However, the Court's categorical finding that video game regulations receive strict scrutiny under the First Amendment, regardless of minors' responses, will hamper its ability to account for the unique role of immersive interactive mediums in the marketplace of ideas.

3. Freedom of Speech — Mixed Public-Private Speech. — The Supreme Court has held repeatedly that the First Amendment protects an individual's ability to speak on matters of public import, even if the speech is profoundly controversial and hurtful.[1] In contrast, speech on matters of purely private significance receives considerably less First Amendment protection.[2] Last Term, in *Snyder v. Phelps*,[3] the Supreme Court held that the First Amendment protects from tort liability a church that picketed 1000 feet away from a military funeral because the content, form, and context of the church's placards dealt sufficiently with matters of public concern.[4] The *Snyder* Court was right to rule in the church's favor. However, in so doing, the Court missed an opportunity to clarify its public concern test as it pertains to cases of mixed public-private speech. The Court could have adopted an alternative approach that would have asked whether the component of the speech that caused the harm concerned matters of public import, and if so, whether exposing the speaker to liability would impermissibly collide with the First Amendment's goal of maintaining open channels for diverse social discourse.

For more than twenty years, members of the Westboro Baptist Church ("Westboro" or "the church") have picketed funerals to communicate their belief that God penalizes the United States and its military for tolerating homosexuality.[5] In March 2006, Westboro's pastor, Fred Phelps, and six members of his congregation traveled to Westminster, Maryland, to picket the funeral of Matthew Snyder ("Matthew"), a marine who died in Iraq in the line of duty.[6] From a small plot of public land approximately 1000 feet from the funeral location,[7] the picketers displayed messages that conveyed both general social critiques ("God Hates the USA," "Pope in hell," and "America is doomed") and criticism directed at the military or Matthew's funeral

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[1] *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam); Connick v. Myers, 461 U.S. 138, 145 (1983); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964); Bridges v. California, 314 U.S. 252, 270–71 (1941).

[2] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (citing *Connick*, 461 U.S. at 146–47).

[3] 131 S. Ct. 1207 (2011).

[4] *Id.* at 1219.

[5] *Id.* at 1213.

[6] Snyder v. Phelps, 533 F. Supp. 2d 567, 571–72 (D. Md. 2008). Albert Snyder, Matthew's father, listed the time and location of the funeral in several local newspapers. *Id.* at 571, 577.

[7] *Snyder*, 131 S. Ct. at 1213. The day before the funeral, the Westboro members also picketed in Annapolis, Maryland, at the Maryland State House and at the United States Naval Academy. *Id.* at 1223 (Alito, J., dissenting).

("You're going to hell," "Semper fi fags," and "Thank God for dead soldiers").[8] They notified police officials in advance of their activities, complied with police directions, and refrained from yelling or using profanity.[9] While driving past the picketers in the funeral procession, Matthew's father, Albert Snyder ("Snyder"), saw the tops of the picket signs; he was able to read the content of the signs only by watching a television news program later that evening[10] and by viewing subsequent newspaper and television coverage of the protest.[11] Shortly after the funeral, a member of Westboro posted a message on the church's website stating that Snyder and his ex-wife "taught Matthew to defy his creator," "raised him for the devil," and "taught him that God was a liar."[12] Snyder viewed this "epic"[13] approximately five weeks after the funeral.[14] After reading the epic, Snyder "threw up" and "cried for about three hours."[15] Expert witnesses testified at the subsequent trial that the emotional anguish Snyder endured "had resulted in severe depression and had exacerbated pre-existing health conditions."[16]

In June 2006, Snyder filed suit against Phelps and Westboro in the U.S. District Court for the District of Maryland, alleging five state law tort claims: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress (IIED), and civil conspiracy.[17] The district court granted the defendants' motion for summary judgment on the defamation and publicity claims.[18] However, a jury found for Snyder on the remaining three claims and awarded him $2.9 million in compensatory damages and $8 million in punitive damages.[19] The district court remitted the latter amount to $2.1 million but denied the defendants' other post-trial motions.[20] Importantly, the court denied Westboro's motion for judgment as a matter of law, rejecting the contention that the church's actions were entitled to complete protection under the First Amendment.[21]

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[8] Snyder v. Phelps, 580 F.3d 206, 212 (4th Cir. 2009). The picketers' signs "were largely the same at all three locations." *Snyder*, 131 S. Ct. at 1213.

[9] *Snyder*, 131 S. Ct. at 1213.

[10] *Id.* at 1213–14.

[11] *Snyder*, 533 F. Supp. 2d at 588.

[12] *Id.* at 572 (internal quotation marks omitted).

[13] Both parties referred to this Internet posting as an "epic" throughout the course of litigation. *See Snyder*, 131 S. Ct. at 1214 n.1.

[14] *Snyder*, 533 F. Supp. 2d at 572.

[15] *Id.* (internal quotation marks omitted).

[16] *Snyder*, 131 S. Ct. at 1214.

[17] *Snyder*, 533 F. Supp. 2d at 572. The court's jurisdiction was based on the parties' diversity of citizenship. *Id.*

[18] *Id.* at 572–73.

[19] *Id.* at 573.

[20] *Id.* at 597.

[21] *Id.* at 576.

The Fourth Circuit reversed.[22] Writing for the panel, Judge King[23] concluded that the district court erred by failing to grant the defendants' motion for judgment as a matter of law.[24] He began by explaining that the First Amendment fully protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual,"[25] including assertions on matters of public concern that contain rhetorical statements with "loose, figurative, or hyperbolic language."[26] Because only judges may decide these and other "purely legal issue[s],"[27] he concluded that the district court erred by permitting the jury to determine the nature and scope of constitutional protection for the defendants' speech-related activities.[28] Judge King also determined that a new trial was unnecessary: although a reasonable reader could interpret the epic and several of the placards as referring to Snyder or his son, each piece of written expression warranted protection due to either an absence of provable facts or the presence of hyperbole.[29]

Judge Shedd concurred.[30] He explained that rather than addressing the First Amendment issues presented, the court could have invoked the doctrine of constitutional avoidance and focused solely on Snyder's failure to provide evidence supporting the jury verdict on each of the three state law tort claims.[31]

The Supreme Court affirmed.[32] Writing for the Court, Chief Justice Roberts[33] asserted that the character of the placards precluded IIED liability because Westboro's speech concerned matters of public import and was delivered in a public setting.[34] As opposed to "matters

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[22] Snyder v. Phelps, 580 F.3d 206, 211 (4th Cir. 2009).

[23] Judge King was joined by Judge Duncan.

[24] *Snyder*, 580 F.3d at 226.

[25] *Id.* at 218 (alteration in original) (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)) (internal quotation marks omitted).

[26] *Id.* at 220 (quoting *Milkovich*, 497 U.S. at 21) (internal quotation marks omitted).

[27] *Id.* at 221.

[28] *Id.*

[29] *Id.* at 222–26. While noting that the epic "presents a somewhat more difficult question," *id.* at 224, Judge King explained that "[i]n context, the Epic is a recap of the protest" that, coupled with its "general tenor," "would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein," *id.* at 225.

[30] *Id.* at 227 (Shedd, J., concurring in the judgment).

[31] *Id.* More specifically, Judge Shedd explained that no intrusion upon seclusion had occurred, *id.* at 230–31, and that the defendants' conduct was not comparably outrageous to the few cases in which Maryland state courts had upheld IIED claims, *id.* at 232.

[32] *Snyder*, 131 S. Ct. at 1221.

[33] Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan.

[34] *Snyder*, 131 S. Ct. at 1219. Chief Justice Roberts declined to examine the epic for several reasons: Snyder did not mention the epic in his petition for certiorari; he did not respond to the contention in the opposition for certiorari that the claim rested only on the picketing; he only dis-

of purely private significance,"[35] issues of public concern typically receive substantial First Amendment protection in order to ensure "the free and robust debate of public issues" and to limit "self-censorship."[36] While the boundary between matters of public and private concern is indistinct, "guiding principles" nevertheless exist.[37] In particular, courts must examine the "content, form, and context"[38] of the disputed speech to avoid unintentionally censoring speech pertaining to social or political issues, especially when these issues deal with "any matter of political, social, or other concern to the community"[39] or "subject[s] of legitimate news interest."[40] Applying these principles to the Westboro picket, Chief Justice Roberts concluded that the signs unequivocally addressed public concerns: the signs touched upon several hot-button social issues,[41] the picketers congregated in public areas where they could maximize their exposure to large numbers of viewers,[42] and there was no preexisting relationship between Snyder and Westboro.[43] He also emphasized that the ideas expressed could not be censored solely on account of their offensiveness.[44]

Importantly, Chief Justice Roberts explained that protected speech may nevertheless be "subject to reasonable time, place, or manner restrictions" by government entities.[45] However, he differentiated the Westboro picket from the handful of cases in which the Court upheld government regulations of picketing outside private residences and abortion clinics.[46] More specifically, Chief Justice Roberts noted that Westboro notified local police of its intention to picket and followed the police's orders; remained out of the sight of the funeral attendees around the church; and refrained from using loud voices, profanity, or

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cussed the epic in a single paragraph in his opening merits brief; and "an Internet posting may raise distinct issues in [the] context" of this case. *Id.* at 1214 n.1.

[35] *Id.* at 1215.

[36] *Id.* (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985)) (internal quotation marks omitted).

[37] *Id.* at 1216.

[38] *Id.* (quoting *Dun & Bradstreet*, 472 U.S. at 761) (internal quotation marks omitted).

[39] *Id.* (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)) (internal quotation mark omitted).

[40] *Id.* (quoting City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam)).

[41] *Id.* at 1216–17. More specifically, the signs highlighted "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." *Id.* at 1217.

[42] *Id.* at 1217–18.

[43] *Id.* at 1217.

[44] *Id.* at 1219.

[45] *Id.* at 1218 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (internal quotation marks omitted).

[46] *See id.* (citing Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994); Frisby v. Schultz, 487 U.S. 474, 477 (1988)).

violence.[47] As a result, he concluded that holding Westboro liable would constitute an impermissible content-based restriction.[48]

Justice Breyer concurred, writing separately to explain that the Court's First Amendment analysis should not have ended after the Court determined that the picket signs address matters of public concern.[49] Moving beyond the public concern test, Breyer weighed the competing interests of Westboro on the one hand and of the State of Maryland and private individuals on the other. Based on this analysis, Justice Breyer reasoned that the majority's opinion preserved the State's ability to protect individuals like Snyder from egregious invasions of personal privacy: because of their location and compliance with police directions, the picketers made a disproportionately small contribution to Snyder's emotional pain relative to the punishment that state law provided for the picketers.[50]

In dissent, Justice Alito disputed the majority's examination of the content, form, and context of the picket.[51] He faulted the majority's characterization of the placards as pertaining principally to matters of public concern and asserted that a reasonable person viewing the signs could believe that the content of the placards related directly to Matthew, notably his sexual orientation.[52] Moreover, he argued that Westboro chose the content, time, and location of the picket to enhance the grief of Matthew's friends and family, which thereby increased the attractiveness of the event to the media.[53] Justice Alito also disagreed with the majority's determination that the location of the picket was public in nature and the emphasis the majority placed on this determination, noting that funerals frequently represent unique instances of vulnerability for friends and family members[54] and that the location of a protest is not dispositive to First Amendment protection inquiries.[55]

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47 *Id.* at 1218–19.

48 *Id.* at 1219. Additionally, Chief Justice Roberts rejected the intrusion upon seclusion claim on the grounds that Snyder was not a member of a captive audience, *id.* at 1219–20, and that the Court "[h]ad applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech," *id.* at 1220.

49 *Id.* at 1221 (Breyer, J., concurring).

50 *See id.* at 1221–22.

51 *See id.* at 1222 (Alito, J., dissenting).

52 *Id.* at 1225. Rather than deciding the intrusion upon seclusion claim, Justice Alito would have remanded the issue for decision by the Fourth Circuit. *Id.* at 1228 n.17.

53 *See id.* at 1224. Justice Alito also argued that by refusing to consider the epic, the majority failed to make "an independent examination of the whole record," a failure which "contrasts sharply with [the Court's] willingness to take notice of Westboro's protest activities at other times and locations." *Id.* at 1225 n.15 (internal quotation marks omitted).

54 *See id.* at 1227–28 (citing Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004)); *id.* at 1228 ("Allowing family members to have a few hours of peace without harassment does not undermine public debate.").

55 *Id.* at 1227 ("[T]here is no reason why a public street in close proximity to the scene of a funeral should be regarded as a free-fire zone.").

The *Snyder* Court was correct to find that Westboro's speech was protected under the public concern test. Two facts in particular underscore the public nature of the protest: First, the Westboro picket occurred in a traditional public forum and touched upon hot-button social topics. Second, the event to which the picket responded was a funeral, which itself can be a quasi-public expression of public concerns. However, Justice Alito correctly criticized the Court for underemphasizing the degree to which Matthew's funeral and the Westboro picket also touched upon matters of private concern. When applying the public concern test, the *Snyder* majority incorporated two problematic variants that various federal circuit courts have used to adjudicate cases involving public-private mixed speech. The Court could have instead implemented a subtly different approach by asking whether the component of the speech that caused the harm concerned matters of public import, and if so, whether exposing the speaker to liability would impermissibly collide with the First Amendment's goal of maintaining open channels for lively and democratic social discourse. Had the Court explored this line of inquiry, it would have concluded that the media coverage of the picket was a but-for cause of Snyder's emotional distress, and that holding Westboro liable would risk constricting two principal methods by which Americans disseminate and consume publicly relevant information. The Court would have nonetheless ruled in Westboro's favor, but under a less inclusive and more administrable standard.

Justice Alito properly noted the dual public-private nature of the Westboro picket. The picket was "public" for three principal reasons: it occurred on a small plot of public land — a traditional public forum;[56] it referenced war and sexuality — issues in which large groups of U.S. residents are (or should be) interested;[57] and it received television and newspaper coverage — two of the principal means of disseminating information of public concern. However, Westboro's picket also contained "private" elements: Westboro picketed near Matthew's funeral, displayed placards with messages that implicitly referenced Matthew's sexual orientation and religion, and posted an online epic directly attacking Matthew's family. In a similar way, Matthew's funeral mixed issues of public and private import. On the one hand, most funerals are uniquely intimate occasions for friends and family to grieve in the privacy of houses of worship and graveyards. On the other hand, certain aspects of funerals — notably, obituaries and com-

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[56] *See* Frisby v. Schultz, 487 U.S. 474, 481 (1988).

[57] *See* Pugel v. Bd. of Trs. of Univ. of Ill., 378 F.3d 659, 668 (7th Cir. 2004) (noting that an academic debate regarding human sexuality touched upon a matter of public concern); Grady v. El Paso Cmty. Coll., 979 F.2d 1111, 1114 (5th Cir. 1992) ("[S]peech regarding the Persian Gulf war constituted a matter of public concern.").

parable news coverage — represent attempts by friends and family (and perhaps even journalists) to comment on public topics ranging from war and disease to death and the afterlife.[58] Indeed, military funerals sometimes conjure up competing narratives and justifications for the wars in which the soldiers lost their lives.[59] Recognizing the fact that funerals are events with both private and public significance raises the difficult and unresolved question of whether courts in cases like *Snyder* can and should demarcate the line between public and private issues.[60]

Courts have proffered three approaches to resolving mixed speech cases; however, all three are flawed. The first approach instructs that speech should receive First Amendment protection so long as any portion of it touches upon a matter of public concern, even if matters of private concern predominate. The Supreme Court has suggested this approach in at least two previous cases,[61] several circuit courts

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[58] *See* Vincent DiGirolamo, *Newsboy Funerals: Tales of Sorrow and Solidarity in Urban America*, 36 J. SOC. HIST. 5, 6 (2002) (arguing that newsboy funerals in the late nineteenth and early twentieth centuries "compel us to expand our understanding of children and death beyond the domestic and into the public sphere," in part because "they enable us to see children's grief not simply as products of familial loss . . . but as expressions of class feeling"); Simon Stow, *Pericles at Gettysburg and Ground Zero: Tragedy, Patriotism, and Public Mourning*, 101 AM. POL. SCI. REV. 195, 202 (2007) (explaining that Gettysburg afforded President Lincoln the opportunity to "make a speech identifying the causes of the war and the conditions for peace"); Barbie Zelizer, *From Home to Public Forum: Media Events and the Public Sphere*, J. FILM & VIDEO, Spring & Summer 1991, at 69, 78 (stating that media coverage of President Kennedy's funeral "awakened a sense of continuity, a rededication of faith and loyalty that remained long after" the funeral ended).

[59] *Cf.* Lori Robertson, *Images of War*, AM. JOURNALISM REV., Oct.–Nov. 2004, at 44, 46 (relaying a journalist's observation that the images of the soldiers' coffins, among other images, made the Iraq war "seem[] less sanitized, more personally intrusive") (internal quotation marks omitted); Geoffrey R. Stone, Essay, *Freedom of the Press in Time of War*, 59 SMU L. REV. 1663, 1670 (2006) (asserting that the federal government's policy of preventing the press from photographing the flag-draped coffins of U.S. soldiers killed in Iraq kept U.S. residents ignorant of the full consequences of the war, thus "stifl[ing] and distort[ing] public debate").

[60] *See, e.g.*, Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30–32 (1990); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 670–79 (1990); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1088–95 (2000).

[61] *See* Rankin v. McPherson, 483 U.S. 378, 386 n.11 (1987) ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern."); Connick v. Myers, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices . . . .").

have routinely employed it,[62] and the *Snyder* Court adopted it as well.[63] However, this approach is overinclusive: As noted above, Justice Alito would argue that the First Amendment should not protect speech that overwhelmingly references issues of private import.[64] Moreover, insulating mixed speech solely because its content or context has a public component risks rendering meaningless the more robust "content, form, and context" inquiries that the Supreme Court has repeatedly undertaken.[65]

The second approach provides that mixed speech should be classified as either public or private depending on which element predominates. Several circuit courts have employed this approach,[66] and the *Snyder* Court implicitly referenced it.[67] However, the approach suffers from administrability concerns: judges may impermissibly rely on their subjective beliefs when determining whether the public or private concern predominates, particularly in difficult mixed cases.[68]

The third approach is Justice Alito's suggestion in *Snyder* that private speech should not be "immunized simply because it is interspersed" with public speech.[69] However, this approach is underinclusive. Speech that touches upon matters of public import can cause private harm to individuals; yet, the liberty to persuade others of one's point of view on public matters, "in spite of the probability of excesses and abuses, . . . [remains] essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[70] Consequently,

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[62] *See, e.g.*, Brennan v. Norton, 350 F.3d 399, 412–13 (3d Cir. 2003); Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001); Kurtz v. Vickrey, 855 F.2d 723, 733 (11th Cir. 1988).

[63] *See Snyder*, 131 S. Ct. at 1216 (stating that speech is public when it touches upon "*any* matter of political, social or other concern to the community," and reasoning that "[t]he 'content' of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of '*purely* private concern'" (emphases added) (citations omitted)).

[64] *See id.* at 1227 (Alito, J., dissenting); *Rankin*, 483 U.S. at 397–98 (Scalia, J., dissenting) ("A statement lying so near the category of completely unprotected speech cannot fairly be viewed as lying within the 'heart' of the First Amendment's protection . . . .").

[65] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

[66] *See, e.g.*, Schilcher v. Univ. of Ark., 387 F.3d 959, 965 (8th Cir. 2004); Pichelmann v. Madsen, 31 F. App'x 322, 326 (7th Cir. 2002); Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990).

[67] *See Snyder*, 131 S. Ct. at 1217 (reasoning that although one could view some of the placards as pertaining to the Snyders, "the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues").

[68] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW § 16.16, at 683 (3d ed. 2007); *cf.* City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (stating that with regard to First Amendment jurisprudence, "fairly precise rules are better than more discretionary and more subjective balancing tests"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) ("[F]or my sins, I will probably write some of the opinions that use [balancing modes of analysis]. All I urge is that those modes of analysis be avoided where possible . . . .").

[69] *Snyder*, 131 S. Ct. at 1227 (Alito, J., dissenting).

[70] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940); *cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may

narrowing this liberty jeopardizes society's ability to discuss important but deeply sensitive subjects.[71] Regarding the instant case, the record indicates that the public elements of Westboro's picket — specifically, the television and print news coverage — were a but-for cause of Snyder's emotional distress.[72] Accordingly, a court could not have held Westboro liable for the private content of its speech without also relying on the public content of its speech.

Rather than applying the public concern test in a way that incorporates the first two approaches, the *Snyder* Court could have adopted an alternate approach by inquiring whether the components of speech that caused harm touched upon a matter of public interest, and if so, whether withholding free speech protection from the speaker risks imperiling the First Amendment's goal of maintaining avenues of communication that allow the public to debate thoroughly important matters. This inquiry would not suffer from the overinclusiveness of the "any public matter" approach because it would not protect speech unless failing to do so would imperil the values the public concern test aims to protect. Moreover, this inquiry would be more administrable than the "predominant theme" approach because it would not permit courts to rely on their subjective beliefs when weighing the relative importance of the public and private components of speech. Lastly, unlike Justice Alito's approach, this inquiry would not penalize parties who engage in speech of public concern.

Westboro's speech qualifies for protection under this alternate approach. First, Snyder's extreme emotional distress was caused largely by viewing coverage of Westboro's picket, which was staged in traditional public fora — on television and in newspapers.[73] With regard to the second consideration in this alternative approach, to hold Westboro

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embarrass others or coerce them into action."); Thornhill v. Alabama, 310 U.S. 88, 103 (1940) ("Free discussion concerning the conditions in industry and the causes of labor disputes . . . is indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.").

[71] One scholar has recently suggested that holding Westboro liable could lend support to courts and juries inclined to punish individuals who publish cartoons depicting the prophet Muhammad, burn or step on a nation's flag, or criticize affirmative action policies as rewarding undeserving minorities. *See* Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 300–01.

[72] The trial court did not differentiate between what Snyder saw in person and what he saw on television, in print, or on the Internet. Instead, the court simply stated that "[t]here was sufficient evidence in the trial record for a reasonable jury to conclude that Defendants' *conduct* was so extreme and outrageous as to cause Plaintiff's injury." Snyder v. Phelps, 533 F. Supp. 2d 567, 581 (D. Md. 2008) (emphasis added). Nevertheless, there is no indication that Snyder endured emotional pain as a result of Westboro's activities before he saw television coverage of the picket.

[73] *Cf. Snyder*, 131 S. Ct. at 1221–22 (Breyer, J., concurring) (reasoning that holding Westboro liable when it did not disrupt Snyder's private mourning during the funeral would punish the church "without proportionately advancing the State's interest in protecting its citizens against severe emotional harm," *id.* at 1222).

liable for speech that was disseminated through television and newspapers would risk deterring potential speakers from discussing issues that are or should be important to large groups of people, particularly if the speakers stage their discussions in traditional public fora such as city sidewalks and parks. This deterrence may be especially problematic for individuals seeking to express viewpoints — distasteful and otherwise — that the majority of local residents refuse to tolerate.[74]

To be sure, prohibiting liability in such circumstances could impose added hardships on the families and close friends of the deceased at a time when various technological advances make it increasingly difficult to grieve in private.[75] However, "[s]ocial interaction exposes all [Americans] to some degree of public view," in part because American society "places a primary value on freedom of speech and of press."[76] As a result, families like the Snyders may encounter hyperbolic and intolerant speech simply by traveling to and from a loved one's funeral. Nevertheless, proscribing liability for individuals who undertake actions similar to Westboro's picket does not ask American citizens to engage in unreasonable "Herculean efforts"[77] in order to live their private lives free of disruption. Indeed, the government is frequently able to construct reasonable time, manner, and place restrictions to ensure that funeral attendees have an adequate degree of distance from unwanted speakers.[78] Moreover, these restrictions, coupled with averting one's eyes at certain moments and avoiding certain television and print news coverage, may represent reasonable approaches that communities and unwilling listeners can take to avoid unwanted exposure. In short,

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[74] Importantly, the first two approaches discussed above and this alternative approach would not always lead to the same conclusion. For example, Westboro could have rented a small plane, attached to the tail of the plane a banner reading "Matthew Snyder died in Iraq because he was a homosexual," and (quietly) flown the plane in large circles and loops around the church immediately before and after the funeral service. This demonstration would certainly contain "public" aspects — notably the public forum and the reference to hot-button issues — thus satisfying the "any public matter" approach. Furthermore, a reasonable viewer could conclude that the demonstration was more public than private, thereby satisfying the "predominant theme" approach. However, Westboro would not likely satisfy the alternative approach: refusing to provide Westboro with free speech protection would not imperil the maintenance of open channels for lively and democratic social discourse, as Westboro could likely choose an alternate way to communicate its views while remaining out of sight from the funeral attendees immediately before and after the service.

[75] *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (implying that an individual can avoid this public view by refraining from "voluntarily inject[ing] himself . . . into a particular public controversy" and by not participating in certain "community and professional affairs").

[76] *Id.* at 364 (Brennan, J., dissenting) (quoting Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)) (internal quotation mark omitted).

[77] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772–73 (1994).

[78] *Cf. id.* at 773 ("If overamplified loudspeakers assault the citizenry, government may turn them down." (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)) (internal quotation marks omitted)).

citizens must shoulder certain hardships so that the country can adhere to the principle that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'"[79]

4. Freedom of Speech — Campaign Finance Regulation. — In *Davis v. FEC*,[1] the Supreme Court struck down the Millionaire's Amendment, a provision relaxing campaign contribution restrictions for candidates whose opponents spent over $350,000 in personal funds,[2] as an impermissible burden on political speech.[3] Commentators disagreed over the decision's implications for public financing systems that employed matching funds mechanisms.[4] Last Term, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[5] the Supreme Court held that the Arizona Citizens Clean Elections Act[6] (CCEA) unconstitutionally burdened privately funded candidates' political speech by granting matching funds to their publicly financed opponents.[7] The decision split the Court 5–4 and produced a pair of opinions that provided independently thorough analyses but relied on dissonant theories of the First Amendment. Although the Court's doctrinal analysis, if extended, could imperil the constitutionality of longstanding public funding systems, the Court's focus on the CCEA's trigger mechanism will likely prevent the implications from reaching so far.

Despite contribution limits enacted by Arizona voters in 1986,[8] Arizona remained plagued by campaign finance–related political corruption scandals throughout the late 1980s and the 1990s.[9] Governor Evan Mecham was indicted for perjury and fraud for allegedly concealing a campaign loan,[10] both then-sitting U.S. Senators were inves-

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[79] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)).

[1] 128 S. Ct. 2759 (2008).

[2] *Id.* at 2766.

[3] *Id.* at 2771.

[4] *Compare, e.g.*, Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 321–22 (2010) (arguing that *Davis* implies that "asymmetrical schemes of public financing that provide additional funding or raise contribution limits in response to independent expenditures are presumably unconstitutional"), *with The Supreme Court, 2007 Term — Leading Cases*, 122 HARV. L. REV. 276, 384 (2008) (arguing that the subsidy-penalty distinction "draws a clear doctrinal line between the asymmetrical restriction scheme in *Davis* and the asymmetrical funding schemes in many states").

[5] 131 S. Ct. 2806 (2011).

[6] ARIZ. REV. STAT. ANN. § 16-940–16-961 (2006 & Supp. 2010).

[7] *See Ariz. Free Enter.*, 131 S. Ct. at 2813.

[8] *See* ARIZ. REV. STAT. ANN. § 16-905 historical and statutory notes.

[9] *See* McComish v. Bennett, 611 F.3d 510, 514 (9th Cir. 2010) (amended opinion); *see also* Carey Goldberg, *2 States Consider Boldly Revamping Campaign Finance*, N.Y. TIMES, Oct. 19, 1998, at A1 (suggesting that passing the campaign finance reform measures would have "special impact" in Arizona because the state had "been plagued by corruption scandals").

[10] *See Arizona: Indicting a Wild-Card Governor*, NEWSWEEK, Jan. 18, 1988, at 31.