## Snyder v. Phelps, 131 S. Ct. 1207 (2011)

*Albert Snyder is the father of Matthew Snyder, a soldier killed in Iraq. On March 10, 2006, Matthew Snyder's funeral was held in Westminster, Maryland. Before and during the funeral service Fred Phelps and other members of the Westboro Baptist Church picketed on public property approximately one thousand feet from the church where Snyder was laid to rest. As they had done at numerous other funerals for fallen soldiers, members of the Westboro Church held placards condemning the United States, Catholics, and homosexuals. Fallen soldiers, Phelps and his followers wish to communicate, are divine punishment for the fallen state of the country. After the service Snyder sued Phelps for defamation and intentional infliction of emotional damage (IIED). A jury in a federal district court awarded Snyder $2.9 million in compensatory damages and $8 million in punitive damages. The district judge reduced the award to $2.1 million. That decision was reversed by the Court of Appeals for the Fourth Circuit, which ruled that Phelps was protected by the First Amendment. Snyder appealed to the Supreme Court of the United States.*

*The Supreme Court by an 8-1 vote agreed that Fred Phelps was protected by the First Amendment. Chief Justice Roberts's majority opinion declared that Phelps was speaking on public affairs and that such speech received the highest degree of protection. Both the Chief Justice and Justice Alito in dissent agreed that Phelps deliberately targeted the funerals of soldiers to gain publicity and that his speech was highly offensive. They nevertheless reached different conclusions on whether that speech was protected. Why do they reach those different conclusions? Whose conclusions are correct? What might explain why the two Bush nominees to the Court disputed the best result in this case? What facts about the case would have to change for there to be a different result? Could government officials ban more conventional anti-war protestors from military funerals? Could family members sue photographers for publishing pictures of crime victims, the military dead, or autopsy photos of deceased racecar drivers?*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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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. . . . 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* (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." . . .

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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 . . . to reach as broad a public audience as possible. . . .

. . . The fact that Westboro spoke in connection with a funeral 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.

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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."

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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 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. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "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). . . .

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." 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 unpleasan[t]'" 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." 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.

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JUSTICE BREYER, concurring. . . .

JUSTICE ALITO, dissenting.

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[The Westboro Church does not have a First Amendment right to] 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). . . .

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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." . . . 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.

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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." . . .

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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.

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

. . . [T]he Court finds that "the overall thrust and dominant theme of [their] demonstration spoke to" broad public issues. . . . 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.

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. . . [T]he 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. . . .

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. . . 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.

### Public Property, Subsidies, Employees, and Schools

The Supreme Court currently permits substantial regulation when speakers claim rights to speak on public property, in public schools, or with public moneys. Cases frequently turn on the extent to which speech is seen as purely private or entwined with some public largess. While the Court in *Boy Scouts of America v. Dale* (2000) ruled that states could not require a private expressive organization to accept members whose beliefs or habits were inconsistent with the message the organization wished to communicate, the justices in *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez* (2010) sustained a university rule that required official law school groups, including the Christian Legal Society (CLS), to not "discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation." Justice Ginsburg's plurality opinion stated, "CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out."

The late Rehnquist and Roberts Courts continue to narrowly define what constitute public fora, or places that are traditionally held open for speech. *United States v. American Library Association* (2003) reaffirmed previous decisions rejecting claims that libraries were public fora. When sustaining a federal law requiring libraries receiving federal money to block Internet access to obscenity and indecent material, Chief Justice Rehnquist declared, "A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves." *Arkansas Educational Television Commission v. Forbes* (1998) rejected claims that political debates sponsored by public television were obligated to include all candidates listed on the ballot. Justice Kennedy's majority opinion maintained that "the debate was a nonpublic forum, for which [the television station] could exclude Forbes in the reasonable, viewpoint-neutral exercise of its journalistic discretion."

The justices in three cases—*Madsen v. Women's Health Center, Inc.* (1994), *Schenck v. Pro-Choice Network of Western New York* (1997), and *Hill v. Colorado* (2000)—sustained most provisions in injunctions limiting pro-life protests outside of abortion clinics. Chief Justice Rehnquist's majority opinion in *Madsen* rejected claims that the ban on pro-life protests violated content neutrality, the principle that time, place, and manner restrictions on speech must not discriminate on the basis of particular viewpoints or subject matters. He wrote,

> The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion, and of any consequent request that their demonstrations be regulated by injunction. There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a