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 FOR AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia, Texas and Washington, D.C., and has hundreds of affiliate attorneys in all fifty states. A significant part of Liberty Counsel's work involves representing individuals and organizations whose First Amendment rights are threatened by or have been infringed by governmental agencies or individuals who disagree with their message.

Sanctions such as the civil damages award in this case pose a significant threat to

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and such consents are being lodged herewith.

bedrock First Amendment freedoms as they will act to chill the very kind of controversial speech the Founders sought to protect when they enacted the First Amendment. It is critically important that citizens' free speech rights not be sacrificed in order to protect others from having to encounter offensive or controversial speech. If sanctions such as the underlying damage award are permitted to stand, then it will cause a ripple effect that will undermine the foundational freedoms upon which this country was founded.

Liberty Counsel does not endorse the message contained in the Respondents' signs and other communications. In fact, Liberty Counsel expressly condemns the offensive tactics of Respondents and the content of their rhetoric. However, Liberty Counsel stands with the Founders in supporting the right of Respondents and other citizens to present messages of their choosing, even offensive messages, without the chilling effect of tort or other liability or governmental censure. Liberty Counsel is concerned about the effects this case could have on the free speech rights of individuals and organizations who wish to exercise their First Amendment rights. Liberty Counsel respectfully submits this Amicus Curiae Brief to provide this Court with information and arguments that may be of

assistance in analyzing the constitutional issues raised by this case.

SUMMARY OF ARGUMENT

This Court carefully balanced the Founders' commitment to protecting robust debate with the ancient concept that "a man's home is his castle" by utilizing the doctrine of a "captive audience" to protect the sanctity of the home from unwelcome intrusion. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). With rare exceptions, this Court has rejected efforts to expand the doctrine beyond the personal residence and its environs. *Cohen v. California*, 403 U.S. 15 (1971); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1997). Even in circumstances in which a person is compelled to be present, such as in a courthouse, this Court has not expanded the "captive audience" doctrine, even when the same speech could be sanctioned if played over the airwaves. *Cohen*, 403 U.S. at 21.

Even when minors are the likely audience for particular speech and are compelled to be present where the activity occurs, this Court has permitted only a limited use of the "captive audience" doctrine. *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986). As is true in other contexts, in the school context this Court has carefully balanced the need to

protect young children from inappropriate messages with students' and others' free speech rights under the First Amendment. *Id.; Grayned v. City of Rockford*, 408 U.S. 104 (1972). Therefore, public school students do not shed their First Amendment rights at the schoolhouse gate, but can express themselves, even in controversial or unpopular ways, so long as they do not materially disrupt school operations or infringe upon the rights of others. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 513 (1969). Students might be compelled to be at school, but that does not immunize them, any more than it immunizes adults, from having to encounter unpopular messages. *Id.*

Similarly, in the abortion clinic context, where patients have been found to be "held captive by medical circumstance," this Court has refused to extend the "captive audience" doctrine beyond what is necessary to protect the safety of the patients. *Madsen v. Women's Health Center,* 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). As is true in the school context, in the abortion clinic context this Court has struck a delicate balance between the patients' right to unimpeded access for medical procedures and speakers' rights to

communicate their message. *Madsen*, 512 U.S. at 773, *Schenck*, 519 U.S. at 377.

Petitioner is asking this Court to upset the delicate balance and expand the "captive audience" doctrine to permit funeral goers to obtain civil money damages against a group of passive protesters standing more than 1,000 feet from the site of a funeral. Underlying Petitioner's and his amici's proposed unprecedented expansion of the "captive audience" doctrine is the desire to strip speech they define as "offensive," "hostile," "intrusive," and "unwelcome" of any First Amendment protection. Statements such as: "Respondents' speech warrants little, if any, First Amendment protection," (VFW Brief, p.6 n.5), and Respondents "should not be accorded the same First Amendment protection they might receive if they had simply been standing on a street corner to display signs to passing motorists..." (See Brief of the State of Kansas, 47 Other States, and the District of Columbia as Amici Curiae, "States' Brief," p. 11), reveal amici's true motivation – to make First Amendment rights dependent upon the perceived "value" or desirability of the speech. (States' Brief, p. 14: "Targeted Picketing Is An Intrusive and Harassing Method of Expression With Limited Value in Public Discourse."). Petitioner's proposed redefinition of the "captive audience"

doctrine would render the First Amendment a meaningless shell as one person's First Amendment rights would be dependent upon the acceptability of his speech to third parties. Petitioner's proposal to place a veto power in the hands of listeners to others' speech undermines the very foundation of the First Amendment contrary to this Court's consistent protection of robust debate and invited dispute. *See e.g., Boos v. Barry,* 485 U.S. 312, 322 (1988): *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949). If Petitioner's redefinition of "captive audience" were to become reality, the First Amendment will be left gasping for air.

This Court should not permit the premature death of the First Amendment proposed by Petitioner's and amici's proposed redefinition of "captive audience" to include attendees at a funeral at which protesters offer passive speech more than 1,000 feet away.

LEGAL ARGUMENT

I. THE CONCEPT OF "CAPTIVE AUDIENCE" AS ENVISIONED BY PETITIONER AND HIS AMICI WOULD BE AN UNWARRANTED EXPANSION, NOT A NATURAL EXTENSION, OF THIS COURT'S PRECEDENTS.

Contrary to the VFW's assertion, expanding the doctrine of "captive audience" to those attending a funeral for a fallen soldier is not merely a "natural extension" of this Court's precedents. Instead, the proposed redefinition of the concept of "captive audience" represents a startling and sweeping departure from this Court's careful, speech-protective definition of the concept. This Court has limited the "captive audience" restriction on First Amendment activities to private homes, medical facilities, mass transit vehicles and school campuses during mandatory scheduled events. Other locations where presence is compelled, such as courthouses, have not been included in the definition of "captive audience," even when the message contains a personally provocative expletive that could not be uttered on the

airwaves without government sanction. *Cohen v. California*, 403 U.S. 15 (1971).

Without referencing the actual facts of this case, Petitioner and his amici ask this Court to analogize the Snyder funeral service to a private home and expand the concept of "captive audience" to those attending a memorial service. Petitioner correctly asserts that this Court has stressed the uniqueness of the home as a refuge, but goes on to claim that the "rationale" of the captive audience decisions should be applied to this case without offering any analysis to substantiate the claim. (Petitioner's Brief, p. 47). Similarly, Amici States offer no legal analysis, but merely conclude that "[l]ike a private home, a private funeral service is a paradigm for a captive audience." (States' Brief, p. 13). In order to reach that conclusion, Amici States must paint a picture of a private family funeral service held in a private facility with protesters blocking the entrance and disrupting a religious ceremony. (*Id.* at 13). Similarly, Amici VFW claim that funerals are like homes and hospitals because they are places of refuge, "a forum for intimate gatherings of families and friends....a sanctuary and place of retreat, the last citadel of sorrow and grief," conjuring up images of an intimate family gathering at a

gravesite or in a funeral home. (VFW Brief, p. 8).

While the portraits painted by the States and VFW might be compelling, they do not comport with the reality of this case and, therefore, cannot form the basis for their proposed expansion of the "captive audience" concept. This was not a private family gravesite service, but was a service attended by over 1,000 people, publicized in the news media and on the funeral home's website with the date, time and location included. (Respondents' Brief, p. 5). The news media filmed the funeral procession, and a group of motorcycle riders and students demonstrated outside the church near Respondents. (Respondents' Brief at 6). Respondents stood on a public right of way chosen by one of the priests, which was 1,000 feet away from the church, away from the entrance used by those attending the funeral. (Respondents' Brief at 7). Respondents did not attend the service or enter the church, and left the property before the service ended. (Respondents' Brief at 8). Petitioner was not even aware of Respondents' presence until after the funeral. (Respondents' Brief at 9-10). This was not the kind of intimate, personal gathering and place of retreat that Petitioner and his amici claim, and therefore is not analogous to a private home worthy of protection from intrusion.

As Petitioner stated, this Court has not considered whether an individual attending a family member's funeral has a privacy interest that warrants protection from unwanted speech. (Petitioner's Brief, p. 49). Nothing in this Court's precedents suggest that the captive audience concept should be extended to such circumstances, and the facts of this case clearly do not justify such an expansion. Any expansion of the "captive audience" doctrine necessarily entails a corresponding contraction of the right of free speech.

A. This Court Has Used The "Captive Audience" Doctrine To Protect The Long-Established Sanctity Of The Home From Unwanted Intrusion.

Building upon the ancient concept that "a man's home is his castle into which not even the king may enter," this Court first defined the concept of a captive audience when it upheld a federal statute under which a person could require that a mailer remove the person's name from mailing lists and stop all future mailings to the household. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). The Court found the statute to be a logical extension of the "right of a householder

to bar, by order or notice, solicitors, hawkers, and peddlers from his property" since the mailer's right to communicate was circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. *Id.* "To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home." *Id.* "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail." *Id.* "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Id.* at 738. This Court emphasized that the sanctity of the home from intruders, not the content of the speech, was the driving force behind its decision.

In *FCC v. Pacifica Found*ation, 438 U.S. 726, 748 (1978) ("*Pacifica*"), the Court found that the pervasive nature of the broadcast media, coupled with the individual's right to privacy *in his home* warranted government restrictions against the broadcast of patently

offensive and indecent material over the airwaves. Citing to *Rowan*, this Court said, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* The Court emphasized that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *Id.* at 745. It is only when patently offensive words are broadcast over the airwaves so as to invade *the privacy of the home* that restrictions on free speech are warranted. *Id.* at 748. As in *Rowan,* so in *Pacifica* it was the invasion of the sanctity of the home that was the critical factor in restricting speech.

Similarly, in *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court emphasized the need to protect people from invasion into their homes. The Court upheld an ordinance that prohibited picketing "before or about any individual's residence." The Court again emphasized that the home is different from other venues in terms of free speech restrictions. *Id.* at 484. "Although in many locations, we expect individuals simply to avoid speech they do not want to hear, (citations omitted) the home is different." *Id.* "[A] special benefit of the privacy

all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Id.* at 484-485. Even though speech restrictions might be unconstitutional in other contexts, "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society" which justifies regulations aimed at protecting citizens from unwanted intrusions. *Id.* at 484. This Court emphasized that the ability to restrict speech, even in the residential context, is very narrow. The anti-picketing ordinance was held to be constitutional only after the Court was satisfied that the ordinance permitted ample alternative means of communication, including entering residential neighborhoods, walking a route in front of an entire block of houses, going door to door to proselytize or distribute literature, and contacting residents through the mail or by telephone short of harassment. *Id.* No such alternative means exist here. Respondents were already standing on a public right of way more than 1,000 feet from the site of the memorial service. If Respondents cannot stand even 1.000 feet away while passively holding

signs, there is no reasonable place in which they could stand and effectively present their message. While that might be Petitioner's intent, it is not constitutionally permissible.

Even when agreeing that citizens had a right to avoid unwanted, offensive intrusions into their homes, this Court has always protected the fundamental right to engage in controversial, even offensive, speech. The protective bubble over a person's home does not travel with the person to other places where he might encounter unwelcome speech, such as a memorial service. Furthermore, this Court has not afforded protection, even in the home, when the intended audience could neither hear nor see the message from his home, as Petitioner and his amici are proposing here. The Court should proceed with caution into an area with the potential for such grave restrictions on fundamental First Amendment rights, no matter how "captive" Petitioner might subjectively feel.

B. This Court Has Declined To Apply The "Captive Audience" Doctrine To Courthouses, Even Though The Courthouse Audience Is Arguably More "Captive" Than The Funeral Goers In This Case.

As "captive" as Mr. Snyder and others might feel at a memorial service, those who are summoned to appear in court, who face incarceration or civil fines if they fail to appear, are even more so. Understandably, Mr. Snyder and others might believe they would suffer an intangible sense of personal loss if they could not attend a memorial service. However, a criminal or civil defendant, witness, or juror who fails to appear in court when summoned faces a very real and tangible loss of personal liberty or financial sanction. Consequently, any interest in protecting a "captive audience" from offensive or controversial speech is arguably greater in a courthouse than at a memorial service. Nevertheless, this Court has declined to extend the "captive audience" doctrine to people present in or around courthouses. *United States v. Grace*, 461 U.S. 171 (1983); *Cohen v. California*, 403 U.S. 15 (1971). If the doctrine does not apply to those legally

obligated to be present in a building, then it should not apply to those who not legally obligated to attend a memorial service, regardless of any sense of personal obligation they might believe compels their attendance.

In *Pacifica,* this Court cited *Cohen* to emphasize the importance of context when analyzing restrictions on First Amendment activity. *Pacifica,* 438 U.S. at 747 n25. As the Court noted, there is a great deal of difference between a vulgar monologue broadcast over the airwaves, which can be subject to civil sanctions, and Mr. Cohen's vulgar message carried on his jacket through a courthouse corridor, which cannot be sanctioned by criminal prosecution. *Id.*

In *Cohen* this Court specifically rejected the argument that people in a courthouse were captive to Mr. Cohen's expletive-laden jacket. *Cohen,* 403 U.S. at 21. "Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Id.*

> While this Court has recognized that government may properly act in many situations *to prohibit intrusion into the privacy of the*

> *home of unwelcome views and ideas which cannot be totally banned from the public dialogue*, e.g., *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), we have at the same time consistently stressed that 'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.' *Id.*, at 738, 90 S.Ct., at 1491. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen, 403 U.S. at 21 (emphasis added). This Court added that, "while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted

expression in the confines of one's own home." *Id.* at 21-22. Petitioner and his amici's attempt to expand the concept of "captive audience" to mourners at a funeral exemplifies the dangers spoken of in *Cohen, i.e.,* that the mere presumed presence of an unwitting listener should curtail speech such as the Phelpses' that might offend someone, and that a majority would seek to silence dissidents as a matter of personal predilection.

As this Court has made clear, "[t]he plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-210 (1975) (*citing Rowan* 397 U.S. at 736). "Much that we encounter offends our esthetic, if not our political and moral, sensibilities." *Id.* "Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Id.* Rather, except in the rare cases of "fighting words," obscenity, or language intruding upon the sanctity of the home, "the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" *Id.* at 211 (citing

Cohen, 403 U.S. at 21). In this case, not only was averting one's eyes possible, but actually occurred, as the Phelpses' demonstration was held 1,000 feet away from the memorial service on a public right of way and was not in fact viewed by Mr. Snyder or others at the service.

This Court's opinion in *Grace* further illustrates the great divide between the Court's precedents and Petitioner's request to expand the "captive audience" doctrine to the facts of this case. *Grace*, 461 U.S. at 182. In *Grace*, this Court struck down a federal statute banning distributing of leaflets or the display of banners or signs on the sidewalk outside of the Supreme Court building. *Id.* This Court emphasized that public rights of way are traditional public fora, in which speech restrictions must survive strict scrutiny. *Id.* Furthermore, as was true with the Phelpses' demonstration, in *Grace*, the speakers did not obstruct the sidewalk or access to the building and did not interfere with the orderly administration of the building. *Id.* Those who were legally obligated to enter the Supreme Court building were not "captive" to any messages that might be presented on the sidewalk. *Id.* Likewise, those attending the Snyder funeral were in no way "captive" to the messages presented by the Phelpses more than 1,000 feet away on a public right of way.

When viewed in light of this Court's precedents, it becomes clear that Petitioner and his amici are not trying to protect a "captive audience" from intrusive and offensive speech, but are instead attempting to silence the Phelpses', and by extension, other controversial messages, that might be disturbing. This Court should reject those efforts and protect the fundamental right to free speech.

C. This Court's Limited, Balanced Application Of The "Captive Audience" Doctrine In The Public School Context Does Not Support Petitioner's And His Amici's Proposed Expansion Of The Doctrine To Memorial Services.

In response to two factors that are not present in this case, this Court has applied the "captive audience" doctrine in the public school context. *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Blackmun, J. concurring); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). However, even though students are compelled to be at school and are more vulnerable than adults to offensive speech, this Court has declined to extend the "captive audience" doctrine to all

speech that happens to occur on campus. *See Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969). "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. A public school student may express his opinions, even unpopular ones, "if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 513. Notably, *Tinker* involved, as does this case, messages that some would find offensive dealing with a controversial military conflict. *Id.* at 510-512. Furthermore, the speech in *Tinker* was directed to and seen by minors who were compelled to be at school and could not avoid the message. *Id.* Nevertheless, this Court did not extend the "captive audience" doctrine to restrict the protesting students' speech. *Id.* at 514.

When this Court did apply the "captive audience" doctrine to public school students, it did so in a narrow and carefully crafted manner that preserved students' First Amendment rights as defined in *Tinker*. *Fraser*, 478 U.S. at 684. The Court was careful to draw distinctions between the politically controversial nature of the silent protests in *Tinker* and the explicitly

sexual nature of the student's speech in *Fraser*. *Id.* It was the sexually explicit nature of the speech, compulsive attendance and the age of the audience that distinguished the speech in *Fraser* from the protest in *Tinker* and justified the differential treatment. *Id.* "This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Id.* (citing *Ginsberg v. New York,* 390 U.S. 629 (1968), which upheld restrictions on the sale of sexually oriented materials to minors, and *Board of Educ. v. Pico,* 457 U.S. 853, 871-872 (1982), in which the Court acknowledged that the school board had the authority to remove books that were vulgar). "These cases [*Ginsberg* and *Pico*] recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children–especially in a captive audience–from exposure to sexually explicit, indecent, or lewd speech." *Id.* There are no such concerns here, and therefore, no justification for extension of the "captive audience" doctrine to this case.

In *Grayned,* this Court reiterated the continuing validity of *Tinker* and the limited applicability of the "captive audience" doctrine

even in public schools when it invalidated prohibitions against picketing on a public right of way within 150 feet of a school from thirty minutes before the start of the school day until thirty minutes after school was dismissed. *Grayned*, 408 U.S. at 118. "Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" *Id.* (citing *Tinker*, 393 U.S. at 513).

If an ordinance prohibiting picketing within 150 feet of a public school, where children are compelled to attend, cannot be validated through the "captive audience" doctrine, then a demonstration held 1,000 feet from a memorial service which no one is legally compelled to attend, can justify application of the doctrine. Petitioner and their amici's request to expand the doctrine should be rejected.

D. This Court Has Declined To Apply The "Captive Audience" Doctrine Even When The Speaker Clearly "Targeted" A Particular Audience With A Provocative Message Designed To Offend.

Petitioner and his amici attempt to distinguish this case from other cases which rejected the "captive audience" doctrine by claiming that the Phelpses "targeted" the Snyder family. However, even in situations which more clearly targeted a particular audience in a more directly provocative manner, this Court has refused to expand the captive audience concept as Petitioner requests. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977).

In *Forsyth County*, the Nationalist Movement wanted to have a "white pride" rally in a rural county that, as this Court said, suffered from a "troubled racial history." *Forsyth County,* 505 U.S. at 125. After two prior racially motivated incidents the county imposed a discretionary parade fee designed to reimburse the government for extra fees expended to "maintain public order." *Id.* When

the Nationalist Movement sought permission to hold a rally to protest the Dr. Martin Luther King, Jr. federal holiday, the county imposed a $100 fee. *Id.* This Court found the fee facially unconstitutional. *Id.* at 137.

In *Skokie*, this Court required that the Illinois Supreme Court stay an injunction against the National Socialist Party of America, which wanted to hold a pro-Nazi march through a residential neighborhood with a large Jewish population, many of whom were holocaust survivors. *Skokie,* 432 U.S. at 43. While not ruling on the merits, this Court indicated that the injunction was overly broad and should be significantly modified, if not overturned. *Id.* at 45. What is notable about the *Skokie* decision is that this Court did not assume that the "captive audience" doctrine would apply, even though the Nazi group intended to walk in front of holocaust survivors' homes displaying messages aimed at displaying the group's hatred for the Jewish people. *Id.*

If a Nazi march right in front of the homes of Jewish holocaust survivors and a "white pride" rally against honoring an African-American civil rights leader are insufficient to trigger the "captive audience" doctrine, then the Phelpses' demonstration more than 1,000 feet away from a publicly advertised memorial

service and unseen by the attendees cannot meet the definition. Petitioner's and his amici's claim that the Phelpses "targeted" a "captive audience" of funeral goers finds no support in this Court's precedents and should be rejected.[2]

Try as they might, Petitioner and his amici cannot fit the square peg of a funeral service into the round hole of a captive audience. This Court has rarely applied the "captive audience" doctrine outside of the residential context. When it has done so, it has been to address very specific concerns that are not applicable in this case, such as protecting minors in a public school from sexually explicit speech during instructional hours. *Fraser,* 478

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[2] *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), cited by Amicus VFW in a footnote, did not, as amicus suggests, widen the definition of captive audience in a way that would apply to this case. Passengers on a streetcar are much more akin to someone sitting in their home than to someone attending a funeral. They are physically confined within a space from which they cannot easily exit, which makes any intrusion more invasive than even a protest directly in front of a funeral service, let alone one that is 1,000 feet away.

U.S. at 684. This Court has declined to apply the "captive audience" doctrine in public contexts when the audience was arguably even more "captive" than the funeral goers in this case, such as criminal defendants or others required by law to be present in a courthouse. *Cohen*, 403 U.S. at 21. Petitioner asks this Court to expand the "captive audience" doctrine farther than the Court has ever taken it. This Court should reject that request, particularly under the facts of this case.

II. NEITHER *HILL V. COLORADO* NOR THE OTHER ABORTION CLINIC "BUFFER ZONE" CASES CAN BE READ TO SUPPORT PETITIONER'S PROPOSED EXPANSION OF THE "CAPTIVE AUDIENCE" DOCTRINE.

Petitioner and his amici rely upon *Hill v. Colorado*, 530 U.S. 703 (2000) as precedent for their proposed expansion of the "captive audience" doctrine. However, the inconsistencies between *Hill* and other First Amendment cases and between *Hill* and other abortion clinic "buffer zone" cases makes it an unstable foundation upon which to build an expansive redefinition of "captive audience." Furthermore, the significant differences between this case and *Hill* mean that, even if it were consistent with other precedents, it still

would not support Petitioner's proposition. This Court's other abortion clinic "buffer zone" decisions, *Madsen v. Women's Health Center*, 512 U.S. 753 (1994) and *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), also do not support Petitioner's proposed redefinition of "captive audience."

In *Hill,* this Court upheld a statute that imposed criminal penalties upon anyone who, while standing within 100 feet of a health care facility, knowingly approached within eight feet of another person, without their consent, to pass a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling. *Hill,* 530 U.S. at 708. The majority found that the statute was a legitimate time, place and manner restriction that was narrowly tailored to meet the State's interest in protecting "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id.* at 715. The majority emphasized the state's need to protect the listeners' right to avoid unwanted communication, calling it "an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.' *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting)."

Id. at 716-717. The majority acknowledged that "'[t]he right to avoid unwelcome speech has special force in the privacy of the home . . . and its immediate surroundings," and concluded that it should apply with similar force to entrances to health care facilities. *Id.* (citing *Rowan*, 397 U.S. at 738, and *Frisby*, 487 U.S. at 485).

In his dissent, Justice Scalia argued that the majority had departed significantly from prior precedent. *Id.* at 751. He criticized the majority's reliance upon what he called "a bon mot in a 1928 dissent," and went on to note that the "right to be let alone" identified in that dissent actually contradicted the majority's position. *Id.* "The right to be let alone that Justice Brandeis identified was a right the Constitution 'conferred, as against the government'; it was that right, not some generalized 'common-law right' or 'interest' to be free from hearing the unwanted opinions of one's fellow citizens, which he called the 'most comprehensive' and 'most valued by civilized men.'" *Id.* "To the extent that there can be gleaned from our cases a "right to be let alone' in the sense that Justice Brandeis intended, it is the right of the speaker in the public forum to be free from government interference of the sort Colorado has imposed here." *Id.* "In any event, the Court's attempt to disguise the 'right

to be let alone' as a 'governmental interest in protecting the right to be let alone' is unavailing for the simple reason that this is not an interest that may be legitimately weighed against the speakers' First Amendment rights (which the Court demotes to the status of First Amendment 'interests.')" *Id.* In a statement particularly apropos to this case, Justice Scalia said, "We have consistently held that 'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.'" *Id.* (citing *Erznoznik*, 422 U.S. at 210). Justice Scalia further noted that the majority's decision contradicted its opinion in *Schenck*, in which it reiterated that "'as a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" *Id.* at 752 (citing *Schenck,* 519 U.S. at 383).

The shortcomings highlighted by Justice Scalia demonstrate why *Hill* cannot be used to support Petitioner's proposed expansion of the "captive audience" doctrine. *Hill* places public rights of way within a 100 foot radius of the entrance to a health care facility in the same category as a personal residence, and grants

greater protection to those entering a health care facility for elective procedures than is afforded to those entering a courthouse to comply with a summons or students on public school campuses. *See Cohen*, 403 U.S. at 21; *Tinker*, 393 U.S. at 512. Notably, *Hill* did not address protecting patients in a hospital seeking treatment from intrusive conduct, but granted people walking within 100 feet of a health care facility the power to censor others' First Amendment rights if they do not like the message. *Hill* improperly redefined a citizens' right to be left alone from government interference with his First Amendment rights as a listener's right to be left alone from hearing unpopular messages, and then placed that redefined "right" above the First Amendment rights of the speaker. That improper balancing of a common law concept against a fundamental First Amendment right is not a proper basis for expanding the "captive audience" doctrine as suggested by Petitioner and his amici, and may be best understood as an "abortion distortion" case.

Furthermore, even if *Hill* did not represent a departure from this Court's precedents, it still would not support Petitioner's proposed expansion of the "captive audience" doctrine. The statute in *Hill* was enacted to prevent someone from coming within

eight feet of another person without their permission and thereby impending access to a health care provider. *Hill,* 530 U.S. at 708. The state based the law upon its duty to protect the health, safety and welfare of its citizens by preventing trauma associated with confrontations while trying to obtain medical care. *Id.* at 715. Here, the civil fines imposed had nothing to do with the health, safety and welfare of patients seeking health care, but to punish the Phelpses for passively displaying objectionable messages in the vicinity of a funeral. There was no threatened or actual impediment to the memorial service, nor any confrontation which could have caused trauma. The protest was not within 100 feet of a health care facility, nor even of the funeral site, and there was no attempt to approach any of the funeral goers. Consequently, even if there were valid state interests underlying the statute in *Hill*, those interests are not present in this case and cannot support Petitioner's proposed expansion of the "captive audience" doctrine.

This Court's other abortion clinic "buffer zone" cases also do not support Petitioner's proposed expansion of the "captive audience" doctrine. *Madsen* 512 U.S. 753; *Schenck*, 519 U.S. 357. In *Madsen* this Court invalidated provisions of an injunction which established a 36-foot buffer zone on private property, banned

observable images, established a 300-foot no-approach zone around an abortion clinic, and established a 300-foot buffer zone around staff residences. *Madsen,* 512 U.S. at 773-775. While this Court generally agreed with the Florida Supreme Court that clinic patients could be said to be "held captive by medical circumstance," it refused to go as far as the state court did in restricting speech. *Id.* In particular, this Court found that the prohibition on "images observable" to patients in the clinic impermissibly burdened more speech than necessary to protect the state's purported interests in protecting patients from threats or preventing anxiety. *Id.* at 773. "The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable." *Id.* "But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic." *Id.* Similarly, "the 300 foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby*," where the prohibition was limited to 'focused picketing taking place solely in front of a particular residence.'" *Id.* at 775. Therefore, even in the home, where an individual's privacy interest is at its absolute

peak, even a 300-foot "buffer zone" against unwelcome speech is too broad. *See id.* Since the Phelpses were more than three times that distance from the funeral, the restriction supported by Petitioner and his amici would be impermissible, even if the funeral service could be analogized to a private residence (which it cannot). Furthermore, as was true with the images on the placards in *Madsen,* the images on the Phelpses' signs did not threaten funeral goers, so there is no legitimate basis for prohibiting their display. This is particularly true in light of the fact that the images could not be seen by funeral goers and therefore could not cause anxiety or distress. Consequently, as this Court said in *Madsen,* the only plausible reason that Petitioner would be bothered by the images on the Phelpses' signs is that he found the expression disagreeable. As this Court has emphasized, that does not justify restricting First Amendment rights. *Cohen,* 403 U.S. at 21.

In *Schenck,* the Court invalidated provisions creating "floating buffer zones," which banned demonstrations within 15 feet of any person or vehicle seeking access to or leaving the clinics. *Schenck,* 519 U.S. at 362. The clinics at issue in *Schenck* had been subjected to numerous large-scale blockades in which protestors marched, stood, kneeled, sat

or lay in parking lots, driveways, and doorways and blocked patients and staff from entering the clinics. *Id.* The lower court also identified problems with threatening, face-to-face confrontations between demonstrators and clinic patients. *Id.* The lower court enacted restrictions based upon a stated interest in ensuring unimpeded access to the clinics and prohibiting threatening face-to-face confrontations. *Id.* While this Court upheld some of the restrictions as narrowly tailored to serve those interests, it invalidated the floating buffer zones because they restricted more speech than was necessary to prevent intimidation and to ensure access to the clinics. *Id.* at 377. "The floating buffer zones prevent defendants...from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id.* The expansive "captive audience" doctrine proposed by Petitioner would invade even more First Amendment rights in that it would sanction passive demonstrations not merely outside normal conversational distance, but outside the sight or hearing of people attending a funeral. This would constitute an unprecedented expansion of the "captive audience" doctrine, going beyond even what is permitted when the privacy of a personal residence is involved.

This Court should reject Petitioner's and his amici's proposal for this unprecedented and unjustified expansion of the "captive audience" doctrine, particularly in light of the facts of this case. The ramifications of their proposal are potentially frightening.

III. EXPANDING THE "CAPTIVE AUDIENCE" DOCTRINE AS PROPOSED BY PETITIONER WOULD UNDERMINE THE FIRST AMENDMENT.

Broadening the concept of "captive audience" as Petitioner and his amici propose threatens the very foundation upon which the First Amendment was built. This Court has long recognized that "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, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). "Robust debate" and "inviting dispute" are among the core foundations of the First Amendment. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

> Those who won our independence believed ... that public discussion is a political duty; and that this

> should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law–the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.'

Id. (citing *Whitney v. California*, 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring). The First Amendment, therefore, reflects "a

profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment.'" *Boos v. Barry*, 485 U.S. 312, 322 (1988). Adopting Petitioner's view of the "captive audience" doctrine would significantly undermine that foundation. Instead of providing "adequate breathing space to the freedoms protected by the First Amendment," the First Amendment may be left gasping for air. *Boos*, 485 U.S. at 322.

The VFW's amicus brief cogently illustrates the point. According to the VFW, "[t]he right of a family to be let alone during a loved one's funeral supersedes any First Amendment protection afforded to Respondents' speech." (VFW Brief, p. 10). "Respondents' speech warrants little, if any First Amendment protection. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.'" (VFW Brief,

p. 6, n5) (quoting *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)). The expansive nature of Petitioner and his amici's proposed definition of "captive audience" and how it threatens the concept of "inviting dispute" is illustrated in the following: "In addition to the personal attacks, it is the very presence of protesters, independently of their words, that is disruptive." (VFW Brief at 9, n.8). If the mere presence of protestors can trigger restrictions on free speech, then the First Amendment will become little more than a hollow shell. Under Petitioner's proposal, any time anyone perceives that there is someone nearby who might say something offensive, then the listener will be able to severely limit or even shut down the speech, even if nothing is uttered or displayed. For example, if one group sponsoring an event in one portion of a park found out that there was a gathering of people with whom they disagreed on the other side of the park, out of ear shot and out of sight, then the former group could severely limit or even prohibit the latter group's activity. It would not be necessary for the former group to hear the message or see the latter group speaking. It would be sufficient if the former group merely knew the latter group were there and believed that the message was offensive. This would be prior restraint at its worst.

Indeed, under amici's proposal, the American Revolution itself would never have occurred, since the mere existence of the Founders and their message would have been offensive to those loyal to Great Britain and therefore subject to sanction. Petitioner and his amici propose a dangerous subjective analysis of free speech rights based upon what some third party believes is appropriate. This proposed expansion of the concept of "captive audience" would all but eliminate the idea of "robust debate" and would encourage widespread restrictions upon activities seen as offensive to some particular group or person. The possibility of civil fines, or, as in this case, money damages in the millions of dollars would chill First Amendment activities in an unprecedented manner. This Court should not sanction such an attack on core First Amendment freedoms.

CONCLUSION

This Court should reject Petitioner's and his amici's proposed assault upon the First

Amendment and decline their invitation to redefine the "captive audience" doctrine.

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