

OFFICE OF THE GENERAL COUNSEL

First Amendment Working Group Advisory

April 19, 2011

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SUMMARY

The Supreme Court held that even extreme and outrageous speech on matters of public concern is protected.

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FIRST AMENDMENT ALERT: Supreme Court Reaffirms Speech on Issues of Public Concern Is Constitutionally Protected

The Decision:

On March 2, 2011, the U.S. Supreme Court issued a decision in *Snyder v. Phelps* holding that the First Amendment bars imposition of tort liability for offensive picketing at military funerals. The defendants, Westboro Baptist Church and several of its members believe that military casualties are God's punishment for the United States' toleration of sin, particularly homosexuality. Defendants frequently communicate this message by picketing at military funerals. Defendants picketed the funeral of the plaintiff's son with signs reading, for example, "Thank God for IEDs," "Thank God for Dead Soldiers," "You're Going to Hell," and "God Hates You." They picketed peacefully at a location that had been designated by local authorities approximately 1000 feet from the church in which the funeral was held. Although the plaintiff was unable to see the picket signs during the funeral, he saw them on subsequent news reports and suffered significant emotional injuries as a result. The plaintiff filed suit against the church, church leader Fred Phelps, and other picketers and won a jury verdict and judgment of \$5 million on state law claims of intentional infliction of emotional distress and intrusion upon seclusion. The jury found that the defendants' conduct was "extreme and outrageous" and caused the plaintiff to suffer "severe emotional distress."

An eight-member majority of the Supreme Court (Justice Alito dissenting) held that the defendants' speech was constitutionally protected. Initially, the Court commented that "[w]hether 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." The Court's examination of the content of Westboro's signs led it to conclude that the church's speech related "to broad issues of interest to society at large," such as "the political and moral conduct of the United States and its citizens, the fate of our nation, [and] homosexuality in the military," rather than matters of "purely private concern." Even though some of the signs (e.g., "God Hates You," and "You're Going to Hell") may have been interpreted as a personal attack on the plaintiff or his son, the "overall thrust and dominant theme" of defendant's messages related to issues of public concern. The Court rejected the plaintiff's argument that the context of defendants' speech—a private funeral—rendered such speech "private." The Court also noted that the defendants had complied with the instructions of local authorities regarding the location of their picketing and "had the right to be where they were." Having concluded that the speech was in a public place and addressed a matter of public concern, the Court referred to long-standing First Amendment principles that protect offensive, insulting, and outrageous speech, and concluded that defendants' speech was shielded from liability for intentional infliction of emotional distress. The Court also rejected plaintiff's claim that, even if their speech was constitutionally protected, defendants could be liable for intrusion upon seclusion because plaintiff had been a "captive audience." The Court ruled that the captive audience doctrine was inapplicable because the defendants stayed well away from the funeral and did not interfere with the funeral service.

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Given the patent offensiveness and severe emotional impact of the speech protected in *Snyder*, it appears that there is little, if any, room for government to regulate the content of outrageous or hurtful speech that occurs in a public place and involves an issue of public concern.

Analysis:

1. The decision highlights the lengths to which the Court is willing to go in protecting highly offensive speech, at least when that speech involves matters of public concern. Given the patent offensiveness and severe emotional impact of the speech protected here, it appears that there is little, if any, room for government to regulate the content of outrageous or hurtful speech that occurs in a public place and involves an issue of public concern.
2. The decision emphasizes a distinction between protection for speech on matters of “public” and “private” concern. While the Court did not describe the appropriate analysis for speech involving matters of private concern, it strongly suggested that there would have been a different outcome had defendants’ speech addressed only private matters.
3. The decision leaves some lack of clarity on the dividing line between matters of public and private concern, but it does suggest that the Court’s interpretation of what constitutes a matter of “public concern” is broad and is not much influenced either by the context in which the speech is delivered or the fact that matters of public and private concern have been mixed together.
4. Along with last year’s decision in *U.S. v. Stevens* (which struck down a ban on depictions of animal cruelty), the decision confirms the unwillingness of the Court’s majority to recognize new First Amendment exceptions beyond narrow existing exceptions for “fighting words,” “true threats,” and a few other categories.
5. The decision leaves open questions about the extent to which government can control speech through content-neutral time, place, and manner rules, including free speech zones, but it does endorse prior holdings allowing such restrictions and suggests the Court’s openness to them.