



SNYDER v. PHELPS
SUPREME COURT OF THE UNITED STATES
March 2, 2011
[8 – 1]

OPINION: Chief Justice Roberts...A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

As you learn the truth about this highly publicized case that favored Westboro by 8-1, please understand that no justice supports the words used by Westboro. I tend to support Justice Alito's dissent, but please understand that this case also deals with freedom – in particular, freedom of speech. Freedom of speech means very little if we only protect speech we like. I am not suggesting this Court got it right. I am suggesting that you may have a more understanding view of this decision when you fully understand the principles involved and the facts you didn't get from the media.

Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas, in 1955. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing, often at military funerals...Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty. Lance Corporal Snyder's father selected the Catholic church in the Snyders' hometown of Westminster, Maryland, as the site for his son's funeral...Phelps became aware of Matthew Snyder's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance:

I have set these apart for emphasis.

"God Hates the USA/Thank God for 9/11"

"America is Doomed"

"Don't Pray for the USA"

"Thank God for IEDs"

"Thank God for Dead Soldiers"

"Pope in Hell"

"Priests Rape Boys"

"God Hates Fags"

"You're Going to Hell"

and "God Hates You."

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10-by 25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. **None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.**

Irrespective of how you view these matters, it remains that the media left us with the impression that the picketers were profane, loud and literally “in the face” of those attending the funeral. We must never seek an outcome by relying on false information. The truth ought to be sufficient, don't you agree?

The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, **[Snyder] did not see what was written on the signs until later that night, while watching a news broadcast covering the event.**

In other words, the funeral itself was not directly affected.

Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church in the United States District Court for the District of Maryland...Snyder alleged five state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Westboro moved for summary judgment contending, in part, that the church's speech was insulated from liability by the First Amendment.

The Court will discuss each of the five different types of claims (or, as we lawyers call them, “causes of action.”) So will we. Westboro “moved for summary judgment.” That means that Westboro contended that even if everything Snyder alleged was true, nevertheless, the First Amendment protects Westboro’s actions from Snyder’s attack upon Westboro. Now we will see how the trial court (the initial court, or in this instance, the Federal District Court) handled the Westboro motion.

The District Court awarded Westboro summary judgment on Snyder's claims for defamation and publicity given to private life, concluding that Snyder could not prove the necessary elements of those torts...

OK, so the District Judge did not agree that the First Amendment protected Westboro’s speech, but it did rule that Snyder’s allegations did not rise to the level of proving a claim for “defamation” or “publicity give to private life.” It is not important, for now, that you know the elements of either “tort” claim. The Judge allowed the case to go to trial on the remaining three theories.

At trial, Snyder described the severity of his emotional injuries. He testified that he is unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it. Expert witnesses testified that Snyder's emotional anguish had resulted in severe depression and had exacerbated preexisting health conditions.

A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages.

So, the jury found that Snyder proved the elements of these three claims and that Snyder was entitled to \$2.9 million for his actual damages, listed above, and an additional \$8 million to punish Westboro.

[After the verdict,] Westboro filed...a motion contending that the jury verdict was grossly excessive and a motion seeking judgment as a matter of law on all claims on First Amendment grounds. The District Court remitted the punitive damages award to \$2.1 million, but left the jury verdict otherwise intact.

So, once again, the Judge ruled that the First Amendment freedom of speech does not protect Westboro from these claims and also reduced the punitive award from \$8 million to \$2.1 million, while leaving the actual damage award of \$2.9 million in tact. Can a judge take it upon himself to reduce a jury award? That is not our topic for now.

In the Court of Appeals, Westboro's primary argument was that the church was entitled to judgment as a matter of law because the First Amendment fully protected Westboro's speech. The Court of Appeals agreed. The court reviewed the picket signs and concluded that Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric...

Translation: Westboro appealed the outcome to the next higher Court of Appeals. This time, the entire verdict was struck down, not because Snyder failed to prove his case or that Snyder was not damaged, but because the Court of Appeals agreed that First Amendment freedom of speech trumped all claims against Westboro. The Supreme Court then agreed to hear the appeal of Snyder which results in this opinion and, therefore, the end of the litigation road.

To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. The Free Speech Clause of the First Amendment—"Congress shall make no law... abridging the freedom of speech"—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.

Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. "Speech on 'matters of public concern'...is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan* [See Case 1A-S-12 on this website]. That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana* (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers* (1983).

"Not all speech is of equal First Amendment importance," however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import...

Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community" or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."

Our opinion in *Dun & Bradstreet*, on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual's credit report "concerns no public issue." The content of the report, we explained, "was speech solely in the individual interest of the speaker and its specific business audience." That was confirmed by the fact that the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further...

In the *Dun & Bradstreet* case, D&B falsely reported that Greenmoss Builders, Inc., a construction contractor, had filed for bankruptcy. Greenmoss brought a defamation action alleging that the false report had injured its reputation. The jury returned a verdict in favor of Greenmoss. On appeal, D&B contended that the First Amendment freedom of speech protected them unless the aggrieved party could prove actual malice. The Court held that actual malice need not be proven when the defamatory statements, as in that case, do not involve matters of public concern.

Deciding whether speech is of public or private concern requires us to examine the "content, form, and context" of that speech, "as revealed by the whole record." *Dun & Bradstreet*. As in other First Amendment cases, the court is obligated "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.* (1984). In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." The placards read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You." While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs—such as "You're Going to Hell" and "God Hates You"—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.

Apart from the content of Westboro's signs, Snyder contends that the "context" of the speech—its connection with his son's funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro's speech. Westboro's signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is "fairly characterized as constituting speech on a matter of public concern" and the funeral setting does not alter that conclusion.

Snyder argues that the church members in fact mounted a personal attack on Snyder and his family, and then attempted to "immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality or the supposed evils of the Catholic Church." We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent

its "honestly believed" views on public issues. There was no preexisting relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter...

Snyder goes on to argue that Westboro's speech should be afforded less than full First Amendment protection "not only because of the words" but also because the church members exploited the funeral "as a platform to bring their message to a broader audience." There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views and because of the relation between those sites and its views—in the case of the military funeral, because **Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies.**

Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term—"emotional distress"—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But **Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street.** Such space occupies a "special position in terms of First Amendment protection." *United States v. Grace* (1983). "We have repeatedly referred to public streets as the archetype of a traditional public forum," noting that "time out of mind public streets and sidewalks have been used for public assembly and debate." *Frisby v. Schultz*. [See Case 1A-S-35 on this website.]

That said, "even protected speech is not equally permissible in all places and at all times." Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is "subject to reasonable time, place, or manner restrictions" that are consistent with the standards announced in this Court's precedents. Maryland now has a law imposing restrictions on funeral picketing, as do 43 other States and the Federal Government. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing "before or about" a particular residence. In *Madsen v. Women's Health Center, Inc.*¹, we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the

¹ Case 1A-S-42 on this website.

church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment..."If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson* (1989).² Indeed, "the point of all speech protection...is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995).³

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "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." *Hustler Magazine v. Falwell*.⁴ In a case such as this, a jury is "unlikely to be neutral with respect to the content of the speech," posing "a real danger of becoming an instrument for the suppression of...vehement, caustic, and sometimes unpleasant" expression. Such a risk is unacceptable; "in public debate we 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* (1988). What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.

For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.

The jury also found Westboro liable for the state law torts of "intrusion upon seclusion" and "civil conspiracy." The Court of Appeals did not examine these torts independently of the intentional infliction of emotional distress tort. Instead, the Court of Appeals reversed the District Court wholesale, holding that the judgment wrongly "attached tort liability to constitutionally protected speech."

² Case 1A-S-37 on this website.

³ Case 1A-A-3 on this website.

⁴ Case 1A-S-34 on this website.

In other words, the Court of Appeals didn't take the time to define what must be proven to make a case for "intrusion upon seclusion" or "civil conspiracy" because they weren't going to permit either cause of action to prevail over the free speech interests of Westboro on these facts, regardless of their definition.

Snyder argues that even assuming Westboro's speech is entitled to First Amendment protection generally, the church is not immunized from liability for intrusion upon seclusion because Snyder was a member of a captive audience at his son's funeral. We do not agree. In most circumstances, "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. Rather,...the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes." *Erznoznik v. Jacksonville* (1975).⁵ As a result, "the ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is...dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California* (1971).⁶

As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see *Rowan v. Post Office Dept.* (1970)⁷, and an ordinance prohibiting picketing "before or about" any individual's residence, *Frisby*.

Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And **there is no indication that the picketing in any way interfered with the funeral service itself**. We decline to expand the captive audience doctrine to the circumstances presented here.

Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged unlawful activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts.

...We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. As we have noted, "the sensitivity and significance of the interests presented in clashes between First Amendment and state law rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Florida Star v. B. J. F.* (1989).

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public

⁵ Case 1A-S-29 on this website.

⁶ Case 1A-S-20 on this website.

⁷ Case 1A-S-19 on this website.

discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed...

Translation: Westboro's free speech interests prevail over Snyder's claims on these facts. Snyder loses. It's the end of the road for him.

CONCURRENCE: BREYER...[Today] the Court holds that the First Amendment protects the picketing that occurred here, primarily because the picketing addressed matters of "public concern."

While I agree with the Court's conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point. A State can sometimes regulate picketing, even picketing on matters of public concern. *Frisby v. Schultz*. Moreover, suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected. *Chaplinsky v. New Hampshire* (1942)⁸ ("fighting words").

The dissent recognizes that the means used here consist of speech. But it points out that the speech, like an assault, seriously harmed a private individual. Indeed, the state tort of "intentional infliction of emotional distress" forbids only conduct that produces distress "so severe that no reasonable man could be expected to endure it," and which itself is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." **The dissent requires us to ask whether our holding unreasonably limits liability for intentional infliction of emotional distress—to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B's private life, while knowing that the revelation will cause B severe emotional harm.** Does our decision leave the State powerless to protect the individual against invasions of, *e.g.*, personal privacy, even in the most horrendous of such circumstances?

⁸ Case 1A-S-8 on this website.

As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict. That review makes clear that Westboro's means of communicating its views consisted of picketing in a place where picketing was lawful and in compliance with all police directions. The picketing could not be seen or heard from the funeral ceremony itself. And Snyder testified that he saw no more than the tops of the picketers' signs as he drove to the funeral. To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm. Consequently, the First Amendment protects Westboro. As I read the Court's opinion, it holds no more.

Justice Breyer, in effect, is warning Westboro and those of like mind that the outcome might be very different where their choice of place of picketing is unlawful or their message is more directed to private matters affecting the deceased's family or where they actually interrupt a funeral ceremony with their actions. In other words, this outcome is very carefully limited to these specific facts.

DISSENT: ALITO...Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree.

[Westboro has] strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are "uninhibited," "vehement," and "caustic." *New York Times Co. v. Sullivan* (1964).

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. To protect against such injury, "most if not all jurisdictions" permit recovery in tort for the intentional infliction of emotional distress (or IIED).

Well, freedom can be very messy at times. Although you have likely at least been enlightened thus far, I have to say I tend to favor Justice Alito on this one.

This is a very narrow tort with requirements that "are rigorous, and difficult to satisfy." To recover, a plaintiff must show that the conduct at issue caused harm that was truly severe...

A plaintiff must also establish that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here. On appeal, they chose not to contest the sufficiency of the evidence. They did not dispute that Mr. Snyder suffered "wounds that are truly severe and incapable of healing themselves." Nor did they dispute that their speech was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Instead, they maintained that the First Amendment gave them a license to engage in such conduct. They are wrong.

It is well established that a claim for the intentional infliction of emotional distress can be satisfied by speech. Indeed, what has been described as "the leading case" recognizing this tort involved speech. And although this Court has not decided the question, I think it is clear that the First Amendment does not entirely preclude liability for the intentional infliction of emotional distress by means of speech.

This Court has recognized that words may "by their very utterance inflict injury" and that the First Amendment does not shield utterances that form "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*. **When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.**

In this case, respondents brutally attacked Matthew Snyder, and this attack, which was almost certain to inflict injury, was central to respondents' well-practiced strategy for attracting public attention.

On the morning of Matthew Snyder's funeral, respondents could have...picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have selected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country.) They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.) But of course, a small group picketing at any of these locations would have probably gone unnoticed.

The Westboro Baptist Church, however, has devised a strategy that remedies this problem. As the Court notes, church members have protested at nearly 600 military funerals. They have also picketed the funerals of police officers, firefighters, and the victims of natural disasters, accidents, and shocking crimes. And in advance of these protests, they issue press releases to ensure that their protests will attract public attention...

In this case, respondents implemented the Westboro Baptist Church's publicity-seeking strategy. Their press release stated that they were going "to picket the funeral of Lance Cpl. Matthew A. Snyder" because "God Almighty killed Lance Cpl. Snyder. He died in shame, not honor— for a fag nation cursed by God....Now in Hell—sine die." This announcement guaranteed that Matthew's funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event.

On the day of the funeral, respondents, true to their word, displayed placards that conveyed the message promised in their press release. Signs stating "God Hates You" and "Thank God for Dead Soldiers" reiterated the message that God had caused Matthew's death in retribution for his sins. Others, stating "You're Going to Hell" and "Not Blessed Just Cursed," conveyed the message that Matthew was "in Hell—sine die."

...Since respondents chose to stage their protest at Matthew Snyder's funeral and not at any of the other countless available venues, a reasonable person would have assumed that there was a connection between the messages on the placards and the deceased. Moreover, since a church funeral is an event that naturally brings to mind thoughts about the afterlife, some of respondents' signs—*e.g.*, "God Hates You," "Not Blessed Just Cursed," and "You're Going to Hell"—would have likely been interpreted as referring to God's judgment of the deceased.

Other signs would most naturally have been understood as suggesting—falsely—that Matthew was gay. Homosexuality was the theme of many of the signs. There were signs reading "God Hates Fags," "Semper Fi Fags," "Fags Doom Nations," and "Fag Troops." Another placard depicted two men engaging in anal intercourse. A reasonable bystander seeing those signs would have likely concluded that they were meant to suggest that the deceased was a homosexual.

After the funeral, the Westboro picketers reaffirmed the meaning of their protest. They posted an online account entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!"

Belying any suggestion that they had simply made general comments about homosexuality, the Catholic Church, and the United States military, the "epic" addressed the Snyder family directly:

"God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil.

"Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic

monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.

....."Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?"

In light of this evidence, it is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not.

Very persuasive!

JUSTICE BREYER provides an apt analogy to a case in which the First Amendment would permit recovery in tort for a verbal attack:

"Suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected."

This captures what respondents did in this case. Indeed, this is the strategy that they have routinely employed—and that they will now continue to employ— inflicting severe and lasting emotional injury on an ever growing list of innocent victims.

The Court concludes that respondents' speech was protected by the First Amendment for essentially three reasons, but none is sound.

First—and most important—the Court finds that "the overall thrust and dominant theme of their demonstration spoke to" broad public issues. As I have attempted to show, this portrayal is quite inaccurate; respondents' attack on Matthew was of central importance. But in any event, I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Snyder and his family should be treated differently.

Second, the Court suggests that respondents' personal attack on Matthew Snyder is entitled to First Amendment protection because it was not motivated by a private grudge, but I see no basis for the strange distinction that the Court appears to draw. Respondents' motivation—"to increase publicity for its views"—did not transform their statements attacking the character of a private

figure into statements that made a contribution to debate on matters of public concern. Nor did their publicity-seeking motivation soften the sting of their attack. And as far as culpability is concerned, one might well think that wounding statements uttered in the heat of a private feud are less, not more, blameworthy than similar statements made as part of a cold and calculated strategy to slash a stranger as a means of attracting public attention.

Third, the Court finds it significant that respondents' protest occurred on a public street, but this fact alone should not be enough to preclude IIED liability. To be sure, statements made on a public street may be less likely to satisfy the elements of the IIED tort than statements made on private property, but there is no reason why a public street in close proximity to the scene of a funeral should be regarded as a free-fire zone in which otherwise actionable verbal attacks are shielded from liability. If the First Amendment permits the States to protect their residents from the harm inflicted by such attacks—and the Court does not hold otherwise—then the location of the tort should not be dispositive. **A physical assault may occur without trespassing; it is no defense that the perpetrator had "the right to be where he was." And the same should be true with respect to unprotected speech. Neither classic "fighting words" nor defamatory statements are immunized when they occur in a public place, and there is no good reason to treat a verbal assault based on the conduct or character of a private figure like Matthew Snyder any differently.**

One final comment about the opinion of the Court is in order. The Court suggests that the wounds inflicted by vicious verbal assaults at funerals will be prevented or at least mitigated in the future by new laws that restrict picketing within a specified distance of a funeral. It is apparent, however, that the enactment of these laws is no substitute for the protection provided by the established IIED tort; according to the Court, the verbal attacks that severely wounded petitioner in this case complied with the new Maryland law regulating funeral picketing. And there is absolutely nothing to suggest that Congress and the state legislatures, in enacting these laws, intended them to displace the protection provided by the well-established IIED tort.

The real significance of these new laws is not that they obviate the need for IIED protection. Rather, their enactment dramatically illustrates the fundamental point that **funerals are unique events at which special protection against emotional assaults is in order.** At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. Exploitation of a funeral for the purpose of attracting public attention "intrudes upon their...grief" and may permanently stain their memories of the final moments before a loved one is laid to rest. **Allowing family members to have a few hours of peace without harassment does not undermine public debate. I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern...**

Respondents' outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. I therefore respectfully dissent.