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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Case 09-751, Snyder v. Phelps.

5 Mr. Summers.

6 ORAL ARGUMENT OF SEAN E. SUMMERS

7 ON BEHALF OF THE PETITIONER

8 MR. SUMMERS: Mr. Chief Justice, and may it
9 please the Court:

10 We are talking about a funeral. If context
11 is ever going to matter, it has to matter in the context
12 of a funeral. Mr. Snyder simply wanted to bury his son
13 in a private, dignified manner. When the Respondents'
14 behavior made that impossible, Mr. Snyder was entitled
15 to turn to the tort law of the State of Maryland.

16 JUSTICE SCALIA: Are we just talking about a
17 funeral? That's one of the problems I have with the
18 case. There was also this video that -- that your
19 client watched, right, later, after the funeral?

20 MR. SUMMERS: There was a flier that was
21 sent out prior to the funeral. We have the funeral and
22 we have what they described as the "epic," which was put
23 on the Internet afterwards, which --

24 JUSTICE SCALIA: Right. Well, what does
25 that have to do with the funeral?

1 MR. SUMMERS: As the district court
2 explained, and the circuit court followed their logic,
3 and I think the facts at trial confirmed this, that the
4 epic was essentially a recap of the funeral protest
5 itself. That's --

6 JUSTICE SCALIA: That's fine, but it -- it
7 does not intrude upon a funeral. I mean, no. You --
8 you either have two separate causes of action -- one is
9 the intrusion upon the funeral, and the other is the
10 harm caused by viewing this -- this posting on the
11 Internet. But I don't see how they both relate to
12 intrusion upon the funeral.

13 MR. SUMMERS: Well, the --

14 JUSTICE SCALIA: And they were just
15 submitted to the jury as one big lump, right?

16 MR. SUMMERS: Well, we had the flier that
17 was submitted, that was sent out before the funeral. We
18 had the facts of the funeral. And, yes, the epic did --
19 of course, we focused on the personal, targeted comments
20 in the epic when we presented our evidence. But, yes,
21 it was --

22 JUSTICE SCALIA: Suppose there hadn't been a
23 funeral protest, just the epic. Would that have
24 supported the cause of action you -- you assert here?

25 MR. SUMMERS: I think that's a closer call.

1 But when we have the personal --

2 JUSTICE SCALIA: Yes or no?

3 MR. SUMMERS: I would say yes, because we
4 have the personal, targeted epithets directed at the
5 Snyder family.

6 JUSTICE SCALIA: Even though it's -- he
7 doesn't have to watch them? They're just posted on the
8 Internet.

9 MR. SUMMERS: That's correct,
10 Justice Scalia.

11 JUSTICE SCALIA: It's his choice to watch
12 them, but if he chooses to watch them he has a cause of
13 action because it causes him distress.

14 MR. SUMMERS: Well, the -- he has a cause of
15 action. That doesn't mean he's going to win. You still
16 have the pleading standards, the summary judgment
17 standards, and the motion to dismiss standards.

18 JUSTICE GINSBURG: Well, why does he have a
19 -- a claim? As I understand it, after this case arose
20 Maryland passed a statute putting time, place, and
21 manner restrictions. I read that statute, and it seems
22 to me that there was nothing unlawful, nothing out of
23 compliance with that statute, that was done here.

24 It was at considerable distance. There was
25 no importuning anyone going to the funeral. It stopped

1 before the funeral, the service, began.

2 Am I right that, under the current statute,
3 this conduct was not unlawful?

4 MR. SUMMERS: Justice Ginsburg, the statute
5 wasn't in place at the time. But there's a complicated
6 answer to the question, because they were positioned
7 about 30 feet from the main vehicle entrance to the
8 church, and they rerouted the funeral procession so they
9 were 200 to 300 feet away from there.

10 JUSTICE GINSBURG: Didn't they -- didn't
11 they stand where the police told them to?

12 MR. SUMMERS: Well, they -- they told the
13 police where they wanted to stand, and the police said
14 okay. So the police didn't say, please stand here.
15 They said -- in fact, they sent out a flier --

16 JUSTICE GINSBURG: And they were there to
17 the knowledge of the police and with the permission of
18 the police.

19 MR. SUMMERS: It's true they did not violate
20 any criminal statutes, Justice --

21 JUSTICE ALITO: Is there anything to suggest
22 that the Maryland legislature, in enacting that statute,
23 intended to occupy the field of regulations of events
24 that occur at funerals?

25 MR. SUMMERS: I believe the -- the Maryland

1 legislature made it clear that they didn't want people
2 to protest funerals in general. When you --

3 JUSTICE GINSBURG: But they didn't prohibit
4 it.

5 MR. SUMMERS: They did prohibit it under
6 certain circumstances and in a certain --

7 JUSTICE GINSBURG: Which this the case,
8 which the facts here meet.

9 MR. SUMMERS: For statutory enforcement.
10 But what we're dealing with here is tort law.

11 JUSTICE SCALIA: Well, if that statute
12 applies to any protest at funerals, protesting the
13 Vietnam War, protesting whatever, your case involves, at
14 least if we accept your version of it, a protest of the
15 -- of a dead soldier who -- who is going to Hell and
16 whose parents have raised him to go to Hell. So simply
17 to say you can have a protest within a certain distance
18 is not to say you can have a protest within a certain
19 distance that -- that defames the corpse. That's --
20 that's a different issue, isn't it?

21 MR. SUMMERS: That's our position, yes,
22 Justice Scalia. And --

23 JUSTICE GINSBURG: You -- you knew just what
24 was going on. Do you suppose -- because this had been
25 done before. In fact, wasn't this the very same day

1 they picketed at Annapolis and at the State Capitol?

2 MR. SUMMERS: They picketed, yes, those
3 three locations that day.

4 JUSTICE GINSBURG: So they knew what the
5 signs were going to be. Could they have gotten an
6 injunction, do you suppose, against this protest?

7 MR. SUMMERS: I don't think they could have
8 beforehand because, although you said we knew what the
9 signs were going to be, generally from their pattern I
10 think we could guess what the signs may have been, but
11 you don't really know what the signs are going to be
12 until they show up. For example, in this case, they had
13 a sign that said "Priests Rape Boys"; they had a sign
14 that said "God Hates You"; "You're Going to Hell."

15 JUSTICE GINSBURG: So you could go into
16 court and say the signs were this, that, or the other
17 thing at the State Capitol, the same signs at Annapolis;
18 they're going to use the same signs at this protest.

19 MR. SUMMERS: As -- Justice Ginsburg, from
20 our perspective, the signs that said "God Hates You";
21 "You're Going to Hell" referred directly to Matthew
22 Snyder, and we would hope and believe that the district
23 court could enjoin those types of specific targeted
24 epithets.

25 If, for example, this was done at a public

1 park in Montana, logically I think you could conclude
2 that it wasn't directed at the family. But when you
3 show up at a 20-year-old Marine's funeral and say
4 "You're Going to Hell" --

5 JUSTICE GINSBURG: Did they have the "Going
6 to Hell" sign at the State Capitol at Annapolis?

7 MR. SUMMERS: They had -- the majority of
8 the signs were the same, yes.

9 JUSTICE GINSBURG: Those particular ones
10 that you mention, did they have those at the other two?

11 MR. SUMMERS: Yes. I believe the only ones
12 that they changed were they have a sign for each
13 different branch of the service. Matt was a Marine, so
14 he --

15 JUSTICE GINSBURG: So it sounds like the
16 "you" is the whole society, the whole rotten society, in
17 their -- in their view.

18 MR. SUMMERS: If we're forced to accept
19 their view, yes, Justice Ginsburg, that's what they
20 testified to. Mr. Snyder's view, the view of the Fourth
21 Circuit, was that these "God Hates You" and "You're
22 Going to Hell" signs specifically referred to Matthew
23 Snyder and the "Thank God for Dead Soldiers" -- Mr.
24 Snyder certainly interpreted that as referring to his
25 son, because after all Matthew Snyder was the only

1 deceased Marine/soldier at the funeral.

2 JUSTICE GINSBURG: Where did -- you said the
3 Fourth Circuit found that those signs targeted the
4 family rather than the whole U.S. society?

5 MR. SUMMERS: The "God Hates You" and the
6 "You're Going to Hell" sign were the ones that the
7 Fourth Circuit said they can avoid that issue, because
8 they can simply say this was hyperbolic and protected
9 pursuant to its interpretation of Milkovich under
10 defamation law and then its extension of
11 Hustler v. Falwell.

12 JUSTICE ALITO: Do you think that the epic
13 is relevant as an explanation of some of these arguably
14 ambiguous signs that were displayed at the funeral? For
15 example, "You're Going to Hell"; "God Hates You" -- who
16 is "you"? If you read the epic, perhaps that sheds
17 light on who "you" is.

18 MR. SUMMERS: It can shed light, but if you
19 put this in the context of a funeral-goer,
20 Justice Alito, what you have is -- it was a typical
21 funeral. Family members driving in and --

22 JUSTICE ALITO: Well, yes, but the signs say
23 "you," and the argument is made "you" doesn't mean
24 Matthew Snyder; it means a larger group. And then you
25 have the epic, which is directed directly at Matthew

1 Snyder. Doesn't that show -- shed light on what "you"
2 meant on those signs?

3 MR. SUMMERS: Correct, and that's where I
4 was going to go with that, Justice Alito. The epic
5 specifically referenced Matthew Snyder by name,
6 specifically referenced Matthew's parents by name. So
7 in our judgment, and the defendants testified that the
8 epic sort of explained, at least in their explanation,
9 explained the funeral protest itself.

10 JUSTICE BREYER: I'm not certain that this
11 is about the funeral. I mean, I understand there was a
12 funeral in it, but the First Amendment question seems to
13 me a different -- possibly a broader and different
14 question. Did your client see the signs? I gather from
15 the record he didn't see what the signs were; he just
16 saw tops of signs. So he didn't read anything on the
17 signs; is that right?

18 MR. SUMMERS: He didn't read the content.

19 JUSTICE BREYER: So he hadn't seen them. So
20 how does -- how did your client find out that the signs,
21 the tops of which he saw at the funeral when the
22 demonstrators were standing with the approval of the
23 police, 300 feet away -- how did he find out what they
24 said?

25 MR. SUMMERS: Your Honor, 2 days in advance,

1 they sent out a flier announcing they were going to
2 protest the funeral. They had Matthew Snyder's picture
3 there. They claimed they were going to protest at
4 St. John's Catholic dog kennel.

5 JUSTICE BREYER: Did they say in -- my
6 question is, how did your client find out these very
7 objectionable things on the signs? How did he find out
8 what they said?

9 MR. SUMMERS: He found out about the
10 specifics of the signs --

11 JUSTICE BREYER: Yes, that's what I'm
12 interested in.

13 MR. SUMMERS: -- by going to the family wake
14 immediately following and seeing it on the television.

15 JUSTICE BREYER: Okay. So now we have two
16 questions. One is, under what circumstances can a group
17 of people broadcast on television something about a
18 private individual that's very obnoxious? And because
19 of the funeral, you said that -- I accept that from your
20 point of view; that is very obnoxious. And the second
21 is, to what extent can they put that on the Internet,
22 where the victim is likely to see it? Either on
23 television or by looking it up on the Internet.

24 Now, those are the two questions that I'm
25 very bothered about. I don't know what the rules ought

1 to be there. That is, do you think that a person can
2 put anything on the Internet? Do you think they can put
3 anything on television even if it attacks, say, the most
4 private things of a private individual? Does
5 Maryland's -- does Maryland's law actually prohibit
6 that? We know it does. And what should the rules be
7 there?

8 Have I said enough to get you talking?
9 (Laughter.)

10 MR. SUMMERS: Yes, Your Honor.

11 Right now the rule we're stuck with is
12 Hustler v. Falwell for intentional infliction of
13 emotional distress, and the --

14 JUSTICE GINSBURG: Your -- your claim is
15 that Hustler was a -- Falwell was a public figure, and
16 the Snyder family is not. So I think what I got from
17 your brief is you don't fall under that case because
18 you're not dealing with a public figure.

19 MR. SUMMERS: That's correct, Justice
20 Ginsburg.

21 CHIEF JUSTICE ROBERTS: Okay. Were you
22 finished --

23 JUSTICE BREYER: Well, you can go ahead and
24 finish --

25 CHIEF JUSTICE ROBERTS: Were you finished

1 answering Justice Breyer's question?

2 JUSTICE BREYER: The more you say about
3 this, the happier I'll be, because --

4 (Laughter.)

5 JUSTICE BREYER: I'm quite interested.

6 MR. SUMMERS: The private, targeted nature
7 of the speech, in our judgment, is what makes it
8 unprotected. So, for example, the epithets directed at
9 the family would be unprotected. If, for example, a
10 person repeatedly put on the Web site that Mr. Smith has
11 AIDS, whether it's true or not, essentially at some
12 point in time, it might rise to the level of an
13 intentional infliction of emotional distress. There
14 would have to be other facts combined there.

15 CHIEF JUSTICE ROBERTS: You -- so you have
16 no objection if the sign said "Get out of Iraq" or
17 antiwar protests; in other words, not directed at this
18 particular individual?

19 MR. SUMMERS: Correct. I don't think
20 there'd be --

21 CHIEF JUSTICE ROBERTS: So no objection
22 there?

23 MR. SUMMERS: I don't think there'd be any
24 constitutional impediment to bringing -- or the
25 Constitution would not -- would bar that claim from

1 going forward.

2 JUSTICE SOTOMAYOR: Excuse me --

3 JUSTICE SCALIA: So the intrusion upon the
4 privacy of the funeral is out of the case then, right,
5 because that sign would intrude upon the privacy of the
6 funeral just as much? That's not really what you're
7 complaining about. You're complaining about the
8 personal attacks, aren't you?

9 MR. SUMMERS: Yes, Justice Scalia, and I
10 think under a certain scenario, you could have --
11 regardless of the signs, you could have a scenario where
12 the funeral was disrupted, and it was disrupted in this
13 case.

14 JUSTICE GINSBURG: It was or it wasn't?

15 MR. SUMMERS: It was, Justice Ginsburg.

16 JUSTICE GINSBURG: I thought that -- that
17 when the service itself began, the protesters stopped.

18 MR. SUMMERS: The police testified that, I
19 think it was, about 8 minutes after the funeral started,
20 that the protesters left the area.

21 JUSTICE SOTOMAYOR: Were they heard and
22 deterred --

23 JUSTICE SCALIA: I thought that they had to
24 turn in a different entrance? Is that -- is that the
25 extent of the disruption?

1 MR. SUMMERS: Well, according to, I believe,
2 all the witnesses, yes, they had to come in --

3 JUSTICE SCALIA: In order to avoid the
4 protest?

5 MR. SUMMERS: That, and they certainly took
6 away -- according to the priest that was coordinating
7 the mass, they certainly took away the peaceful
8 experience that all private figures --

9 JUSTICE SCALIA: But you wouldn't have
10 objected to that if there weren't these nasty signs, you
11 just said, right?

12 MR. SUMMERS: No. I said -- I hope I said,
13 Justice Scalia, that under the right context, just the
14 signs alone -- if that's all we're saying, there's a
15 sign out there that says "God Hates America," I don't
16 think that we could have a claim there. But if they, in
17 fact, disrupted the funeral, I do think in some set of
18 facts there could be a claim.

19 JUSTICE SCALIA: All right.

20 JUSTICE SOTOMAYOR: Counsel, I'm trying to
21 tease out the importance of the -- whether the person's
22 a private nature or public figure -- a private person or
23 a public figure. Does it make a difference if I am
24 directing public comments to a public or private figure?

25 MR. SUMMERS: Well, in the context of

1 defamation, we had the Rosenbloom followed by the Gertz
2 decision.

3 JUSTICE SOTOMAYOR: No, I'm talking about in
4 terms of infliction of emotional distress. If I am
5 talking to you as a Marine, if you were a Marine, and I
6 was talking about the Iran war and saying that you are
7 perpetuating the horrors that America is doing and said
8 other things that were offensive, would you have a cause
9 of action because you are being called a perpetrator of
10 the American experience?

11 MR. SUMMERS: I'd think there'd be -- have
12 to be a lot more facts involved, harassing type of
13 facts. The --

14 JUSTICE SOTOMAYOR: But you're saying yes.
15 So public speech, speech on a public matter, if directed
16 to a private person, should be treated differently under
17 the law? I think that was part of what Justice Breyer
18 was asking. Is that what your position is?

19 MR. SUMMERS: Public speech, even directed
20 to a private figure, should be treated differently than
21 as directed towards a public official.

22 JUSTICE SOTOMAYOR: All right. And under
23 what theory of the First Amendment would we do that?
24 What case would stand for -- our case -- stand for the
25 proposition that public speech or speech on a public

1 matter should be treated differently depending on the
2 recipient of the speech?

3 MR. SUMMERS: Gertz v. Welch treated the
4 public versus private figure status different, albeit --

5 JUSTICE GINSBURG: That was defamation,
6 wasn't it?

7 JUSTICE SOTOMAYOR: That's defamation.
8 That's false -- truth or falsity. But --

9 MR. SUMMERS: Correct. Correct, but the
10 problem is the only other case we have that deals with
11 intentional infliction of emotional distress from this
12 Court is Hustler v. Falwell, and Hustler v. Falwell
13 clearly dealt with a public figure. The States have
14 interpreted Hustler v. Falwell as not applying to a
15 private figure.

16 JUSTICE SOTOMAYOR: But have they done it in
17 the context of differentiating between public and
18 private speech?

19 MR. SUMMERS: Yes, there is an Illinois case
20 that we've cited in the brief where it was specifically
21 said it was a matter of public concern, and they said
22 the plaintiff was not a public figure; therefore, the --
23 just you have to meet the elements of intentional
24 infliction of emotional distress.

25 JUSTICE SOTOMAYOR: I was not talking about

1 State cases. I was talking about a Supreme Court case
2 that suggested that we would treat -- we would treat the
3 First Amendment and the right to -- to speak on public
4 matters differently, depending on the person to whom it
5 was directed.

6 MR. SUMMERS: I think Gertz v. Welch says
7 that. Dun & Bradstreet says you have to at least look
8 at the context of the situation.

9 JUSTICE SOTOMAYOR: So it always goes to the
10 context. Now, going to the context of this speech, do
11 we look at the words on a sign alone, or do we look at
12 the entire context of what all of the other signs said
13 at the demonstration, to determine whether or not the
14 speech here was public or private speech?

15 MR. SUMMERS: I think you have to look at
16 the particular signs, because if you don't, anyone could
17 come up with a public concern, because they could direct
18 any type of epithets at a person. In the middle of
19 their paragraph they could say I'm for taxes or I'm
20 against taxes. And, therefore, the entire statement
21 would be --

22 JUSTICE SOTOMAYOR: Well, in that case --

23 JUSTICE SCALIA: Mr. Summers, I'm a little
24 concerned at your apparent acceptance of -- of the
25 proposition that if one comes up to a Marine and says,

1 you're contributing to a -- a terribly unfair war, that
2 that alone would -- would form the basis for the -- the
3 tort of intentional infliction of an emotional distress.

4 What -- what are the requirements for that?
5 I thought that it had to be outrageous conduct. Doesn't
6 it have to be outrageous conduct?

7 MR. SUMMERS: It does, Justice Scalia, and I
8 wasn't suggesting that --

9 JUSTICE SCALIA: Well, I mean -- I mean, why
10 accept that as -- as parallel to what -- to what you're
11 claiming here?

12 MR. SUMMERS: And I hope I didn't. What I
13 meant to say, if I didn't, was there would have to be a
14 lot more facts involved to rise to the level of an
15 intentional infliction of emotional distress case if you
16 just told the Marine, for example, you're not in favor
17 of the war.

18 JUSTICE BREYER: What about the -- taking --
19 if you have an instance where the defendant has said on
20 television or on the Internet something absolutely
21 outrageous. You show that. You show that it was
22 intended to and did inflict serious emotional suffering.
23 You show that any reasonable person would have known
24 that likelihood. And then the defendant says: Yes, I
25 did that, but in a cause, in a cause. And now -- in a

1 cause that we are trying to demonstrate how awful the
2 war is.

3 At that point, I think the First Amendment
4 might not leave this alone. But if it's not going to
5 leave this alone, there's where we need a rule or we
6 need an approach or we need something to tell us how the
7 First Amendment in that instance will begin to -- enter
8 and force a balancing.

9 Is it that you want to say no -- no punitive
10 damages in such a case? Or that you would have to
11 insist upon a particularly clear or a reasonable
12 connection between the private part of this and the
13 public effort?

14 Have you thought about that at all? Because
15 that's where I am thinking and having trouble.

16 MR. SUMMERS: The -- I think the standard
17 should be *Hustler v. Falwell* generally does not apply --

18 JUSTICE BREYER: *Hustler* -- *Hustler v.*
19 *Falwell* is defamation.

20 MR. SUMMERS: I thought *Hustler v. Falwell*
21 was intentional infliction of emotional --

22 JUSTICE BREYER: Intentional infliction,
23 okay, good. Thank you. Go ahead.

24 JUSTICE KAGAN: Mr. Summers --

25 JUSTICE BREYER: Well, answer then, please.

1 MR. SUMMERS: I think the rule should be
2 Hustler v. Falwell generally does not apply to a private
3 figure unless the defendants can show some compelling
4 connection there, and if you --

5 JUSTICE BREYER: Compelling.

6 MR. SUMMERS: If you -- or at least
7 reasonable, rational connection. In this case, they
8 don't even claim there's a connection. They just used
9 this moment to hijack someone else's private event when
10 they are grieving over a 20-year-old child's funeral.

11 JUSTICE KAGAN: Mr. Summers, Hustler seems
12 to me to have one sentence that's key to the whole
13 decision, and it goes like this. It says:
14 "'Outrageousness' in the area of political and social
15 discourse has an inherent subjectiveness about it which
16 would allow a jury to impose liability on the basis of
17 the jurors' tastes or views, or perhaps on the basis of
18 their dislike of a particular expression."

19 How does that sentence -- how is that
20 sentence less implicated, in a case about a private
21 figure than in a case about a public figure?

22 MR. SUMMERS: Well, at least in Hustler --
23 Justice Kagan, at least in Hustler v. Falwell we had a
24 traditional area of public discourse. We had a parody.
25 I believe the opinion went to great length to explain

1 that.

2 Here what we're talking about is a private
3 funeral. I don't -- I would hope that the First
4 Amendment wasn't enacted to allow people to disrupt and
5 harass people at someone else's private funeral.

6 JUSTICE GINSBURG: So --

7 JUSTICE KAGAN: But that goes back to the
8 question that was asked previously about -- suppose you
9 had a general statute that just said there will be no
10 disruptions of any kind at private funerals. You know,
11 pick your distance, 500 feet, 1,000 feet, but something
12 that didn't refer to content, that didn't refer to
13 ideas, that just made it absolutely clear that people
14 could not disrupt private funerals. What harm would
15 that statute not address in your case?

16 MR. SUMMERS: Well, the States have -- in
17 the statutory case, they have the interest of penalizing
18 the offending party. In tort law, the State's interest
19 is to provide a remedy for its citizens. Under the
20 Fourth Circuit's interpretation of these facts, Mr.
21 Snyder has absolutely no remedy, none. He's a private
22 figure, a grieving father, and he is left without any
23 remedy whatsoever.

24 JUSTICE GINSBURG: We have other instances
25 where conduct is lawful, meets all the terms of the

1 statute that's meant to govern protests at funerals, and
2 yet there's an award of damages permitted.

3 MR. SUMMERS: I believe that the
4 Hustler v. Falwell was a -- had several tort claims, but
5 there was no criminal statute violated. I understand
6 that it went the other way because of the public figure
7 status, but that would be an example.

8 Another example --

9 JUSTICE GINSBURG: Well, that was a -- I'm
10 asking you for an example where -- a Federal case where
11 the conduct was permitted by the statute, by the
12 policemen there, and yet there was -- was a damage
13 award.

14 MR. SUMMERS: Justice Ginsburg, I'm not
15 aware of any case, but I think the -- if, for example,
16 someone sued someone for defamation, there probably
17 wouldn't be a statute that was violated so I don't -- I
18 would presume --

19 JUSTICE GINSBURG: I'm talking about this
20 intentional infliction of emotional distress claim that
21 you're bringing.

22 MR. SUMMERS: Other than Hustler v. Falwell,
23 I do not have any Federal cases to cite to you. The
24 State cases we cited in our brief --

25 JUSTICE ALITO: Is this a situation in which

1 all conduct that complies with the Maryland funeral
2 protest statute is lawful? If the Maryland legislature
3 said this is the -- these are the exclusive regulations
4 that apply here, so that if someone came up to Mr.
5 Phelps at the funeral and spat in his face, that would
6 not be -- that wouldn't be illegal?

7 MR. SUMMERS: Justice Alito, I don't know
8 whether that would be criminally --

9 JUSTICE ALITO: Because it's not
10 specifically prohibited by the statute?

11 JUSTICE GINSBURG: Well, it certainly
12 wouldn't be because of the distance. I mean, you'd have
13 to be a lot closer than the Maryland statute allows to
14 spit in someone's face.

15 CHIEF JUSTICE ROBERTS: Perhaps you would
16 like to answer Justice Alito's question.

17 MR. SUMMERS: I believe that you could
18 commit a tort and still be in compliance with the
19 criminal code, Justice Alito.

20 JUSTICE SCALIA: Mr. Summers, can I -- can I
21 ask this? Suppose -- suppose I don't think you have a
22 cause of action for invasion of privacy when these
23 people were at this distance from the funeral. But that
24 was one of the causes of action submitted to the jury.

25 If I disagree with you on that cause of

1 action, I suppose I'd have to say there has to be a
2 retrial now.

3 MR. SUMMERS: Of course, this Court could do
4 that, Justice Scalia, but --

5 JUSTICE SCALIA: So you have to support both
6 causes of action here, the intentional infliction of
7 emotional distress and the invasion of privacy, right?

8 MR. SUMMERS: Yes, Justice Scalia. But
9 according to the Fourth Circuit, we agree that the
10 Respondents waived that issue by not appealing that
11 issue.

12 JUSTICE SCALIA: Waived -- waived what
13 issue?

14 MR. SUMMERS: The invasion -- or elements of
15 the invasion of privacy. They didn't contest that we
16 met the elements of the tort. They -- they contested
17 the constitutional issue, but not whether or not we met
18 the elements of the tort.

19 JUSTICE SCALIA: Oh, all right. Okay.

20 MR. SUMMERS: Could I reserve the remainder?

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Ms. Phelps.

23 ORAL ARGUMENT OF MARGIE J. PHELPS

24 ON BEHALF OF THE RESPONDENTS

25 MS. PHELPS: Mr. Chief Justice, and may it

1 please the Court:

2 When members of the Westboro Baptist Church
3 entered an ongoing, extensive, public discussion and
4 wide array of expressive activities taking place in
5 direct connection with the deaths and funerals of
6 soldiers killed in Iraq and Afghanistan, they did so
7 with great circumspection, and they did so with an
8 awareness of the boundaries that have been set by the
9 precedents of this Court.

10 JUSTICE KAGAN: Ms. Phelps, suppose --
11 suppose your group or another group or -- picks a
12 wounded soldier and follows him around, demonstrates at
13 his home, demonstrates at his workplace, demonstrates at
14 his church, basically saying a lot of the things that
15 were on these signs or -- or other offensive and
16 outrageous things, and just follows this person around,
17 day-to-day.

18 Does that person not have a claim for
19 intentional infliction of emotional distress?

20 MS. PHELPS: Any non-speech activity, like
21 stalking, following, importuning, being confrontational,
22 could indeed give rise to a cause of action.

23 JUSTICE KAGAN: Demonstrations outside the
24 person's home, outside the person's workplace, outside
25 the person's church -- demonstrations, not disruptions,

1 but saying these kinds of things: You are a war
2 criminal -- what -- what would -- whatever these signs
3 say or worse.

4 MS. PHELPS: My answer, Justice Kagan, is
5 no, I don't believe that that person should have a cause
6 of action or would under your cases have a cause of
7 action. You couldn't give that cause of action without
8 direct reference to the viewpoint, which is exactly what
9 happened in this case. And --

10 JUSTICE SCALIA: My goodness. We -- we did
11 have a doctrine of fighting words, and you acknowledge
12 that if somebody said, you know, things such as that to
13 his face, that wouldn't be protected by the First
14 Amendment.

15 MS. PHELPS: We agree that fighting words
16 are less protected under the First Amendment.

17 JUSTICE SCALIA: Unprotected.

18 MS. PHELPS: I will go with unprotected,
19 Justice Scalia. And if I may add this: Fighting words
20 require imminence, they require proximity, and they
21 require a lack of those words being part of a broader
22 political or social speech.

23 JUSTICE SCALIA: Is -- is that so? Do we
24 know that?

25 MS. PHELPS: I beg your pardon?

1 JUSTICE SCALIA: Do we know that? Is it the
2 criterion of the fighting words exception to the First
3 Amendment that there be an actual fight? Certainly not
4 that. Is -- is it a requirement that there be a
5 potential for a fight? I doubt it.

6 MS. PHELPS: I think --

7 JUSTICE SCALIA: Where -- where do you get
8 the notion that it has -- that there has to be an
9 imminent fight?

10 MS. PHELPS: I get the notion from the
11 series of cases starting within 7 years after your
12 Chaplinsky case with the Gooding case and on down
13 through the Brandenburg case and on down --

14 JUSTICE SCALIA: Which say what?

15 MS. PHELPS: That say that --

16 JUSTICE SCALIA: The person was too remote?
17 The fight was not -- was not imminent?

18 MS. PHELPS: The -- the definition, the
19 working definition of "fighting words," is that they
20 have to be words which by their nature are likely to
21 incite an immediate breach of the peace and not occur in
22 the context of some social, artistic, educational, or
23 political kind of speech.

24 And if I may hasten to add, Justice Scalia,
25 these Respondents were not charged with fighting words.

1 The jury was not instructed to limit themselves to
2 fighting words. No element of the torts under which
3 liability attached included fighting words.

4 The words that were at issue in this case
5 were people from a church delivering a religious
6 viewpoint, commenting not only on the broader public
7 issues that the discussion was under way in this nation
8 about dying soldiers, about the morals of the nation --

9 JUSTICE ALITO: But is it --

10 JUSTICE GINSBURG: Ms. Phelps, there's no
11 question that these signs and the signs like that we saw
12 during the Vietnam War. But you had the demonstration
13 at the capitol, and you had the demonstration at
14 Annapolis. This is a case about exploiting a private
15 family's grief, and the question is: Why should the
16 First Amendment tolerate exploiting this bereaved family
17 when you have so many other forums for getting --
18 getting across your message, the very same day you did?

19 MS. PHELPS: Right. So several pieces to
20 that, Justice Ginsburg. When I hear the language
21 "exploiting the bereavement," I look for what is the
22 principle of law that comes from this Court? And the
23 principle of law, as I understand it, is without regard
24 to viewpoint, there are some limits on what public
25 places you can go to, to deliver words as part of a

1 public debate.

2 If you stay within those bounds -- and under
3 these torts even, this notion of exploiting, it has no
4 definition in a principle of law that would guide people
5 as to when they could or could not. And if I may --

6 JUSTICE ALITO: Is it your -- is it your
7 argument that the First Amendment never allows a claim
8 for the intentional infliction of emotional distress
9 based on speech unless the speech is such that it can be
10 proven to be false or true?

11 MS. PHELPS: In --

12 JUSTICE ALITO: Is that your -- is that
13 argument?

14 MS. PHELPS: With a -- yes, Justice Alito,
15 and with a little bit more from your cases, if I may:
16 And not under an inherently subjective standard, and
17 where you're only claiming that the impact of the speech
18 was adverse emotional impact.

19 JUSTICE ALITO: All right. Well, Justice
20 Kagan gave you one example. Let me give you another
21 example along the same lines.

22 Let's say there is a grandmother who has
23 raised a son who was killed in Afghanistan or in Iraq by
24 an IED. And she goes to visit her son's -- her
25 grandson's grave, and she's waiting to take a bus back

1 to her home. And while she's at the bus stop, someone
2 approaches and speaks to her in the most vile terms
3 about her son: He was killed by an IED; do you know
4 what IEDs do? Let me describe it for you, and I am so
5 happy that this happened; I only wish I were there; I
6 only wish that I could have taken pictures of it. And
7 on and on.

8 Now, is that protected by the First
9 Amendment? There's no false statement involved, and
10 it's purely speech.

11 MS. PHELPS: Right. And -- and it may give
12 rise to some fighting words claim, depending on the
13 proximity and the context. And I would have to know
14 what --

15 JUSTICE ALITO: Well, it's an older -- it's
16 an elderly person. She's really probably not in -- in a
17 position to punch this person in the nose.

18 JUSTICE SCALIA: And she's a Quaker, too.
19 (Laughter.)

20 MS. PHELPS: Justice Scalia, let us assume
21 that the grandmother had not done what Mr. Snyder did in
22 this case. Mr. Snyder, from the moment he learned of
23 his son's death, went to the public airways multiple
24 times in the days immediately before and immediately
25 after --

1 JUSTICE SCALIA: Do you think that
2 everybody --

3 CHIEF JUSTICE ROBERTS: What is your answer
4 -- what is your answer to Justice Alito's question? Do
5 you think the First Amendment would bar that cause of
6 action or not?

7 MS. PHELPS: There would have to be a very
8 narrow circumstance where it didn't, Mr. Chief Justice.
9 That's my answer.

10 CHIEF JUSTICE ROBERTS: So you think there
11 are situations where a tort of intentional infliction of
12 emotional distress is allowed, even for a matter of
13 public debate?

14 MS. PHELPS: Not public debate,
15 Mr. Chief Justice. That is not the way I understood the
16 hypothetical he posed me.

17 CHIEF JUSTICE ROBERTS: Well, I understood
18 the hypothetical, that the person disagreed with the war
19 in Iraq and the sending of American troops there.

20 MS. PHELPS: Right. And knew that this
21 elderly woman was the grandmother of a soldier. And I
22 would ask the question in the hypothetical, how they
23 knew, which is why I was making reference to what Mr.
24 Snyder did.

25 JUSTICE ALITO: Well, if that --

1 CHIEF JUSTICE ROBERTS: The person selects
2 the grandmother because he thinks that will give maximum
3 publicity to his views. Now, is -- does the First
4 Amendment bar that cause of action or not?

5 MS. PHELPS: If the grandmother entered the
6 public discussion, the First Amendment bars it.

7 CHIEF JUSTICE ROBERTS: Well, no --
8 Justice -- Justice Alito posed, the grandmother was
9 returning from the grave of her grandson. She didn't
10 enter the public discussion at all. So I'm anxious to
11 determine whether in those circumstances you think the
12 First Amendment allows that cause of action or not.

13 MS. PHELPS: I'm reluctant to say that it
14 does not, Mr. Chief Justice. However --

15 JUSTICE GINSBURG: But you gave the answer
16 before about -- you said stalking.

17 MS. PHELPS: Right.

18 JUSTICE GINSBURG: Isn't this comparable to
19 stalking?

20 MS. PHELPS: And that's what I was trying to
21 liken it to, and that's what it sounds more like to me.

22 CHIEF JUSTICE ROBERTS: Do you think it
23 satisfies the normal tort or law against stalking for
24 someone to come up to an individual and engage in
25 discussion? I thought a lot more was required.

1 MS. PHELPS: Well, Mr. Chief Justice, I
2 would not file that claim for that person, for that
3 elderly grandmother. I am not prepared, without knowing
4 more, to say absolutely there could be no cause of
5 action. What I am prepared to say is there was
6 absolutely much more than that in this case.

7 JUSTICE ALITO: Well, if that -- if that's a
8 possibility there's a claim there, then what
9 distinguishes that from this case?

10 Now, I thought you were beginning to say
11 that my hypothetical is different because Mr. Snyder
12 made his son into a public figure, and the question I
13 wanted to ask in that connection is whether every
14 bereaved family member who provides information to a
15 local newspaper for an obituary thereby makes the
16 deceased person a public figure?

17 MS. PHELPS: Not the deceased person,
18 Justice Alito. We don't allege that the young man dead
19 was a public figure. We do --

20 JUSTICE ALITO: But if the grandmother
21 called up the local paper and said: Let me tell you
22 something about my grandson --

23 MS. PHELPS: Yes.

24 JUSTICE ALITO: -- who was just killed in
25 Iraq. You know, he liked football and camping.

1 MS. PHELPS: Right.

2 JUSTICE ALITO: That makes him -- that makes
3 her a public figure?

4 MS. PHELPS: It's getting closer. And
5 Justice Alito, if she went on then to say: And how many
6 more parents like me and my ex-wife are going to have to
7 suffer this way and when will this senseless war end,
8 and I've gotten Congressman Murtha on the phone and
9 talked about this situation, and I'm against the war?
10 And then proceeded to repeat that question in the public
11 airwaves repeatedly, then a little church where the
12 servants of God are found say, we have an answer to your
13 question that you put in the public airwaves, and our
14 answer is you have got to stop sinning if you want this
15 trauma to stop happening --

16 CHIEF JUSTICE ROBERTS: But Your response --
17 your response to Justice Alito is dwelling on the facts
18 of this particular case.

19 MS. PHELPS: Yes, sir.

20 CHIEF JUSTICE ROBERTS: I'm interested in
21 knowing what your position is on the broader question.
22 Can you imagine a circumstance where this same type of
23 discussion is directed at an individual and yet would
24 give rise to the tort of emotional distress?

25 MS. PHELPS: Yes, I can imagine,

1 Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: I'm sorry -- can or
3 cannot?

4 MS. PHELPS: I can.

5 CHIEF JUSTICE ROBERTS: You can.

6 MS. PHELPS: I can imagine that there could
7 be a circumstance, a hypothetical, where there was not
8 this level of involvement, and it was out of the blue
9 and it was "up close," if I may use the term,
10 confrontational.

11 CHIEF JUSTICE ROBERTS: Okay. So if you
12 recognize that there can be a tort of emotional distress
13 in circumstances like that, isn't that the factual
14 question of whether it rises to that level of
15 outrageousness, which is part of the tort for the jury?

16 MS. PHELPS: I don't agree with that,
17 Mr. Chief Justice, because you've now taken an
18 inherently subjective standard with the absence of any
19 of these non-speech misbehaviors. And now you are back
20 to only -- the only barrier between a person and their
21 First Amendment right to robust public debate, including
22 this Court has said, outrageous statements --

23 CHIEF JUSTICE ROBERTS: Does it make --

24 MS. PHELPS: -- is that an --

25 CHIEF JUSTICE ROBERTS: I'm sorry.

1 MS. PHELPS: -- with just that subjectively
2 inherent standard and that subjective statement of
3 emotional impact. This Court has said repeatedly --

4 CHIEF JUSTICE ROBERTS: Does it make a
5 difference --

6 MS. PHELPS: -- we won't let that go.

7 CHIEF JUSTICE ROBERTS: Does it make a
8 difference, which seems to me to be the case here, that
9 Mr. Snyder was selected not because of who he was, but
10 because it was a way to get maximum publicity for your
11 client's particular message?

12 MS. PHELPS: That is not accurate,
13 Mr. Chief Justice, with due respect.

14 CHIEF JUSTICE ROBERTS: Well, assuming it is
15 accurate, does that make a difference?

16 MS. PHELPS: The -- the motive of the
17 speaker to get maximum exposure, which every public
18 speaker pines for, looks for, strives for, and is
19 entitled to -- does not change the legal principle
20 that's at play.

21 CHIEF JUSTICE ROBERTS: Well, it might
22 affect whether or not the selection inflicts emotional
23 distress for a reason unconnected with the individual
24 who is the subject of emotional distress.

25 MS. PHELPS: Well, if --

1 CHIEF JUSTICE ROBERTS: In other words, if
2 the person is selected because, as I indicated, it gives
3 maximum publicity, rather than because of a particular
4 connection to the matter of public debate, I wonder if
5 that makes a difference.

6 MS. PHELPS: I think it makes a difference
7 when you are looking at what role the plaintiff had in
8 that public discussion and how tied the words that they
9 seek to punish are to his role in that public
10 discussion. I think that's how you get to the point --

11 JUSTICE KAGAN: Well, Ms. Phelps, let's say
12 that we disagree with you as to whether Mr. Snyder had
13 at all injected himself into this controversy. Or let's
14 take a case where it's clear that the father of the
15 fallen soldier had not injected himself, had not called
16 any newspapers, had not said anything to anybody, but a
17 group knew that this funeral was taking place and was
18 there with the same signs, with the same -- are you --
19 are you saying that that makes the difference? That
20 there, there would be a claim?

21 MS. PHELPS: I'm -- I'm saying it does make
22 a difference, and no -- but no, there would not be a
23 claim there in my opinion because --

24 JUSTICE KAGAN: So it's not a difference
25 that matters.

1 MS. PHELPS: It is a difference that matters
2 in some measure, I believe, Justice Kagan, in this wise:
3 I believe that the umbrella of protection under the
4 First Amendment that this Court has established firmly
5 is speech on public issues. Sometimes you get under
6 that umbrella because it's a public official or it's a
7 public figure, but the umbrella that you give the
8 protection for is speech on public issues.

9 Now, when a plaintiff comes to your Court
10 and says, I want \$11 million from a little church
11 because they came forth with some preaching I didn't
12 like, I think it does make a difference for the Court to
13 look closely at what role did that man have in that
14 public discussion.

15 JUSTICE ALITO: But your argument depends on
16 the proposition that this is speech on a matter of
17 public concern; is that correct?

18 MS. PHELPS: Absolutely, Justice Alito.

19 JUSTICE ALITO: So let me -- let me give you
20 this example. Suppose someone believes that
21 African-Americans are inferior, they are inherently
22 inferior, and they are really a bad influence on this
23 country. And so a person comes up to an
24 African-American and starts berating that person with
25 racial hatred.

1 Now, is that -- this is just any old person
2 on -- any old African-American on the street. That's a
3 matter of public concern?

4 MS. PHELPS: I think the issue of race is a
5 matter of public concern. I think approaching an
6 individual up close and in their grill to berate them
7 gets you out of the zone of protection, and we would
8 never do that.

9 JUSTICE KENNEDY: But that simply --

10 JUSTICE SCALIA: Excuse me --

11 JUSTICE KENNEDY: That simply points out
12 that all of us in a pluralistic society have components
13 to our identity; we're Republicans or Democrats, we're
14 Christians or atheists, we're single or married, we're
15 old or young. Any one of those things you could turn
16 into a public issue and follow a particular person
17 around, making that person the target of your comments,
18 and, in your view, because this gives you maximum
19 publicity, the more innocent, the more removed the
20 person is, the greater the impact -- the Justice Alito
21 hypothetical in -- in the grandmother case.

22 So I -- I think -- I think your -- your
23 public concern issue may -- may not be a limiting factor
24 in cases where there is an outrageous conduct and where
25 there should be a tort.

1 MS. PHELPS: Well, but, again, this Court
2 has given substantial, longstanding protection to speech
3 on public issues. And how could it be gainsaid that the
4 dying soldiers is not on the lips of everyone in this
5 country? And it is a matter of great public interest
6 and why they are dying, and how God is dealing with this
7 nation. Were you to consult the Joint Appendix and see
8 that at the very same funeral, right outside the front
9 door of the church, were people with flags and signs
10 articulating the "God bless America" viewpoint, and so
11 this little church --

12 JUSTICE KENNEDY: But your position is that
13 you can take this and you can follow any citizen around
14 at any point? That -- that was the thrust of the
15 questions from Justice Kagan.

16 MS. PHELPS: Not follow --

17 JUSTICE KENNEDY: And -- and Justice Alito,
18 and it seems to me that there -- you should help us in
19 finding some line there.

20 MS. PHELPS: Yes, I will help you,
21 Justice Kennedy, and I am pleased to do that because we
22 don't do follow-around in this church. We were a
23 thousand feet away, seven picketers a thousand feet
24 away, out of sight, out of sound, not just standing
25 where the police said to stand --

1 JUSTICE KENNEDY: But in the -- but the
2 hypotheticals point out that there can be an intentional
3 infliction of emotional distress action for certain
4 harassing conduct.

5 MS. PHELPS: For harassing conduct, not for
6 speech. Not for public speech, Justice Kennedy.

7 JUSTICE KENNEDY: But torts and crimes are
8 committed with words all the time.

9 MS. PHELPS: I agree with that. And there
10 has never been any allegation in this case that the
11 words of the Westboro Baptist Church were in any
12 category of low-value or less protected speech.

13 JUSTICE SOTOMAYOR: Well, that's --

14 JUSTICE SCALIA: Let's talk
15 about subjectively. You're concerned about -- surely
16 fighting words is -- you know, whether something is a
17 fighting word, that's a very subjective call, isn't it?

18 MS. PHELPS: I believe that your cases give
19 some good light on that, Justice Scalia.

20 JUSTICE SCALIA: You don't think it's
21 subjective?

22 MS. PHELPS: There may be in some people's
23 mind an element of subjectivity. My 20 years of --

24 JUSTICE SCALIA: You think that's solid,
25 absolutely, what's a fighting word; whereas, what is an

1 outrageous statement is -- is very much different from
2 what's a fighting word? I don't see the difference.

3 Besides which, isn't it the case that in
4 order to recover for the tort of intentional infliction
5 of emotional injury, you have to substantiate the injury
6 with some physical manifestation, which the plaintiff
7 here had?

8 And, my goodness, for fighting words, you
9 don't even need that. You can just say, these words
10 angered me to the degree that I would have been inclined
11 to fight. At least for this tort, you have to have
12 physical manifestations.

13 Why isn't that a very objective standard?

14 MS. PHELPS: Well, because the Court said it
15 was inherently subjective in the Falwell case. And I
16 think that the language that Justice Kagan brought
17 forth, and there's a few more paragraphs that follow,
18 identify why it's inherently subjective.

19 And the way this case was tried identifies
20 why it's inherently subjective, where although two signs
21 and then three were identified as actionable by a
22 strange reading of those words, all of the preachments
23 of Westboro Baptist Church, including all of the signs
24 at that picket, all of the signs at other pickets, and
25 all their doctrines went to a jury with that inherent --

1 JUSTICE SCALIA: So your point depends --

2 MS. PHELPS: -- inherently subjective

3 standard.

4 JUSTICE SCALIA: -- depends upon the
5 proposition that what is outrageous is more subjective
6 than what is fighting words, right?

7 MS. PHELPS: Well, Justice Scalia, I must
8 hasten to say this: I am not a fan of the fighting
9 words doctrine. I do think it has problems. I just
10 don't think it applies in this case.

11 JUSTICE GINSBURG: The Court has made that a
12 very narrow category, hasn't it? I mean, we have not
13 allowed the fighting words -- you say that to me and I'm
14 immediately going to punch you in the nose, because I
15 have -- it's an instinctive reaction.

16 I think the Court has rejected spreading
17 fighting words beyond that.

18 MS. PHELPS: And especially not to where
19 there's just emotional injury. That's where I
20 particularly think, although Chaplinsky would have
21 suggested in some broad language you would go that way,
22 you have not gone that way in any of the cases. And
23 again I have to reiterate, you have required immediacy
24 and intent.

25 Whether a fight ensues or not, I do

1 understand that hasn't been pinned down as a
2 requirement. But in intent, it's your purpose, is to
3 mix it up with somebody, not to go out and say: Nation,
4 hear this little church. If you want them to stop
5 dying, stop sinning.

6 That's the only purpose of this little
7 church. A thousand feet away could not possibly be
8 fighting words.

9 JUSTICE BREYER: We are still worried about
10 the statements on television and on the Internet and the
11 knowledge there. And I'm not -- I'm starting -- I'm
12 trying to get the same answer from you I was trying from
13 your colleague.

14 Brandeis said that the right to be let alone
15 is the most important, and so he must have been thinking
16 there could be a tort there for interference with
17 privacy, and the First Amendment doesn't stop State tort
18 laws in appropriate circumstances.

19 MS. PHELPS: Right.

20 JUSTICE BREYER: And emotional injury,
21 deliberately inflicted, could be one. All right.
22 Now -- and I think it is one. But I see that in some
23 instances that could be abused to prevent somebody from
24 getting out a public message, and, therefore, I'm
25 looking for a line.

1 Now, let me suggest a couple. See what you
2 think. Maybe you can think of some others.

3 You could have a judge make the decision,
4 since the First Amendment is involved, not the jury, and
5 the judge could say whether in this instance it was
6 reasonable for the defendant to think that it was
7 important to interfere with the emotional life of that
8 individual.

9 You could say if that was so, there will
10 still be no -- there would be no punitive damages.
11 There could be ordinary damages.

12 You could remove all protection from the
13 defendant in an instance where the defendant nonetheless
14 knew, actually knew, that they were going to cause an
15 individual who's private severe injury, emotional
16 injury, irrespective of their public message.

17 So what I'm doing is suggesting a number of
18 thoughts of ways of trying to do what I'm trying to
19 accomplish, to allow this tort to exist --

20 MS. PHELPS: Right.

21 JUSTICE BREYER: -- but not allow the
22 existence of it to interfere with an important public
23 message where that is a reasonable thing to do.

24 Now, maybe this is impossible, this task.
25 But I'd like your thoughts on it.

1 MS. PHELPS: Thank you, Justice Breyer. And
2 I'm taking that we are speaking now of the intrusion
3 claim, and I believe that I could offer you a compare
4 and contrast two extremes that may help us here.

5 On the one hand, you have a body of law that
6 comes under the heading of captive audience. And you
7 can go into that body of law and read all those cases in
8 one sitting, so to speak, from which you would conclude
9 that it is very narrow, it is very limited, and there
10 must be some actual physical sound, sight, intrusion, if
11 you're talking about invasion of privacy.

12 At the other extreme, for a compare and
13 contrast, is what they seek in this case, what the trial
14 judge gave them in this case, which is: In an
15 unspecified period of time that each individual will
16 call their mourning period, no one, at any time, any
17 place, any manner, may say any word that that mourner
18 says caused me emotional distress.

19 JUSTICE ALITO: Why aren't the members of
20 the family --

21 MS. PHELPS: That would chill too much
22 speech.

23 JUSTICE ALITO: Why aren't the members of
24 the family of the deceased a captive audience at the
25 funeral?

1 MS. PHELPS: If -- if we were right outside
2 the door like the other expressers were in these
3 exhibits, they might have been. Your body of law about
4 captive audience, when you -- Hill v. Colorado, Madsen,
5 Schenck -- that line of cases recently, taking the
6 picketing, where they, by the way, specifically said at
7 footnote 25, this isn't about content. You've got to be
8 up -- again, I will uses the colloquial term -- up in
9 your grill. The term I think the Court used was
10 "confrontational."

11 Now, you can't be a captive audience with --
12 to someone that you couldn't see when the test is --

13 JUSTICE ALITO: Well, I thought the targeted
14 picketing of a person's house is not protected by the
15 First Amendment.

16 MS. PHELPS: Focused picketing, per Frisby,
17 directly in front of, can be regulated. And even in
18 Frisby, the Court --

19 JUSTICE ALITO: What's the difference
20 between that and picketing around the site of the
21 funeral?

22 MS. PHELPS: Proximity, Justice Alito.
23 Because the captive audience doctrine, as fleshed out in
24 those abortion picketing cases, what you were looking at
25 was is it practical for the person to avoid it without

1 having to run a gauntlet?

2 That's why you said images observable, the
3 only objection you can have there is content. Get up
4 and close the blinds.

5 JUSTICE ALITO: So it doesn't have to do
6 with whether this is a -- what you characterize as a
7 public funeral as opposed to a private funeral? That's
8 not the distinction you are relying on any longer?

9 MS. PHELPS: Not primarily. I'm primarily
10 relying upon proximity. I do think that you could have
11 a public event where there was not an element of
12 vulnerability in the people going in. You might even
13 let them up in their grill. I don't know for sure, but
14 we don't have to worry about that.

15 JUSTICE SOTOMAYOR: Counsel, I'm following
16 your argument that the bulk of your speech in the epic,
17 and even the bulk of your signs, involve public speech.

18 What you have not explained to me is how
19 your speech directed at the Snyders constituted public
20 speech, or speech about a public matter, because you're
21 talking about them raising Matthew for the devil,
22 teaching him to, I think, defy the creator, to divorce
23 and to commit adultery.

24 At what point and how do we take personal
25 attacks and permit those, as opposed to -- I fully

1 accept you're entitled in some circumstances to speak
2 about any political issue you want. But what's the line
3 between doing that and then personalizing it and
4 creating hardship to an individual?

5 MS. PHELPS: Right. I believe, Justice
6 Sotomayor, that the line is where it was in this case:
7 When the father used the occasion of the son's death to
8 put a question out in the public airwaves repeatedly.

9 JUSTICE SOTOMAYOR: So if we disagree that
10 that made him a public figure, if we view him as a
11 private figure, is that enough to defeat your argument?

12 MS. PHELPS: No, Justice Sotomayor.

13 JUSTICE SOTOMAYOR: All right. So assume
14 that he's a private -- that the Matthews are private
15 figures, and you did this.

16 MS. PHELPS: Right. I think --

17 JUSTICE SOTOMAYOR: So explain to me how you
18 are protected by the First Amendment.

19 MS. PHELPS: If, without regard to what
20 label is put on a person who steps into the public
21 discussion --

22 JUSTICE SOTOMAYOR: You want to change my
23 assumption.

24 MS. PHELPS: Okay.

25 JUSTICE SOTOMAYOR: We assume that he's a

1 private figure. You have now made a public statement
2 and directed personal comments at an individual who is a
3 private figure. Is that actionable?

4 MS. PHELPS: Well, I don't know, Justice
5 Sotomayor. I don't know that I can give you a
6 definitive answer as you've framed it. What I can tell
7 you is that I think the Court would have great
8 difficulty making a rule of law that whether you call
9 yourself private, public, limited, whatever, you -- not
10 the person you're mad at over their words -- but you
11 step into the public discussion and make some public
12 statements, and then somebody wants to answer you.

13 CHIEF JUSTICE ROBERTS: Well, so that --
14 what -- what if -- did Mr. Snyder, the father, become a
15 public figure simply because his son was killed in Iraq?

16 MS. PHELPS: No, Mr. Chief Justice. I
17 don't --

18 CHIEF JUSTICE ROBERTS: Okay. So if didn't
19 take out --

20 MS. PHELPS: I don't allege that here.

21 CHIEF JUSTICE ROBERTS: If he didn't take
22 out the usual obituary notice, then this case should
23 come out the other way?

24 MS. PHELPS: It's not the obituary notice,
25 Mr. Chief Justice, he went far beyond that.

1 CHIEF JUSTICE ROBERTS: All right. Well,
2 let's just say he does nothing. He does nothing other
3 than bury his son.

4 MS. PHELPS: Right.

5 CHIEF JUSTICE ROBERTS: He is then not a
6 public figure?

7 MS. PHELPS: If he does nothing, we don't
8 picket him. And I don't know for sure --

9 CHIEF JUSTICE ROBERTS: Well, that's because
10 if he does nothing and it's not publicized, you don't
11 get the maximum publicity that your clients are looking
12 for. My question is, if he simply buries his son, is he
13 a public figure open to this protest or -- or not?

14 MS. PHELPS: I don't know, in the context of
15 a war, if I can give a definitive answer to that. It
16 was not an issue of seeking maximum publicity; it was an
17 issue of using an existing public platform to bring a
18 viewpoint that was not being articulated. For 2 years
19 this church watched --

20 JUSTICE ALITO: And what if a parent is
21 called after the -- he puts in the obituary information
22 and called by the local newspaper and asked for a
23 comment, and he says or she says, I'm proud of my son
24 because he died in the service of our country? Does
25 that -- is he stepping into a public debate by doing

1 that?

2 MS. PHELPS: How -- by however you call it,
3 Justice Alito, a church or anybody has the right to
4 answer that public comment; that is our position.

5 CHIEF JUSTICE ROBERTS: Thank you, Ms.
6 Phelps.

7 MS. PHELPS: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Summers, you
9 have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF SEAN E. SUMMERS

11 ON BEHALF OF THE PETITIONER

12 MR. SUMMERS: Thank you, Mr. Chief Justice.

13 JUSTICE KAGAN: Mr. Summers, could I ask you
14 to go back to an answer that you gave to one of my
15 colleagues when you were last up there? You said that a
16 -- a more standard antiwar demonstration -- "get out of
17 Iraq," "war is immoral" at this funeral, same distance,
18 same-sized signs -- that a more standard antiwar
19 demonstration would be protected by the First Amendment
20 from an intentional infliction of emotional distress
21 suit.

22 And I'm wondering why that is. If you think
23 that what is -- what causes the lack of protection here
24 is the kind of glomming on to a private funeral, the
25 exploitation of a private person's grief, the -- the

1 appearance for no other reason than to gain publicity at
2 a private event -- if that's the problem, why doesn't it
3 also apply to a standard, you know, "get out of Iraq,"
4 "war is wrong" kind of demonstration?

5 MR. SUMMERS: Justice Kagan, I say that is
6 a -- one, it's a much closer call, and, two, I would
7 look to the facts of the case to see if the funeral
8 itself was disrupted.

9 But that isn't the facts of our case. The
10 facts of our case was, one, that it was disrupted, and,
11 two, that it's personal, targeted assaults on Mr.
12 Snyder.

13 JUSTICE KAGAN: Well, suppose it's not
14 disrupted and suppose -- and I know that this is -- that
15 you contest these facts -- that yours wasn't disrupted,
16 that they stopped when you started, that they were a
17 sufficient number of feet away from the funeral and so
18 forth.

19 So we're just talking the fact that there
20 are people who have -- who are appropriating and taking
21 advantage of a private funeral in order to express their
22 views, and they are in compliance with all the
23 content-neutral rules.

24 MR. SUMMERS: I'd say that's a much closer
25 call and not the --

1 JUSTICE KAGAN: But why is it a closer call?

2 MR. SUMMERS: It's a closer call because
3 it's not the personal, targeted nature of the attack on
4 the Snyder family that we have in this case.

5 JUSTICE KAGAN: So does that mean that now
6 we have to start reading each sign and saying "war is
7 wrong" falls on one side of the line, but "you are a war
8 criminal" falls on another side of the line? Is that
9 what we would have to do?

10 MR. SUMMERS: I think that, generally
11 speaking, yes, Justice Kagan. The court -- the district
12 court would have to look at the signs, as the district
13 court did in this case, and determine which one he
14 believed were directed at the family and which ones were
15 not. There was a comment earlier that all the signs
16 were presented. Well, all the signs were presented by
17 the Respondents, not by Mr. Snyder. So we --

18 JUSTICE SCALIA: I guess that that kind of a
19 call is always necessary under -- under the tort that
20 you're -- that you're relying upon. The conduct has to
21 be outrageous, right?

22 MR. SUMMERS: Correct. And that --

23 JUSTICE SCALIA: That always requires that
24 kind of a call, unless the tort is unconstitutional, as
25 applied to all -- all harm inflicted by words.

1 MR. SUMMERS: Correct, Justice Scalia, the
2 element of intentional infliction of emotional distress
3 requires outrageousness.

4 JUSTICE KAGAN: Well, that's true, but I was
5 assuming a situation in which the -- a jury found that
6 the "war is wrong" -- that a jury did find that
7 outrageous, and the question was: Were we going to
8 reverse the jury verdict because we -- the First
9 Amendment prohibited it?

10 MR. SUMMERS: Again, I believe that's a
11 closer call, and I would say yes, if it's a general
12 statement, does not disrupt the funeral, does not target
13 the family. I'd say that it's one -- a much closer
14 call, and, yes, it's more likely that the Constitution
15 is going to prevent that claim from going forward.

16 The -- I see that I'm out of time.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Summers.

19 The case is submitted.

20 (Whereupon, at 11:03 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

<p>A</p> <p>abortion 49:24</p> <p>above-entitled 1:11 57:21</p> <p>absence 37:18</p> <p>absolutely 20:20 23:13,21 35:4,6 40:18 43:25</p> <p>abused 46:23</p> <p>accept 7:14 9:18 12:19 20:10 51:1</p> <p>acceptance 19:24</p> <p>accomplish 47:19</p> <p>accurate 38:12,15</p> <p>acknowledge 28:11</p> <p>action 4:8,24 5:13 5:15 17:9 25:22 25:24 26:1,6 27:22 28:6,7,7 33:6 34:4,12 35:5 43:3</p> <p>actionable 44:21 52:3</p> <p>activities 27:4</p> <p>activity 27:20</p> <p>actual 29:3 48:10</p> <p>add 28:19 29:24</p> <p>address 23:15</p> <p>adultery 50:23</p> <p>advance 11:25</p> <p>advantage 55:21</p> <p>adverse 31:18</p> <p>affect 38:22</p> <p>Afghanistan 27:6 31:23</p> <p>African-American 40:24 41:2</p> <p>African-America... 40:21</p> <p>agree 26:9 28:15 37:16 43:9</p> <p>ahead 13:23 21:23</p> <p>AIDS 14:11</p> <p>airwaves 36:11,13 51:8</p> <p>airways 32:23</p>	<p>AL 1:6</p> <p>albeit 18:4</p> <p>ALBERT 1:3</p> <p>Alito 6:21 10:12,20 10:22 11:4 24:25 25:7,9,19 30:9 31:6,12,14,19 32:15 33:25 34:8 35:7,18,20,24 36:2,5,17 40:15 40:18,19 41:20 42:17 48:19,23 49:13,19,22 50:5 53:20 54:3</p> <p>Alito's 25:16 33:4</p> <p>allegation 43:10</p> <p>allege 35:18 52:20</p> <p>allow 22:16 23:4 47:19,21</p> <p>allowed 33:12 45:13</p> <p>allows 25:13 31:7 34:12</p> <p>ambiguous 10:14</p> <p>Amendment 11:12 17:23 19:3 21:3,7 23:4 28:14,16 29:3 30:16 31:7 32:9 33:5 34:4,6 34:12 37:21 40:4 46:17 47:4 49:15 51:18 54:19 57:9</p> <p>America 16:15 17:7 42:10</p> <p>American 17:10 33:19</p> <p>angered 44:10</p> <p>Annapolis 8:1,17 9:6 30:14</p> <p>announcing 12:1</p> <p>answer 6:6 21:25 25:16 28:4 33:3,4 33:9 34:15 36:12 36:14 46:12 52:6 52:12 53:15 54:4 54:14</p>	<p>answering 14:1</p> <p>antiwar 14:17 54:16,18</p> <p>anxious 34:10</p> <p>anybody 39:16 54:3</p> <p>apparent 19:24</p> <p>appealing 26:10</p> <p>appearance 55:1</p> <p>APPEARANCES 1:14</p> <p>Appendix 42:7</p> <p>applied 56:25</p> <p>applies 7:12 45:10</p> <p>apply 21:17 22:2 25:4 55:3</p> <p>applying 18:14</p> <p>approach 21:6</p> <p>approaches 32:2</p> <p>approaching 41:5</p> <p>appropriate 46:18</p> <p>appropriating 55:20</p> <p>approval 11:22</p> <p>area 15:20 22:14 22:24</p> <p>arguably 10:13</p> <p>argument 1:12 2:2 2:5,8 3:3,6 10:23 26:23 31:7,13 40:15 50:16 51:11 54:10</p> <p>arose 5:19</p> <p>array 27:4</p> <p>articulated 53:18</p> <p>articulating 42:10</p> <p>artistic 29:22</p> <p>asked 23:8 53:22</p> <p>asking 17:18 24:10</p> <p>assaults 55:11</p> <p>assert 4:24</p> <p>assume 32:20 51:13,25</p> <p>assuming 38:14 57:5</p> <p>assumption 51:23</p>	<p>atheists 41:14</p> <p>attached 30:3</p> <p>attack 56:3</p> <p>attacks 13:3 15:8 50:25</p> <p>audience 48:6,24 49:4,11,23</p> <p>avoid 10:7 16:3 49:25</p> <p>award 24:2,13</p> <p>aware 24:15</p> <p>awareness 27:8</p> <p>awful 21:1</p> <p>a.m 1:13 3:2 57:20</p> <p>B</p> <p>back 23:7 31:25 37:19 54:14</p> <p>bad 40:22</p> <p>balancing 21:8</p> <p>Baptist 27:2 43:11 44:23</p> <p>bar 14:25 33:5 34:4</p> <p>barrier 37:20</p> <p>bars 34:6</p> <p>based 31:9</p> <p>basically 27:14</p> <p>basis 20:2 22:16,17</p> <p>beg 28:25</p> <p>began 6:1 15:17</p> <p>beginning 35:10</p> <p>behalf 1:15,17 2:4 2:7,10 3:7 26:24 54:11</p> <p>behavior 3:14</p> <p>believe 6:25 8:22 9:11 16:1 22:25 24:3 25:17 28:5 40:2,3 43:18 48:3 51:5 57:10</p> <p>believed 56:14</p> <p>believes 40:20</p> <p>berate 41:6</p> <p>berating 40:24</p> <p>bereaved 30:16 35:14</p>	<p>bereavement 30:21</p> <p>beyond 45:17 52:25</p> <p>big 4:15</p> <p>bit 31:15</p> <p>bless 42:10</p> <p>blinds 50:4</p> <p>blue 37:8</p> <p>body 48:5,7 49:3</p> <p>bothered 12:25</p> <p>boundaries 27:8</p> <p>bounds 31:2</p> <p>Boys 8:13</p> <p>Bradstreet 19:7</p> <p>branch 9:13</p> <p>Brandeis 46:14</p> <p>Brandenburg 29:13</p> <p>breach 29:21</p> <p>Breyer 11:10,19 12:5,11,15 13:23 14:2,5 17:17 20:18 21:18,22,25 22:5 46:9,20 47:21 48:1</p> <p>Breyer's 14:1</p> <p>brief 13:17 18:20 24:24</p> <p>bring 53:17</p> <p>bringing 14:24 24:21</p> <p>broad 45:21</p> <p>broadcast 12:17</p> <p>broader 11:13 28:21 30:6 36:21</p> <p>brought 44:16</p> <p>bulk 50:16,17</p> <p>buries 53:12</p> <p>bury 3:12 53:3</p> <p>bus 31:25 32:1</p> <p>C</p> <p>C 2:1 3:1</p> <p>call 4:25 43:17 48:16 52:8 54:2 55:6,25 56:1,2,19</p>
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