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**Supreme Court of the United States**

**Franklin v. Bolles**

By Farha Faisal

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

No. 05-22789

JAMES FRANKLIN,

Plaintiff-Appellee,

versus

NATHAN BOLLES,

Defendant-Appellant

Appeal from the United States District Court  
for the Middle District of Maryland  
Tampa

**Argued: February 27, 2010**

**Decided: January 10, 2011**

Before SMITH, *Chief Judge*, SHIMBERG, ALUSI, SCOTT, SAVONA, MUSA, AIELLO, AZIZ, BOWEN, RUBEN, ROARK, PACE, JONES, SIMMONS, SNINSKY, MISRA, and HAYNES, *Circuit Judges*.

**OPINION**

**CAROLINE S. AIELLO**, *Circuit Judge*:

This appeal comes to us from the United States District Court for the Middle District of Maryland. It presents the interesting issue revolving around the First Amendment's prohibition against harmful speech and the Fourth Amendment's protection of individual privacy. Does the First Amendment protect a church group from picketing a funeral using potentially harmful language? Does the First Amendment shield that church from tort liability for its speech? Are there sufficient grounds in such an instance for tort claims of intention infliction of emotional distress, intrusion upon seclusion, and civil conspiracy? Taking into account these issues, we must deliberate on the facts of this case.



## HARVARD MODEL CONGRESS 2009

### I. Facts of the Case

#### A.

Nathan Bolles founded the Westboro Baptist Church in Topeka, Kansas, in 1955. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals.

Marine Lance Corporal Matthew Franklin was killed in Iraq in the line of duty. Lance Corporal Franklin's father selected the Catholic church in the Franklins' hometown of Westminster, Maryland, as the site for his son's funeral. Local newspapers provided notice of the time and location of the service.

Bolles became aware of Matthew Franklin's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Franklin's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."

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

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

#### B.

Franklin filed suit against Bolles, Bolles's daughters, and the Westboro Baptist Church (collectively Westboro or the church) in the United States District Court for the District of Maryland under that court's diversity jurisdiction. Franklin alleged five state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Westboro moved for summary judgment contending, in part, that the church's speech was insulated

from liability by the First Amendment. The District Court awarded Westboro summary judgment on Franklin's claims for defamation and publicity given to private life, concluding that Franklin could not prove the necessary elements of those torts. A trial was held on the remaining claims. At trial, Franklin described the severity of his emotional injuries. He testified that he is unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it. Expert witnesses testified that Franklin's emotional anguish had resulted in severe depression and had exacerbated pre-existing health conditions.

A jury found for Franklin on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages. Westboro filed several post-trial motions, including a motion contending that the jury verdict was grossly excessive and a motion seeking judgment as a matter of law on all claims on First Amendment grounds. The District Court remitted the punitive damages award to \$2.1 million, but left the jury verdict otherwise intact.

Westboro appealed this decision to this court, and we now face the issue of whether the church was entitled to judgment as a matter of law because the First Amendment fully protects their speech. We must review the issues at hand and evaluate whether the statements made were those on matters of public concern, not provably false, and expressed through hyperbolic rhetoric—all of which are protected as speech under the First Amendment.

## II. First Amendment Concerns

To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. See *Harris v. Jones*, 281 Md. 560 (1977). The Free Speech Clause of the First Amendment—"Congress shall make no law ... abridging the freedom of speech"—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46 (1988).

Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. "[S]peech on 'matters of public concern' ... is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U. S. 749. The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U. S. 64 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U. S. 138 (1983).

"[N]ot all speech is of equal First Amendment importance," however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. *Hustler* at 56. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]

here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import. *Dun & Bradstreet*, *supra*, at 760.

We noted a short time ago, in considering whether public employee speech addressed a matter of public concern, that "the boundaries of the public concern test are not well defined." *San Diego v. Roe*, 543 U. S. 77 (2004). Although that remains true today, we have articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors.

Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *Connick*, at 146, or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *San Diego*, at 83-84. The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U. S. 378, 387 (1987) .

Our opinion in *Dun & Bradstreet* on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual's credit report "concerns no public issue." 472 U. S., at 762. The content of the report, we explained, "was speech solely in the individual interest of the speaker and its specific business audience." That was confirmed by the fact that the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further. To cite another example, we concluded in *San Diego v. Roe* that, in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos "did nothing to inform the public about any aspect of the [employing agency's] functioning or operation."

Deciding whether speech is of public or private concern requires us to examine the " 'content, form, and context' " of that speech, " 'as revealed by the whole record.' " *Dun & Bradstreet*, at 761. As in other First Amendment cases, the court is obligated "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485 (1984). In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." *Dun & Bradstreet* at 759. The placards read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Maryland Taliban," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You." While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs—such as "You're Going to Hell" and "God Hates You"—were viewed as containing messages

related to Matthew Franklin or the Franklins specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.

Apart from the content of Westboro's signs, Franklin contends that the "context" of the speech—its connection with his son's funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro's speech. Westboro's signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is "fairly characterized as constituting speech on a matter of public concern," *Connick*, 461 U. S., at 146, and the funeral setting does not alter that conclusion.

Franklin argues that the church members in fact mounted a personal attack on Franklin and his family, and then attempted to "immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality or the supposed evils of the Catholic Church." We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Franklin, and there can be no serious claim that Westboro's picketing did not represent its "honestly believed" views on public issues. *Garrison*, 379 U. S., at 73. There was no pre-existing relationship or conflict between Westboro and Franklin that might suggest Westboro's speech on public matters was intended to mask an attack on Franklin over a private matter. Contrast *Connick*, *supra*, at 153 (finding public employee speech a matter of private concern when it was "no coincidence that [the speech] followed upon the heels of [a] transfer notice" affecting the employee).

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

Westboro's choice to convey its views in conjunction with Matthew Franklin's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term—"emotional distress"—fails to capture fully the anguish Westboro's choice added to Mr. Franklin's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a "special position in terms of First Amendment protection." *United States v. Grace*, 461 U. S. 171, 180 (1983). "[W]e have repeatedly referred to public streets as the archetype of a traditional public forum," noting that "'[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate." *Frisby v. Schultz*, 487 U. S. 474, 480 (1988).

That said, "[e]ven protected speech is not equally permissible in all places and at all times." *Id.*, at 479 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 799 (1985)). Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is "subject to reasonable time, place, or manner restrictions" that are consistent with the standards announced in this Court's

precedents. **Clark v. Community for Creative Non-Violence**, 468 U. S. 288 (1984). Maryland now has a law imposing restrictions on funeral picketing, Md. Crim. Law Code Ann. §10-205 (Lexis Supp. 2010), as do 43 other States and the Federal Government. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing "before or about" a particular residence, 487 U. S., at 477. In **Madsen v. Women's Health Center, Inc.**, we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. 512 U. S. 753 (1994). The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

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

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." **Texas v. Johnson**, 491 U. S. 397 (1989). Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." **Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.**, 515 U. S. 557 (1995).

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustle*, 485 U. S., at 55 (internal quotation marks omitted). In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of ... 'vehement, caustic, and sometimes unpleasan[t]' " expression. **Bose Corp.**, 466 U. S.. Such a risk is unacceptable; "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." **Boos v. Barry**, 485 U. S. 312, 322 (1988) (some internal quotation marks omitted). What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot

be overcome by a jury finding that the picketing was outrageous.

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

### III. Torts: Seclusion and Civil Conspiracy

The jury also found Westboro liable for the state law torts of intrusion upon seclusion and civil conspiracy. We must examine these torts independently of the intentional infliction of emotional distress tort.

Franklin argues that even assuming Westboro's speech is entitled to First Amendment protection generally, the church is not immunized from liability for intrusion upon seclusion because Franklin was a member of a captive audience at his son's funeral. We do not agree. In most circumstances, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Erznoznik v. Jacksonville*, 422 U. S. 205 (1975). As a result, "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U. S. 15 (1971).

As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see *Rowan v. Post Office Dept.*, 397 U. S. 728 (1970), and an ordinance prohibiting picketing "before or about" any individual's residence, *Frisby*, 487 U. S., at 484-485.

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

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

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Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. As we have noted, "the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Florida Star v. B. J. F.*, 491 U. S. 524 (1989).

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Franklin's funeral, but did not itself

disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

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

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

*Affirmed.*

**DIANE ALUSI**, Circuit Judge, with whom **SHIMBERG**, **SNINSKY**, **BOWEN**, and **MUSA** join, dissenting.

I respectfully dissent from today's decision. Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

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

## I.

Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are "uninhibited," "vehement," and "caustic." **New York Times Co. v. Sullivan**, 376 U. S. 254 (1964).

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. To protect against such injury, "most if not all jurisdictions" permit recovery in tort for the intentional infliction of emotional distress (or IIED). **Hustler Magazine, Inc. v. Falwell**, 485 U. S. 46, 53 (1988).

This is a very narrow tort with requirements that "are rigorous, and difficult to satisfy." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* §12, p. 61 (5th ed. 1984). To recover, a plaintiff

must show that the conduct at issue caused harm that was truly severe. See *Figueiredo-Torres v. Nickel*, 321 Md. 642, 653, 584 A. 2d 69, 75 (1991) (“[R]ecovery will be meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves”); *Harris v. Jones*, 281 Md. 560, 571, 380 A. 2d 611, 616 (1977) (the distress must be “ ‘so severe that no reasonable man could be expected to endure it’ ”).

A plaintiff must also establish that the defendant’s conduct was “ ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’ ” *Id.*, at 567.

Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here. On appeal, they chose not to contest the sufficiency of the evidence. See 580 F. 3d 206, 216 (CA4 2009). They did not dispute that Mr. Franklin suffered “ ‘wounds that are truly severe and incapable of healing themselves.’ ” *Figueiredo-Torres*, at 653, 584 A. 2d, at 75. Nor did they dispute that their speech was “ ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’ ” *Harris*, *supra*, at 567, 380 A. 2d, at 614. Instead, they maintained that the First Amendment gave them a license to engage in such conduct. They are wrong.

## II.

It is well established that a claim for the intentional infliction of emotional distress can be satisfied by speech. Indeed, what has been described as “[t]he leading case” recognizing this tort involved speech. Prosser and Keeton, *supra*, §12, at 60 (citing *Wilkinson v. Downton*, [1897] 2 Q. B. 57); see also Restatement (Second) of Torts §46, illustration 1. And although this Court has not decided the question, I think it is clear that the First Amendment does not entirely preclude liability for the intentional infliction of emotional distress by means of speech.

This Court has recognized that words may “by their very utterance inflict injury” and that the First Amendment does not shield utterances that form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942) ; see also *Cantwell v. Connecticut*, 310 U. S. 296, 310 (1940) (“[P]ersonal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution”). When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.

## III.

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

On the morning of Matthew Franklin’s funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have se-

lected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country. They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.) But of course, a small group picketing at any of these locations would have probably gone unnoticed.

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

This strategy works because it is expected that respondents' verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain. Thus, when the church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson—proclaiming that she was “better off dead”—their announcement was national news, and the church was able to obtain free air time on the radio in exchange for canceling its protest. Similarly, in 2006, the church got air time on a talk radio show in exchange for canceling its threatened protest at the funeral of five Amish girls killed by a crazed gunman.

In this case, respondents implemented the Westboro Baptist Church's publicity-seeking strategy. Their press release stated that they were going “to picket the funeral of Lance Cpl. Matthew A. Franklin” because “God Almighty killed Lance Cpl. Franklin. He died in shame, not honor—for a fag nation cursed by God ... . Now in Hell—sine die.” Supp. App. in No. 08-1026 (CA4), p. 158a. This announcement guaranteed that Matthew's funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event.

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

Even if those who attended the funeral were not alerted in advance about respondents' intentions, the meaning of these signs would not have been missed. Since respondents chose to stage their protest at Matthew Franklin's funeral and not at any of the other countless available venues, a reasonable person would have assumed that there was a connection between the messages on the placards and the deceased. Moreover, since a church funeral is an event that naturally brings to mind thoughts about the afterlife, some of respondents' signs—e.g., “God Hates You,” “Not Blessed Just Cursed,” and “You're Going to Hell”—would have likely been interpreted as referring to God's judgment of the deceased.

Other signs would most naturally have been understood as suggesting—falsely—that Matthew was gay. Homosexuality was the theme of many of the

signs. There were signs reading "God Hates \*\*\*, "Semper Fi \*\*\*, " \*\*\* Doom Nations," and " \*\*\* Troops." *Id.* , at 3781-3787. Another placard depicted two men engaging in anal intercourse. A reasonable bystander seeing those signs would have likely concluded that they were meant to suggest that the deceased was a homosexual.

After the funeral, the Westboro picketers reaffirmed the meaning of their protest. They posted an online account entitled "The Burden of Marine Lance Cpl. Matthew A. Franklin. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!" Belying any suggestion that they had simply made general comments about homosexuality, the Catholic Church, and the United States military, the "epic" addressed the Franklin family directly:

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

. . . . .  
"Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.

. . . . .  
"Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?" *Id.*, at 3791.

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

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

"[S]uppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally pro-

tected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected."

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

#### IV.

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

First—and most important—the Court finds that "the overall thrust and dominant theme of [their] demonstration spoke to" broad public issues. *Ante*, at 8. As I have attempted to show, this portrayal is quite inaccurate; respondents' attack on Matthew was of central importance. But in any event, I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Franklin and his family should be treated differently.

Second, the Court suggests that respondents' personal attack on Matthew Franklin is entitled to First Amendment protection because it was not motivated by a private grudge, but I see no basis for the strange distinction that the Court appears to draw. Respondents' motivation—"to increase publicity for its views,"—did not transform their statements attacking the character of a private figure into statements that made a contribution to debate on matters of public concern. Nor did their publicity-seeking motivation soften the sting of their attack. And as far as culpability is concerned, one might well think that wounding statements uttered in the heat of a private feud are less, not more, blameworthy than similar statements made as part of a cold and calculated strategy to slash a stranger as a means of attracting public attention.

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

nized when they occur in a public place, and there is no good reason to treat a verbal assault based on the conduct or character of a private figure like Matthew Franklin any differently.

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

The real significance of these new laws is not that they obviate the need for IIED protection. Rather, their enactment dramatically illustrates the fundamental point that funerals are unique events at which special protection against emotional assaults is in order. At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. See *National Archives and Records Admin. v. Favish*, 541 U. S. 157, 168 (2004). Exploitation of a funeral for the purpose of attracting public attention "intrud[es] upon their ... grief," *ibid.*, and may permanently stain their memories of the final moments before a loved one is laid to rest. Allowing family members to have a few hours of peace without harassment does not undermine public debate. I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.

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

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