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IN THE SUPREME COURT OF THE UNITED STATES

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ALBERT SNYDER, :

Petitioner :

v. : No. 09-751

FRED W. PHELPS, SR., ET AL. :

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Washington, D.C.

Wednesday, October 6, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

SEAN E. SUMMERS, ESQ., York, Pennsylvania; on behalf of Petitioner.

MARGIE J. PHELPS, ESQ., Topeka, Kansas; on behalf of Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first today in Case 09-751, Snyder v. Phelps. Mr. Summers.

ORAL ARGUMENT OF SEAN E. SUMMERS

ON BEHALF OF THE PETITIONER

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

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

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

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

JUSTICE SCALIA: Right. Well, what does 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.

6 JUSTICE SCALIA: That's fine, but it -- it
7 does not intrude upon the funeral. I mean, no. You
8 either have two separate causes of action -- one is the
9 intrusion upon the funeral and the other is the harm
10 caused by viewing this posting on the Internet -- but I
11 don't see how they both relate to intrusion upon the
12 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 flyer that
17 was submitted, that was sent out before the funeral. We
18 have 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, it
21 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 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 are 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 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 --

10 JUSTICE GINSBURG: Didn't they stand where
11 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 flyer --

16 JUSTICE GINSBURG: And it was there with the
17 knowledge of the police and with the permission of the
18 police.

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

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 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 didn't prohibit it under
6 certain circumstances and in a certain --

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

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

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

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

22 JUSTICE GINSBURG: If you knew just what was
23 going on, do you suppose -- because this had been done
24 before. In fact, wasn't this the very same day they
25 picketed at Annapolis and at the State Capitol.

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

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

6 MR. SUMMERS: I don't think they could have
7 beforehand because although you said we knew what the
8 signs were going to be, generally from their pattern I
9 think we could guess what the signs may have been, but
10 you don't really know what the signs are going to be
11 until they show up. For example, in this case, they had
12 a sign that said "three straight boys," they had a sign
13 that said "God hates you, you are going to hell."

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

19 MR. SUMMERS: As -- Justice Ginsburg, from
20 our perspective, the signs that said "God hates you, you
21 are going to hell" referred directly to Matthew Snyder
22 and we would hope and believe that the district court
23 could enjoin those types of specific targeted epithets.

24 If, for example, this was done at a public
25 park in Montana, logically I think you could conclude

1 that it wasn't directed at the family. But when you
2 show up at a 20-year-old marine's funeral and say "you
3 are going to hell" --

4 JUSTICE GINSBURG: Did they have the "going
5 to hell" sign at the State Capitol and Annapolis?

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

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

10 MR. SUMMERS: Yes. I believe the only ones
11 that they changed is they have a sign for each different
12 branch of the service. Matt was a marine, so --

13 JUSTICE GINSBURG: So it sounds like to you
14 it's the whole society, the whole rotten society in
15 their view.

16 MR. SUMMERS: If we are forced to accept
17 their view, yes, Justice Ginsburg, that's what they
18 testified to. Mr. Snyder's view, the view of the Fourth
19 Circuit, was that these "God hates you" and "You're
20 going to hell" signs specifically referred to Matthew
21 Snyder and the "Thank God for dead soldiers," Mr. Snyder
22 certainly interpreted that as referring to his son,
23 because after all Matthew Snyder was the only deceased
24 marine/soldier at the funeral.

25 JUSTICE GINSBURG: Where did -- you said the

1 Fourth Circuit found that those signs targeted the
2 family rather than the whole U.S. society?

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

10 JUSTICE ALITO: Do you think that the epic
11 is relevant as an explanation of some of the these
12 arguably ambiguous signs that were displayed at the
13 funeral? For example, "You are going to hell," "God
14 hates you"; who is "you"? If you read the epic, perhaps
15 that sheds light on who "you" is.

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

20 JUSTICE ALITO: Well, yes, but the signs say
21 "you" and the argument is made "you" doesn't mean
22 Matthew Snyder; it means a larger group. And then you
23 have the epic, which is directed directly at Matthew
24 Snyder. Doesn't that show -- shed light on what "you"
25 meant on those signs?

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

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

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

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

23 MR. SUMMERS: Your Honor, 2 days in advance
24 they sent out a flyer announcing they were going to
25 protest the funeral. They had Matthew Snyder's picture

1 there. They claimed they were going to protest at
2 St. John's Catholic dog kennel.

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

7 MR. SUMMERS: He found out about the
8 specifics of the signs --

9 JUSTICE BREYER: Yes, that's what I'm
10 interested in.

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

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

22 Now, those are the two questions that I am
23 very bothered about. I don't know what the rules ought
24 to be there. That is, do you think that a person can
25 put anything on the Internet? Do you think they can put

1 anything on television even if it attacks, say, the most
2 private things of a private individual? Does
3 Maryland's -- does Maryland's law actually prohibit
4 that? Do we know it does, and what should the rules be
5 there?

6 Have I said enough to get you talking?

7 (Laughter.)

8 MR. SUMMERS: Yes, Your Honor.

9 Right now the rule we are stuck with is
10 *Hustler v. Falwell* for intentional infliction of
11 emotional distress, and the --

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

17 MR. SUMMERS: That's correct, Justice
18 Ginsburg.

19 CHIEF JUSTICE ROBERTS: Okay. Were you
20 finished answering Justice Breyer's question?

21 JUSTICE BREYER: The more you say about this
22 the happier I will be, because I'm quite interested.

23 MR. SUMMERS: The private targeted nature of
24 the speech in our judgment is what makes it unprotected.
25 So for example, the epithets directed at the family

1 would be unprotected. If, for example, a person
2 repeatedly put on the web site that Mr. Smith has AIDS,
3 whether it's true or not, essentially at some point in
4 time it might rise to the level of an intentional
5 infliction of emotional distress. There would have to
6 be other facts combined there.

7 CHIEF JUSTICE ROBERTS: So you have no
8 objection if the sign said "Get out of Iraq," an antiwar
9 protest, in other words not directed at this particular
10 individual?

11 MR. SUMMERS: Correct. I don't think --

12 CHIEF JUSTICE ROBERTS: So no objection
13 there?

14 MR. SUMMERS: I don't think there'd be any
15 constitutional impediment to bringing -- or the
16 Constitution would not -- would bar that claim from
17 going forward.

18 JUSTICE SOTOMAYOR: Excuse me --

19 JUSTICE SCALIA: So the intrusion upon the
20 privacy of the funeral is out of the case then, right,
21 because that sign would intrude upon the privacy of the
22 funeral just as much? That's not really what you are
23 complaining about. You are complaining about the
24 personal attacks, aren't you?

25 MR. SUMMERS: Yes, Justice Scalia, and I

1 think under a certain scenario, you could have,
2 regardless of the signs, you could have a scenario where
3 the funeral was disrupted and it was disrupted in this
4 case.

5 JUSTICE GINSBURG: It was or it wasn't.

6 MR. SUMMERS: It was, Justice Ginsburg.

7 JUSTICE GINSBURG: I thought that when the
8 service itself began the protesters stopped.

9 MR. SUMMERS: The police testified that, I
10 think it was, about 8 minutes after the funeral started,
11 that the protesters left the area.

12 JUSTICE SOTOMAYOR: Were they encouraged --

13 JUSTICE SCALIA: I thought that they had to
14 come in a different entrance? Is that the extent of the
15 disruption?

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

18 JUSTICE SCALIA: In order to avoid the
19 protest.

20 MR. SUMMERS: That, and they certainly took
21 away, according to the priest that was coordinating the
22 mass, they certainly took away the peaceful experience
23 that all private figures --

24 JUSTICE SCALIA: But you wouldn't have
25 objected to that if there weren't these nasty signs, you

1 just said, right?

2 MR. SUMMERS: No. I hope I said,
3 Justice Scalia, that under the right context, jut the
4 signs alone, if that's all we are saying, there's a sign
5 out there that says "God hates America," I don't think
6 that we could have a claim there. But if they in fact
7 disrupted the funeral, I do think in some set of facts
8 there could be a claim.

9 JUSTICE SCALIA: All right.

10 JUSTICE SOTOMAYOR: Counsel, I'm trying to
11 tease out the importance of the -- whether the person's
12 a private -- or public figure -- a private person or a
13 public figure. Does it make a difference if I am
14 directing public comments to a public or private figure?

15 MR. SUMMERS: Well, in the context of
16 defamation we had the Rosenbloom followed by the Gertz
17 decision.

18 JUSTICE SOTOMAYOR: No, I'm talking about in
19 terms of infliction of emotional distress. If I am
20 talking to you as a Marine, if you were a Marine, and I
21 was talking about the Iran war and saying that you are
22 perpetuating the horrors that America's doing and said
23 other things that were offensive, would you have a cause
24 of action because you are being called a perpetrator of
25 the American experience?

1 MR. SUMMERS: I'd think there'd be -- have
2 to be a lot more facts involved, harassing type of
3 facts. The --

4 JUSTICE SOTOMAYOR: But you are saying yes.
5 So public speech, speech on a public matter, if directed
6 to a private person, should be treated differently under
7 the law? I think that was part of what Justice Breyer
8 was asking. Is that what your position is?

9 MR. SUMMERS: Public speech, even directed
10 to a private figure, should be treated differently than
11 as directed towards a public official.

12 JUSTICE SOTOMAYOR: All right. And under
13 what theory of the First Amendment would we do that?
14 What case would stand for, our case, stand for the
15 proposition that public speech or speech on a public
16 matter should be treated differently depending on the
17 recipient of the speech?

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

20 JUSTICE GINSBURG: That was defamation,
21 wasn't it?

22 JUSTICE SOTOMAYOR: That was defamation.
23 That's false -- truth or falsity.

24 MR. SUMMERS: Correct. Correct, but the
25 problem is, the only other case we have that deals with

1 intentional infliction of emotional distress from this
2 Court is *Hustler v. Falwell*, and *Hustler v. Falwell*
3 clearly dealt with a public figure. The States have
4 interpreted *Hustler v. Falwell* as not applying to a
5 private figure.

6 JUSTICE SOTOMAYOR: But have they done it in
7 the context of differentiating between public and
8 private speech?

9 MR. SUMMERS: Yes, there is an Illinois case
10 that we cited in the brief where it was specifically
11 said it was a matter of public concern, and they said
12 the plaintiff was not a public figure; therefore the --
13 just, you have to meet the elements of intentional
14 infliction of emotional distress.

15 JUSTICE SOTOMAYOR: I was not talking about
16 State cases. I was talking about a Supreme Court case
17 that suggested that we would treat -- we would treat the
18 First Amendment and the right to -- to speak on public
19 matters differently, depending on the person to whom it
20 was directed?

21 MR. SUMMERS: I think *Gertz v. Welch* says
22 that. *Dun & Bradstreet* says you have to at least look
23 at the context of the situation.

24 JUSTICE SOTOMAYOR: So it goes -- it goes to
25 the context. Now, going to the context of this speech,

1 do we look at the words on a sign alone or do we look at
2 the entire context of what all of the other signs said
3 at the demonstration, to determine whether or not the
4 speech here was public or private speech?

5 MR. SUMMERS: I think you have to look at
6 the particular signs, because if you don't, anyone could
7 come up with a public concern, because they could direct
8 any type of epithets at a person. In the middle of
9 their paragraph they could say: I'm for taxes or I'm
10 against taxes, and therefore the entire statement
11 would be --

12 JUSTICE SOTOMAYOR: Well, in that case --

13 JUSTICE SCALIA: Mr. Summers, I'm a little
14 concerned at your apparent acceptance of -- of the
15 proposition that if one comes up to a Marine and says,
16 you are contributing to a -- a terribly unfair war, that
17 that alone would -- would form the basis for the -- the
18 tort of intentional infliction of an emotional distress.

19 What -- what are the requirements for that?
20 I thought that it had to be outrageous conduct. Doesn't
21 it have to be outrageous conduct?

22 MR. SUMMERS: It does, Justice Scalia, and I
23 wasn't suggesting --

24 JUSTICE SCALIA: Well, I mean -- I mean, why
25 accept that as -- as parallel to what -- to what you are

1 claiming here?

2 MR. SUMMERS: And I hope I didn't. What I
3 meant to say, if I didn't, was there would have to be a
4 lot more facts involved to rise to the level of an
5 intentional infliction of emotional distress case if you
6 just told the Marine, for example, you're not in favor
7 of the war.

8 JUSTICE BREYER: What about the -- taking --
9 if you have an instance where the defendant has said on
10 television or on the Internet something absolutely
11 outrageous, you showed that. You show that it was
12 intended to and did inflict serious emotional suffering.
13 You show that any reasonable person would have known
14 that likelihood, and then the defendant says: Yes, I
15 did that, but in a cause, in a cause. And now -- in a
16 cause that we are trying to demonstrate how awful the
17 war is.

18 At that point I think the First Amendment
19 might not leave this alone. But if it's not going to
20 leave this alone, there's where we need a rule, or we
21 need an approach or we need something to tell us how the
22 First Amendment in that instance will begin to -- enter
23 and force a balancing.

24 Is it that you want to say no, no punitive
25 damages in such a case? Or that you would have to

1 insist upon a particularly clear or a reasonable
2 connection between the private part of this and the
3 public effort?

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

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

8 JUSTICE BREYER: *Hustler* -- *Hustler v.*
9 *Falwell* is defamation.

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

12 JUSTICE BREYER: Intentional infliction,
13 okay, good. Thank you. Go ahead.

14 JUSTICE KAGAN: Mr. Summers --

15 JUSTICE BREYER: Well, answer then, please.

16 MR. SUMMERS: I think the rule should be
17 *Hustler v. Falwell* generally does not apply to a private
18 figure unless the defendant can show some compelling
19 connection there, and if you -- if you --

20 JUSTICE BREYER: Compelling.

21 MR. SUMMERS: Or at least reasonable,
22 rational connection. In this case they don't even claim
23 there is a connection. They just used this moment to
24 hijack someone else's private event when they are
25 grieving over a 20-year-old child's funeral.

1 JUSTICE KAGAN: Mr. Summers, Hustler seems
2 to me to have one sentence that is key to the whole
3 decision, and it goes like this. It says:
4 "Outrageousness in the area of political and social
5 discourse has an inherent subjectiveness about it which
6 would allow a jury to impose liability on the basis of
7 the jurors' tastes or views or perhaps on the basis of
8 their dislike of a particular expression."

9 How does that sentence -- how is that
10 sentence less implicated, in a case about a private
11 figure than in a case about a public figure?

12 MR. SUMMERS: Well at least in Hustler --
13 Justice Kagan, at least in Hustler v. Falwell we had a
14 traditional area of public discourse. We had a parody.
15 I believe the opinion went to great length to explain
16 that.

17 Here what we are talking about is a private
18 funeral. I don't -- I would hope that the First
19 Amendment wasn't enacted to allow people to disrupt and
20 harass people at someone else's private funeral.

21 JUSTICE GINSBURG: So --

22 JUSTICE KAGAN: But that goes back to the
23 question that was asked previously about, suppose you
24 had a general statute that just said, there will be no
25 disruptions of any kind at private funerals. You know,

1 pick your distance, 500 feet, 1,000 feet, but something
2 that didn't refer to content, that didn't refer to
3 ideas, that just made it absolutely clear that people
4 could not disrupt private funerals. What harm would
5 that statute not address in your case?

6 MR. SUMMERS: Well, the States have -- in
7 the statutory case, they have the interest of penalizing
8 the offending party. In tort law, the State's interest
9 is to provide a remedy for its citizens. Under the
10 Fourth Circuit's interpretation of these facts, Mr.
11 Snyder has absolutely no remedy, none. He is a private
12 figure, a grieving father, and he is left without any
13 remedy whatsoever.

14 JUSTICE GINSBURG: We have other instances
15 where conduct is lawful, meets all the terms of the
16 statute that's meant to govern protests at funerals, and
17 yet there is an award of damages permitted.

18 MR. SUMMERS: I believe that the
19 *Hustler v. Falwell* was a -- had several tort claims, but
20 there was no criminal statute violated. I understand
21 that it went the other way because of the public figure
22 status, but that would be an example.

23 Another example --

24 JUSTICE GINSBURG: Well, that was a -- I'm
25 not asking you for an example where -- a Federal case

1 where the conduct was permitted by the statute, by the
2 policemen there, and yet there was -- was a damage
3 award.

4 MR. SUMMERS: Justice Ginsburg, I am not
5 aware of any case, but I think the -- if for example
6 someone sued someone for defamation, there probably
7 wouldn't be a statute that was violated so I don't -- I
8 would presume --

9 JUSTICE GINSBURG: I'm talking about this
10 intentional infliction of emotional distress claim that
11 you're bringing.

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

15 JUSTICE ALITO: Is this the situation in
16 which all conduct that complies with the Maryland
17 funeral protest statute is lawful? If the Maryland
18 legislature said this is the -- these are the exclusive
19 regulations that apply here, so that if someone came up
20 to Mr. Phelps at the funeral and spat in his face, that
21 would not be -- that wouldn't be illegal?

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

24 JUSTICE ALITO: Because it's not
25 specifically prohibited by the statute.

1 JUSTICE GINSBURG: Well, it certainly
2 wouldn't be because of the distance. I mean, you would
3 have to be a lot closer than the Maryland statute allows
4 to spit in someone's face.

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

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

10 JUSTICE SCALIA: Mr. Summers, can I ask you:
11 Suppose I don't think you have a cause of action for
12 invasion of privacy when these people were at this
13 distance from the funeral. But that was one of the
14 causes of action submitted to the jury.

15 If I disagree with you on that cause of
16 action, I suppose I would have to say there has to be a
17 retrial now.

18 MR. SUMMERS: Of course this Court could do
19 that, Justice Scalia.

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

23 MR. SUMMERS: Yes, Justice Scalia. But
24 according to the Fourth Circuit, we agree that the
25 Respondents waived that issue by not appealing that

1 issue.

2 JUSTICE SCALIA: Waived what issue?

3 MR. SUMMERS: The invasion -- or elements of
4 the invasion of privacy. They didn't contest that we
5 met the elements of the tort. They -- they contested
6 the constitutional issue, but not whether or not we met
7 the elements of the tort.

8 JUSTICE SCALIA: Oh, all right. Okay.

9 MR. SUMMERS: I'd like to reserve the
10 remainder.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Ms. Phelps.

13 ORAL ARGUMENT OF MARGIE J. PHELPS

14 ON BEHALF OF THE RESPONDENTS

15 MS. PHELPS: Mr. Chief Justice, and may it
16 please the Court:

17 When members of the Westboro Baptist Church
18 entered an ongoing, extensive, public discussion and
19 wide array of expressive activities taking place in
20 direct connection with the deaths and funerals of
21 soldiers killed in Iraq and Afghanistan, they did so
22 with great circumspection and they did so with an
23 awareness of the boundaries that have been set by the
24 precedents of this Court.

25 JUSTICE KAGAN: Ms. Phelps, suppose --

1 suppose your group or another group or -- picks a
2 wounded soldier and follows him around, demonstrates at
3 his home, demonstrates at his workplace, demonstrates at
4 his church, basically saying a lot of the things that
5 were on these signs or -- or other offensive and
6 outrageous things, and just follows this person around,
7 day-to-day.

8 Does that person not have a claim for
9 intentional infliction of emotional distress?

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

13 JUSTICE KAGAN: Demonstrations outside the
14 person's home, outside the person's workplace, outside
15 the person's church -- demonstrations, not disruptions,
16 but saying these kinds of things: You are a war
17 criminal, you -- what -- would -- whatever these signs
18 say or worse?

19 MS. PHELPS: My answer, Justice Kagan, is:
20 No, I don't believe that that person should have a cause
21 of action or would under your cases have a cause of
22 action. You couldn't give that cause of action without
23 direct reference to the viewpoint, which is exactly what
24 happened in this case.

25 JUSTICE SCALIA: My goodness. We did have a

1 doctrine of fighting words, and you acknowledge that if
2 somebody said, you know, things such as that to his
3 face, that wouldn't be protected by the First Amendment.

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

6 JUSTICE SCALIA: Unprotected.

7 MS. PHELPS: I will go with unprotected,
8 Justice Scalia. And if I may add this: Fighting words
9 require imminence, they require proximity, and they
10 require a lack of those words being part of a broader
11 political or social --

12 JUSTICE SCALIA: Is that so? Do we know
13 that?

14 MS. PHELPS: I beg your pardon?

15 JUSTICE SCALIA: Do we know that? Is it the
16 criterion of the fighting words exception to the First
17 Amendment that there be an actual fight? Certainly not
18 that. Is it a requirement that there be a potential for
19 a fight? I doubt it.

20 Where -- where do you get the notion that it
21 has -- that there has to be an imminent fight?

22 MS. PHELPS: I get the notion from the
23 series of cases starting within 7 years after your
24 Chaplinsky case with the Gooding case and on down
25 through the Brandenburg case and on down --

1 JUSTICE SCALIA: Which say what?

2 MS. PHELPS: That say that --

3 JUSTICE SCALIA: The person was too remote?

4 The fight was not -- was not imminent?

5 MS. PHELPS: The -- the definition, the
6 working definition of "fighting words," is that they
7 have to be words which by their nature are likely to
8 incite an immediate breach of the peace and not occur in
9 the context of some social, artistic, educational, or
10 political kind of speech.

11 And if I may hasten to add, Justice Scalia,
12 these Respondents were not charged with fighting words.
13 The jury was not instructed to limit themselves to
14 fighting words. No element of the tort under which
15 liability attached included fighting words.

16 The words that were at issue in this case
17 were people from a church delivering a religious
18 viewpoint, commenting not only on the broader public
19 issues that the discussion was underway in this nation
20 about dying soldiers, about the morals of the nation --

21 JUSTICE GINSBURG: Ms. Phelps, there is no
22 question that these signs and the signs like that we saw
23 during the Vietnam War. But you had the demonstration
24 at the capitol, and you had the demonstration at
25 Annapolis. This is a case about exploiting a private

1 family's grief and the question is: Why should the
2 First Amendment tolerate exploiting this Marine's family
3 when you have so many other forums for getting --
4 getting across your message, the very same day you did?

5 MS. PHELPS: Right. So several pieces to
6 that, Justice Ginsburg. When I hear the language
7 "exploiting the bereavement," I look for: What is the
8 principle of law that comes from this Court? And the
9 principle of law, as I understand it, is without regard
10 to viewpoint, there are some limits on what public
11 places you can go to, to deliver words as part of a
12 public debate.

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

17 JUSTICE ALITO: Is it your -- is it your
18 argument that the First Amendment never allows a claim
19 for the intentional infliction of emotional distress
20 based on speech unless the speech is such that it can be
21 proven to be false or true?

22 MS. PHELPS: In --

23 JUSTICE ALITO: Is that your argument?

24 MS. PHELPS: With a -- yes, Justice Alito,
25 and with a little bit more from your cases, if I may:

1 And not under an inherently subjective standard, and
2 where you're only claiming that the impact of the speech
3 was adverse emotional impact.

4 JUSTICE ALITO: All right. Well, Justice
5 Kagan gave you one example. Let me give you another
6 example along the same lines.

7 Let's say there is a grandmother who has
8 raised a son who was killed in Afghanistan or in Iraq by
9 an IED. And she goes to visit her son's -- her
10 grandson's grave, and she's waiting to take a bus back
11 to her home. And while she's at the bus stop, someone
12 approaches and speaks to her in the most vile terms
13 about her son: He was killed by an IED; do you know
14 what IEDs do? Let me describe it for you, and I am so
15 happy that this happened; I only wish I were there; I
16 only wish that I could have taken pictures of it. And
17 on and on.

18 Now, is that protected by the First
19 Amendment? There is no false statement involved and
20 it's purely speech.

21 MS. PHELPS: Right. And -- and it may give
22 rise to some fighting words claim, depending on the
23 proximity and the context. And I would have to know
24 what --

25 JUSTICE ALITO: Well, it's an elderly

1 person. She's really probably not in -- in a position
2 to punch this person in the nose.

3 JUSTICE SCALIA: And she's a Quaker, too.

4 (Laughter.)

5 MS. PHELPS: Yes. Let us assume that the
6 grandmother had not done what Mr. Snyder did in this
7 case. Mr. Snyder from the moment he learned of his
8 son's death went to the public airways multiple times in
9 the days immediately before and immediately after --

10 JUSTICE SCALIA: Do you think that
11 everybody --

12 CHIEF JUSTICE ROBERTS: What is your answer
13 to Justice Alito's question? Do you think the First
14 Amendment would bar that cause of action or not?

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

18 CHIEF JUSTICE ROBERTS: So you think there
19 are situations where a tort of intentional infliction of
20 emotional distress is allowed, even for a matter of
21 public debate?

22 MS. PHELPS: Not public debate,
23 Mr. Chief Justice. That is not the way I understood the
24 hypothetical he posed me.

25 CHIEF JUSTICE ROBERTS: Well, I understood

1 the hypothetical, that the person disagreed with the war
2 in Iraq and the sending of American troops there.

3 MS. PHELPS: Right, and knew that this
4 elderly woman was the grandmother of a soldier. And I
5 would ask the question in the hypothetical, how they
6 knew, which is why I was making reference to what Mr.
7 Snyder did.

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

12 MS. PHELPS: If the grandmother entered the
13 public discussion, the First Amendment bars it.

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

20 MS. PHELPS: I am reluctant to say that it
21 does not, Mr. Chief Justice. However --

22 JUSTICE GINSBURG: But you gave the answer
23 before about -- you said stalking.

24 MS. PHELPS: Right.

25 JUSTICE GINSBURG: Isn't this comparable to

1 stalking?

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

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

8 MS. PHELPS: Well, Mr. Chief Justice, I
9 would not file that claim for that person, for that
10 elderly grandmother. I am not prepared, without knowing
11 more, to say absolutely there could be no cause of
12 action. What I am prepared to say is there was
13 absolutely much more than that in this case.

14 JUSTICE ALITO: Well, if there -- if that --
15 there is a possibility there is a claim there, then what
16 distinguishes that from this case?

17 Now, I thought you were beginning to say
18 that my hypothetical is different because Mr. Snyder
19 made his son into a public figure; and the question I
20 wanted to ask in that connection is whether every
21 bereaved family member who provides information to a
22 local newspaper for an obituary thereby makes the
23 deceased person a public figure?

24 MS. PHELPS: Not the deceased person,
25 Justice Alito. We don't allege that the young man dead

1 was a public figure. We do --

2 JUSTICE ALITO: But if the grandmother
3 called up the local paper and said, let me tell you
4 something about my grandson --

5 MS. PHELPS: Yes.

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

8 MS. PHELPS: Right.

9 JUSTICE ALITO: That makes him -- that makes
10 her a public figure?

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

23 CHIEF JUSTICE ROBERTS: Your response --
24 your response to Justice Alito is dwelling on the facts
25 of this particular case.

1 MS. PHELPS: Yes, sir.

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

7 MS. PHELPS: Yes, I can imagine,
8 Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: I'm sorry, can or
10 cannot?

11 MS. PHELPS: I can.

12 CHIEF JUSTICE ROBERTS: You can.

13 MS. PHELPS: I can imagine that there could
14 be a circumstance, a hypothetical, where there was not
15 this level of involvement, and it was out of the blue
16 and it was up close, if I may use the term,
17 confrontational.

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

23 MS. PHELPS: I don't agree with that,
24 Mr. Chief Justice, because you have now taken an
25 inherently subjective standard with the absence of any

1 of these non-speech misbehaviors. And now you are back
2 to only -- the only barrier between a person and their
3 First Amendment right to robust public debate, including
4 this Court has said, outrageous statements --

5 CHIEF JUSTICE ROBERTS: Does it make -- I'm
6 sorry.

7 MS. PHELPS: -- with just that subjectively
8 inherent standard, and that subjective statement of
9 emotional impact. This Court has said repeatedly --

10 CHIEF JUSTICE ROBERTS: Does it make a --

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

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

17 MS. PHELPS: That is not accurate,
18 Mr. Chief Justice, with due respect.

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

21 MS. PHELPS: The motive of the speaker to
22 get maximum exposure, which every public speaker pines
23 for, looks for, strives for, and is entitled to -- does
24 not change the legal principle that's at play.

25 CHIEF JUSTICE ROBERTS: Well, it might

1 affect whether or not the selection inflicts emotional
2 distress for a reason unconnected with the individual
3 who is the subject of the emotional distress.

4 MS. PHELPS: Well, if --

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

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

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

25 MS. PHELPS: I'm saying it does make a

1 difference, and no -- but no, there would not be a claim
2 there in my opinion because --

3 JUSTICE KAGAN: So it's not a difference
4 that matters.

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

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

19 JUSTICE ALITO: But your argument depends on
20 the proposition that this is speech on a matter of
21 public concern, is that correct?

22 MS. PHELPS: Absolutely, Justice Alito.

23 JUSTICE ALITO: So let me -- let me give you
24 this example. Suppose someone believes that African
25 Americans are inferior, they are inherently inferior,

1 and they are really a bad influence on this country.
2 And so a person comes up to an African-American and
3 starts berating that person with racial hatred.

4 Now is that in -- this is just any old
5 person on -- any old African-American on the street.
6 That's a matter of public concern?

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

12 JUSTICE KENNEDY: But that's simply --

13 JUSTICE SCALIA: Excuse me --

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

25 So I -- I think -- I think your -- your

1 public concern issue may -- may not be a limiting factor
2 in cases where there is an outrageous conduct and where
3 there should be a tort.

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

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

19 MS. PHELPS: Not follow --

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

23 MS. PHELPS: Yes, I will help you,
24 Justice Kennedy and I am pleased to do that. Because we
25 don't do follow-around in this church. We were

1 1,000 feet away, 7 picketers, 1,000 feet away, out of
2 sight, out of sound, not just standing where the police
3 said to stand --

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

8 MS. PHELPS: For harassing conduct, not for
9 speech. Not for public speech, Justice Kennedy.

10 JUSTICE KENNEDY: But torts and crimes are
11 committed with words all the time.

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

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

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

22 JUSTICE SCALIA: You don't think it's
23 subjective?

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

1 JUSTICE SCALIA: You think that's solid,
2 absolutely, what's a fighting word, whereas what is an
3 outrageous statement is very much different from what's
4 a fighting word? I don't see the difference.

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

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

15 Why isn't that a very objective standard?

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

21 And the way this case was tried identifies
22 why it was inherently subjective, where although two
23 signs and then three were identified as actionable by a
24 strange reading of those words, all of the preachments
25 of Westboro Baptist Church, including all of the signs

1 at that picket, all of the other signs at other pickets,
2 and all their doctrines, went to a jury with that
3 inherent --

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

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 it
15 is an instinctive reaction. I think the Court has
16 rejected spreading fighting words beyond that.

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

24 Whether a fight ensues or not, I do
25 understand that hasn't been pinned down as a

1 requirement. But in intent, it's your purpose, is to
2 mix it up with somebody, not to go out and say: Nation,
3 hear this little church. If you want them to stop
4 dying, stop sinning. That's the only purpose of this
5 little church. 1,000 feet away could not possibly be
6 fighting words.

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

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

17 MS. PHELPS: Right.

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

23 Now, let me suggest a couple and see what
24 you think, and maybe you can think of some others.

25 You could have a judge make the decision,

1 since the First Amendment is involved, not the jury, and
2 the judge could say whether in this instance it was
3 reasonable for the defendant to think that it was
4 important to interfere with the emotional life of that
5 individual.

6 You could say if that was so, there will
7 still be no -- there would be no punitive damages.
8 There could be ordinary damages.

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

14 So what I'm doing is suggesting a number of
15 thoughts of ways of trying to do what I'm trying to
16 accomplish, to allow this tort to exist but not allow
17 the existence of it to interfere with an important
18 public message where that is a reasonable thing to do.

19 Now, maybe this is impossible, this task.
20 But I would like your thoughts on it.

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

25 On the one hand, you have a body of law that

1 comes under the heading of captive audience. And you
2 can go into that body of law and read all those cases in
3 one sitting, so to speak, from which you would conclude
4 that it is very narrow, it is very limited, and there
5 must be some actual physical sound, sight, intrusion, if
6 you are talking about invasion of privacy.

7 At the other extreme, for a compare and
8 contrast, is what they seek in this case, what the trial
9 judge gave them in this case, which is: In an
10 unspecified period of time that each individual will
11 call their mourning period, no one, at any time, any
12 place, any manner, may say any word that that mourner
13 says caused me emotional distress. That would chill too
14 much speech.

15 JUSTICE ALITO: Why aren't the members of
16 the family -- why aren't the members of the family of
17 the deceased a captive audience at the funeral?

18 MS. PHELPS: If we were right outside the
19 door like the other expressers were in these exhibits,
20 they might have been. Your body of law about captive
21 audience, when you -- Hill v. Colorado, Madison,
22 Schenck. That line of cases recently, taking the
23 picketing -- where they, by the way, specifically said
24 at footnote 25 this isn't about content. You've got to
25 be up -- again, I will uses the colloquial term -- up in

1 your grill. The term I think the Court used was
2 confrontational.

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

5 JUSTICE ALITO: I thought the targeted
6 picketing of a person's house is not protected by the
7 First Amendment.

8 MS. PHELPS: Focused picketing, per Frisby,
9 directly in front of can be regulated. And even in
10 Frisby, the Court --

11 JUSTICE ALITO: What's the difference
12 between that and picketing around the site of the
13 funeral?

14 MS. PHELPS: Proximity, Justice Alito.
15 Because the captive audience doctrine, as fleshed out in
16 those abortion picketing cases, what you were looking at
17 was: Is it practical for the person to avoid it without
18 having to run a gauntlet?

19 That's why you said images observable, the
20 only objection you can have there is content. Get up
21 and close the blinds.

22 JUSTICE ALITO: So it doesn't have to do
23 with whether this is a -- what you characterize as a
24 public funeral as opposed to a private funeral? That is
25 not the distinction you are relying upon any longer?

1 MS. PHELPS: Not primarily. I am primarily
2 relying upon proximity. I do think that you could have
3 a public event where there was not an element of
4 vulnerability in the people going in. You might even
5 let them up in their grill. I don't know for sure, but
6 we don't have to worry about that.

7 JUSTICE SOTOMAYOR: Counsel, I am following
8 your argument that the bulk of your speech in the epic,
9 and even the bulk of your signs, involve public speech.

10 What you have not explained to me is how
11 your speech directed at the Snyders constituted public
12 speech, or speech about a public matter. Because you
13 are talking about them raising Matthew for the devil,
14 teaching him to, I think, defy the creator, to divorce
15 and commit adultery.

16 At what point and how do we take personal
17 attacks and permit those, as opposed to -- I fully
18 accept you're entitled in some circumstances to speak
19 about any political issue you want. But what's the line
20 between doing that and then personalizing it and
21 creating hardship to an individual?

22 MS. PHELPS: Right. I believe, Justice
23 Sotomayor, that the line is where it was in this case:
24 Where the father used the occasion of the son's death to
25 put a question out in the public airwaves repeatedly.

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

4 MS. PHELPS: No, Justice Sotomayor.

5 JUSTICE SOTOMAYOR: Assume that the Matthews
6 are private figures and you did this. So explain to me
7 how you are protected by the First Amendment.

8 MS. PHELPS: If without regard to what label
9 is put on a person who steps into the public discussion.

10 JUSTICE SOTOMAYOR: You want to change my
11 assumption.

12 MS. PHELPS: Okay.

13 JUSTICE SOTOMAYOR: We assume that he is a
14 private figure. You have now made a public statement
15 and directed personal comments at an individual who is a
16 private figure. Is that actionable?

17 MS. PHELPS: Well, I don't know, Justice
18 Sotomayor. I don't know that I can give you a
19 definitive answer as you have framed it. What I can
20 tell you is that I think the Court would have great
21 difficulty making a rule of law that whether you call
22 yourself private, public, limited, whatever, you -- not
23 the person you're mad at over their words -- but you
24 step into the public discussion and make some public
25 statements, and then somebody wants to answer you.

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

4 MS. PHELPS: No, Mr. Chief Justice. I
5 don't --

6 CHIEF JUSTICE ROBERTS: Okay.

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

8 CHIEF JUSTICE ROBERTS: So if he didn't take
9 out -- if he didn't take out the usual obituary notice,
10 then this case should come out the other way?

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

13 CHIEF JUSTICE ROBERTS: All right. Well,
14 let's just say he does nothing. He does nothing other
15 than bury his son.

16 MS. PHELPS: Right.

17 CHIEF JUSTICE ROBERTS: He is then not a
18 public figure?

19 MS. PHELPS: If he does nothing we don't
20 picket him. And I don't know --

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

1 MS. PHELPS: I don't know in the context of
2 a war, if I can give a definitive answer to that. It
3 was not an issue of seeking maximum publicity; it was an
4 issue of using an existing public platform to bring a
5 viewpoint that was not being articulated. For two years
6 this church --

7 JUSTICE ALITO: What if a parent is called
8 after the -- puts in the obituary information and called
9 by the local newspaper and asked for a comment, and he
10 says or she says, I'm proud of my son because he died in
11 the service of our country. Does that -- is he stepping
12 into a public debate by doing that?

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

16 CHIEF JUSTICE ROBERTS: Thank you, Ms.
17 Phelps.

18 MS. PHELPS: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Summers, you
20 have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF SEAN E. SUMMERS

22 ON BEHALF OF THE PETITIONER

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

24 JUSTICE KAGAN: Mr. Summers, could I ask you
25 to go back to an answer that you gave to one of my

1 colleagues when you were last up there? You said that a
2 -- a more standard antiwar demonstration, "get out of
3 Iraq," "war is immoral," at this funeral, same distance,
4 same sized signs -- that a more standard antiwar
5 demonstration would be protected by the First Amendment
6 from an intentional infliction of emotional distress
7 suit.

8 And I'm wondering why that is. If you think
9 that what is -- what causes the lack of protection here
10 is the kind of glomming to a private funeral, the
11 exploitation of a private person's grief, the -- the
12 appearance for no other reason than to gain publicity at
13 a private event -- if that's the problem, why doesn't it
14 also apply to a standard, you know, "get out of Iraq,"
15 "war is wrong," kind of demonstration?

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

20 But that isn't the facts of our case. The
21 facts of our case was one, that it was disrupted and
22 two, that it's personal, targeted assaults on Mr.
23 Snyder.

24 JUSTICE KAGAN: Well, suppose it is not
25 disrupted and suppose -- and I know you that this is,

1 that contest these facts -- that yours wasn't disrupted,
2 that they stopped when you started, that they were a
3 sufficient number of feet away from the funeral and so
4 forth.

5 So we are just talking the fact that there
6 are people who have -- who are appropriating and taking
7 advantage of a private funeral in order to express their
8 views, and they are in compliance with all of the
9 content-neutral rules.

10 MR. SUMMERS: I would say that's a much
11 closer call and not the --

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

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

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

21 MR. SUMMERS: I think that, generally
22 speaking, yes, Justice Kagan. The court -- the district
23 court would have to look at the signs, as the district
24 court did in this case, and determine which one he
25 believed were directed at the family and which ones were

1 not. There was a comment earlier that all the signs
2 were presented. Well, all the signs were presented by
3 the Respondents, not by Mr. Snyder. So we --

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

8 MR. SUMMERS: Correct.

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

12 MR. SUMMERS: Correct, Justice Scalia, the
13 element of intentional infliction of emotional distress
14 requires outrageousness.

15 JUSTICE KAGAN: Well, that's true, but I was
16 assuming a situation in which a jury found that the war
17 was wrong, that a jury did find that outrageous; and the
18 question was were we going to reverse the jury verdict
19 because we -- the First Amendment prohibited it?

20 MR. SUMMERS: Again, I believe that's a
21 closer call and I would say yes, if it's a general
22 statement, does not disrupt the funeral, does not target
23 the family, I would say that it's one, a much closer
24 call, and yes, it's more likely that the Constitution is
25 going to prevent that claim from going forward.

1 The -- I'd say --

2 CHIEF JUSTICE ROBERTS: Thank you,

3 Mr. Summers. The case is submitted.

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

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