLUSION

Carving out an intentional infliction of emotional distress exception from the First Amendment, holding the Phelpsians liable because their speech interfered with the emotional value of petitioner's religious observance, or treating their speech as less protected because the petitioner was supposedly a "captive audience" would jeopardize more than just the Phelpsians' antics. It would also undermine the protections the First Amendment offers to university students, as well as to other Americans whose views might—rightly or wrongly—be seen as outrageous by government decisionmakers. For these reasons, the decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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