

The First Amendment: Cases, Problems and Materials (Fourth Edition)

2016 Supplement

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Dedication

For Laurence, Ben and Kate, with love, R.W.

For Elizabeth, Caitlin, Margaret, and Peter, with love, CH

To Heather, Lily, and Matthew, for the immeasurable joy they bring,
and to Mom, whose love, faithfulness and endurance continue to show me the way. JACK

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CHAPTER 1

HISTORICAL INTENTIONS & UNDERLYING VALUES

P. 12: at the end of the note, add the following new note:

2. *The Internet and Speech Suppression.* As the *Reno* decision, *infra*, recognizes, the Internet is a very democratic medium which offers ordinary people the opportunity to engage in mass communication. However, there is evidence suggesting that public awareness of governmental surveillance of Internet communications has a suppressive effect on speech. See Karen Turner, *Mass Surveillance Silences Minority Opinions, According to Study, The Washington Post* (Mar. 28, 2016). The study was characterized as follows: “A new study shows that knowledge of government surveillance causes people to self-censor their dissenting opinions online. . . . The majority of participants reacted by suppressing opinions that they perceived to be in the minority. *Id.*

CHAPTER 2

ADVOCACY OF ILLEGAL ACTION

E. MODERN STANDARDS

P. 44: Delete problem # 2 and renumber the remaining problems.

P. 45: In the next-to-last line of problem #5, delete the isolated letter “s” and insert the word “class.”

P. 45: Delete the title of existing problem # 6 and the first four words of the sentence; then capitalize the word “Even” and insert this sentence from problem # 6 at the end of problem #5, and renumber the remaining problems.

P. 45: Replace existing problem # 7 (which has been renumbered to problem # 5), with the following new problem #5:

5. *Brandenburg in the Cyber Village.* How would *Brandenburg* apply to Internet communications? Suppose, for example, during war time, that a blogger repeatedly and consistently urges people to “resist the draft by all means, including force.” The *Brandenburg* test seems to contemplate a situation where an individual who tries to whip a mob into immediate violence. Can the imminence requirement be satisfied by an Internet communication because of the delayed nature of the communication (the possible delay between posting and reading)? In fact, is the Internet a potentially more dangerous method of communication? For example, there is evidence suggesting that Islamist groups and white supremacist groups (e.g., some believe that Dylan Roof, the young man who killed nine people at a prayer service in Charleston, South Carolina, was radicalized online) have used the Internet to radicalize sympathetic individuals.

Moreover, does the Internet have greater potential to immediately mobilize action? In recent years, individuals have been able to organize so-called “flash mobs” using social networking and text messaging. Often, these flash mobs are for benign purposes (e.g., snowball fights or pillow fights). See Caroline Porter & Douglas Belkin, *Students Deploy Riot-Ready Social Media*, *The Wall Street Journal* A-5 (Apr. 21, 2014); Ian Urbina, *Mobs Are Born as Word Grows by Text Message*, *The New York Times* A-1 (Mar. 25, 2010). Suppose that these flash mobs are designed for more nefarious purposes: to provoke assaults or brawls. See *id.* At what point are the police allowed to intervene?

P. 50: After the case and before the problems, add the following new Note:

NOTE: PROTECTED ADVOCACY VERSUS ILLEGAL CONSPIRACY

A distinction has always been made between crimes like conspiracy and solicitation, on the one hand, and protected speech. For example, if A solicits B to rob a bank, and offers B \$100,000 for successful completion of the crime, A can be convicted of solicitation. Likewise, if A and B conspire to rob the bank, they can be convicted of conspiracy to rob the bank. By contrast, if A makes a public speech calling on “every moral human being to resist the draft,” the speech is protected unless the *Brandenburg* test is satisfied. While the distinction between the two types of situations is clear, the dividing line between the two cannot always be precisely ascertained. In *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014), three men plotted to attack a Marine Corps base in Virginia as well as various sights overseas. At trial, the government sought to introduce statements made in e-mails, Facebook postings and YouTube links, in which the defendants expressed to undercover government agents their desire to engage in violent Jihad and the need to raise money to support Jihadist efforts. The court upheld the admission of those statements.

P. 51: following problem # 3, insert the following new problems # 4, and renumber the remaining problems:

4. *The Agitator*. An American, who has converted to Islam, maintains an online blog that repeatedly urges the citizenry to make off-hour attacks on KFC restaurants, bank, mobile phone stores, and other corporate outposts. His reason for promoting “off-hour” attacks is to ensure that people are not hurt, and he claims that he has never advocated for the use of explosives. In the posts, he argues that non-violent protests are “futile” and constitute simply an opportunity to “get arrested or shot in an exercise of crowd control training for the police.” His posts have led individuals to bomb places of business, and they sometimes claim responsibility using his hashtags. In addition, his blog posts are widely circulated among activists. Under the *Brandenburg* test, can the blog poster be criminally prosecuted for these posts? See David D. Kirkpatrick, *American Agitator Helps Fuel Attacks in Egypt*, *The New York Times* A-1 (Feb. 28, 2015).

P. 52: Delete the citation for the *Holder* opinion and insert the following new citation:

561 U.S. 1 (2010)

F. SPEECH AND TERRORISM AFTER 9/11

P. 59: At the end of the notes, add the following new note ## 4-6:

4. *Violent Jihad*. In May, 2014, Mostafa Kamel Mostafa, a British cleric, was convicted on eleven terrorism-related charges. Mostafa, aka Abu Hamza al-Masri, was convicted of having

helped orchestrate the kidnaps of Americans and an attempt to create a terrorist training camp. The question was whether he was being prosecuted for his fiery statements (e.g., about devoting his life to violent Jihad), or for specific acts of terrorism.

5. *Snowden, NSA Litigation, and USA Freedom Act.* In June 2013, a contractor at the National Security Agency (NSA), Edward Snowden, leaked documents to the media showing that the government was secretly collecting extensive amounts of data from phone and Internet companies. Soon thereafter, five plaintiffs filed suit in D.C. and the ACLU filed suit in New York to challenge the NSA bulk metadata collection program on constitutional grounds. The NSA argued that the program was lawful based on Patriot Act provisions and a secret order of the Foreign Intelligence Surveillance Court (FISC). One court determined that the program violated the Fourth Amendment grounds without reaching the First Amendment claims. See *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2015). The other court rejected both the First and Fourth Amendment claims, but the appellate court vacated that ruling, holding that the NSA exceeded its statutory authority without resolving constitutional issues. Compare *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) with *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015).

The relevant Patriot Act provisions expired on June 30, 2015, and two days later, President Obama signed the USA Freedom Act that modified those provisions. After six months, the new statute will require the NSA to rely on court orders to seek more particularized information from telephone companies by providing “known terrorist phone numbers” and collecting the numbers in contact with whatever numbers are in contact with those known numbers. The new law “prohibits the [Government] from grabbing, for example, all information relating to a particular service provider or area code.” See Associated Press, *Questions and Answers about Newly Approved USA Freedom Act*, THE NEW YORK TIMES, June 3, 2015, http://www.nytimes.com/aponline/2015/06/03/us/politics/ap-us-nsa-surveillance-qa.html?_r=0. But telephone companies will be required under the Act to give the Government “the sought after metadata, which can indicate caller location, numbers dialed, length of conversations, and other information, but not the actual conversations.” Jason Reed, Reuters, *Surveillance court moving toward renewal of NSA spying program for 6 months*, Reuters, RT, June 12, 2015, <http://rt.com/usa/268441-surveillance-court-nsa-spying/>

6. *Praising the 9/11 Attacks.* In January 2015, Mostafa Kamel Mostafa, aka Abu Hamza al-Masri, was sentenced to life imprisonment in the federal district court in Manhattan for terrorism-related crimes. He was extradited from the U. K. in 2012 after serving as an imam in London at the Finsbury Park mosque. His convictions included charges related to his efforts, as described by prosecutors, “to drive his young, impressionable followers to participate in acts of violence of murder across the globe.” The sentencing judge described as “barbaric” his “efforts to recruit others to kill.” The trial evidence included testimony regarding the 1998 kidnappings of 16 tourists in Yemen by a militant group “aligned with Mr. Mostafa.” Four hostages were killed during the rescue operation. Mostafa also was convicted of “sending one of his followers to train with Al Qaeda in Afghanistan” and “trying to create a terrorist training camp” in Oregon. His speeches were introduced at the trial, including his reference to Osama bin Laden as “a hero” and his observation that, “Everybody was happy when the planes hit the World Trade Center.” See Benjamin Weiser, *Life Sentence for British Cleric Who Helped Plan 1998 Kidnapping in Yemen*, THE NEW YORK TIMES, January 9, 2015, <http://www.nytimes.com/2015/01/10/nyregion/>

british-cleric-sentenced-to-life-in-prison-in-terror-case.html?ref=topics&_r=0 Abu Hamza's lawyers argued that "the case relied largely on the incendiary language of the defendant's sermons," and that "the jurors reacted emotionally to the inflammatory statements rather than sticking to the evidence." Joseph Ax, *London imam Abu Hamza convicted of U.S. terrorism charges*, Reuters, Mon. May 19, <http://www.reuters.com/article/us-usa-security-imam-idUSBREA4I0NL20140519>.

CHAPTER 3

CONTENT-BASED SPEECH RESTRICTIONS: *CHAPLINSKY AND THE CONCEPT OF EXCLUDED SPEECH*

A. “FIGHTING WORDS”

P. 66: Delete the heading for the note and insert this new heading, new number, and new title for the note:

NOTES

1. *Fighting Words and Vagueness.*

P. 64: Renumber note #4 on pp. 410-411 as note # 2, and move it to p. 64 to follow the now renumbered note # 1.

P. 68: Insert the following new problems ## 8-9, and then renumber the remaining problem:

8. *Shouting from a Passing Vehicle.* Defendant, who is passing by in an automobile, calls out to a teenage neighbor referring to her as a “spic bastard.” Suppose that a police officer charges defendant with “disorderly conduct,” and the prosecutor seeks to justify the charges under the fighting words doctrine. Given the justifications that underlie the doctrine, can it be applied to someone who yells insulting words from a passing vehicle? *See City of Billings v. Nelson*, 322 P.3d 1039 (Mont. 2014); *Sandal v. Larson*, 119 F.3d 1250 (6th Cir. 1997).

9. *The Abusive Pedestrian.* Shortly after midnight, a man is embracing his girlfriend on a public street. The police, who mistakenly believe that they are involved in an altercation, approach the couple to make inquiry. The man releases his embrace and calls the police “queers” and yells out “fuck you, cops.” The man also make threats against the police, telling him that he is going to kill them. Can the fighting words doctrine be used to justify a disorderly conduct conviction? *See State v. Matthews*, 111 A.3d 390 (R.I. 2015).

P. 70-71: Renumber problem ## 3-4 as ## 1-2, insert a new problem # 3 (below), and renumber the remaining problems.

4. *Abusive Response.* Shortly after midnight, a man was embracing his girlfriend on a public sidewalk. A police officer, who was passing by, formed the mistaken impression that the two were involved in an altercation. When the officer approached the couple to inquire what was going on, the man let go of his girlfriend and responded, “Fuck you, cop.” The man also made threats, such as “Mind your own business or I will kill you.” Does the fighting words doctrine

allow the officer to arrest the man for the crime of disorderly conduct? *Compare State v. Matthews*, 111 A.3d 390 (R.I. 2015).

P. 67: At the end of existing problem # 5, insert the following:

Compare City of Billings v. Nelson, 322 P.3d 1039 (Mont. 2014); *State v. Suhn*, 759 N.W.2d 546 (S.D. 2008).

B. HOSTILE AUDIENCES

P. 77: At the end of the problems, add the following new problems ## 7 & 8:

7. *Proselytizing at Festival.* The Arab International Festival is an annual event in Dearborn, Michigan. It is open to the public and 250,000 people attend the three-day event. A Christian evangelical group decides to use the event in order to convert non-believers. Members of the group attend the Festival wearing t-shirts with various printed slogans: “Jesus is the Way, All Others are Thieves and Robbers,” “Be Converted That Your Sins May Be Blotted Out,” and “Islam is a Religion of Blood and Murder.” In response, some attendees at the festival react to the t-shirt slogans by throwing water bottles and garbage at those who are wearing them. Police officers, on duty at the Festival, are summoned to the scene, and they warn the people wearing t-shirts that they would receive citations for disorderly conduct if they did not leave the Festival immediately. Under the circumstances, was this police order consistent with the First Amendment? *Compare Bible Believers v. Wayne County*, 765 F.3d 578 (6th Cir. 2014).

8. *Images of the Prophet Mohammed.* As with the Charlie Hebdo massacres in Paris, and the response to the Danish cartoons, some Muslims can be highly offended by publications of pictures or caricatures of the Prophet Mohammed. In addition, these depictions can sometimes lead to violence. Might it be appropriate for the government to prohibit such depictions because of the threat of violence?

C. DEFAMATION

[1] The Constitutionalization of Defamation

P. 86: Insert the following new note # 7, and then renumber the remaining notes:

7. *Immunity from Suit for Defamation.* Under the Communications Decency Act of 1996, 47 U.S.C. § 230, the effect of the following provision is to provide immunity from defamation liability: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided another information content provider.” As explained in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), this provision allows an internet service to exercise “a publisher’s traditional editorial functions,” such as “whether to publish,

withdraw, postpone or alter content,” without fear of tort liability. Congress enacted § 230 with the purposes of preserving “the robust nature of Internet communications,” protecting freedom of speech in such communications, and encouraging “the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted.” The “specter of tort liability” would produce two kinds of “chilling effects.” First, given the fact that millions of postings that “would be impossible for service providers to screen,” they “might choose to severely restrict the number and type of messages posted.” Also, tort liability would create a “disincentive” for the development of filtering technologies, such as those that allow parents to “restrict their children’s access” to particular types of online content.

P. 86: In note # 8, before the final citation, insert the following new citation:

Trout Point Lodge, Ltd. v. Handshoe, 729 F.3d 481 (5th Cir. 2013);

P. 86: At the end of the notes, add the following new note # 11:

11. *Alternate Approaches.* By and large, courts and legislatures in other countries have chosen not to adopt the *N.Y. Times* actual malice standard. For example, both Australia and England opted instead for an extension of common law qualified privilege as a way of providing greater protection to defamation defendants. See *See Jameel v. Wall Street Journal Europe*, [2006] U.K.H.L. 44; *Reynolds v. Times Newspapers* [2001] 2 A.C. 127 (HL); *Lange v. Australian Broadcasting Corp.* (1997) 189 C.L.R. 520, 521 (Austl.). The evidence suggests that this approach did not strike a satisfactory balance between the interest in free expression, and the individual interest in reputation. See RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT & CLIVE P. WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, FREE SPEECH AND REPUTATION (2006). On the contrary, because the Australian decision focused on the lower-standard of “reasonableness,” and because the English decision provided a list of factors to be considered, it is not clear that either approach provided sufficient “breathing space” for free expression. See *id.* Britain recently replaced its judicial decision with statutory protections, but the statute also contains a list of factors. See Defamation Act, 2013, c. 26 (U.K.).

P. 87: At the end of the problems, insert the following new problems # 7:

7. *The Planned Parenthood Case.* In 2015, the Center for Medical Progress (CMP), an anti-abortion organization, released videos which implied that Planned Parenthood was profiting from the sale of body parts from aborted fetuses. The videos, which showed Planned Parenthood officials discussing the sale of body parts, were several hours long. At several points in the videos, Planned Parenthood officials flatly stated that they do not profit from the sale of donated

fetal tissue. However, overall, the video implies that they are profiting. Congress responded by reducing Planned Parenthood funding, and some attacked the organization. Assume that the “actual malice” standard is applied to this case. What would Planned Parenthood have to show in order to recover damages against CMP?

P. 87: In the note at the bottom of the page, on the 8th line, after the word “id.”, insert the following:

In *Comins v. VanVoorhis*, 135 So.3d 545 (Fl. Dist. Ct. App. 2014), the Court concluded that a blogger qualified as a “media defendant” for purposes of Florida’s defamation statute. *Compare Obsidian Financial Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014) (treating a blogger as a journalist for defamation purposes).

[2] “Public Figures” and “Private Plaintiffs”

P. 97: At the end of the notes, insert the following new note # 5:

5. *Anti-SLAPP Statute*. SLAPP stands for Strategic Lawsuit Against Public Participation, and a majority of the state legislatures have enacted “anti-SLAPP” statutes that are intended to provide the remedy of prompt dismissal of meritless claims by plaintiffs whose suits seek to suppress a defendant’s protected First Amendment expression. Under the D.C. statute, for example, when a defendant files a special motion to dismiss and shows that the plaintiff’s claim arises from “an act in furtherance of the right of advocacy on issues of public interest,” then the plaintiff must demonstrate the likelihood of success on the merits of its claim or the suit will be dismissed. One example of a defamation suit dismissed under the Texas anti-SLAPP statute is *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009), in which the owner of an airline refueling operation alleged that he was defamed by newspaper stories that he sold contaminated fuel to military aircraft that may have caused engine failure. The defendant authors and publishers qualified for the anti-SLAPP procedure because the plaintiff’s suit arose from “an act in furtherance of [their] right of free speech [and] in relation to a public issue.” The evidence offered by plaintiff included the news stories and affidavits from plaintiff and his attorney, and The court dismissed the suit because the plaintiff’s evidence, which included the news stories and affidavits by the plaintiff and his attorney, did not establish a probability of success on the element of negligence. The court reasoned that “even assuming that the stories were false,” the affidavits did not show that the defendants “acted unreasonably in investigating and publishing the stories.” Note that federal courts are divided on the question whether a state anti-SLAPP statute may be applied in a federal diversity suit. *See, e.g., Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1335-36 (D.C. Cir. 2015).

P. 99: Insert the following new problems ## 7 & 8, and renumber the remaining problems:

7. *Disappearance in Aruba*. A woman, Natalee Holloway, disappeared in Aruba in 2005 after leaving a bar with Deepak Kalpoe and his brother. The disappearance generated substantial controversy and lots of news coverage. Assume that Deepak is interviewed by the police about the disappearance, speaks to the media about it several times, and tries to obtain a book contract regarding the story of the disappearance. Based on criticism of Deepak's conduct by Holloway's mother and Aruban government officials, Deepak files a defamation suit against them in the United States. Is Deepak a public figure? Why or why not? Assume that the same criticisms are made about Deepak's brother. However, he never spoke to the media and never sought a book contract. Is the brother a public figure? *See McGraw v. Superior Court*, 42 MED. L. Rptr. 1481 (Cal. Ct. App. 2014).

8. *Categorical Presumptions*? Suppose that, following a suicide, a newspaper speculates regarding the deceased's motives, suggesting that a relative's actions contributed to cause the suicide. When the newspaper is sued for defamation by the relative, it defends on the basis that its speculation regarding motive necessarily involves an assertion of opinion rather than an assertion of fact. Is the newspaper correct? Is speculation regarding motive necessarily an opinion?

[3] Application of the “Actual Malice” Standard

P. 103: Insert the following new problem # 2 and renumber the remaining problems:

2. *The “Birther” Parody*. One day after the release of a book questioning whether President Barrack Obama is a U.S. citizen, and therefore eligible for the U.S. presidency, a magazine publishes a satirical article about the book. The article suggests that the publisher is in the process of withdrawing the book from distribution, and that it will provide refunds to all who have purchased the book. In response to the article, book stores began pulling the book from their shelves, and purchasers began demanding refunds. If the magazine editors intended the article as satire, would it matter whether some readers perceived it as fact rather than satire? In other words, for First Amendment purposes, could the article be regarded as a false assertion of fact? How does a reviewing court go about deciding whether to treat the article as an assertion of fact or as satire? *See Farah v. Esquire Magazine*, 736 F.3d 528 (D.C. Cir. 2013).

P. 104: Delete the fourth sentence in problem # 4.

[4] Fact vs. Opinion

P. 111: Add the following new problems ## 1-3 and renumber the remaining problems:

1. *Dirtiest Hotels*. A travel guide provides a list of the “Dirtiest Hotels.” In regard to the plaintiff’s hotel, the list states that “there was dirt at least one-half inch thick in the bathtub which was filled with lots of dark hair.” Does the list constitute opinion or fact? Can the statements regarding dirt and hair in the bathtub be regarded as fact, or are they simply “opinion”? *See Seaton v. Trip Advisor LLC*, 728 F.3d 592 (6th Cir. 2013).

2. *The Airline Gate Agent*. A mother and her four-year-old daughter hold boarding passes with different boarding zone numbers. When the mother tries to board with her daughter, the gate agent informs them that they cannot board at that time because the daughter’s boarding zone number does not entitle the child to board. Following the incident, the mother posts complaints on social media regarding the gate agent’s actions. The gate agent feels that she has been defamed and files a defamation action against the mother. Are the posts actionable as defamation or do they simply constitute “opinion?” *See Patterson v. Grant-Herms*, 2013 Tenn. App. LEXIS 675 (Tenn. Ct. App.) (Oct. 8, 2013).

3. *Questions Regarding Impropriety*. In an online article, a reporter raises questions concerning the ways in which the sons of the president of a Palestinian authority may be benefitting from his father’s political status. (The article is entitled, “The Brothers Abbas: Are the sons of the Palestinian President growing rich off their father’s system?”) The article also contains suggestions of impropriety (e.g., “new details are emerging of how close family members of Palestinian leader Mahmoud Abbas, a major U.S. partner in the Middle East, have grown wealthy”). Do the questions raised by the reporter involve defamatory statements? Can the suggestions be regarded as statements of fact or should they be regarded as “opinion”?

P. 112: at the end of the problems, add the following new problems:

8. *Satirical Blog Post*. Three weeks after the media release of President Obama’s birth certificate showing that he was born in Hawaii, Jerome Farah, publisher of WND Books, announced the book launch of a “tell-all” book by Jerome Corsi, “Where’s the Birth Certificate? The Case that Barack Obama is not Eligible to Be President.” The next day, journalist Mark Warren published post an article on Esquire Magazine’s Politics Blog, which included this statement: “In a stunning development one day after the release of [the Corsi book], [Farah] has announced plans to recall and pulp the entire 200,000 first printing run of the book, as well as announcing an offer to refund the purchase price to anyone who has already bought [the] book.” The title of the blog post was: “BREAKING: Jerome Corsi’s Birther Book Pulled from Shelves!” Ninety minutes later, an “update” appeared on the Esquire blog—for those that didn’t figure it out”—stating that Warren’s article was “satire” and criticizing Farah and Corsi of “accusing the President of perpetrating a fraud on the world by having released a forged birth certificate,” a claim that is not “in any way based on reality, but just to sell books.” Farah, who is the CEO of “a news and commentary Internet publication which competes with Esquire,” was quoted that day as opining that the blog post was a “poorly executed parody.””

Both Farah and Corsi filed a suit against Warren and Esquire with damage claims based on defamation and other torts. According to their Complaint, book stores responded to Warren's blog post by "pulling the book from their shelves, or not offering it for sale at all," and "consumers began requesting refunds." The Complaint also stated that the disclaimer "update" was issued only after Farah "issued a statement saying he was exploring legal options against Esquire and Warren. The federal district court dismissed the complaint and the D. C. Circuit affirmed, holding that the blog post was protected speech under *Milliken*. What reasoning would explain that result? See *Farah v. Esquire Magazine*, 736 F.3d 528 (D.C. Cir. 2013).

9. *Libel Per Se*. A client posted negative internet reviews of her divorce attorney, which included statements that the attorney lied about the fee to be charged and falsified the contract for the attorney's services. The attorney sued the client for defamation and the client admitted at trial that these two statements were not true. The court entered judgment for the plaintiff attorney based on the libel *per se* theory, which holds some false statements necessarily impart damage and malice, which may be conclusively presumed as a matter of law. On appeal, should the court reverse on the ground that *Gertz* requires fault and proof of damages to be established by a private figure plaintiff? Should it matter whether the attorney's defamation action was not brought against a media defendant? Compare *Blake v. Ann-Marie Giustibelli, P.A.*, 182 So.3d 881 (Fla. Dist. Ct. App. 2016).

10. *Allegations of Malice*. Bob is a limited-purpose public figure who is known in the art world for using fingerprint analysis to authenticate paintings. The *New Yorker* published an article that included interview quotes from art critics who expressed doubt about the reliability of Bob's methods and suggested that he profited from particular dubious authentications. Bob filed a defamation suit against the author of the article and the publisher of the *New Yorker*, alleging actual malice based on: 1) the failure of the defendants to "investigate and determine the validity" of the allegedly defamatory statements; 2) the reliance of the defendants on biased interview sources; and 3) the failure of the defendants to describe Bob's "many satisfied clients and many works of art he has authenticated without controversy." According to *Gertz* and other precedents, can these allegations of malice survive a motion to dismiss? Compare *Biro v. Conde Nast*, 807 F.3d 541 (2d Cir. 2015).

11. *Anonymous Comments on Blog*. Consider a lawsuit brought by a plaintiff against a defendant website, seeking the removal of defamatory material in comments posted by anonymous authors. Under what circumstances may the plaintiff obtain the disclosure of the identities of the authors by suing the defendant website for that purpose? Compare *Mortgage Specialists Inc. v. Impplode-Explode Heavy Industries Inc.*, 999 A.2d 184 (N.H. 2010).

E. EMOTIONAL DISTRESS

P. 116: Delete the citation for the *Snyder* opinion and insert the following new citation:

562 U.S. 443 (2011)

P. 128: Replace problem # 8 with the following new problem # 8, and then insert the following new problems ## 9-12, and renumber the remaining problem:

8. *Revenge Porn.* A spurned boyfriend decides to post pornographic pictures of his former girlfriend on a website along with her actual name, Facebook page, and other personal information. The pictures were taken by the boyfriend with the woman's consent while they were in an intimate relationship. What avenues of redress are available to the woman? Should the answer be different if the pictures were taken surreptitiously rather than with her consent? What if the boyfriend promised not to reveal the photos to anyone else in order to encourage the woman to let him take them? What if the photos were selfies, taken by the woman to track her weight loss, and they were stolen from her computer by a hacker who posted them? In any of these examples, would it matter if the photos were taken before the woman turned eighteen years of age? Can the woman seek a remedy against the website hosts, assuming that they have known that posted photos were taken without the consent of the subject, and that they fail to take action to remove them when the woman demands that they do?

9. *Legislative Responses?* Suppose that you are a legislator who is concerned about the growing availability of revenge porn sites, and you wish to take legislative action designed to curtail the practice. What alternatives are available to you? Can you criminalize such conduct? Can you provide tort remedies? Is injunctive relief possible? What about copyright remedies? Consider the fact scenarios described in the prior problem and decide which remedies should be available in each situation.

10. *Drafting a Valid Revenge Porn Law.* Would the following revenge porn law be valid: "An actor may not knowingly disclose an image of another, identifiable, person, whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or should have known that the depicted person has not consented to such disclosure." See Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators* (2015), available at <http://ssrn.com/abstract=2468823>. What about the following law: "It is a criminal offense for any person, in the absence of a purpose to convey or disseminate information or ideas, to do any act intended to cause or otherwise attempt to cause extreme emotional distress to another person." See John A. Humbach, *How to Write a Constitutional "Revenge Porn" Law* (draft 2014). Should there be an exception for revenge porn that involves politicians or matters of public interest (e.g., photos of a politician on a revenge porn website showing him involved in an extra-marital affair)? If so, how would you define the "public interest?" See *Bollea v. Gawker Media LLC*, 913 F. Supp. 2d 1325 (M.D. Fl. 2012). Might there be other circumstances under which the law would be invalid?

11. *Drafting a Valid Cyberbullying Law.* In addition to revenge porn, emotional distress can also be caused by so-called "cyberbullying." Legislators have tried to draft valid laws protect individuals against such bullying. Which of the laws are valid under the First Amendment?

A. “Any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the Internet or through a computer or e-mail network; disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information; or sending hate mail, with no legitimate private, personal or public purpose and with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate or otherwise inflict significant emotional harm on another person.” Would the law withstand a First Amendment challenge as applied to a high school student who posted sexual information regarding his/her classmates? *See People v. Marquan M.*, 24 N.Y.3d 1, 19 N.E.3d 480, 994 N.Y.S.2d 554 (N.Y. App. 2014).

B. “Any act that involves a knowing pattern of conduct that seriously alarms the target and would cause a reasonable person to suffer substantial emotional distress.” Will the prosecution hold up as applied to a couple who e-mails threats against their neighbors (referring to personal information, and inciting a confederate to file a child abuse claim against them), and luring others into unwittingly joining the campaign (by posting false Craigslist advertisements which prompted lots of phone calls), are prosecuted under the following law: under the First Amendment? *See Commonwealth v. Johnson*, 470 Mass. 300, 21 N.E.3d 937 (Mass. 2014).

12. *Anti-Stalking Laws*. A man is under a restraining order that prevents him from going to a woman’s workplace or otherwise contacting her. The man then posts on Facebook a letter addressed to the woman (she was not his Facebook “friend”) in which he suggests that violence will result unless she drops the restraining order. Can the man validly be prosecuted for contacting the woman when she was told about the post, and sought it out? Can he also be convicted of criminal threatening? *See State v. Craig*, 112 A.3d 559 (N.H. 2015).

E. INVASION OF PRIVACY

P. 129-130: After the first paragraph of text that follows heading E., delete the second paragraph of text.

P. 133: Before the problems, delete the note and replace it with this new heading and the following new notes:

NOTES

1. *Privacy Torts*. The Supreme Court has not often addressed First Amendment issues relating to the other four privacy torts. These include: 1) false light; 2) intrusion on the plaintiff’s seclusion; 3) publicity (public disclosure) of private embarrassing facts about the plaintiff; and 4) appropriation of the plaintiff’s name, image, or likeness for the defendant’s benefit. However, First Amendment arguments regarding all four privacy torts are raised regularly in lower court

litigation.

2. *False Light Tort*. The “false light” privacy tort requires a plaintiff to show that defendant’s speech included false facts, but they need not be defamatory. Instead, the speech must be highly offensive to a reasonable person and must put the plaintiff in a “false light,” which means that the plaintiff is humiliated in some way by the speech. When a defendant’s speech concerns a matter public interest, *Time, Inc. v. Hill* held that the First Amendment requires a plaintiff to show that the defendant’s acted with reckless disregard of the falsity of his or her speech. The *Hill* opinion included no analysis of the plaintiff’s status, unlike the defamation ruling in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In the only other false light case in the post-*Gertz* era, the Court found it unnecessary to decide whether the *New York Times* standard should apply to all false light cases, or whether the *Gertz* negligence standard could be applied in suits by private figure plaintiffs. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). The *Hill* Court relied on two rationales that support the use of the reckless disregard standard in all false light cases. First, the non-defamatory character of false-light speech means that its content “affords no warning of prospective harm through falsity.” Second, the broad scope of the false-light speech category creates an “impossible burden of verifying” the facts associated in news articles” with every person’s “name, picture, or portrait.” Even so, lower courts are divided on the question whether to apply *Gertz* to false light suits by private figures.

3. *Publicity Tort*. The publicity tort requires a showing that defendant disclosed true private facts not generally known, which disclosure would be highly offensive to a reasonable person. The status of the plaintiff is not relevant and the tort defense of newsworthiness may be applicable. One notable example of a publicity tort suit is the action by Terry Bollea against Gawker for an internet posting of a video showing Bollea having sexual intercourse with “the then-wife of his best friend, Tampa-area radio shock jock Bubba the Love Sponge,” which video was “viewed by an estimated 7 million people.” The jury awarded \$25 million in punitive damages and \$115 in compensatory damages. Eriq Gardner, *Judge Upholds Hulk Hogan’s \$140 Million Trial Victory Against Gawker*, The Hollywood Reporter, May 25, 2016, <http://www.hollywoodreporter.com/thr-esq/judge-upholds-hulk-hogans-140-897301>

4. *Disclosure of Victim’s Identity*. The publicity tort requires a showing that defendant disclosed true private facts not generally known, which disclosure would be highly offensive to a reasonable person. The status of the plaintiff is not relevant and the tort defense of newsworthiness applies. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the plaintiff father brought a tort suit for the violation of his daughter’s privacy by a defendant broadcaster that occurred during a televised news report concerning a criminal trial. A reporter identified the daughter as the rape victim whose death led to the charges against the defendants on trial. The Court held that the First Amendment prohibited recovery for the publicity tort against the broadcaster because the reporter had obtained the daughter’s name from official court documents, which were open to public inspection. The Court left open the question whether liability for the publicity tort could be established if a victim’s name were obtained from unofficial sources and then disclosed. In a later case in which a newspaper published a victim’s name that was obtained from a publicly released police report, the Court reversed a damage

judgment based a statute that made it unlawful to “print, publish or broadcast” the name of the victim of a sexual offense in “any instrument of mass communication.” The Court relied on the logic of *Cox Broadcasting* in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), reasoning that, “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.” The Court concluded that the interest in shielding the rape victim (which might be an interest of the “highest order”) was insufficient because the name was already in the public domain.

5. *Appropriation of Performance*. The appropriation tort requires a showing that defendant engaged in an act of appropriation—using true facts about the plaintiff’s identity or reputation—with the intention to reap some benefit thereby. The status of the plaintiff is not relevant and the tort defense of newsworthiness applies. For example, in *Davis v. Electronic Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015), the court held that the defendant developer’s unauthorized use of the video game likenesses of former professional football players did not qualify for First Amendment protection. Therefore, the right of publicity suit by the plaintiff players could proceed based on the reasonable probability that they would prevail on their claim. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the plaintiff was an entertainer who performed his act, as a “human cannonball” being shot out of a cannon, at various venues. A reporter for the defendant broadcaster recorded the entire 15-second performance of the entertainer’s act at a county fair, and included the video in a news report, disregarding the plaintiff’s request not to record his act. The state supreme court held that *Time, Inc. v. Hill* established a First Amendment privilege for the press “to report matters of legitimate public interest even though such reports might intrude on matters otherwise private,” and therefore also supported a privilege “when an individual seeks to publicly exploit his talents while keeping the benefits private.”

The Supreme Court rejected this reasoning, noting that the First Amendment does not “immunize the media when they broadcast a performer’s entire act without his consent.” Such a broadcast posed “a substantial threat to the economic value of that performance,” and went “to the heart” of plaintiff’s “ability to earn a living as an entertainer.” The plaintiff “did not contend that “his performance could not be reported by the press as newsworthy,” and sought damages only for the “appropriation of his professional property.” Moreover, the damages remedy did not impose strict liability “contrary to the letter or spirit” of *Gertz*, because the defendant “knew that plaintiff objected to televising his act, but nevertheless displayed the entire film.”

6. *Intrusion upon Seclusion*. The intrusion tort requires a showing that defendant violated the plaintiff’s reasonable expectation of privacy through an act of intentional intrusion upon solitude, seclusion, or private matters. The intrusion must be one that would be highly offensive to a reasonable person. The status of the plaintiff is not relevant and there is no tort defense of newsworthiness. This tort requires a showing that defendant violated the plaintiff’s reasonable expectation of privacy through an act of intentional intrusion upon solitude, seclusion, or private matters, which intrusion would be highly offensive to a reasonable person. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the plaintiff’s verdict included damages for the intrusion tort, which the

federal district court upheld on the theory that “when Snyder turned on the television to see if there was footage of his son’s funeral, he did not ‘choose’ to see close-ups of the defendants’ signs and interviews with Phelps[,] but rather their actions intruded upon his seclusion.” However, the Supreme Court disagreed with the district court’s rejection of the defendant’s First Amendment defense, reasoning that defendant’s speech occurred at a public place and related to a matter of public concern. The Court also refused to extend the “captive audience” rationale to *Snyder*’s facts in order to allow recovery for the intrusion tort. Notably, the federal district court relied on a second theory for upholding that recovery, reasoning that the defendants “invaded [Snyder’s] privacy during a time of bereavement,” when they posted the “epic” commentary on the Westboro website and left it there for Snyder to discover and read. Given the failure of Snyder’s counsel to mention the “epic” in the cert. petition, the Supreme Court declined “to consider the ‘epic’ in deciding the case.”

7. *Privacy in Europe.* In general, the laws of European nations confer greater privacy rights than those in the United States, where First Amendment protection for freedom of expression has resulted in the subordination of privacy in cases like *Time, Inc. v. Hill*. For example, the European Court of Justice declared a “right to be forgotten” and ordered Google to expunge records in appropriate cases. *See David Streitfeld, European Court Lets Users Erase Records on Web*, THE NEW YORK TIMES, May 13, 2014. Not long afterwards, a state court refused to enter a similar order. *See Google, Inc. v. Expunction Order*, 441 S.W.3d 644 (Tex. Ct. App. 2014).

P. 133: Delete problems ## 1 & 2, and renumber the remaining problems.

P. 134: Delete the first part of problem # 4 and pick up with the word “assuming” but put it in upper case, and then add this problem to the end of the prior one. In other words, the following should be added to the end of problem # 3:

Assuming that the Court decides to grant injunctive relief in favor of Mrs. Onassis, how should the court frame the injunction? Would it be appropriate for the court to prohibit Galella from taking photos of Mrs. Onassis and her children? From reporting on her activities? If such conditions would be too broad, how might an appropriate order be framed?

P. 134: Renumber problem #5 as problem # 4 and insert the following new problems ## 5 & 6:

P. 134: following problem # 5, insert the following new problem and renumber the remaining problems:

5. *More on Aggressive Paparazzi.* A local ordinance increases the punishment for reckless driving and other traffic offenses when they are committed with the intent to capture an image, sound recording, or other physical impression of another person for a commercial purpose. The law applies to anyone, including the press, curious on-lookers and stalking fans who obtain images with the hope of selling them. It even extends to a private detective hired by a spouse to document suspected adulterous behavior. The law applies whether the intended image or recording is of a celebrity or someone with no claim to fame, whether it qualifies as news or is a matter of purely private interest, and whether it will be sold to the mass media or put to purely private use. What standard of review should apply? Is the law valid under the First Amendment? *See Raef v. Superior Court*, 193 Cal.Rptr.3d 159 (Cal. App. 2015).

6. *NCAA Video Games.* The National Collegiate Athletic Association (NCAA) regulates college sports, and it considers players to be “student athletes” rather than professionals. The college players cannot be paid a salary, although they can receive funds to cover their tuition and fees, room and board costs, and required course-related books. The NCAA, by contrast, makes money from producing video games that use the player’s likenesses. Some of these videos are very life-like in the sense that they depict players who have all of the attributes of players on particular teams. In other words, the players in the video wear the same numbers as the actual team players, have the same height and weight, and often display the same characteristics (e.g., dribbling using the right hand). Can the players recover for the use of their names and likenesses in the video games? How much? *See O’ Bannon v. National Athletic Collegiate Association*, 802 F.3d 1049 (9th Cir. 2015); *Davis v. Electronic Arts, Inc.* 775 F.3d 1172 (9th Cir. 2015).]

P. 134: renumber problem # 6 as problem # 7, and problem # 7 as problem # 8.

P. 135: Renumber problem # 8 and problem # 9, insert the following new problems ## 10-12, and then renumber the remaining problem:

10. *The Neighbors.* A photographic artist, living in New York City, takes pictures of his neighbors inside their apartment without their consent. Their apartment building has a glass facade and the artist took the pictures through the window using a telephoto lens. When the artist seeks to display the pictures as part of an art exhibition, the neighbors object on privacy grounds. What remedies, if any, are available to the neighbors? *See Foster v. Svenson*, 41 MED. L. RPTR. 2564 (N.Y. Sup. Ct. 2013).

11. *Privacy, the Google Case, and the Right to be Forgotten.* In 2014, the European Court issued a decision against Google involving the so-called “right to be forgotten.” Basically, the court held that privacy rights take precedence over public access to online speech, and therefore Google must accept requests from European citizens who want their Google results purged of certain types of unflattering information. Could a U.S. administrative agency, or a U.S. court, impose a similar “right to be forgotten” in the United States without running afoul of

the First Amendment?

12. *The Google Decision in the U.S.* Plaintiff, an attorney, is the subject of disciplinary proceedings brought by the state bar association in the state in which he is licensed to practice. Eventually, the state bar association dismisses the proceedings against the attorney. However, by this time, information regarding the proceedings are accessible through the Internet using search engines like Google. Can the attorney obtain an order requiring Google to expunge all mention of the disciplinary proceeding from its system? *See Google, Inc. v. Expunction Order*, 441 S.W.3d 644 (Tex. App. 2014).

13. *The Neighbors.* A photographic artist, living in New York City, takes pictures of his neighbors inside their apartment without their consent. Their apartment building has a glass facade and the artist took the pictures through the window using a telephoto lens. When the artist seeks to display the pictures as part of an art exhibition, the neighbors object on privacy grounds. What remedies, if any, are available to the neighbors? *Compare Foster v. Svenson*, 41 MED. L. RPTR. 2564 (N.Y. Sup. Ct. 2013).

F. OBSCENITY

P. 151: Delete note # 1 and insert the following new note # 1:

1. *Obscenity Possession Not Punishable.* Three years after the *Memoirs* ruling, the Court held that the First Amendment prohibits “making mere private possession of obscene material a crime” in *Stanley v. Georgia*, 394 U.S. 557 (1969). After police had obtained a search warrant to look for bookmaking evidence in Stanley’s house, they found reels of film in a bedroom, watched them on a projector in his living room, deemed them to be obscene, and seized them. The State argued that since obscene materials are unprotected speech, their possession may be prosecuted like “other things thought to be detrimental to the welfare of their citizens.” The Court observed that although *Roth* treated “the regulation of commercial distribution of obscenity as an “important interest,” the First Amendment protects “the right to receive information and ideas, regardless of their social worth,” as “fundamental to our free society.” That right took on “an added dimension” in *Stanley* because of the fundamental right “to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.” Thus, the *Stanley* defendant asserted “the right to be free from state inquiry into the contents of his library,” and the Court viewed the “mere categorization” of his films as “obscene” as insufficient to justify “such a drastic invasion of personal liberties.” The State relied on three government interests to justify the prosecution of possession of obscene materials: 1) “the right to protect the individual’s mind from the effects of obscenity”; 2) the need to protect society from “deviant sexual behavior or crimes of sexual violence”; and 3) the “difficulties of proving an intent to distribute or in producing evidence of actual distribution.” The Court rejected the first interest as “nothing more than the assertion that the State has the right to control the moral content of a person’s thoughts.” As for the second interest, the Court found “little

empirical basis” for the assertion “that exposure to obscene materials” could induce antisocial conduct, and rejected it because adequate deterrents “ordinarily to be applied to prevent crime are education and punishment” for violations of the law. The Court likened the State’s unsupported claim to the argument that “it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.” Nor was the Court persuaded by the State’s third assertion in “alleged difficulties” in proving the distribution crime. Assuming that such difficulties exist, the Court reasoned that the prosecution of possession would be “infringement of the individual’s right to read observe what he pleases” that “may not be justified by the need to ease the administration of otherwise valid criminal laws.”

Chapter 4

CONTENT BASED SPEECH RESTRICTIONS: POST-CHAPLINSKY CATEGORICAL EXCLUSIONS

A. “OFFENSIVE” SPEECH

P. 165: Delete note # 5. Then insert the following new note # 5:

5. *“Little Eichmanns.”* In arguing that the 911 attacks were provoked by American foreign policy, A professor at the University of Colorado wrote an essay after 911, arguing that the attacks were the result of American foreign policy, and referring to the victims of the destruction of the World Trade Center as the “technocratic corps” of “America’s global financial empire,” and as “little Eichmanns.” After the eruption of criticism in the media, the university Board of Regents ordered an investigation to determine whether the professor’s comments merited dismissal. A university committee concluded that his speech was protected by the university’s free speech code. But additional accusations were made concerning the professor’s “scholarly practices,” including allegations of plagiarism, false descriptions of evidence, and fabrications. Subsequent investigations by faculty panels led to their findings of “repeated misconduct” and their recommendation that the professor should be fired, which occurred in 2007. He filed a suit claiming unlawful termination, arguing that his firing was motivated by his essay and not the other charges of misconduct. He won the suit at trial but the state appellate courts rejected his claim, and the Supreme Court denied review in 2013. See Scott Jaschik, *Final Loss for Ward Churchill*, INSIDE HIGHER ED, April 2, 2013, <https://www.insidehighered.com/news/2013/04/02/supreme-court-rejects-appeal-ward-churchill>

P. 165, at the end of the notes, add the following new note:

7. *The Confederate Battle Flag.* Although individuals have a constitutional right to display the Confederate battle flag, there have been public and private movements against this flag. Following the murders of nine church attendees in Charleston, the State of South Carolina is debating whether to remove the flag from a Confederate monument on the state house grounds. Also, a number of large merchants (e.g., Walmart) decided that they would no longer sell the flag, and some manufacturers decided to stop producing it.

8. *Private Policing of Speech.* In an Internet era, much speech is disseminated over private platforms (e.g., Twitter). Although the First Amendment limits the ability of the government to impermissibly restrict speech, private entities usually function outside its restrictions. In some instances, these private entities decide to censor or control speech on their platforms. For example, following the beheading of a journalist by ISIS, Twitter decided to

remove grisly images of the beheading from its platform. *See Yoree Koh & Reed Albergotti, Twitter Faces Free-Speech Dilemma, Wall Street Journal* B-1 (Aug. 22, 2014).

P. 166: In problem # 5, at the end of the problem, insert the following:

Could the Council at least prohibit all profanity, as well as all uses of the “N” word? *See Sheldon S. Shafer, Council Seeks Speech Limits, The Courier-Journal* A-1 (June 9, 2014).

P. 167: Insert the following new problems ## 6 & 7, and renumber the remaining problems.

6. *More on “Civility.”* The Kentucky Bar Association (KBA) adopts a rule entitled “Social Media Concerns.” Among other things, the rule tells prospective applicants to the KBA to: “Be conscious of the dangers of social media, and be sure that photographs and commentary are both professional and polite.” Can the KBA, as a condition of admission to the bar, require potential applicants to be “professional” and “polite?”

7. *Profanity Near Houses of Worship.* A Missouri law makes it a crime to engage in “profane,” “rude,” or “indecent behavior” outside of a house of worship. The law is challenged by a group of individuals who advocate for greater inclusion of women gays and lesbians in the Catholic Church, and who are vocal regarding child abuse by clergy. Is the law likely to survive First Amendment scrutiny? *See Survivors Network of Those Abused by Priests, Inc. v. Joyce,* (8th Cir. 2015).

P. 168: After the problems, insert the following new problem # 10:

10. *Criticism of Police.* Assume that Joe creates a Facebook page and a website with the title, “Police Department Corruption in Lackawanna.” The website includes references to the city police department as a “pig gang,” and to an unnamed officer as a “known sociopath” who makes false arrests. Joe is arrested for the crime of harassment, and the criminal complaint reveals that Joe’s speech on his Facebook page and website are the basis for the charge against him. The complaint includes quotations from language on the website that the police view as “harassing.” Is Joe’s speech protected under *Cohen?* Compare Phil Fairbanks, *Ugly posts on Facebook aimed at Lackawanna Police raise First Amendment questions*, THE BUFFALO NEWS, May 16, 2015, <http://www.buffalonews.com/city-region/federal-court/ugly-posts-on-facebook-aimed-at-lackawanna-police-raise-first-amendment-questions-20150516>.

B. “HATE” SPEECH

P. 182: Before the problems, insert the following new notes:

NOTES

1. *The Continued Existence of Hate Speech.* In a particularly dramatic illustration of the presence of racism in society, President Obama's launch of a new Twitter account was met with an outpouring of profanity-laced racist posts. In addition to hurling racial epithets at Obama, responders also referred to him as a "monkey." See Julie Hirschfeld Davis, *Slurs Hurled at President Via Twitter*, *The New York Times* A-15 (May 22, 2015).

2. *Increasing Intolerance Regarding Free Speech?* Some question whether U.S. society has become increasingly intolerant of speech, especially on college campuses. For example, at the University of Michigan, a showing of the film "American Sniper" was cancelled because of the way it depicted certain racial groups. See Ronald K.L. Collins, "*American Sniper*" Cancelled at U. Michigan – Part of "Speech Destroying Storm" Says Floyd Abrams, First Amendment News (Apr. 8, 2015). Following a panel discussion at Smith University, on the subject of free speech and civil discourse, a defender of free speech was labeled a "racist" because of her defense of free speech. In particular, she criticized campus speech codes, and urged the audience to defend free speech over parochial notions of "civility." In addition, she questioned the desirability of replacing offensive words (e.g., the N-word) with initials. See, e.g., Harvey Silvergate, *Liberals are Killing the Liberal Arts*, *The Wall Street Journal* A17 (Nov. 10, 2014). At the University of Iowa College of Law, a candidate for a faculty position sued claiming that she had been discriminated against because of her conservative views. See *Wagner v. Jones*, 758 F.3d 1030 (8th Cir. 2014).

P. 182, following problem # 4, add the following new problems and renumber the remaining problems:

5. *Hostile Work Environments.* Even though the state may generally be precluded from engaging in content-based or viewpoint-based discrimination against speech, can it prohibit employers and employees from creating "hostile working environments?" Suppose that a supervisor at a government agency routinely refers to black subordinates using the "N-word" or as "boy." Under the First Amendment, can the local equal rights commission sanction the supervisor for creating a "hostile work environment?" Could a university prohibit professors from using the N-word or from making derogatory references to women in class? Should similar rules apply to students? However, could the university sanction a professor who uses the N-word in a discussion of a self-defense case because one of the parties to that case used it, and the professor is trying to emphasize the impact of the word on one of the parties to the case?

6. *Striking a Balance Between Free Expression and the Creation of Less Hostile Work Environments.* Even if it is permissible for an employer to prohibit supervisors and employees from creating hostile work environments, or for a university to prohibit racist or sexist speech, what is the scope of the employer/university's authority? Suppose, for example, that a university decides to prohibit "micro-aggressions" based on race or sex. It defines the following statements

as constituting “micro-aggressions”: “America is the land of opportunity”; “America is a ‘melting pot’”; “I believe the most qualified person should get the job”; “Affirmative action is racist.” Can the university prohibit these statements on the basis that they create a “hostile” environment, or that they involve “slights, snubs, or insults, whether intentional or unintentional, that communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership?” See Eugene Volokh, *Op-Ed: U.C.’s PC Police*, *Los Angeles Times* (June 23, 2015) <http://www.latimes.com/opinion/op-ed/la-oe-0623-volokh-uc-microaggressions-20150623-story.html>

7. *More on Striking the Balance.* Over the last couple of years, there has been considerable controversy regarding the case of Professor Laura Kipnis of Northwestern University, described as a “feminist film professor,” who wrote an article about sexual mores on campus and university attempts to regulate romantic relationships. Two students filed Title IX charges against Kipnis on the grounds that her article might chill the reporting of sexual harassment claims. See Rachel Martin, *Laura Kipnis: The Boundaries of Sexual Assault Have Stretched*, National Public Radio, Weekend Edition Sunday, June 7, 2015; David Brooks, *The Campus Crusaders*, N.Y. Times, June 2, 2015. Even if a university has the right to prevent faculty or staff from creating a “hostile work environment,” or from unduly inhibiting the reporting of sexual harassment claims, how far does that authority extend? Should it preclude professors from writing articles expressing their views?

8. *More on Viewpoint Discrimination.* During a period of riots in Baltimore, the dean of a law school decides that those who choose to “support” the protests can take deferred exams. Calling the protests “the civil rights issue of our time, the dean indicates that she wishes to support those students who have the “energy and commitment” to support the protests. See Susan Svrluga, *Law School Dean: If You Help Freddie Gray Protestors in Baltimore, You Can Defer an Exam*, *The Washington Post* (Apr. 29, 2015). Suppose that a student who opposes the protests, and who wishes to volunteer to work for organizations opposing the protests, also asks to defer an exam, but the request is denied. Can the law school prefer students who “support” the protests over those who “oppose” them?

9. *Student Speech.* May a university sanction students who use the N-word? Does context matter? For example, could the use of the N-word be sanctioned if it were used in a derogatory fashion in a class discussion? Suppose that, in a discussion of gender equality during a class, a conservative fundamentalist student states that “a woman’s place is in the home.” Can the university sanction professors and students for making such statements? Does context matter? Suppose that college students derogatorily use the N-word outside of class. Could the college expel them for creating a “hostile learning environment” based on their off-campus statements? See Manny Fernandez & Erik Eckholm, *Expulsion of Two Oklahoma Students Over Video Leads to Free Speech Debate*, *The New York Times* A-14 (Mar. 12, 2015).

P. 187: After the notes, insert the following new note # 3:

3. *Confederate Battle Flag*. Although individuals have a constitutional right to display the Confederate Battle Flag, opposition to the flag as a symbol of slavery and as “hate speech” has taken a variety of forms. For example, a California statute was enacted in 2014 to ban the sale and display of Confederate flags by state or local government agencies, except for historical or educational purposes. After the murder of nine African-American parishioners at Charleston’s Emanuel AME Church in June 2015, a photograph of the defendant with a Confederate flag sparked a movement to remove the flag from the Alabama and South Carolina capitol grounds, and from specialty license plates in five states. National retailers announced bans on the sale of Confederate flags and merchandise bearing its image. See M.J. Lee, *Wal-mart, Amazon, Sears, eBay to stop selling Confederate Flag merchandise*, CNN, June 24, 2015, <http://www.cnn.com/2015/06/22/politics/confederate-flag-walmart-south-carolina/> Polls show that public opinion remains divided, with some people regarding the Confederate flag as an acceptable or venerated symbol of Southern tradition, and others opposing its display as an offensive symbol of slavery. See Kathleen Weldon, THE BLOG, *Public Opinion Polls on the Confederate Flag and the Civil War*, July 17, 2015, http://www.huffingtonpost.com/kathleen-weldon/public-opinion-on-the-confederate_b_7796458.html.

P. 188: Insert the following new problem # 1 and renumber the remaining problems.

1. *The Federal Hate Prevention Act*. A federal statute makes it a crime to physically attack a person because of that person’s race. After *R.A.V. v. Wisconsin* and *Mitchell* and *Dawson*, is such a statute constitutional? See *United States v. Hatch*, 722 F.3d. 1193 (10th Cir. 2013). Would it be enough if the animus were a “factor” in the attack, or does it have to be the “but for” cause? See *United States v. Miller*, F.3d (6th Cir. 2014).

P. 189: At the end of the problems, insert the following new problems:

7. *Free Speech on College Campuses*. On some college campuses, statements such as “American is a land of opportunity,” or “everyone can succeed in this society if they work hard enough are considered to be “micro aggressions” that faculty are instructed to avoid. The idea behind the prohibition is that students should be shielded from ideas that might cause discomfort or offense. Is it appropriate for universities to prohibit faculty from engaging in these “microaggressions,” or at least require them to give “trigger warnings” (so that objecting students can leave the class)? Are such prohibitions (or trigger warnings) consistent with what some believe to be the goal of a college education – to challenge, expand, and refine student ideas and beliefs rather than to simply affirm them? See Michael Bloomberg & Charles Koch, *Why Free Speech Matters on Campus*, *The Wall Street Journal* A 13 (May 13, 2016).

8. *Prohibiting “Hurtful” or “Hateful” Speech*. In the wake of campus protests, the University of Missouri sent an email to all students, faculty and staff asking anyone who

witnesses individuals engaging in “hateful and/or harmful speech or actions,” to notify the campus police. The email goes on to note that the University’s Office of Student Conduct can take action against such speech or actions. Can a University prohibit all speech of this nature? See Thomas A. Lambert, *Post-Protest Mizzou: Adverse Consequences of the Capitulation*, the John William Pope Center for Higher Education Policy (Feb. 3, 2016).

9. *The U. Chicago Policy on Free Expression.* The University of Chicago in its Report on the Committee on Freedom of Expression, explicitly affirmed its commitment “to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas they oppose.” One of the authors of the report stated that “College is a time to learn to deal with challenging, unsettling, and even offensive and hateful ideas. In the real world, we are inevitably confronted with these ideas, and college should prepare our graduates to know how to respond to such ideas courageously, effectively and persuasively.” Are “trigger warnings” and the concept of “micro aggressions” consistent with the University of Chicago policy? Does the policy make sense?

10. *The Lanham Act and Disparagement.* The Washington Redskins, a football team in the National Football League, was given a trademark on the name “Redskins.” May the Trademark Trial and Appeal Board later revoke the trademark on the grounds that the term “Redskins” is disparaging to Native Americans? Would the revocation involve viewpoint discrimination?

P. 189: Before the case, insert the following new heading and text, and then re-letter the subsequent headings in the chapter:

C. TRUE THREATS

As recognized in *R.A.V.*, threats of violence have been treated as a category of unprotected speech since the Court’s earliest First Amendment precedents. However, the anti-bias statute in *R.A.V.* was not understood to be focused on punishing such threats. Based on its language, the statute was understood to be aimed at “protecting the community against bias-motivated threats to public safety and order” that arise when symbols like the burning cross are used as “fighting words” epithets. A different understanding could have been proposed for a statute that criminalized the use of a burning cross for the implicit purpose of protecting all individuals from threats of violence. As the next case reveals, such a specialized threat statute would not exhibit the visible flaw of viewpoint discrimination and could be validated under *R.A.V.*’s reasoning.

P. 197: Before the problems, insert the following new notes ## 1 & 2:

NOTES

1. *Definition of “True Threat.”* In *Watts v. United States*, 394 U.S. 705 (1969), the Court held that the federal statute prohibiting the act of “knowingly and willfully [making] any threat” to “inflict bodily harm upon the President” was constitutional on its face, but held that “what is a threat must be distinguished from what is constitutionally protected speech.” The *Watts* Court reversed the defendant’s conviction because the Government did not prove a “true threat” based on the defendant’s utterance of “political hyperbole,” which was merely a “very crude offensive method of stating a political opposition to the President.” The Court’s interpretation of the defendant’s speech as not being a “true threat” was based on its context, the reaction of the listeners, and its expressly conditional nature.

2. *Mental State for “True Threat.”* In *United States v. Elonis*, 135 S. Ct. 2001 (2015), the Court refused to definitively define the mental state required for a “true threat” under the First Amendment. No reference to a mental state element appears in 18 U.S.C. § 875C, which punishes “any communication containing any threat . . . to injure the person of another.” The defendant posted rap lyrics on Facebook that contained violent language and imagery, along with disclaimers that his lyrics did not depict real persons, and that he was exercising his First Amendment rights. However, the lyrics were viewed as threatening by his estranged wife, his co-workers, and the FBI agents who arrested him. At trial, defense counsel sought a jury instruction that required proof of the “intent to communicate a true threat.” But the trial judge instructed the jury in accordance with the interpretation used by most federal circuit: “A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.”

The Supreme Court reversed, holding that as a matter of statutory interpretation, when a statute is silent regarding the required mental state, a court must imply a mental state “which is necessary to separate wrongful conduct from otherwise innocent conduct.” In the *Elonis* threat statute, “‘the crucial element separating legal innocence from wrongful conduct’ is the threatening nature of the communication,” which is why “the mental state requirement must apply to the fact that the communication contains a threat.” Thus, the “reasonable person” or negligence standard advanced by the Government was “inconsistent with ‘the conventional requirement for criminal conduct—awareness of some wrongdoing.’” The Court concluded that it was beyond dispute that “if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat,” then “the mental state requirement § 875C is satisfied.” The Court refused to decide whether recklessness would be sufficient under the statute because that issue was not briefed or argued by either party.

3. *Dieudonné M'bala M'bala and Charlie Hebdo.* Other nations can be much more

aggressive about banning so-called “hate speech” even when it does not involve a “true threat.” For example, Dieudonné M’bala M’bala, a French comedian, does a routine in which he mocks the Holocaust and makes anti-Semitic remarks. The routine has been banned in France. *See France: Cities Ban Comic’s Shows*, THE NEW YORK TIMES, January 18, 2014, A-8. Dieudonné has been convicted “dozens of times” and fined for anti-Semitic slander. Most recently, he was convicted of publicly condoning terrorism, a crime punishable by five years in prison, or seven years when it occurs in the media or social media. M’bala M’bala received a jail sentence of two months for posting these words on his Facebook page: “Tonight, as far as I’m concerned, I feel like Charlie Coulibaly.” This posting occurred after the killing of four people at a kosher supermarket in Paris by Amedy Coulibaly, who described his acts as an expression of solidarity with the terrorist killings by the Kouachi brothers of eleven Charlie Hebdo journalists and one police officer. The latter terrorist attack inspired the slogan, I am Charlie (Je Suis Charlie), which was reflected in the Facebook reference to “*Charlie Coulibaly*.” M’bala M’bala’s defense counsel planned an appeal, and emphasized in the media that the comedian’s posting should be interpreted “in the context of all the other messages he published on Facebook,” in which “he paid tribute to all the victims of the attacks and clearly condemned the acts.” *See Aurelien Breeden, Dieudonné M’bala M’bala, French Comedian, Convicted of Condoning Terrorism*, THE NEW YORK TIMES, March 18, 2015, http://www.nytimes.com/2015/03/19/world/europe/dieudonne-mbala-mbala-french-comedian-convicted-of-condoning-terrorism.html?_r=0

In the week following Charlie Hebdo and kosher supermarket killings, 54 people were detained in France and some were jailed “for a variety of remarks, shouted in the street or posted on social media.” So-called “fast-track custodial sentences” were “handed down in cities across France for expressions of support for the gunmen in the two terrorist attacks. For example, one man received a one-year prison sentence “for posting a video on Facebook that mocked policeman Ahmed, who was shot at point-blank range by one of the Kouachis.” Another was jailed for shouting obscenities at police and saying “the Kouachi brothers were ‘just the start.’” The fast-track sentences were “condemned” by France’s League of Human Rights (LDH). *See Paul Kirby, Inside Europe Blog, Paris attacks: France grapples with freedom of speech*, BBC NEWS, January 15, 2015, <http://www.bbc.com/news/blogs-eu-30829005> On November 13, 2015, after 130 people were killed in the terrorist attack in Paris, a state of emergency was declared for six months, authorizing the police to ban demonstrations, shut down websites, and make warrantless arrests. *See Aurelien Breeden & Jeffrey Marcus, France Weighs Limits of Liberty, Equality, and Citizenship*, New York Times, March 30, 2016, http://www.nytimes.com/interactive/2016/02/16/world/europe/france-constitution-new-laws.html?_r=0

P. 198: At the end of the problem # 6, insert the following:

Would your analysis be different if two University of Mississippi students placed a noose around

the neck of a statue of James Meredith in a university memorial that commemorates his admission as the first black student at Ole Miss? See Alan Blinder, *Ole Miss Students May Face Charges in Racist Incident*, *The New York Times*, A-13 (Feb. 22, 2014).

P. 199: At the end of problem # 8, insert the following:

If charges can be brought against the poster for statements like this, is it possible to reconcile the true threat doctrine with *Brandenburg* and the advocacy of illegal action cases? Most courts suggest that when determining whether a “true threat” exists, it is necessary to examine the question from the standpoint of how a “reasonable person” would understand the words. What if a reasonable person would understand that the poster has made an implied threat, but there seems to be no intent to “incite immediate lawless action,” to “take” immediate lawless action, and no likelihood that lawless action would follow. Can there be a true threat under such circumstances?

P. 201: After problem # 12, insert the following new problems and renumber the remaining problem:

13. *True Threat?* Defendant was involved in a non-amicable breakup with his former live-in girlfriend who obtained a protective order against him. The girlfriend, afterwards, began dating a police officer. One day, defendant uploads to Facebook an image showing himself holding a shotgun along with a caption which stated that “make no mistake of my will to succeed in bringing you two idiots to justice.” When the girlfriend saw the Facebook post, she was terrified. If the trial court views the “two idiots” reference as referring to the girlfriend and her police officer boyfriend, has defendant made a “true threat” of death or physical violence against the two of them? See *Commonwealth v. Walters*, 472 Mass. 680, 37 N.E.3d 980 (2015).

14. *More on True Threats.* A prison inmate, on hearing that certain individuals were executing a judgment against his home, began ranting and raving in anger. During his rant, he flatly stated that he would kill the individuals when he was released from jail. Do his threats constitute “true threats?” See *United States v. Houston*, 792 F.3d 663 (4th Cir. 2015). Suppose that prison officials found a letter in the inmate’s cell exhorting a third party to kill a witness in the case. The letter was in an unstamped and unsealed envelope that was never mailed. Did the inmate intimidate or attempt to intimidate the witness? See *State v. Ozuna*, 359 P.3d 739 (Wash., en banc, 2015).

15. *The Dutch School Girl.* A fourteen year-old Dutch schoolgirl masks her identity and sends an e-mail to American Airlines that reads as follows: “Hello, my name’s Ibrahim and I’m from Afghanistan. I’m part of Al Qaida [sic] and on June 1st I’m going to do something really big bye.” Has the girl communicated a true threat against American Airlines? See Dan Bilefsky, *After Prank by Dutch Girl on Twitter, Real Trouble*, *The New York Times*, A-4 (Apr. 16, 2014).

16. *Facebook Rants*. A man rants on Facebook exhorting his “religious followers” to “kill cops” and to commit a massacre at a preschool. After *Elonis*, can the man be convicted of making true threats against the cops and the kids? Suppose that he really didn’t have any “religious followers” and believed that he had deleted all of his Facebook “friends.” Can he still be prosecuted for making a “true threat?” See *United States v. Wheeler*, 776 F.3d 736 (10th Cir. 2015).

17. *Intimidation on Campus*. The Student Conduct Code at a state university provides that students may be disciplined for “conduct that threatens or endangers the health or safety of any person, including threats, intimidation, or harassment.” Ted is a student who was disciplined under this provision. He was incensed by a poem in the student newspaper and decided to confront the faculty advisor for the newspaper, Professor Smith. Ted found Smith’s office door open, entered the office, turned on a video camera, pointed it at Smith, and demanded to know whether Smith agreed with the poem. Smith told Ted that he had nothing to say and he asked Ted to leave his office. But Ted continued to ask the same question repeatedly. Then Smith called the campus police and Ted left. Smith filed an official complaint with the Student Conduct Board, and Ted received a disciplinary hearing, after which he was sanctioned for his conduct toward Smith. Is the provision of the Student Conduct Code constitutional on its face and as applied to Ted? Compare *O’Brien v. Welty*, 815 F.3d 920 (9th Cir. 2016).

C. CHILD PORNOGRAPHY

P. 208: Delete note # 2 and insert the following new notes # 2 and # 3:

2. *Sexting Crimes*. Surveys show that over 50% of young adults and roughly one third of teenagers who are age 16 or 17 have shared sexually suggested images of themselves or others on their cell phones. Even when consensual, the conduct of “sexting” may be prosecuted as the felony crime of possession or distribution of child pornography because the sent or received image of a minor depicts the “lewd exhibition of the genitals,” for example. Almost half the states have enacted a lesser misdemeanor crime in a “sexting” statute, and many of these statutes go beyond the child pornography definition because they criminalize all nude images of minors. Where such lesser crimes are an available option, prosecutors are more likely to charge juveniles for “sexting” consensually than in states where the only option is charging them with the child pornography crime. States have exempted high-school-age teens from criminal prosecution for consensual sexual conduct with peers, but the same teens who are sexting consensually may be prosecuted either for the sexting crime or the child pornography crime. At least one state has enacted a law that provides a shield against child pornography charges for underage teens who receive an image from another underage teen who has been charged with that crime. See Amy Adele Hasinoff, *Teenage Sexting is Not Child Porn*, THE NEW YORK TIMES, April 4, 2016, http://www.nytimes.com/2016/04/04/opinion/teenage-sexting-is-not-child-porn.html?_r=0

3. *Lewd Exhibition Element*. The child pornography statute in *Ferber* included the element of

“lewd exhibition of the genitals,” which may be the element with the broadest scope in such statutes. One example of the interpretation of this element is the approach taken by courts that require consideration of all of these enumerated factors: 1) whether the focal point of the image is the child’s public area or genitals; 2) whether the setting is sexually suggestive, such as in a place or a post generally associated with a sexual activity; 3) whether the child was clothed or nude; 4) whether the picture portrays the child as a sexual object; 5) whether the picture suggests sexual coyness or willingness on the part of the child to engage in sexual activity; and 6) whether the image is intended to elicit a sexual response from the viewer. *Compare United States v. Dost*, 636 F. Supp. 828 (C.D. Ca. 1986).

P. 220: Insert the following new problems ## 5-7 and renumber the remaining problem:

5. *Online Sex Chats with Minors.* A Texas law makes it a crime to engage in sexually explicit online communications with minors for purposes of sexual gratification. Is the law valid? Can it be applied to an individual who sends a communication to a minor that is not obscene? For example, what if the individual sends a non-obscene movie or non-obscene literature? *See Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013).

6. *“Upskirt” Photography.* A state law prohibits anyone from taking an “upskirt” photograph, involving pictures of uncovered genitals. Defendant, while on a trolley, takes a picture of a teenage girl’s clothed body part with a concealed camera. Can defendant be prosecuted under the law? Can the state prohibit all “upskirt” photography whether it involves a clothed or unclothed woman? *See Delagrange v. State*, 5 N.E.3d 354 (Ind. 2014).

7. *Banning Sexual Offenders from Online Activities.* Can a state ban sexual offenders from accessing social network sites? The state’s asserted interest is to protect children from sexual predators. Is the term “social media” clear enough to satisfy the First Amendment? *See State v. Packingham*, , 777 S.E.2d 738 (N.C. 2015); *United States v. Gnirke*, 775 F.3d 1155 (9th Cir. 2015).

8. *Sheriff’s Campaign.* A classified ad website, Backpage.com, provides a forum for posting ads on traditional subjects (rental property, employment, furniture and clothing for sale), as well as an “adult” section for ads for escorts, massage parlors, strip clubs, telephone sex, and other sex-related services. In order to express his opposition to the continuing existence of the “adult” section of the website, Sheriff Sam sends a letter to the CEO and Board of Directors of MasterCard and Visa, which states: “As the Sheriff, I request that you cease and desist from allowing your credit cards to be used to place any ads on Backpage.com – your cards have been and will continue to be used to buy ads that sell children for sex. Financial institutions have the legal duty under federal law to file suspicious activity reports to authorities in cases of sexual exploitation of minors. Please contact me immediately to discuss your response.” Two days later, Visa and MasterCard stopped allowing their cards to be used to pay for ads anywhere on the Backpage.com website. Therefore, Backpage.com filed suit against Sheriff Sam, seeking an injunction to stop him from threatening credit card companies with sanctions intended to ban

their financial services from being provided to the website. What arguments can plaintiff's counsel make to explain why Sheriff Sam has violated the First Amendment? *Compare Backpage.com, LLC v. Dart*, 807 F.3d 7th Cir. 2015).

9. *Restitution Calculation.* The restitution provision in §2259 authorizes and mandates the federal district courts to order defendants to pay a victim “the full amount of the victim’s losses as determined by the court.” Assume that the defendant possessed two images of the victim as a sexually abused child, and the victim sought restitution for all internet trafficking in her images in the amount of approximately \$3 million for lost income and \$500,000 for the costs of future treatment and counselling. Is the defendant liable for the entire sum of the victim’s losses? The estimated number of people who possess the victim’s internet images “to date easily number in the thousands.” How should the court calculate the restitution owed to the victim? *See Paroline v. United States*, 134 S. Ct. 1710 (2014).

E. POSSIBLE ADDITIONAL CATEGORIES FOR EXCLUSION FROM SPEECH PROTECTION

P. 234: Replace the singular heading “NOTE” with the following heading:

NOTE: ANIMAL CRUELTY AND OVERBREADTH

P. 235: Replace the existing heading “PROBLEM: PROHIBITING REPARATIVE THERAPY” with the new heading “PROBLEMS”, and at the beginning of the existing problem, insert the following new caption for new problem # 1:

1. *Prohibiting Reparative Therapy.*

P. 235: Insert the following new problem # 1 and number the existing note as note # 2:

1. *Rewriting the Crush Video Statute.*

P. 236: After new problem # 1, insert the following new problem # 2:

2. *Obscene Animal Cruelty Video.* In response to the Court’s invalidation of the statute in *Stevens*, Congress enacted the following statute: “It is a crime to knowingly create, sell, market, advertise, exchange, or distribute an “animal crush video” in, or using a means or facility of, interstate or foreign commerce. An “animal crush video” is defined as one that: (1) depicts actual conduct in which one or more non-human animals is intentionally crushed, burned,

drowned, suffocated, impaled, or otherwise subjected to serious bodily injury and (2) is obscene. This statute shall not apply with regard to any visual depiction of: customary or normal veterinary or agricultural husbandry practices; the slaughter of animals for food; or hunting, trapping, or fishing. This statute also shall not apply to good faith distribution of an “animal crush video” to: (1) a law enforcement agency; or a third party for the sole purpose of analysis to determine if referral to a law enforcement agency is appropriate. Assume that Joe is charged with both creating and distributing a video that allegedly satisfies the statute. Joe’s defense counsel files a motion to dismiss the indictment on the ground that the entire statute is facially invalid because it does not describe a category of unprotected speech. Is Joe correct? *See United States v. Richards*, 755 F.3d 269 (5th Cir. 2014).

P. 236: Delete the citation for the *Brown* opinion and insert the following new citation:

564 U.S. 786 (2011)

P. 236: Add the following cite at the end of the first paragraph:

See also Doe v. Governor of New Jersey, 783 F.3d 150 (3d Cir. 2015).

P. 260: Problems ## 1 & 2 should be combined by eliminating the following language from the beginning of problem # 2 (“2. Applying the Fraudulent Valor Act) and simply attaching the remainder of the problem to the prior problem. Then, renumber the remaining problems appropriately.

P. 261: At the end of problem # 5, insert the following:

See also United States v. Swisher, 771 F.3d 514 (9th Cir. 2014).

P. 261: Following problem # 5, which is being renumbered to problem # 4, insert the following new problem # 5:

5. *False Political Advertisements.* Suppose that a state adopts a law making it a misdemeanor to “participate in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the effect of a ballot question, that is designed or tends to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.” Suppose that the law is challenged by a group that seeks to oppose school funding ballot initiatives. What level of

scrutiny should be applied to such a law? Does the law satisfy that level of scrutiny? *See 281 Care Committee v. Arneson*, 776 F.3d 774 (8th Cir. 2014).

P. 261: After problem # 5, insert the following new problems and renumber the remaining problems:

6. *Prohibitions Against False Campaign Speech.* An Ohio statute prohibits “false statements” that are made “during the course of any campaign for nomination or election to public office or office of a political party.” The statute applies to false statements regarding the “voting record of a candidate or public official,” and to anyone who had posted, published, circulated, distributed or otherwise disseminated a false statement regarding a candidate “either knowing the same to be false or with reckless disregard of whether it was false or not.” An advocacy group, the Susan B. Anthony List, states that a congressman voted for taxpayer funded abortion when he voted for the Affordable Care Act. The congressman believes that the statement is demonstrably false and brings charges against Anthony List before the Ohio Elections Commission (OEC). Anthony List challenges the proceedings on First Amendment grounds. May the OEC decide whether Anthony List’s allegations are false and impose criminal sanctions for violations? *See Anthony List v. Driehaus*, 134 S. Ct. 233 (2014), on remand, 814 F.3d 466 (6th Cir. 2016). *See also Commonwealth v. Lucas*, 34 N.E.3d 1242 (Mass. 2015).

P. 262: At the end of the problems, insert the following new problem # 10:

10. *Marked Ballot Selfies.* Under N.H. Rev. Stat. §659(a), it has been unlawful since 1979 for a New Hampshire voter to show his or her ballot to someone else with an intention to disclose how he plans to vote. In 2014, the legislature amended the statute to add section (b), and the statute now provides as follows: §659 (a) No voter shall allow his or her ballot to be seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has voted; (b) This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means. At the state Senate hearing of the Criminal Justice Committee, the Secretary of State urged the enactment of the amendment because of the need to punish “votes being bought,” and “to prevent situations where a voter could be coerced into proving that they he or she voted a particular way by posting an image of the voter’s completed ballot.” The minority was concerned with the proposed scope of section (b) and proposed additional limiting language to create liability “only if the distribution or sharing is for the purpose of receiving pecuniary benefit or avoiding coercion.” But the Committee majority rejected this proposal. After the enactment of section (b), Leon came under investigation by the N.H. Attorney General’s Office. When Leon was running for re-election in the 2014 Republican primary as the Representative for Coos County, he took a photo of his marked ballot with his cell phone to show that he had voted for

himself as well as other Republican candidates. Then Leon posted the photo to Twitter (#COOS7 vote in primary 2014 # nhpolitics) and to his N.H. House of Representatives Facebook page, along with this comment: “Section 659(b) is an unconstitutional overreach of the government.” When he heard about the investigation, Leon filed a §1983 suit to obtain an injunction against the enforcement of the amendment to §659(b) on First Amendment grounds. The evidence at the federal court hearing showed that: (1) the State received no complaints that images of marked ballots had been used either to coerce votes or to buy votes, either during the more than 15 years since cell phones have been equipped with digital cameras, or during earlier decades when other cameras could be used to take photos of marked ballots; (2) the crimes of voter coercion and vote buying are specifically prohibited in N.H. statutes and in federal statutes; (3) no prosecutions for these crimes have occurred in N.H. since 1976. Leon’s counsel argues that §659(b) must be invalidated because it is a content-based law that cannot satisfy strict scrutiny. Use the reasoning in *Stevens*, *Brown*, and *Alvarez* to explain why the court will invalidate §659(b). *Compare Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015).

F. NEAR OBSCENE

P. 266: In note 3, on line 14, delete the word “because” and insert the words “based on”; then on line 16, delete the word “because” and insert the word “since”; then on line 17, delete the bracketed word “[is]” and insert the bracketed word “[was]”; then on line 26, insert quotation marks after the word areas; then on the second to the last line, insert a comma after the word “municipalities”.

P. 270: In note 1, on line 26, after the word “concurred” insert the words “in the judgment” before the period.

P. 271: In note 2, on line 17, insert the word “and” before the number “4”).

P. 271: At the end of the notes, insert the following new note:

3. *Evidentiary Standard.* Based on a 1977 study concerning the effect on crime rates in Los Angeles when separate adult businesses existed in close geographic proximity, the city council enacted an ordinance in 1978 requiring the dispersal of an adult entertainment business within 1,000 feet of other such businesses. In 1983, the council amended the ordinance to prohibit “the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof.” This ordinance was challenged by a single proprietor who combined an adult bookstore with an adult arcade where videos purchased by bookstore customers could be played in viewing booth for a fee. The Court granted review in

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002), to clarify the *Renton* evidentiary standard for a municipality to show that an ordinance furthers a substantial government interest. *Renton* allowed a municipality “to rely on any evidence that is ‘reasonably believed to be relevant’ for demonstrating a connection between speech and a substantial, independent government interest.” However, a plurality of four justices in *Alameda Books* emphasized that, “This is not to say that a municipality can get away with shoddy data or reasoning. The municipality’s evidence must fairly support the municipality’s rationale for its ordinance.” Five justices concluded that the City’s reliance on its own 1977 study was sufficient to defeat a motion for summary judgment. The plurality reasoned that, “While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, [such] areas [also are] areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the findings of the 1977 study, and thus reasonable, for [the city] to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity.” Justice Kennedy concurred in the judgment, noting that the ordinance could withstand a facial challenge because the city could infer from the 1977 study that “knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another, so if the city’s first ordinance was justified, therefore, then the second is too.” But he observed that if the “city’s [evidentiary basis] can be proved unsound at trial, then the ordinance might not withstand” constitutional scrutiny.” Four justices dissented, arguing that the city moved “from a policy of dispersing adult establishments” to “a policy of dividing them in two,” and that the 1977 study “provides no evidentiary support” for the amended ordinance. Instead, the city merely assumed “that a bookstore selling videos and providing viewing booths produces secondary effects of crime, and more crime than would result from having a single store without booths in one part of town and a video arcade in another.”

P. 272: At the end of the problems, add the following new problem # 5:

5. *Requiring Adult Bookstores to Close at Night.* A city enacted an ordinance requiring all adult bookstores to close between the hours of midnight and 10:00 a.m. The ordinance allowed other commercial establishments to remain open, including liquor stores, pharmacies and convenience stores. The asserted justification for the ordinance is that there will be fewer armed robberies, and the exceptions are justified on the theory that the patrons of adult bookstores would be more likely to be carrying cash (and therefore more likely to be targets for robbers), compared to the patrons of other establishments. Is the ordinance constitutional? Would it matter whether the crime rate for all crimes increased or decreased following enactment of the ordinance? See *Annex Books, Inc. v. City of Indianapolis*, 740 F.3d 1136 (7th Cir. 2014).

G. COMMERCIAL SPEECH

P. 284: In the caption for note # 4, delete the word “Regulation” and insert the word “Advertisements”

P. 285: At the end of note # 4, add the following:

However, in *Dwyer v. Cappell*, 762 F.3d 275 (3d Cir. 2014), the court struck down a New Jersey rule that prohibits lawyers from posting “judicial compliments” on their websites unless the lawyer posts the entire judicial opinion in which the compliment was made. The court concluded that the restriction was not reasonably designed to prevent lawyers from deceiving consumers, and was overly burdensome.

P. 286: in note 9, on the second line, delete the citation for the *Sorrell* case and insert the following new citation:

564 U.S. 552 (2011)

P. 287: Add the following new note # 12:

10. *Compelled Disclosure*. The Court recognizes that compelled disclosure regulations for commercial speech can be treated with more deference than the *Central Hudson* test requires for regulations restricting commercial speech. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the plurality noted that commercial speech is protected because it provides valuable information to consumers, and therefore, a commercial speaker has only a minimal interest in refraining from disclosure of information. While an “unjustified or unduly burdensome disclosure requirement” might be problematic, the plurality reasoned that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” Under this standard, the attorney in *Zauderer* could be subjected to disciplinary action for advertisements that were deceptive in failing to disclose that clients would be liable for costs, though not legal fees, under a contingent fee arrangement. A majority affirmed the *Zauderer* plurality’s test in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), in upholding the legality of the disclosures required by “professionals who provide bankruptcy assistance to consumer debtors,” which required “only an accurate statement identifying the advertiser’s legal status and the character of the assistance provided.” The federal circuit courts have interpreted the *Zauderer* standard as a type of rational basis review, and some courts have extended *Zauderer*’s application to cases involving government interests aside from the prevention of

consumer deception. *Compare CTIA–The Wireless Association v. City of Berkeley*, 189 F. Supp. 3d 1048 (N.D. Cal. 2015); *Safelite Group, Inc. v. Jepsen*, 764 F.3d 539 (5th Cir. 2014).

P. 288: At the end of existing problem # 4, insert the following new citation:

Compare Cahaly v. LaRosa, 796 F.3d 399 (4th Cir. 2015).

P. 288: Then, add the following new paragraph to problem # 4:

Now, suppose that a state enacts a statute that prohibits politically-based robo calls. This statute places different restrictions on robocalls depending on whether they are (1) unsolicited and (2) made for consumer, political, or other purposes. By definition, it prohibits only those robocalls that are “for the purpose of making an unsolicited consumer telephone call” or are “of a political nature including, but not limited to, calls relating to political campaigns.” All qualifying robocalls are banned with three exceptions, based on the express or implied consent of the called party: (1) in response to an express request of the person called; (2) when primarily connected with an existing debt or contract, payment or performance of which has not been completed at the time of the call; (3) in response to a person with whom the telephone solicitor has an existing business relationship or has had a previous business relationship. Even if the state has the power to prohibit commercial robo calls, does it have the authority to prohibit politically-based robocalls as well? *See Cahaly v. Larosa*, 796 F.3d 399 (S.D. Ind. 2015).

P. 288: At the end of problem # 6, insert the following new text:

How should the court resolve the First Amendment issue?

P. 289: At the end of problem # 7, delete the period and insert the following new citation:

; *United States v. Simpson*, 741 F.3d 539 (5th Cir. 2015).

P. 289: At the end of the problems, insert the following new problems ## 11 & 12:

11. *The Parenting Advice Columnist.* A licensed psychologist has been dispensing parenting advice in a newspaper column for the last twenty years. The column is distributed through more than 200 newspapers nationwide. However, the columnist is licensed only in North Carolina, and some Kentucky psychologists seek to prohibit him from referring to himself

as a “psychologist” on the basis that he is not licensed in Kentucky. Kentucky psychologists view the column as the equivalent of the illegal practice of psychology. Suppose that you are hired to advise the Commonwealth. Do you think that the columnist can be prohibited from referring to himself as a “psychologist” in his advice column? See Matthew Barakat, *Parenting Columnist Targeted by Ky. Sues, The Courier-Journal* B-3 (July 18, 2013).

12. *Meat Labeling Requirements.* Under prior labeling rules, meat producers were allowed to label meat as the “product” of countries where any production steps had taken place. Under a revised rule, subject to some minor exceptions, they are required to indicate each country in which the animal was born, raised or slaughtered. Is the government entitled to impose such labeling requirements on meat producers? What is the state interest in imposing such a regulation? See *American Meat Institute v. USDA*, 746 F.3d 1065 (D.C. Cir. 2014).

13. *Paying Retailers for Ads.* A company engaged in the business of installing display advertisements in retail outlets filed suit to challenge the California law that prohibits manufacturers and wholesale distributors of alcoholic beverages from “paying or crediting a retailer for any advertising, display, or distribution service.” Following the repeal of Prohibition, many state legislatures enacted similar laws in order to prevent manufacturers and wholesale distributors from creating monopolies by buying the favor of retailers and creating exclusive dealing arrangements. It was feared that such monopolies would lead to the same growth in the number of saloons and bars controlled by the manufacturers and wholesale distributors that had occurred before Prohibition. Ultimately, the goal of the legislation was to reduce the consumption of alcohol and suppress the social evils of intemperance. What argument will the plaintiff make to persuade the court that the law cannot be upheld under the *Central Hudson* test? Compare *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016).

14. *Day Laborers.* The Town enacted an ordinance that provides as follows: “It shall be unlawful for any person standing within or adjacent to any public right-of-way within the Town to stop or attempt to stop any motor vehicle utilizing said public right-of-way for the purpose of soliciting employment of any kind from the occupants of said motor vehicle. A solicitation includes conduct such as holding signs, waving arms, shouting, jumping up and down, or making hand signals. A solicitation is deemed complete when made, whether or not an employment relationship is created, a transaction completed, or an exchange of money takes place.” The ordinance is challenged by plaintiffs who are day laborers and wish to solicit employment in the manner prohibited by the ordinance. Under *Central Hudson*, can they obtain an injunction against the ordinance? Compare *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 128 F. Supp. 3d 597 (E.D.N.Y. 2015).

15. *Surcharge or Discount.* In some states, paying for an item with a credit card is more expensive than paying with cash. Under a Florida statute, even though it is a crime for “a seller or lessor in a sales or lease transaction to impose a surcharge on the buyer or lessee for electing to use a credit card,” the statute also expressly allows merchants to “offer a discount for the purpose of inducing payment by cash.” In order to violate the statute, a merchant must communicate the price difference to a customer and describe that difference as a “credit card surcharge.” This statute is challenged by small business owners who wish to describe the price

difference as an additional amount for credit card use rather than as a lower amount for cash payments. This is because credit card companies charge merchants two or three percent of the amount of each transaction paid for by credit card (“swipe fees”), and the merchants want to be able to tell customers that the purpose of the credit card surcharge is to help them to recoup the swipe fees. The State argues that the statute does not regulate speech because “prices are not speech.” Will this argument prevail? In the alternative, assuming that the Florida statute does restrict speech, the State argues that the law serves two government interests: 1) the need to avoid the negative economic impact of reduced credit card use by customers who are told about the “credit card surcharge”; and 2) the potential for merchants to use credit card surcharges to produce windfall profits beyond reimbursement for swipe fees. Based on these interests, will a court uphold the statute under the *Central Hudson* test? *Compare Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2014); *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015); *Dana's RR Supply v. Attorney General*, 807 F.3d 1235 (11th Cir. 2015).

16. *Ad Sign Distinctions.* A city’s Sign Code bans the use of “General Advertising Signs” that advertise for a third-party product or service which is not sold on the premises to which the signs are affixed, while allowing the use of “Business Signs” that advertise for the business to which they are affixed. When these provisions are challenged by a business that wishes to use “General Advertising Signs,” the City invokes the government interests of public safety and aesthetics to justify the distinction between the two types of advertising signs. Can the City win under *Central Hudson*? *Compare Contest Promotions, LLC v. City of San Francisco*, 100 F. Supp. 3d 835 (N.D. Cal. 2015).

Chapter 5

CONTENT-NEUTRAL SPEECH RESTRICTIONS: SYMBOLIC SPEECH AND PUBLIC FORA

A. SYMBOLIC SPEECH

P. 298: At the end of problem # 4, add the following new citation:

Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013).

P. 298: After the problems, add the following new problems # 5 and # 6:

5. *Dancing at Memorial*. The Jefferson Memorial in Washington, D. C., is open to visitors 24 hours a day, all year round. Late one evening, just before midnight on April 12, Ann and 17 of her friends entered the interior space of the Jefferson Memorial. Each person was wearing headphones. As they approached the statue of Jefferson inside the Memorial, each took a position on the marble floor and began to dance. They later testified that their purpose was “to celebrate and honor President Thomas Jefferson by ushering in his birthday with silent dance; and in the individual spirit for which Jefferson is known, the dancers danced for the most part by themselves, in place and silently, each listening to his or her music on headphones.” They decided to leave when a Park Police officer threatened them with arrest because of a National Park Service regulation, which provides that a “public gathering” may not be held in the interior space of the Jefferson Memorial. Was the dancing by the group protected under the definition of symbolic speech in *Spence v. Washington*? Compare *Oberwetter v. Hilliard*, 639 F.3d 545 (D.C. Cir. 2011).

6. *Car Planter*. Mike owns and operates Planet K stores throughout Texas, and when each new store opens, Mike observes the tradition of inviting people to hit a car with a sledgehammer until it is a smashed wreck. The wreck is then filled with dirt, planted with vegetation, painted, and placed outside each store as a “car planter.” For his car planter in San Antonio, Mike commissioned a local artist, Furly Travis, to paint the wreck, and Mike asked Furly to include the phrase “make love not war” in the design. Furly inserted this slogan into his painting of scenes of life in San Antonio on the surface of the car-planter. When Mike was threatened with arrest for violating a San Antonio ordinance prohibiting the presence of inoperable cars on private property, he challenged the law on First Amendment grounds. Furly testified that he had no specific message in mind when he painted the car for Mike’s, “just happiness.” Does Mike’s car planter qualify as symbolic speech under *Spence v. Washington*? Compare *Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir. 2010).

P. 304: After problem # 3, move problems # 4 and # 5 from p. 339 and insert them as new

problems #4 and # 5 with the same captions:

4. *The Occupy Columbia Movement.*
5. *Occupy Columbia and the Emergency Regulation.*

P. 304: In the new problem # 5 (moved from p. 339), before the citation at the end of the problem, insert the following new text:

If the protesters file suit to challenge the regulation, and the State argues that it is constitutional, how should a court resolve the suit?

P. 312: Renumber problem # 3 as new problem # 4 and delete problem # 4; then after problem # 2, insert the following new problem # 3:

3. *Revised Texas Statute.* When the Texas legislature revised the statute that was invalidated in the 1984 ruling in *Texas v. Johnson*, the revised statute was entitled “flag destruction” and provided as follows: “A person commits an offense if a person intentionally or knowingly damages, defaces, mutilates, or burns the flag of the United States or the State of Texas.” In 2012, a man (also named Johnson) was prosecuted for this crime based on his conduct of grabbing a U. S. flag from a pole on a building and throwing it in the street. He later testified that he was angry because of racial remarks made about his mother by a local merchant. The indictment specified that his conduct “was not being done in conformity with statutes relating to the proper disposal of damaged flags.” What arguments can defense counsel make concerning the unconstitutionality of the revised statute? *Compare State v. Johnson*, 475 S.W.3d 860 (Tex. Crim. App. 2015).

B. PUBLIC FORUM DOCTRINE

[1] FOUNDATIONAL PRINCIPLES

P. 315: After the case and before the problems, add the following new note:

NOTE: STREETS INSIDE A FORUM

Historically, Although courts have held that parks and streets are open for expressive purposes, other governmental property (e.g., a military base) may be closed to expressive activity or more highly regulated. *See United States v. Apel*, 188 L. Ed. 2d 75 (2014). More difficult questions can arise when a public road traverses a military base. *See id.*

P. 315-316: After the *Hague* case, move problems #1, #2, and #3 on p. 315-316 by inserting them as problems ## 1-3 following the *Schneider* case on p. 318; also, add the following citation to the end of problem #3:

Compare Frisby v. Schultz, 487 U.S. 474 (1988).

P. 316: In the second paragraph of the *Schneider* opinion, delete the last bracketed sentence and insert the following two new sentences in brackets:

[In Case No. 11, the petitioner was a Jehovah's Witness who engaged in door-to-door canvassing by going from house to house offering free religious literature to the residents. She was convicted of violating an ordinance that prohibited door-to-door canvassing without a permit.]

P. 319: Delete existing problem # 1, and move existing problems ## 2, 3 & 7, and place them after the *Reed* case (below) as problems ## 1-3, and then renumber the remaining problems.

P. 319: Delete problem # 4.

P. 321: Before the paragraph that precedes the case, insert the following new subheading:

[2] Status of Forum

P. 321: After the three new problems, delete the paragraph of text that precedes the *ISKCON* case, and insert the following new heading [2] and new text:

[2] Forum Categories

The level of scrutiny used for evaluating the constitutionality of regulations of private speech on government property depends entirely upon a court's categorization of the property at issue. The Court's precedent recognizes two types of fora to which the same level of scrutiny applies: a "traditional public forum," which includes property that historically has been used for assembly and debate, namely, public streets, sidewalks, and parks; and a "designated public forum," which has been created by government designation for use as a place or channel for assembly and debate. In these two fora, a content-neutral time, place and manner restriction is

subject to “intermediate scrutiny,” meaning that it must be narrowly tailored to serve a significant government interest, and must leave open ample alternative channels of communication. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). If a regulation is content-based, it is subject to strict scrutiny and must be so narrowly tailored so that it constitutes the least restrictive means for achieving a compelling government interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). By contrast, less demanding scrutiny is used for both content-neutral and content-based regulations of speech in “nonpublic fora” – the regulation “can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985).

Much litigation has focused on the high stakes question whether a forum is a “designated public forum” or a “nonpublic forum.” A variety of principles control this decision, including “the policy and practice of the government” regarding whether it intended to designate a place not traditionally open to assembly and debate as a public forum, as well as the nature of the property and its compatibility with expressive activity. *Cornelius*, 473 U.S. at 802. One type of “designated public forum” is created by “government designation of a place or channel of communication for use by the public at large for assembly and speech.” *Id.* An example is an event like a state fair that is open to all comers, including visitors and exhibitors. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Another type of “designated public forum” is created by government designation of a forum “for use by certain speakers, or for the discussion of certain subjects.” *Cornelius*, 473 at 803. 473 U.S. at 802. This latter category arises when a university makes its facilities “generally open” to registered student groups for meetings and activities. *See Widmar v. Vincent*, 454 U.S. 263 (1981).

However, many fora are regarded as “nonpublic” in the sense that they are open to the public but closed to expressive activity generally, and there is a lack of evidence of history, policy, or practice showing that the government’s intended to open the forum to assembly and debate. An example is the interior of airport terminals that includes the corridors and shopping areas outside of the passenger security zones. *See International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). More often, the status of “nonpublic forum” is assigned in the so-called “limited public forum” context when a forum is not closed but is open only to some speech. “A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.” In other words, a forum is nonpublic when the government “does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, “obtain permission.” *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 679 (1998). An example of such a “nonpublic forum” is the school mail system used by teachers in *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983), where the evidence showed: 1) the system was not open to the public; 2) its function was to facilitate internal communication with teachers regarding school-related matters; 3) permission from the principal was required to use the system; and 4) in practice, such permission had been granted only selectively to outside groups that engaged in activities of interest and

educational relevance to students, and to the union representing the teachers. The same kind of evidence supported the holding in *Cornelius* that the “annual charitable fundraising drive conducted in the federal workplace” was a nonpublic forum. Neither the policy nor the practice of the relevant federal agency allowed all charities to obtain access to the drive for their fundraising purposes. Instead, access required the permission of a federal official based on criteria that could be satisfied only on a case-by-case basis by non-partisan groups serving health and welfare needs. Ultimately, “[w]here the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all.” *Arkansas Educational Television Commission*, 522 U.S. at 678. Moreover, forum analysis is inapplicable when the government engages in expressive activity on its own behalf, rather than providing any kind of forum for private speech. If “the speech at issue [is] government speech rather than private speech,” then “the First Amendment strictures that attend the various types of government-established forums do not apply,” although “constitutional and statutory provisions outside of the Free Speech Clause may limit government speech.” *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246, 2250 (2015).

P. 326: After the “Notes” heading, delete existing note #1 and insert the following new note # 1:

1. *Sidewalks as a Public Forum.* The case-by-case nature of the Court’s forum analysis is illustrated by its debates and inconsistent rulings regarding the forum status of sidewalks. In the 1960s and 1970s, the Court was closely divided regarding the emerging definition of the “public forum” concept, with some justices favoring broad recognition of “the right to use a public place for expressive activity” as long as such expression is “compatible” with the normal activity of the place. See *Grayned v. City of Rockford*, 408 U.S. 104, 115, 116 (1972). By the 1980s, the Court’s precedents endorsed the narrower view that “publicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.” Thus, the “nonpublic forum” category was created in order to cover the “circumstances [when] the government may ban the entry on to public property [of] all persons except those who have legitimate business on the premises,” and “preserve the property under its control for the use to which it is lawfully dedicated.” *United States v. Grace*, 461 U.S. 171, 177, 178 (1983). In assigning public forum status to the sidewalks “forming the perimeter of the Supreme Court grounds,” the *Grace* Court observed that all sidewalks “may be considered, generally without further inquiry, to be public forum property,” because like streets and parks, sidewalks are “historically associated with the free exercise of expressive activities.” More specifically, the Court noted that the *Grace* sidewalks are “indistinguishable from any other sidewalks” in the city, with “no separation, no fence, and no indication whatever” that anyone using the sidewalks has “entered some special type of enclave.” By contrast, the nonpublic-forum sidewalks “located within an enclosed military reservation” in *Greer v. Spock*, 424 U.S. 828 (1976), could be

distinguished because they were “separated from the streets and sidewalks of any municipality.” Yet in the 1990s, the old debate regarding the boundaries of “traditional public fora” reappeared in *United States v. Kokinda*, 497 U.S. 720 (1990), where the sidewalk at issue was part of post office property that separated the parking lot from the building. Four justices argued for nonpublic forum status because the sidewalk was “constructed solely to provide for passage” to enter the post office. Four dissenting justices argued that all sidewalks and streets are reserved historically for expressive activities even though constructed for transportation purposes, and that their forum status should not turn on “particularized factual inquiries” “into whether a sidewalk serves one building or many or whether a street is a dead end or a major thoroughfare.” Justice Kennedy concurred in the plurality’s judgment, finding it unnecessary to decide the forum status of the sidewalk.

P. 327: At the end of note # 2, after the block quote, insert the following new sentence:

More difficult questions can arise when a public road traverses a military base. See *United States v. Apel*, 186 L.Ed.2d 75 (2014).

P. 327: After the notes, move notes # 3, # 4, and # 5 from pp. 336-337 and insert them on this page (with same numbering) to follow note #2.

P. 328: Delete heading [2] and insert new heading [3]:

[3] Permit Restrictions

P. 331: After the case, insert the following new notes #1 and #2:

NOTES

1. *Canvassing for Any Cause*. In *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002), the Court invalidated a permit requirement that was challenged by Jehovah’s Witnesses who members wished to engage in door-to-door canvassing to distribute free religious literature. The ordinance prohibited the following conduct as a criminal nuisance: “The practice of going in and upon private property and/or the private residence of Village residents in the Village by canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise or services, not having been invited to do so by the owners or occupants of such private property or residences, and not having first obtained a permit pursuant to this Chapter, for the purpose of advertising, *promoting*, selling and/or explaining *any* product, service, organization or *cause*, or for the purpose of soliciting

orders for the sale of goods, wares, merchandise or services without first registering in the office of the Mayor and obtaining a Solicitation Permit.” Although permits were issued routinely and without charge, the registration form required an applicant to provide the following information, which was made publicly available in the Mayor’s Office:

- (1) The registrant’s name and home address for the past five years;
- (2) A brief description of the nature and purpose of the business, promotion, solicitation, organization, cause, and/or the goods or services offered;
- (3) The name and address of the employer or affiliated organization, with information showing the exact relationship and authority of the registrant;
- (4) The length of time for which the privilege to canvass or solicit is desired; and
- 5) The specific address of each private residence at which the registrant intends to engage in the conduct for which the permit is sought.

Once obtained, the canvasser was required to carry the permit and show it to any police officer or resident who asked to see it. The information in the application was made available for public inspection in the Mayor’s Office.

The Village argued that the ordinance served three government interests – the prevention of fraud, the prevention of crime, and the protection of the privacy of residents. The first interest was aimed at protecting residents from “flim flam con artists who prey on small town populations” by pretending to be canvassers. The second interest was focused on the use of “canvassing” by other criminals such as burglars. The third interest was based on the need to protect residents from the “unwanted annoyance” caused by the appearance of uninvited canvassers on their doorsteps. The ordinance also authorized residents to prohibit such canvassers from coming to their doors by posting “No Solicitation” signs.

The Court invalidated the ordinance under the First Amendment because of the unprecedented nature of the regulation and breadth of affected speech affected. The Court noted that *Schneider* recognized the importance of distributing leaflets door-to-door as a vehicle for the dissemination of speech and ideas, especially for proselytizing groups like the Jehovah’s Witnesses and others who seek to use inexpensive methods of communication. Moreover, it was offensive “to the very notion of a free society” that “in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and obtain a permit to do so.” Such a permit scheme constituted “a dramatic departure from our national heritage and constitutional tradition,” and the law produced three “pernicious” effects. First, it required a “surrender of anonymity” by speakers who might be canvassing for unpopular causes.” Second, it burdened upon those with religious objections to a permit requirement like the Jehovah’s Witnesses. Third, the ordinance banned a “significant amount of spontaneous speech,” such as leafletting by a person who decided to participate in a political campaign “on a holiday or a weekend” when the Mayor’s Office was closed. While acknowledging the importance of the governmental interests, the Court held that the ordinance’s was not narrowly tailored. Even if the state had an interest in preventing fraud, that interest could not justify applying the law “to petitioners, to political campaigns, or to enlisting support for unpopular causes.” Residents who wanted privacy could post “No Solicitation” signs, or ignore

“unwelcome visitors,” thereby providing “ample protection for the unwilling listener.” Moreover, these measures were “less intrusive and more effective” than the permit requirement, given that the “annoyance caused by an uninvited knock is the same whether or not the visitor is armed with a permit.” Finally, there was no evidence “of a special crime problem related to door-to-door solicitation,” and it seemed unlikely “that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance.” They could pretend to need directions, solicit answers to phony surveys, or obtain permits under false names.

2. *Public or Private Property*. The *Watchtower* Court invalidated the permit scheme even though the ordinance technically did not apply to the traditional public forum of “the streets,” but instead restricted canvassing speech that took place on “private property” and at “private residences.” The decision contrasted with *Cox* which a challenge to a permit scheme that applied to a “parade or procession” conducted in the traditional “public forum” of “any public street or way.” In neither case did the status of the forum dictate the test used to evaluate the permit scheme, even though that status would be controlling in a modern case litigated under the public forum doctrine. Moreover, the *Watchtower* Court expressly noted that it was not necessary to use “intermediate scrutiny” in assessing whether the permit ordinance advanced important interests by a narrowly tailored means—two aspects of the familiar standard for assessing content-neutral regulations of speech in the public forum. Instead, the Court described the need to “appraise the substantiality” of the government interests and to “examine the effect of the challenged legislation” on First Amendment rights. Even though the older *Cox* opinion did not use that formula, its analysis reflected the same balancing of concerns. As the Court explained, the parade permit scheme had “obvious advantages” because it sought “to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder.” No less intrusive methods were considered as options for achieving these interests. Moreover, the scheme’s “interference with liberty of speech and writing seemed slight.” It limited only the time, place, and manner of a parade and placed no restrictions on the distribution of literature by individuals or groups “traveling in an unorganized fashion.” By contrast with *Cox*, the Court predicted that the *Watchtower* ordinance would have “pernicious” effects on speakers and their speech, and “less intrusive and more effective” methods could be used to protect privacy and deter crime.

P. 331: Change the title of problem # 1 to the following title:

1. *Burden on Resources*.

P. 332: Renumber problem # 5 as #4. Move problem # 4 from p. 332 and insert (renumbered as new problem # 1) on p. 583 in Chapter 8 to follow the new *Walker* case that will be added to that page.

P. 332: Move problems # 1, # 3, # 4, and # 5 that now appear on pp. 338-339, renumber them as new problems ## 5-8, and then insert them on p. 332 at the end of the problems:

P. 332: Insert the following new problems at the end of the problems:

9. *Millionaire Parties*. A charitable organization, Top Flight Entertainment (TFE) plans to host events designed to raise money for charity, which are referred to as “millionaire parties.” Assume that at these events, the patrons will engage in casino-style gambling, and that topless dancers will act as waitresses. These activities are legal at these events, but under state law, a license must be obtained by the sponsor, and so TFE applies for a license. While the license approval is pending, TFE files a suit against the state in an unrelated matter. Then the state denies TFE’s license application, even though licenses have been granted to other entities that sponsor identical events. Assuming that topless dancing and gambling are protected First Amendment activities, does the state’s denial of the license violate TFE’s constitutional rights? *Compare Top Flight Entertainment Ltd. v. Schuette*, 729 F.3d 623 (6th Cir. 2013).

10. *The “Keep Moving” Rule*. After a white police officer killed a black man in Ferguson, Missouri, there were extensive civil rights protests. In an effort to control the crowds, the police order protestors to “keep moving” whenever they think that such an order is appropriate. Those who refused to move on were arrested. However, the police were not provided with a list of circumstances or factors that might justify a “keep moving” order. In addition, there was evidence suggesting that different officers interpreted the “keep moving” rule differently: some required protestors to move at a certain speed while other officers prohibited individuals from walking back and forth in areas of a particular size. Some officers also applied the “keep moving” rule to the press. Can the police validly arrest those who refuse to “keep moving” but who are not otherwise engaged in illegal conduct? See *Abdullah v. St. Louis County*, 52 F.Supp.3d 936 (E.D. Mo. 2014).

11. *Tour Guide License*. In order to act as paid tour guide in D.C., it is necessary to pay \$200 in fees and answer at least 70 questions correctly on a 100-question multiple choice exam. Violation of this requirement is punishable by 90 days in jail and a fine of \$300. This licensing scheme was challenged in a suit filed by D.C. Segs in the City (Segs), which trains tourists to ride a Segway and then leads up to five tours a day, seven days a week. The tour guides use radio earpieces for maintaining communication with the tour-group members and for narrating facts and stories about nearby points of interest. Segs brought both a facial and as-applied challenge on First Amendment grounds. The federal district court concluded that the licensing scheme targets “the non-expressive conduct” of “escorting” a commercial sightseeing trip or tour, “and only incidentally burdens speech.” Applying intermediate scrutiny, the court upheld the constitutional validity of the scheme as narrowly tailored to further the government interest of “promoting the tourism industry” by “attempting to ensure” that tour guides “have, at least, some

minimal knowledge about what and where they are guiding or directing people to.” What arguments could the appellate court use to reverse the district court and invalidate the scheme on its face? *Compare Edwards v. District of Columbia*, 755 F.3d 996 (D. C. Cir. 2014); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014).

P. 332: Before the *Mosley* case, insert the following new heading:

[4] Content-Based Restrictions

P. 332: Move problems # 1, # 3, # 4, and # 5 that now appear on pp. 338-339, renumber them as new problems # 5 through # 8, and then insert them on p. 332 after new problem #4.

P. 333: After the new problems that follow the *McCullen* case, insert the following new heading [5] and new text, the *Reed* case, and the new “Notes” heading; then move note # 2 from pp. 335-336 and renumber as new note # 3, and move note # 3 from p. 336 and renumber as new note # 4, and move note # 5 from p. 337 to be note # 5 here; then insert the new “Problems” heading, and new problems # 1, # 2, # 3, # 4, and # 5:

[5] Content-Based Restrictions

As the next case reveals, the use of strict scrutiny emerged in First Amendment doctrine as a borrowing from equal protection doctrine. The requirements imposed by strict scrutiny in modern cases, however, will depend on the status of the forum in which the content-based regulation operates.

REED v. TOWN OF GILBERT
135 S. Ct. 2218 (2015)

JUSTICE THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona adopted a comprehensive code governing the manner in which people may display outdoor signs. The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is “Temporary Directional Signs Relating to a Qualifying Event,” loosely defined as signs directing the public to a meeting of a nonprofit group. The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here. The first is “Ideological Signs.” This category includes any “sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency.” The Code treats ideological signs most favourably, allowing them to be up to 20 square feet in area and to be placed in all “zoning districts” without time limits. The second category is “Political Signs.” This includes any “temporary sign designed to influence the outcome of an election called by a public body.” The Code treats these signs less favourably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and “rights-of-way.” These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election. The third category is “Temporary Directional Signs Relating to a Qualifying Event.” A temporary sign is defined as a “sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display.” This includes any “Temporary Sign intended to direct pedestrians, motorists, and other passers by to a ‘qualifying event.’” A “qualifying event” is defined as any “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.” The Code treats temporary directional signs even less favourably than political signs. Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way. But no more than four signs may be placed on a single property at any time. They may be displayed no more than 12 hours before the “qualifying event” and no more than 1 hour afterward.

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church’s name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

The Town’s Sign Code compliance manager twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church’s failure to include the date of the event on the signs. Town officials even confiscated one of the Church’s signs. Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town’s Code compliance

manager informed the Church that there would be “no leniency under the Code” and promised to punish any future violations.

Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona. The District Court denied the petitioners’ motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed. It then remanded for the District Court to determine in the first instance whether the Sign Code’s distinctions among temporary directional signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech. On remand, the District Court granted summary judgment in favour of the Town. The Court of Appeals again affirmed. We granted certiorari and now reverse.

Under the First Amendment, a government, including a municipal government vested with state authority, “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “‘justified without reference to the content of the regulated speech,’” or that were adopted by the government “because of disagreement with the message the speech conveys,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

The Town’s Sign Code is content based on its face. It defines “Temporary Directional Signs” on the basis of whether a sign conveys the message of directing the public to church or some other “qualifying event.” It defines “Political Signs” on the basis of whether a sign’s message is “designed to influence the outcome of an election.” And it defines “Ideological Signs” on the basis of whether a sign “communicates a message or ideas” that do not fit within the Code’s other categories. It then subjects each of these categories to different restrictions. The restrictions that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke’s Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke’s followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke’s theory of government. The Church’s signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s

justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

The Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive. The Court of Appeals determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech based on disagreement with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." The United States contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be "'justified without reference to the content of the regulated speech.'" This analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment," and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral. That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. See *United States v. Eichman*, 496 U. S. 310, 315 (1990); *United States v. O'Brien*, 391 U.S. 367, 375, 377 (1968). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals misunderstands *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was "'justified without reference to the content of the speech.'" But *Ward*'s framework "applies only if a statute is content neutral." Its rules thus operate "to protect speech," not "to restrict it." *Hill v. Colorado*, 530 U.S. 703 (2000) (Kennedy, J., dissenting). The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavoured speech. That is why the First Amendment expressly targets the operation of laws—*i.e.*, the "abridgement of speech"—rather than merely the motives of those who enacted them. "The vice of content-based legislation is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill, supra*, at 743 (Scalia, J., dissenting). For instance, in

NAACP v. Button, 371 U.S. 415 (1963), the Court encountered a State's attempt to use a statute prohibiting “improper solicitation” by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People. Although *Button* predated our recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the “regulation of professional conduct” rendered the statute consistent with the First Amendment. One could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. We have repeatedly “rejected the argument that ‘discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.’” *Discovery Network*, 507 U.S. at 429.

The Court of Appeals reasoned that the Sign Code was content neutral because it “does not mention any idea or viewpoint, let alone single one out for differential treatment.” For the purpose of the Code, “it makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted.” In the Town's view, a sign regulation that “does not censor or favour particular viewpoints or ideas” cannot be content based. This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on “the specific motivating ideology or the opinion or perspective of the speaker”—is a “more blatant” and “egregious form of content discrimination.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). But “the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980). Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. The Town's Sign Code singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on “the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.” That analysis is mistaken on both factual and legal grounds. The Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as signs placed by the Church. If Reed had decided to display signs in support of a particular candidate, he could have made those signs far larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because “speech restrictions based on the identity of the speaker are all too often simply a means to control content,” we have insisted that “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference,” *Turner*, 512 U.S. at 658. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code’s distinctions hinge on “whether and when an event is occurring.” The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Come election time, it requires Town officials to determine whether a sign is “designed to influence the outcome of an election” (and thus “political”) or merely “communicating a message or ideas for noncommercial purposes” (and thus “ideological”). That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i.e.*, an election) is involved.

Just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. A speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem “entirely reasonable” will sometimes be “struck down because of their content-based nature.” *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (O’Connor, J., concurring).

Because the Town’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny. Thus, it is the Town’s burden to demonstrate that the Code’s differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end. The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town’s aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code’s distinctions fail as hopelessly underinclusive. Starting with the preservation of aesthetics, temporary directional signs are “no greater an eyesore,” *Discovery Network*, 507 U.S. at 425, than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem. The Town similarly has not shown

that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting. In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a ““law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,”” *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002), the Sign Code fails strict scrutiny.

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an ““absolutist”” content-neutrality rule would render “virtually all distinctions in sign laws subject to strict scrutiny,” but that is not the case. Not “all distinctions” are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny. The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign’s message: size, building materials, lighting, moving parts, and portability. On public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *Taxpayers for Vincent*, 466 U.S. at 817.

A city might reasonably view the general regulation of signs as necessary because signs “take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.” *City of Ladue*, 512 U.S. at 48. At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue, including political and ideological signs and signs for events, are far removed from those purposes. They are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring.

Here are some rules that would not be content based: 1. Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below. 2. Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings. 3. Rules distinguishing between lighted and unlighted signs. 4. Rules distinguishing between

signs with fixed messages and electronic signs with messages that change. 5. Rules that distinguish between the placement of signs on private and public property. 6. Rules distinguishing between the placement of signs on commercial and residential property. 7. Rules distinguishing between on-premises and off-premises signs. 8. Rules restricting the total number of signs allowed per mile of roadway. 9. Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed. In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots. Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. Elsewhere, historic site markers—for example, "George Washington Slept Here"—are also exempt from general regulations. Similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee.

Many sign ordinances of that kind are now in jeopardy. Says the majority: When laws "single out specific subject matter," they are "facially content based"; and when they are facially content based, they are automatically subject to strict scrutiny. Although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, most will be struck down. The government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). Courts would have to determine that a town has a compelling interest in informing passers by where George Washington slept. Likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny—is that our communities will find themselves in an unenviable bind: They will have to repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, I find it challenging to understand why that

is so. This Court’s decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *McCullen v. Coakley*, 134 S. Ct. 2518, ___ (2014). The second is to ensure that the government has not regulated speech “based on hostility—or favoritism—towards the underlying message expressed.” *R. A. V. v. St. Paul*, 505 U. S. 377, 386 (1992). The subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents to install a light bulb over “name and address” signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is a “realistic possibility that official suppression of ideas is afoot.” *Davenport v. Washington Ed. Assn.*, 551 U.S. 177 (2007). That is always the case when the regulation facially differentiates on the basis of viewpoint. It is also the case (except in non-public or limited public forums) when a law restricts “discussion of an entire topic” in public debate. “If the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating.’” *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980). Such subject-matter restrictions, even though viewpoint-neutral on their face, may “suggest an attempt to give one side of a debatable public question an advantage in expressing its views to the people.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”—we insist that the law pass the most demanding constitutional test. *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992).

When that is not realistically possible, we may do well to relax our guard so that “entirely reasonable” laws imperiled by strict scrutiny can survive. Our concern with content-based regulation arises from the fear that the government will skew the public’s debate of ideas—so when “that risk is inconsequential, strict scrutiny is unwarranted.” *Davenport v. Washington Ed. Assn.*, 551 U.S. 177, 188 (2007). To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating “historical, cultural, or artistic events” from a generally applicable limit on sidewalk signs. We explained, the law’s enactment and enforcement revealed “not even a hint of bias or censorship.” In *City of Ladue v. Gilleo*, 512 U. S. 43 (1994), the Court assumed *arguendo* that a sign ordinance’s exceptions for

address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. We did not need to, and did not, decide the level-of-scrutiny question because the law's breadth made it unconstitutional under any standard. The majority could easily have taken *Ladue*'s tack here. The Town of Gilbert's defense of its sign ordinance—the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. The Town provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations. There is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." As the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) Courts will strike down those democratically enacted local laws even though no one has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

JUSTICE BREYER, concurring in the judgment.

I join Justice Kagan's separate opinion. To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. There are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. In these types of cases, strict scrutiny is often appropriate, and content discrimination has served a useful purpose. But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. Content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? Whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far.

Virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. To hold that content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity. Consider governmental regulation of securities (requirements for content that must be included in a registration statement); of energy conservation labeling-practices (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs (requiring a prescription drug label to bear the symbol “Rx only”); of doctor-patient confidentiality (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient’s spouse or sexual partner); of income tax statements (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds \$10,000); of commercial airplane briefings (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos (requiring petting zoos to post a sign at every exit “strongly recommending that persons wash their hands upon exiting the petting zoo area”). Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court’s many subcategories and exceptions to the rule.

The Court could escape the problem by watering down the force of the presumption against constitutionality that “strict scrutiny” normally carries with it. But doing so will weaken the First Amendment’s protection in instances where “strict scrutiny” should apply in full force. The better approach is to treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators. Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant “strict scrutiny.” Nonetheless, for the reasons that Justice Kagan sets forth, I believe that the Town of Gilbert’s regulatory rules violate the First Amendment. I consequently concur in the Court’s judgment only.

NOTES

1. *Impermissible Valuation of Speech.* When the *Reed* plaintiff filed suit in 2007, the Town’s Sign Code categorized his sign as a “Religious Assembly Temporary Direction Sign”

that could not be posted for more than two hours before the religious assembly or more than one hour afterward. Nor could he post his sign in the public right-of-way. In 2008, the title for the plaintiff's sign category was changed to "Temporary Directional Signs Related to a Qualifying Event," with posting allowed for 12 hours before the "event." Posting his sign in the public right-of-way was not allowed until 2011. The implicit valuation of speech categories by the Town Sign Code was described by one observer as follows: "Of course, the strongest justification for the content classifications in the Town's ordinance had to do not with differences in *harm* caused by speech, but differences in *value*. The rationale, presumably, is that campaign-related signs are especially valuable to the community, because political campaigns are so important, but lose their value after the campaign is done; ideological signs are less valuable than campaign-related signs, but still quite valuable, and retain that value permanently; and signs promoting specific events are less valuable than the other signs, and also lose their value after the event. The majority never expressly discussed these arguments, but the strong implication [of *Reed* is] that the government may *not* favor certain speech (even in viewpoint-neutral ways) on the grounds that its content is seen as more valuable." Eugene Volokh, *Supreme Court reaffirms broad prohibition on content-based speech restrictions in today's Town of Gilbert decision*, The Volokh Conspiracy, THE WASHINGTON POST, June 15, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/18/supreme-court-reaffirms-broad-prohibition-on-content-based-speech-restrictions-in-todays-reed-v-town-of-gilbert-decision/>

2. *Commercial Speech*. Lower courts have interpreted the *Reed* Court's silence about commercial speech as implying that *Reed* did not modify the longstanding *Central Hudson* standard for used for such speech. See, e.g., *CTIA – The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048 (N.D. Cal. 2015).

PROBLEMS

1. *Soliciting in Roadway Medians*. The Court upheld charitable solicitation as protected speech in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and many lower courts have addressed the validity of regulations that limit solicitation speech in the public forum. Assume that the County enacted an ordinance to prohibit "distributing handbills, soliciting contributions, or selling merchandise to car drivers or passengers while standing in county roadways, including the median areas." Following its enactment, homeless persons continued to solicit donations in the median areas while sitting down. So the ordinance was amended to prohibit the same three activities "while standing or sitting in the highway, including the entire width of a road or street that is ordinarily used for vehicular travel, and including the shoulder, the median, and the area between the travel lane and the back of the curb." The amended ordinance was challenged in a suit filed by Bob, a homeless man who wanted to solicit donations, and Peg, a candidate for city council who wanted to distribute campaign literature. Is the amended ordinance valid? Compare *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015).

2. *Aggressive Manner*. Assume that the amended ordinance in the prior problem is repealed and replaced with a new ordinance that includes these two provisions: "(1) It is unlawful any person to beg, panhandle or solicit in an aggressive manner; and (2) It is unlawful

to stand or walk on a traffic island or roadway except for the purpose of crossing at an intersection or crosswalk, for the purpose of entering or exiting a vehicle, or for some other lawful purpose.” Are these two provisions valid? *Compare Thayer v. City of Worcester*, ___ F. Supp. 3d ___ (D. Mass 2015), 2015 WL 6872450, (Nov. 9, 2015); *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014).

P. 336-337: Move notes # 3, #4, and #5 and insert them (with same numbering) on p. 327 after note # 2.

P. 337: Rerunber note # 6 as new note # 3.

P. 336-337: After problems ## 1, 3, 4 & 5 are moved, renumber the remaining problems.

P. 337: Rerunber note # 6 as new note # 3.

P. 338: Move problem # 2 from p. 338 and insert on p. 352 (with same numbering) to replace problem # 2 on that page.

P. 338-339: Move problems # 1, # 3, # 4, and # 5 that now appear on pp. 338-339, and renumber them as new problems ## 5-8, and insert on p. 332 after new problem #4, and renumber the remaining problems on pp. 338-341.

P. 339: Move problems # 4 and # 5 from p. 339 and insert them on p. 304 as new problems #4 and # 5 with the same captions:

4. The Occupy Columbia Movement.

5. Occupy Columbia and the Emergency Regulation.

P. 340: At the end of problem # 7 (no renumbered as problem # 3), insert the following new citation:

See Snyder v. Phelps, 79 L.Ed.2d 172 (2011).

P. 341: At the end of the problems, insert the following new problems:

10. *Restrictions on Park Vendors.* City officials in New York City are concerned regarding about the aesthetics and congestion in the city's public parks, and so they enact regulations that impose restrictions on the size and placement of vendor tables, and the places where tables can be placed. The restrictions only apply in parks that are determined to be suffering from serious congestion issues. Under the regulations, "expressive-matter" vendors are allowed to sell their materials without obtaining the permit required for other types of vendors. But "expressive-matter" vendors are subject to the size and location restrictions applicable to all other vendors. Are these restrictions constitutional? *See Ledgeman v. N.Y.C. Depot of Parks & Recreation*, 731 F.3d 199 (2nd Cir. 2013).

11. *Homeless Newspaper Sales.* A group of homeless individuals in the City of Brentwood, California, produce and sell a newspaper. A city ordinance prohibits the sale of newspapers "on any portion of any street within the city." Thus, newspapers can be sold only door-to-door, or on park property, or on sidewalks. In addition, motorists can buy newspapers provided that the vendor remains on the sidewalk. The city justifies the prohibition of sales "on the streets" on safety grounds. Does the ordinance constitute a permissible time, place and manner restriction? *See The Contributor v. City of Brentwood*, 726 F.3d 861 (6th Cir. 2013).

12. *Prohibitions on Begging.* A city enacts an ordinance prohibiting begging on public streets. The city argues that begging is not "protected speech," that the ordinance limits "conduct" rather than "speech," that some begging is fraudulent (because solicitors are not really "homeless"), and that some passers-by feel threatened when baggers solicit money from them. The plaintiffs contend that begging is no different than charitable solicitation which the Court upheld as constitutionally protected in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Is begging "communicative activity," and should it be regarded as protected under the First Amendment? *See Spent v. Schultze*, 726 F.3d 867 (6th Cir. 2013).

P. 341: Before the *Heffron* case, insert the following new heading:

[5] Content-Neutral Restrictions

P. 352: At the end of the existing note, add the following new note:

2. *Public Forum and the U.S. Supreme Court.* A federal statute restricts expressive activity within the building or grounds of the U.S. Supreme Court. The statute makes it unlawful "to parade, stand, or move in processions or assemblages in the Supreme Court Building or

grounds” (the Assemblages Clause), and also makes it unlawful “to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement” (the Display Clause). The statute defines the grounds of the Supreme Court as extending to, and including, the sidewalks surrounding the court. In *United States v. Grace*, 461 U.S. 171 (1981), the Court struck down the ban as applied to the sidewalks surrounding the Court. However, in *Hodge v. Talkin*, 799 F.3d 1145 (D.C. Cir. 2015), the court held that the Supreme Court plaza is a non-public forum so that freedom of expression can be restricted.

P. 352: Delete problem # 2 on this page and renumber the remaining problems.

P. 354: After the problems, insert new problems, and then insert the following new case, notes, and problems:

7. *Restrictions on Park Vendors.* City officials in New York City are concerned regarding about the aesthetics and congestion in the city’s public parks, and so they enact regulations that impose restrictions on the size and placement of vendor tables, and the places where tables can be placed. The restrictions only apply in parks that are determined to be suffering from serious congestion issues. Under the regulations, “expressive-matter” vendors are allowed to sell their materials without obtaining the permit required for other types of vendors. But “expressive-matter” vendors are subject to the size and location restrictions applicable to all other vendors. Are these restrictions constitutional? *Compare Ledgeman v. N.Y.C. Depot of Parks & Recreation*, 731 F.3d 199 (2d Cir. 2013).

8. *Homeless Newspaper Sales.* A group of homeless individuals in the City of Brentwood, California, produce and sell a newspaper. A city ordinance prohibits the sale of newspapers “on any portion of any street within the city.” Thus, newspapers can be sold only door-to-door, or on park property, or on sidewalks. In addition, motorists can buy newspapers provided that the vendor remains on the sidewalk. The city justifies the prohibition of sales “on the streets” on safety grounds. Does the ordinance constitute a permissible time, place and manner restriction? *Compare The Contributor v. City of Brentwood*, 726 F.3d 861 (6th Cir. 2013).

9. *Forum Restrictions.* Normally, states have allowed individuals to picket and engage in free speech activities near their state houses. Suppose that individuals want to hold a protest inside the capitol building itself. Do they have the right to hold a sit-in inside one of the legislative chambers? Can they be in a near-by room, but make so much noise that it’s difficult for the chamber to do its business? Can a member of the chamber be prosecuted for participating in a disruptive protest? *See Reza v. Pearce*, 806 F.3d 497 (9th Cir. 2015).

10. *Public Forum Doctrine.* Suppose that the U.S. Park Service decides to cull Bison herds because it believes that they have become too large. Historically, the Park Service has

allowed the public to observe the culling. However, it recently decided not to allow them to view the forthcoming culling of some 900 bison on public safety grounds. The Park Service argues that bison can become dangerous during the culling process. Also, the Park Service seeks to encourage the bison to wander towards capture pens, and they are less likely to do so when a crowd is present. Is there/should there be a constitutional right of access to observe the culling because it is taking place in a publicly funded park?

11. *Prohibiting Peddling on Public Streets*. The City of Chicago enacts an ordinance prohibiting peddling on the sidewalks immediately adjacent to Wrigley Field (where the Chicago Cubs play baseball), and the ordinance specifically defines the affected sidewalks. However, peddling is permitted on sidewalks that are across the street from the stadium. The city seeks to justify the ordinance on the basis that the stadium is surrounded by buildings, mostly businesses, and the walking areas are relatively narrow. Does the ordinance infringe the First Amendment? *See Left Field Media LLC v. City of Chicago*, 2016 WL 2956879, — F.3d — (7th Cir. 2016).

McCULLEN v. COAKLEY
89 L. Ed. 2d 502 (2014).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act, Mass. Gen. Laws, ch. 266, §120E (West 2000). The law was designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed. The Act established a defined area with an 18-foot radius around the entrances and driveways of such facilities. Anyone could enter that area, but once within it, no one (other than certain exempt individuals) could knowingly approach within six feet of another person — unless that person consented — “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.” A separate provision subjected to criminal punishment anyone who “knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.” The statute was modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado*, 530 U. S. 703 (2000). Relying on *Hill*, the United States Court of Appeals for the First Circuit sustained the Massachusetts statute against a First Amendment challenge.

By 2007, some Massachusetts legislators and law enforcement officials had come to regard the 2000 statute as inadequate. At legislative hearings, multiple witnesses recounted apparent violations of the law. Massachusetts Attorney General Martha Coakley testified that protestors violated the statute “on a routine basis.” She played a video depicting protestors approaching patients and clinic staff within the buffer zones, ostensibly without consent. Clinic employees and volunteers testified that protestors congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots. Captain William Evans of the Boston Police Department testified that his officers had made “no more than five or

so arrests" at the Planned Parenthood clinic in Boston and that what few prosecutions had been brought were unsuccessful. Captain Evans testified that the 18-foot zones were so crowded with protestors that it was hard to determine whether a protestor had deliberately approached a patient or, if so, whether the patient had consented. Attorney General Coakley concluded that the six-foot no-approach zones were "unenforceable." What the police needed, she said, was a fixed buffer zone around clinics that protestors could not enter. Captain Evans agreed. To address these concerns, the Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones (within the 18-foot area) with a 35-foot fixed buffer zone from which individuals are categorically excluded: "No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway." A "reproductive health care facility" is defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed."

The 35-foot buffer zone applies only "during a facility's business hours," and the area must be "clearly marked and posted." Facilities typically mark the zones with painted arcs and posted signs on adjacent sidewalks and streets. A first violation of the statute is punishable by a fine of up to \$500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between \$500 and \$5,000, up to two and a half years in prison, or both. The Act exempts four classes of individuals: (1) "persons entering or leaving such facility"; (2) "employees or agents of such facility acting within the scope of their employment"; (3) "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment"; and (4) "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." The legislature retained the separate provision from the 2000 version that proscribes the knowing obstruction of access to a facility.

Some of the individuals who stand outside Massachusetts abortion clinics are protestors who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners attempt to engage women approaching the clinics in what they call "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. Eleanor McCullen, for instance, will typically initiate a conversation this way: "Good morning, may I give you my literature? Is there anything I can do for you? I'm available if you have any questions." If the woman seems receptive, McCullen will provide additional information. Petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which tend only to antagonize their intended audience. Petitioners say they have collectively persuaded hundreds of women to forgo abortions. The buffer zones have displaced

petitioners from their previous positions outside the clinics. McCullen offers counseling outside a Planned Parenthood clinic in Boston, as do petitioners Jean Zarrella and Eric Cadin. Petitioner Gregory Smith prays the rosary there. The clinic occupies its own building on a street corner. Its main door is recessed into an open foyer, approximately 12 feet back from the public sidewalk. Before the Act was amended to create the buffer zones, petitioners stood near the entryway to the foyer. Now a buffer zone — marked by a painted arc and a sign — surrounds the entrance. This zone extends 23 feet down the sidewalk in one direction, 26 feet in the other, and outward just one foot short of the curb. The clinic's entrance adds another seven feet to the width of the zone. The upshot is that petitioners are effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the clinic.

Petitioners Mark Bashour and Nancy Clark offer counseling and information outside a Planned Parenthood clinic in Worcester. The Worcester clinic sits well back from the public street and sidewalks. Patients enter the clinic in one of two ways. Those arriving on foot turn off the public sidewalk and walk down a nearly 54-foot-long private walkway to the main entrance. More than 85% of patients, however, arrive by car, turning onto the clinic's driveway from the street, parking in a private lot, and walking to the main entrance on a private walkway. Bashour and Clark would like to stand where the private walkway or driveway intersects the sidewalk and offer leaflets to patients as they walk or drive by. But a painted arc extends from the private walkway 35 feet down the sidewalk in either direction and outward nearly to the curb on the opposite side of the street. Another arc surrounds the driveway's entrance, covering more than 93 feet of the sidewalk (including the width of the driveway) and extending across the street and nearly six feet onto the sidewalk on the opposite side. Bashour and Clark must now stand either some distance down the sidewalk from the private walkway and driveway or across the street.

Petitioner Cyril Shea stands outside a Planned Parenthood clinic in Springfield, which, like the Worcester clinic, is set back from the public streets. Approximately 90% of patients arrive by car and park in the private lots surrounding the clinic. Shea used to position himself at an entrance to one of the five driveways leading to the parking lots. Painted arcs now surround the entrances, each spanning approximately 100 feet of the sidewalk parallel to the street (again, including the width of the driveways) and extending outward well into the street. Shea now stands far down the sidewalk from the driveway entrances. Petitioners claim that the buffer zones have considerably hampered their counseling efforts. Although they have managed to conduct some counseling and to distribute some literature outside the buffer zones — particularly at the Boston clinic — they have had many fewer conversations and distributed many fewer leaflets since the zones went into effect.

The second statutory exemption allows clinic employees and agents acting within the scope of their employment to enter the buffer zones. Relying on this exemption, the Boston clinic uses “escorts” to greet women as they approach the clinic, accompanying them through the zones to the clinic entrance. Petitioners claim that the escorts sometimes thwart petitioners’ attempts to communicate with patients by blocking petitioners from handing literature to patients, telling patients not to “pay any attention” or “listen to” petitioners, and disparaging petitioners as “crazy.”

In January 2008, petitioners sued Coakley and other Commonwealth officials. They sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied petitioners' facial challenge. The Court of Appeals for the First Circuit affirmed. The case then returned to the District Court. After another bench trial, it denied the remaining as-applied challenge, finding that the Act left petitioners ample alternative channels of communication. The Court of Appeals once again affirmed. We granted certiorari.

The Massachusetts Act regulates access to "public ways" and "sidewalks." Such areas occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. *United States v. Grace*, 461 U.S. 171 (1983). These places — labeled "traditional public fora" — "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *FCC v. League of Women Voters of Cal.*, 468 U. S. 364 (1984), this aspect of traditional public fora is a virtue, not a vice. In short, traditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny.

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is "very limited." *Grace*, *supra*, at 177. The guiding First Amendment principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" applies with full force in a traditional public forum. *Police Dept. of Chicago v. Mosley*, 408 U. S. 92 (1972). As a general rule, in such a forum the government may not "selectively shield the public from some kinds of speech on the ground that they are more offensive than others." *Erznoznik v. Jacksonville*, 422 U. S. 205 (1975). We have afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. "Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward*, 491 U. S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U. S. 288 (1984)).

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer

zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny — that is, it must be the least restrictive means of achieving a compelling state interest. See *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803 (2000).

The Act applies only at a “reproductive health care facility,” defined as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” Given this definition, petitioners argue, “virtually all speech affected by the Act is speech concerning abortion,” thus rendering the Act content based. We disagree. The Act does not draw content-based distinctions on its face. Contrast *Boos v. Barry*, 485 U. S. 312 (1988); *Carey v. Brown*, 447 U. S. 455 (1980). The Act would be content based if it required “enforcement authorities” to “examine the content of the message that is conveyed to determine whether” a violation has occurred. It does not. Whether petitioners violate the Act “depends” not “on what they say,” but simply on where they say it. Petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

By limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, “a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward, supra*, at 791. The question is whether the law is “justified without reference to the content of the regulated speech.” *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986). The Massachusetts Act is. Its stated purpose is to “increase forthwith public safety at reproductive health care facilities.” Respondents have articulated similar purposes before this Court — namely, “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” We have previously deemed the foregoing concerns to be content neutral. See *Boos*, 485 U. S. at 321. Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

The Act would not be content neutral if it were concerned with undesirable effects that arise from “the direct impact of speech on its audience” or “listeners’ reactions to speech.” If the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener’s reactions. Whether or not a single person reacts to abortion protestors’ chants or petitioners’ counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not dispute that the Commonwealth’s interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests “apply outside every building in the State that hosts any activity that might occasion protest or comment,” not just abortion clinics. By choosing to pursue these interests only at

abortion clinics, petitioners argue, the Massachusetts Legislature evinced a purpose to “single out for regulation speech about one particular topic: abortion.” We cannot infer such a purpose from the Act’s limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. At the same time, however, “States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.” *Burson v. Freeman*, 504 U. S. 191 (1992) (plurality opinion). The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with “every building in the State that hosts any activity that might occasion protest or comment.” In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

JUSTICE SCALIA objects that the statute does restrict more speech than necessary, because “only one Massachusetts abortion clinic is known to have been beset by the problems that the statute supposedly addresses.” But there are no grounds for inferring content-based discrimination simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis. The poor fit goes to the question of narrow tailoring, which we consider below.

Petitioners argue that the Act is content based because it exempts four classes of individuals, one of which comprises “employees or agents of a reproductive healthcare facility acting within the scope of their employment.” This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination — an “egregious form of content discrimination,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). In particular, petitioners argue that the exemption allows clinic employees and agents — including the volunteers who “escort” patients arriving at the Boston clinic — to speak inside the buffer zones. Of course, “an exemption from an otherwise permissible regulation of speech may represent a governmental ‘attempt to give one side of a debatable public question an advantage in expressing its views to the people.’” *City of Ladue v. Gilleo*, 512 U. S. 43, 51 (1994) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 785–786 (1978)). The statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt. There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. The exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance. Given the need for an exemption for clinic employees, the “scope of their employment” qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. It performs the same function as the identical “scope of their employment” restriction on the exemption for “law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents.” The limitation makes clear —

with respect to both clinic employees and municipal agents — that exempted individuals are allowed inside the zones only to perform those acts authorized by their employers.

There is no suggestion that any of the clinics authorize their employees to speak about abortion in the buffer zones. Petitioners did testify about instances in which escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners' attempts to speak and hand literature to the women, and disparaged petitioners in various ways. It is unclear whether these alleged incidents occurred within the buffer zones. There is no viewpoint discrimination if the incidents occurred outside the zones because petitioners are equally free to say whatever they would like in that area. Even assuming the incidents occurred inside the zones, the record does not suggest that they involved speech within the scope of the escorts' employment. If the speech was beyond the scope of their employment, then each of the alleged incidents would violate the Act's express terms. Petitioners' complaint would then be that the police were failing to *enforce* the Act equally against clinic escorts. While such allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act. In any event, petitioners nowhere allege selective enforcement.

It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. In that case, the escorts would not seem to be violating the Act because the speech would be within the scope of their employment. The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate — a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. The record contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones.⁴

Even though the Act is content neutral, it still must be "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U. S. at 796. The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. By demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrificing speech for efficiency." *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988). For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden

⁴ We do not hold that "speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed." We instead apply an uncontroversial principle of constitutional adjudication: a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him. When someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so.

substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U. S. at 799. Such a regulation “need not be the least restrictive or least intrusive means of” serving the government’s interests. But the government still “may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”

Respondents claim that the Act promotes “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” We have recognized the legitimacy of the government’s interests in “ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman’s freedom to seek pregnancy-related services.” *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 376 (1997). The buffer zones clearly serve these interests. At the same time, the buffer zones impose serious burdens on petitioners’ speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics’ entrances and driveways. The zones thereby compromise petitioners’ ability to initiate the close, personal conversations that they view as essential to “sidewalk counseling.” McCullen explained that she often cannot distinguish patients from passers by outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. Even when she does manage to begin a discussion outside the zone, she must stop abruptly at its border, which she believes causes her to appear “untrustworthy” or “suspicious.” McCullen is often reduced to raising her voice at patients from outside the zone — a mode of communication sharply at odds with the compassionate message she wishes to convey. Clark gave similar testimony about her experience at the Worcester clinic.

These burdens on petitioners’ speech have clearly taken their toll. Although McCullen claims that she has persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, she reaches “far fewer people” than she did before the amendment. Zarrella reports an even more precipitous decline in her success rate: She estimated having about 100 successful interactions over the years before the 2007 amendment, but not a single one since. At the Worcester clinic, Clark testified that “only one woman out of 100 will make the effort to walk across the street to speak with her.”

The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. Because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands — the most effective means of getting the patients to accept it. In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics’ driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients. While the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms — such as normal conversation and leafletting on a public sidewalk — have historically been more closely associated with the transmission of ideas than others.

In the context of petition campaigns, “one-on-one communication” is “the most effective,

fundamental, and perhaps economical avenue of political discourse.” *Meyer v. Grant*, 486 U. S. 414, 424 (1988). “Handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression”; “no form of speech is entitled to greater constitutional protection.” *McIntyre v. Ohio Elections Comm’n*, 514 U. S. 334, 347 (1995). When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.

Respondents emphasize that the Act does not prevent petitioners from engaging in various forms of “protest” — such as chanting slogans and displaying signs — outside the buffer zones. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. While petitioners have been able to have a number of quiet conversations outside the buffer zones, the conversations have been far less frequent and far less successful since the buffer zones were instituted. It is thus no answer to say that petitioners can still be “seen and heard” by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message.

Respondents suggest that, at the Worcester and Springfield clinics, petitioners are prevented from communicating with patients not by the buffer zones but by the fact that most patients arrive by car and park in the clinics’ private lots. It is true that the layout of the two clinics would prevent petitioners from approaching the clinics’ *doorways*, even without the buffer zones. But petitioners do not claim a right to trespass on the clinics’ property. They instead claim a right to stand on the public sidewalks by the driveway as cars turn into the parking lot. Before the buffer zones, they could do so. Now they must stand a substantial distance away. The Act alone is responsible for that restriction on their ability to convey their message.

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests. Respondents identify no other State with a law that creates fixed buffer zones around abortion clinics. That of course does not mean that the law is invalid. It does raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage. The Commonwealth’s interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision that subjects to criminal punishment “any person who knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.” If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U. S. C. §248(a)(1), which subjects to both criminal and civil penalties anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or

interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.” Some dozen other States have done so. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime “to follow and harass another person within 15 feet of the premises of a reproductive health care facility.” N. Y. C. Admin. Code §8–803(a)(3) (2014).⁵

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. That is an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances. See, e.g., Boston, Mass., Municipal Code, ch. 16–41.2(d) (2013) (“No person shall solicit while walking on, standing on or going into any street or highway used for motor vehicle travel, or any area appurtenant thereto (including medians, shoulder areas, bicycle lanes, ramps and exit ramps)”). All of the foregoing measures are, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like. Subsection (e) of the Act, the FACE Act, and the New York City anti-harassment ordinance are all enforceable not only through criminal prosecutions but also through public and private civil actions for injunctions and other equitable relief. We have noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction “regulates the activities, and perhaps the speech, of a group,” but only “because of the group’s past *actions* in the context of a specific dispute between real parties.” *Madsen*, 512 U. S. at 762. Moreover, given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.

The Commonwealth also asserts an interest in preventing congestion in front of abortion clinics. Even when individuals do not deliberately obstruct access to clinics, they can inadvertently do so simply by gathering in large numbers. But the Commonwealth could address that problem through more targeted means. Some localities have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid individuals to reassemble within a certain distance of the clinic for a certain period. We upheld a similar law forbidding three or more people “to congregate within 500 feet of a foreign embassy, and refuse to disperse after having been ordered so to do by the police,” *Boos*, 485 U. S. at 316 (quoting D. C. Code §22–1115 (1938)) — an order the police could give only when they

⁵ We do not “give our approval” to this or any of the other alternatives we discuss. We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors, such as whether the term “harassment” had been authoritatively construed to avoid vagueness and overbreadth problems.

“reasonably believed that a threat to the security or peace of the embassy was present.” To the extent the Commonwealth argues that even these types of laws are ineffective, it has another problem. The portions of the record that respondents cite to support the anticongestion interest pertain mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings. Respondents point to no evidence that individuals regularly gather at other clinics, or at other times in Boston, in sufficiently large groups to obstruct access. For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.

The Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate. Respondents emphasize the history in Massachusetts of obstruction at abortion clinics, and the Commonwealth’s allegedly failed attempts to combat such obstruction with injunctions and individual prosecutions. They also point to the Commonwealth’s experience under the 2000 Act, during which the police found it difficult to enforce the six-foot no-approach zones given the “frenetic” activity in front of clinic entrances. Respondents identify not a single prosecution brought under those laws within at least the last 17 years. While they claim that the Commonwealth “tried injunctions,” the last injunctions they cite date to the 1990s. In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective.

Respondents contend that the alternatives suffer from two defects: First, given the “widespread” nature of the problem, it is simply not “practicable” to rely on individual prosecutions and injunctions. But the problem appears to be limited principally to the Boston clinic on Saturday mornings. By their own account, the police appear perfectly capable of singling out lawbreakers. The legislative testimony revealed substantial police and video monitoring at the clinics, especially when large gatherings were anticipated. Officers are so familiar with the scene outside the Boston clinic that they “know all the players down there.” If Commonwealth officials can compile an extensive record of obstruction and harassment to support legislation, we do not see why they cannot do the same to support injunctions and prosecutions against those who might deliberately flout the law.

The second supposed defect is that laws like subsection (e) of the Act and the federal FACE Act require a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove. As Captain Evans predicted, fixed buffer zones “make our job so much easier.” Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency. We do not think that showing intentional obstruction is nearly so difficult in this context as respondents suggest. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then his continued conduct is knowing or intentional.

Respondents' reliance on our decision in *Burson v. Freeman* is misplaced. There, we upheld a state statute that established 100-foot buffer zones outside polling places on election day within which no one could display or distribute campaign materials or solicit votes. We approved the buffer zones as a valid prophylactic measure, noting that existing "intimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." Such laws were insufficient because "voter intimidation and election fraud are difficult to detect." Obstruction of abortion clinics and harassment of patients, by contrast, are anything but subtle. We noted in *Burson* that under state law, "law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," with the result that "many acts of interference would go undetected." Not so here. The police maintain a significant presence outside Massachusetts abortion clinics.

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks — sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment. The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur — and where that speech can most effectively be communicated — is not content based. The structure of the Act indicates that it rests on content-based concerns. The goals of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," are achieved by an earlier-enacted subsection of the statute, which provides criminal penalties for "any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." That provision is easy to enforce. The speech-free zones carved out by subsection (b) add nothing to safety and access; what they achieve, and what they were obviously designed to achieve, is the suppression of speech opposing abortion. Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a

presumptively invalid viewpoint-discriminatory restriction). It exempts “employees or agents” of an abortion clinic “acting within the scope of their employment. There is not a shadow of a doubt that the assigned or foreseeable conduct of a clinic employee or agent can include both speaking in favor of abortion rights and countering the speech of people like petitioners. Indeed, the trial record includes testimony that escorts at the Boston clinic “expressed views about abortion to the women they were accompanying, thwarted petitioners’ attempts to speak and hand literature to the women, and disparaged petitioners in various ways,” including by calling them “crazy.” In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. Having determined that the Act is content based and does not withstand strict scrutiny, I need not pursue the inquiry whether the statute is “narrowly tailored to serve a significant governmental interest.”

JUSTICE ALITO, concurring in the judgment.

The Massachusetts statute at issue in this case violates the First Amendment. It is clear on the face of the law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. If the law were truly content neutral, the law would still be unconstitutional on the ground that it burdens more speech than is necessary to serve the Commonwealth’s asserted interests.

NOTES: “AS APPLIED” CHALLENGES

The *McCullen* Court noted that it was applying “an uncontroversial principle of constitutional adjudication: that a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him. When someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so.” The Court emphasized that, “We do not hold that “speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed.”

PROBLEMS

1. *Buffer Zone for Parking Enforcement Officers.* A city employs parking enforcement officers (PEOs) to make daily rounds of the parking meters downtown in order to issue tickets for cars parked at expired meters. The protesters follow the PEOs looking for expired meters, and inserting coins before a ticket can issue. They leave a card on the car windshield that reads: “Your meter expired! However, we saved you from the king’s tariff!” The protesters also talk to the PEOs, criticize them for attempting to issue tickets, and encourage them to quit their jobs. The City seeks to enjoin the protesters from “coming within” or “communicating with any PEO” within “a safety zone of 30 feet” of any on-duty PEO, and to prohibit the protesters from “touching, taunting, obstructing, detaining, hindering, impeding, blocking, intimidating or harassing” conduct within that safety zone. At trial, several PEOs testified that the protesters

made them feel anxious and harassed, and considered quitting their jobs. The attorney for the protestors argues that the suit should be dismissed because the requested injunction would violate the First Amendment, citing *McCullen v. Coakley* and *Snyder v. Phelps*. How should the court rule? Compare *City of Keene v. Cleaveland*, 2015 LEXIS 53, (N.H.) (June 9, 2015).

2. *Roadway Medians*. A county ordinance prohibits the conduct of “distributing handbills, soliciting contributions, or selling merchandise to car drivers or passengers while standing in county roadways, including the median areas.” Following passage, homeless persons continued to solicit financial donations in the median areas, but they did so while sitting down. The police chief then proposed that the ordinance should be amended to prohibit sitting, as well, on the basis that it would make the roads safer. His testimony was based on his personal opinion, rather than on consultations with traffic-safety experts, and he could not give any examples of accidents caused by people in the median areas who were engaged in acts prohibited by the ordinance. However, the County Attorney’s Office reported an “increased number of complaints from county motorists concerning panhandling in the medians” of particular roadways. Based on the chief’s testimony and the report, the Board amended the ordinance to prohibit the distribution of handbills, the solicitation of contributions, or the selling merchandise to car drivers or passengers, “while in the highway,” defined as “the entire width of a road or street that is improved, designed, or ordinarily used for vehicular travel and the shoulder, *the median*, and the area between the travel lane and the back of the curb.” The amended ordinance was challenged on First Amendment grounds by a group that included homeless persons (who wanted to solicit donations) and people who wanted to distribute campaign literature. Under *McCullen*, is the law valid? Compare *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015).

C. CAMPAIGN FINANCE LAWS

[1] Modern Foundations

P. 359: After the notes, insert the following new note # 4:

4. *Fundraising for 2008, 2012, and 2016 Campaigns*. In the 2008 campaign, all presidential candidates raised a total of \$1.6 billion dollars. In the 2012 election, the total was \$2.1 billion. There are some predictions that \$5 billion will be raised for the 2016 election. See Michelle Conlin & Emily Flitter, *U. S. authorities unlikely to stop 2016 election fundraising free-for-all*, REUTERS, June 4, 2015, <http://www.reuters.com/article/2015/06/04/us-usa-election-enforcement-idUSKBN0OK0CI20150604>. In the 2008 campaign, 24% of Obama donors gave \$200 or less, and that percentage rose to 28% in the 2012 campaign. In the 2008 campaign, 21% of McCain donors gave \$200 or less, whereas 12% of Romney donors gave that amount in the 2012 campaign. See Campaign Finance Institute, *Campaign Finance Historical Data*, http://www.cfinst.org/pdf/federal/president/2012/Pres12_30G_Table4.pdf.

In the 2012 campaign, “according to an analysis of congressional races, candidates who

had the most money on their side (from their campaign and from outside sources) won 92.7 percent of House races, but only 63.6 percent of Senate races. In total, there were 460 winning candidates last night, but only 43 of them had less money on their side than their opponents.” Communications, *Blue Team Aided by Small Donors, Big Bundlers; Huge Outside Spending Still Comes Up Short*, OpenSecrets.org, Open Secrets Blog, November 7, 2012, <http://www.opensecrets.org/news/2012/11/post-election/>

[2] The *Citizens United* Revolution

P. 379: At the end of the notes, insert the following new notes # 8 and # 9:

8. *Attempts to Undo Citizens United by Constitutional Amendment.* In 2014, when the Democrats controlled the Senate, the Senate Judiciary Committee voted for a resolution, S. J. Res. 19, regarding a proposal to amend the Constitution. It passed on a party-line vote and was reported to the Senate. The resolution went no further in the Senate before the 2014 elections occurred and the Republicans took control in 2015. The resolution read as follows:

Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.

Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.

Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.

See Congress.Gov, S. J. Res. 19 – A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections, <https://www.congress.gov/bill/113th-congress/senate-joint-resolution/19/text>. The same resolution was introduced as S. J. Res. 5 in January 2015 and given a “2% chance of being enacted or passed.” See <https://www.govtrack.us/congress/bills/114/sjres5>.

9. *Emergence of Super PACs in 2012 Campaign.* The so-called Super PAC or “independent-expenditure-only committee,” emerged after the decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The fundraising of the Republican-aligned Super PACs exceeded that of the Democratic-aligned Super PACs in the 2012 campaign. For total itemized contributions, the difference was \$311 million (D) versus \$752 million ® (with all other Super PACs at \$20 million). For total independent expenditures, the difference was \$185 million (D) versus \$405 million ® (with all other Super PACs at \$12 million. See *Fundraising and Spending by Political Leaning, 2011-2012*, Sunlight Foundation Reporting Group, <http://reporting.sunlightfoundation.com/outside-spending-2012/by-affiliation/>

The analysis of data from the FEC shows that “outside spending organizations reported \$1.28 billion in spending to the FEC through the end of Election Day 2012,” and “almost half of all reported outside spending comes from Super PACs.” (Note that “nearly one-quarter, or \$298.9 million [of the \$1.28 billion], was “dark money” that cannot be traced back to an original source.”) Of “the \$656 million raised by Super PACs,” 132 donors provided 60.4% or \$396 million. The total “grassroots contributions” from 1,425,500 “small donors” to the major party presidential candidates was \$285.2 million. The same amount was contributed by “just 61 large donors to Super PACs giving an average of \$4.7 million each.” For example, “Sheldon and Miriam Adelson gave \$52.2 million to Super PACs in the 2012 cycle,” “which “is just 0.21% of their net worth. See Adam Lioz & Blair Bowie, *Election Spending 2012: A Post-Election Analysis of Federal Election Commission Data*, November 9, 2012, <http://www.demos.org/publication/election-spending-2012-post-election-analysis-federal-election-commission-data>.

P. 382: before the problems, insert the following new case and the following new notes # 1, # 2 and # 3:

McCUTCHEON v. FEDERAL ELECTION COMMISSION
88 L. Ed. 2d 468 (2014).

Chief Justice ROBERTS announced the judgment of the Court and delivered an opinion, in which Justice SCALIA, Justice KENNEDY, and Justice ALITO join.

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options.

The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others. See, e.g., *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 180 L.Ed.2d 664 (2011).

Many people might find those latter objectives attractive: They would be delighted to see fewer television commercials touting a candidate's accomplishments or disparaging an opponent's character. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades — despite the profound offense such spectacles cause — it surely protects political campaign speech despite popular opposition. See *Texas v. Johnson*,

491 U.S. 397 (1989); *Snyder v. Phelps*, 79 L.Ed.2d 172 (2011); *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (*per curiam*). Indeed, the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. “Ingratiation and access are not corruption.” *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 360 (2010). They embody a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns. Any regulation must instead target what we have called “*quid pro quo*” corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money. See *McCormick v. United States*, 500 U.S. 257 (1991). “The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). Campaign finance restrictions that pursue other objectives impermissibly inject the Government “into the debate over who should govern.” *Bennett, supra*, at 2826. And those who govern should be the *last* people to help decide who *should* govern.

The statute at issue in this case imposes two types of limits on campaign contributions. The first, called base limits, restricts how much money a donor may contribute to a particular candidate or committee. 2 U.S.C. § 441a(a)(1). The second, called aggregate limits, restricts how much money a donor may contribute in total to all candidates or committees. § 441a(a)(3). This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combating corruption. The Government contends that the aggregate limits also serve that objective, by preventing circumvention of the base limits. We conclude, however, that the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment.

For the 2013–2014 election cycle, the base limits in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permit an individual to contribute up to \$2,600 per election to a candidate (\$5,200 total for the primary and general elections); \$32,400 per year to a national party committee; \$10,000 per year to a state or local party committee; and \$5,000 per year to a political action committee, or “PAC.” 2 U.S.C. § 441a(a)(1); 78 Fed.Reg. 8532 (2013).⁶ A national committee, state or local party

⁶ A PAC is a business, labor, or interest group that raises or spends money in connection with a federal election, in some cases by contributing to candidates. A so-called “Super PAC” is a PAC that makes only independent expenditures and cannot contribute to candidates. The base

committee, or multicandidate PAC may in turn contribute up to \$5,000 per election to a candidate. § 441a(a)(2).⁷

The base limits apply with equal force to contributions that are “in any way earmarked or otherwise directed through an intermediary or conduit” to a candidate. § 441a(a)(8). If, for example, a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from the original donor to the specified candidate.

For the 2013–2014 election cycle, the aggregate limits in BCRA permit an individual to contribute a total of \$48,600 to federal candidates and a total of \$74,600 to other political committees. Of that \$74,600, only \$48,600 may be contributed to state or local party committees and PACs, as opposed to national party committees. § 441a(a)(3). All told, an individual may contribute up to \$123,200 to candidate and noncandidate committees during each two-year election cycle. The base limits thus restrict how much money a donor may contribute to any particular candidate or committee; the aggregate limits have the effect of restricting how many candidates or committees the donor may support, to the extent permitted by the base limits.

In the 2011–2012 election cycle, appellant Shaun McCutcheon contributed a total of \$33,088 to 16 different federal candidates, in compliance with the base limits applicable to each. He alleges that he wished to contribute \$1,776 to each of 12 additional candidates but was prevented from doing so by the aggregate limit on contributions to candidates. McCutcheon also contributed a total of \$27,328 to several noncandidate political committees, in compliance with the base limits applicable to each. He alleges that he wished to contribute to various other political committees, including \$25,000 to each of the three Republican national party committees, but was prevented from doing so by the aggregate limit on contributions to political committees. McCutcheon further alleges that he plans to make similar contributions in the future. In the 2013–2014 election cycle, he again wishes to contribute at least \$60,000 to various candidates and \$75,000 to non-candidate political committees. Appellant Republican National Committee is a national political party committee charged with the general management of the Republican Party. The RNC wishes to receive the contributions that McCutcheon and similarly situated individuals would like to make — contributions otherwise permissible under the base limits for national party committees but foreclosed by the aggregate limit on contributions to political committees.

In June 2012, McCutcheon and the RNC filed a complaint before a three-judge panel of the U.S. District Court for the District of Columbia. [They] asserted that the aggregate limits on contributions to candidates and to noncandidate political committees were unconstitutional under

and aggregate limits govern contributions to traditional PACs, but not to independent expenditure PACs.

⁷ A multicandidate PAC is a PAC with more than 50 contributors that has been registered for at least six months and has made contributions to five or more candidates for federal office. 11 CFR § 100.5(e)(3) (2012). PACs that do not qualify as multicandidate PACs must abide by the base limit applicable to individual contributions.

the First Amendment. The three-judge District Court denied appellants' motion for a preliminary injunction. McCutcheon and the RNC appealed directly to this Court, as authorized by law. 28 U.S.C. § 1253. We noted probable jurisdiction.

Buckley presented this Court with its first opportunity to evaluate the constitutionality of the original contribution and expenditure limits set forth in FECA. FECA imposed a \$1,000 per election base limit on contributions from an individual to a federal candidate. It also imposed a \$25,000 per year aggregate limit on all contributions from an individual to candidates or political committees. 18 U.S.C. §§ 608(b)(1), 608(b)(3) (1970 ed., Supp. IV). On the expenditures side, FECA imposed limits on both independent expenditures and candidates' overall campaign expenditures. §§ 608(e)(1), 608©.

Buckley recognized that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." But it distinguished expenditure limits from contribution limits based on the degree to which each encroaches upon protected First Amendment interests. Expenditure limits, the Court explained, "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." The Court thus subjected expenditure limits to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

By contrast, the Court concluded that contribution limits impose a lesser restraint on political speech because they "permit the symbolic expression of support evidenced by a contribution but do not in any way infringe the contributor's freedom to discuss candidates and issues." As a result, the Court focused on the effect of the contribution limits on the freedom of political association and applied a lesser but still "rigorous standard of review." Under that standard, "even a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."

The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that purpose satisfied the requirement of a "sufficiently important" governmental interest. As for the "closely drawn" component, *Buckley* concluded that the \$1,000 base limit "focuses precisely on the problem of large campaign contributions while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." The Court therefore upheld the \$1,000 base limit under the "closely drawn" test. The challengers argued that the base limit was fatally overbroad because most large donors do not seek improper influence over legislators' actions. Although the Court accepted that premise, it nevertheless rejected the overbreadth challenge for two reasons: First, it was too "difficult to isolate suspect contributions" based on a contributor's subjective intent. Second, "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large

monetary contributions be eliminated.”

In one paragraph of its opinion, the Court turned to the \$25,000 aggregate limit. It noted that the constitutionality of the aggregate limit “had not been separately addressed at length by the parties.” Then, in three sentences, the Court disposed of any constitutional objections to the aggregate limit: “The overall \$25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.”

We see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review. *Buckley* held that the Government's interest in preventing *quid pro quo* corruption or its appearance was “sufficiently important,” we have elsewhere stated that the same interest may properly be labeled “compelling,” see *National Conservative Political Action Comm.*, 470 U.S. at 496–497, so that the interest would satisfy even strict scrutiny. Moreover, regardless whether we apply strict scrutiny or *Buckley*'s “closely drawn” test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective. See, e.g., *National Conservative Political Action Comm.*, *supra*, at 496–501; *Randall v. Sorrell*, 548 U.S. 230 (2006) (opinion of BREYER, J.). Or to put it another way, if a law that restricts political speech does not “avoid unnecessary abridgement” of First Amendment rights, it cannot survive “rigorous” review. Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the “closely drawn” test. We therefore need not parse the differences between the two standards in this case.

Buckley treated the constitutionality of the \$25,000 aggregate limit as contingent upon that limit's ability to prevent circumvention of the \$1,000 base limit, describing the aggregate limit as “no more than a corollary” of the base limit. The Court determined that circumvention could occur when an individual legally contributes “massive amounts of money to a particular candidate through the use of unearmarked contributions” to entities that are themselves likely to contribute to the candidate. For that reason, the Court upheld the \$25,000 aggregate limit. Although *Buckley* provides some guidance, we think that its ultimate conclusion does not control here. *Buckley* spent a total of three sentences analyzing that limit; in fact, the opinion pointed out that the constitutionality of the aggregate limit “had not been separately addressed at length by the parties.” We are now asked to address appellants' direct challenge to the aggregate limits in place under BCRA. BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop.

Statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a comprehensive

regulatory scheme. With more targeted anticircumvention measures in place today, the indiscriminate aggregate limits under BCRA appear particularly heavy-handed. The 1976 FECA Amendments, for example, added another layer of base contribution limits. The 1974 version of FECA had already capped contributions *from* political committees to candidates, but the 1976 version added limits on contributions *to* political committees. This change was enacted at least “in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*.” *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 197–198 (1981) (plurality opinion). Because a donor's contributions to a political committee are now limited, a donor cannot flood the committee with “huge” amounts of money so that each contribution the committee makes is perceived as a contribution from him. Rather, the donor may contribute only \$5,000 to the committee, which hardly raises the specter of abuse that concerned the Court in *Buckley*. Limits on contributions to political committees consequently create an additional hurdle for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so.

The 1976 Amendments also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees. See 2 U.S.C. § 441a(a)(5); 11 CFR § 100.5(g)(4). The Government acknowledges that this antiproliferation rule “forecloses what would otherwise be a particularly easy and effective means of circumventing the limits on contributions to any particular political committee.” In effect, the rule eliminates a donor's ability to create and use his own political committees to direct funds in excess of the individual base limits. It thus blocks a straightforward method of achieving the circumvention that was the underlying concern in *Buckley*.

The intricate regulatory scheme that the Federal Election Commission has enacted since *Buckley* further limits the opportunities for circumvention of the base limits via “unearmarked contributions to political committees likely to contribute” to a particular candidate. Although the earmarking provision, 2 U.S.C. § 441a(a)(8), was in place when *Buckley* was decided, the FEC has since added regulations that define earmarking broadly. For example, the regulations construe earmarking to include any designation, “whether direct or indirect, express or implied, oral or written.” 11 CFR § 110.6(b)(1). The regulations specify that an individual who has contributed to a particular candidate may not also contribute to a single-candidate committee for that candidate. § 110.1(h)(1). Nor may an individual who has contributed to a candidate also contribute to a political committee that has supported or anticipates supporting the same candidate, if the individual knows that “a substantial portion [of his contribution] will be contributed to, or expended on behalf of,” that candidate. § 110.1(h)(2).

Appellants' challenge raises distinct legal arguments that *Buckley* did not consider. For example, presumably because of its cursory treatment of the \$25,000 aggregate limit, *Buckley* did not separately address an overbreadth challenge with respect to that provision. The Court rejected such a challenge to the *base* limits because of the difficulty of isolating suspect contributions. The propriety of large contributions to individual candidates turned on the subjective intent of donors, and the Court concluded that there was no way to tell which donors sought improper influence over legislators' actions. The aggregate limit, on the other hand, was

upheld as an anticircumvention measure, without considering whether it was possible to discern which donations might be used to circumvent the base limits. The Court never addressed overbreadth in the specific context of aggregate limits, where such an argument has far more force. Given the foregoing, we are confronted with a different statute and different legal arguments, at a different point in the development of campaign finance regulation. Appellants' substantial First Amendment challenge to the system of aggregate limits currently in place thus merits our plenary consideration.

The First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971). As relevant here, the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights: The contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate." Those First Amendment rights are important regardless whether the individual is, on the one hand, a "lone pamphleteer or street corner orator in the Tom Paine mold," or is, on the other, someone who spends "substantial amounts of money in order to communicate his political ideas through sophisticated" means. *National Conservative Political Action Comm.*, 470 U.S. at 493. Either way, he is participating in an electoral debate that we have recognized is "integral to the operation of the system of government established by our Constitution." *Buckley, supra*, at 14.

Buckley acknowledged that aggregate limits diminish an individual's right of political association. As the Court explained, the "overall \$25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." But the Court characterized that restriction as a "quite modest restraint upon protected political activity." We cannot agree. . . . An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a "modest restraint" at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.

To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption. The individual may give up to \$5,200 each to nine candidates, but the aggregate limits constitute an outright ban on further contributions to any other candidate (beyond the additional \$1,800 that may be spent before reaching the \$48,600 aggregate limit). At that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance — clear First Amendment harms that the dissent never acknowledges. It is no answer to say that the individual can simply contribute less money to more people. To require one person

to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. The Government may not penalize an individual for “robustly exercising” his First Amendment rights. *Davis v. Federal Election Comm’n*, 554 U.S. 724, 739 (2008).

The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies. In the context of base contribution limits, *Buckley* observed that a supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate. Such personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening.

The dissent faults this focus on “the individual’s right to engage in political speech,” saying that it fails to take into account “the public’s interest” in “collective speech.” This “collective” interest is said to promote “a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects.” But there are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good. First, the dissent’s “collective speech” reflected in laws is of course the will of the majority, and plainly can include laws that restrict free speech. The whole point of the First Amendment is to afford individuals protection against such infringements. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting “collective speech.” Cf. *United States v. Alvarez*, 183 L.Ed.2d 574 (2012); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). Second, the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such “ad hoc balancing of relative social costs and benefits.” *United States v. Stevens*, 559 U.S. 460, 470 (2010).

Our established First Amendment analysis already takes account of any “collective” interest that may justify restrictions on individual speech. Under that accepted analysis, such restrictions are measured against the asserted public interest (usually framed as an important or compelling governmental interest). We do not doubt the compelling nature of the “collective” interest in preventing corruption in the electoral process. But we permit Congress to pursue that interest only so long as it does not unnecessarily infringe an individual’s right to freedom of speech; we do not truncate this tailoring test at the outset.

With the significant First Amendment costs for individual citizens in mind, we turn to the governmental interests asserted in this case. This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. See *Davis, supra*, at 741; *National Conservative Political Action Comm.*, 470 U.S. at 496–497. We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to “level the playing field,” or to “level electoral opportunities,” or to “equalize the

financial resources of candidates.” *Bennett*, 131 S.Ct. at 2825–2826; *Davis, supra*, at 741–742; *Buckley, supra*, at 56. The First Amendment prohibits such legislative attempts to “fine-tune” the electoral process, no matter how well intentioned. *Bennett*, 131 S.Ct. at 2824. As we framed the relevant principle in *Buckley*, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” The dissent’s suggestion that *Buckley* supports the opposite proposition simply ignores what *Buckley* actually said on the matter. See also *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290 (1981).

Moreover, while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption — “*quid pro quo*” corruption. As *Buckley* explained, Congress may permissibly seek to rein in “large contributions that are given to secure a political *quid pro quo* from current and potential office holders.” In addition to “actual *quid pro quo* arrangements,” Congress may permissibly limit “the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” to particular candidates. Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner “influence over or access to” elected officials or political parties. Because the Government’s interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access. See *Citizens United*, 558 U.S. at 360.

The dissent advocates a broader conception of corruption, and would apply the label to any individual contributions above limits deemed necessary to protect “collective speech.” Thus, under the dissent’s view, it is perfectly fine to contribute \$5,200 to nine candidates but somehow corrupt to give the same amount to a tenth. It is fair to say, as Justice Stevens has, “that we have not always spoken about corruption in a clear or consistent voice.” The definition of corruption that we apply today, however, has firm roots in *Buckley* itself. The Court in that case upheld base contribution limits because they targeted “the danger of actual *quid pro quo* arrangements” and “the impact of the appearance of corruption stemming from public awareness” of such a system of unchecked direct contributions. *Buckley* simultaneously rejected limits on spending that was less likely to “be given as a *quid pro quo* for improper commitments from the candidate.” In any event, this case is not the first in which the debate over the proper breadth of the Government’s anticorruption interest has been engaged. The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. In “drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.” *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (opinion of ROBERTS, C.J.).

The dissent laments that our opinion leaves only remnants of FECA and BCRA that are inadequate to combat corruption. Such rhetoric ignores the fact that we leave the base limits

undisturbed.⁸ Those base limits remain the primary means of regulating campaign contributions — the obvious explanation for why the aggregate limits received a scant few sentences of attention in *Buckley*.⁹

“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. at 816. Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption. The difficulty is that once the aggregate limits kick in, they ban all contributions of *any* amount. But Congress’s selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving nine candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all others corruptible if given a dime. And if there is no risk that additional candidates will be corrupted by donations of up to \$5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.

The problem is that they do not serve that function in any meaningful way. In light of the various statutes and regulations currently in effect, *Buckley*’s fear that an individual might “contribute massive amounts of money to a particular candidate through the use of unearmarked contributions” to entities likely to support the candidate is far too speculative. And — importantly — we “have never accepted mere conjecture as adequate to carry a First Amendment burden.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). There is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds. See 2 U.S.C. § 441a(a)(8); 11 CFR § 110.6. The Government admits that if the funds are subsequently re-routed to a particular candidate, such action occurs at the initial recipient’s discretion — not the donor’s. As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, the risk of *quid pro quo* corruption is generally applicable only to “the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder.” *McConnell*, 540 U.S. at 310 (opinion of KENNEDY, J.).

⁸ The fact that this opinion does not address the base limits also belies the dissent’s concern that we have silently overruled the Court’s holding in *McConnell v. Federal Election Comm’n*. At issue in *McConnell* was BCRA’s extension of the base limits to so-called “soft money” — previously unregulated contributions to national party committees. Our holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*’s holding about “soft money.”

⁹ Just eight of the 38 States that have imposed base limits on contributions from individuals to candidates have also imposed aggregate limits (excluding restrictions on a specific subset of donors). The Government presents no evidence concerning the circumvention of base limits from the 30 States with base limits but no aggregate limits.

Buckley nonetheless focused on the possibility that “unearmarked contributions” could eventually find their way to a candidate’s coffers. Even accepting the validity of *Buckley*’s circumvention theory, it is hard to see how a candidate today could receive a “massive amount of money” that could be traced back to a particular contributor uninhibited by the aggregate limits. The Government offers a series of scenarios in support of that possibility. But each is sufficiently implausible that the Government has not carried its burden of demonstrating that the aggregate limits further its anticircumvention interest.

The primary example of circumvention, in one form or another, envisions an individual donor who contributes the maximum amount under the base limits to a particular candidate, say, Representative Smith. Then the donor also channels “massive amounts of money” to Smith through a series of contributions to PACs that have stated their intention to support Smith. Various earmarking and antiproliferation rules disarm this example. Importantly, the donor may not contribute to the most obvious PACs: those that support only Smith. Nor may the donor contribute to the slightly less obvious PACs that he knows will route “a substantial portion” of his contribution to Smith. § 110.1(h)(2). The donor must instead turn to other PACs that are likely to give to Smith. When he does so, however, he discovers that his contribution will be significantly diluted by all the contributions from others to the same PACs. After all, the donor cannot give more than \$5,000 to a PAC and so cannot dominate the PAC’s total receipts, as he could when *Buckley* was decided. 2 U.S.C. § 441a(a)(1)©. He cannot retain control over his contribution, 11 CFR § 110.1(h)(3), direct his money “in any way” to Smith, 2 U.S.C. § 441a(a)(8), or even *imply* that he would like his money to be recontributed to Smith, 11 CFR § 110.6(b)(1). His salience as a Smith supporter has been diminished, and with it the potential for corruption.

It is not clear how many candidates a PAC must support before our dedicated donor can avoid being tagged with the impermissible knowledge that “a substantial portion” of his contribution will go to Smith. But imagine that the donor is one of ten equal donors to a PAC that gives the highest possible contribution to Smith.¹⁰ The PAC may give no more than \$2,600 per election to Smith. Of that sum, just \$260 will be attributable to the donor intent on circumventing the base limits. Thus far he has hardly succeeded in funneling “massive amounts of money” to Smith.

But what if this donor does the same thing via, say, 100 different PACs? His \$260 contribution will balloon to \$26,000, ten times what he may contribute directly to Smith in any given election. This 100-PAC scenario is highly implausible. In the first instance, it is not true that the individual donor will necessarily have access to a sufficient number of PACs to effectuate such a scheme. For the 2012 election cycle, the FEC reported about 2,700 nonconnected PACs (excluding PACs that finance independent expenditures only). And not

¹⁰ Even those premises are generous because they assume that the donor contributes to non-multicandidate PACs, which are relatively rare. Multicandidate PACs [must] have more than 50 contributors. 11 CFR § 100.5(e)(3). The more contributors, of course, the more the donor’s share in any eventual contribution to Smith is diluted.

every PAC that supports Smith will work in this scheme: For our donor's pro rata share of a PAC's contribution to Smith to remain meaningful, the PAC must be funded by only a small handful of donors. The antiproliferation rules, which were not in effect when *Buckley* was decided, prohibit our donor from creating 100 pro-Smith PACs of his own, or collaborating with the nine other donors to do so. See 2 U.S.C. § 441a(a)(5) ("all contributions made by political committees established or financed or maintained or controlled by any other person, or by any group of such persons, shall be considered to have been made by a single political committee"). Moreover, if 100 PACs were to contribute to Smith and few other candidates, and if specific individuals like our ardent Smith supporter were to contribute to each, the FEC could weigh those "circumstantial factors" to determine whether to deem the PACs affiliated. 11 CFR § 100.5(g)(4)(ii). The FEC's analysis could take account of a "common or overlapping membership" and "similar patterns of contributions or contributors," among other considerations. §§ 100.5(g)(4)(ii)(D), (J). The FEC has in the past initiated enforcement proceedings against contributors with such suspicious patterns of PAC donations.

On a more basic level, it is hard to believe that a rational actor would engage in such machinations. In the example described, a dedicated donor spent \$500,000 — donating the full \$5,000 to 100 different PACs — to add just \$26,000 to Smith's campaign coffers. That same donor, meanwhile, could have spent unlimited funds on independent expenditures on behalf of Smith. Indeed, he could have spent his entire \$500,000 advocating for Smith, without the risk that his selected PACs would choose not to give to Smith, or that he would have to share credit with other contributors to the PACs.

In the context of independent expenditures "the absence of prearrangement and coordination of an expenditure with the candidate or his agent undermines the value of the expenditure to the candidate." *Citizens United*, 558 U.S., at 357. But probably not by 95 percent. And at least from the *donor's* point of view, it strikes us as far more likely that he will want to see his full \$500,000 spent on behalf of his favored candidate — even if it must be spent independently — rather than see it diluted to a small fraction so that it can be contributed directly by someone else.

The District Court crafted an example [whereby] a donor gives a \$500,000 check to a joint fundraising committee composed of a candidate, a national party committee, and "most of the party's state party committees" (actually, 47 of the 50). The committees divide up the money so that each one receives the maximum contribution permissible under the base limits, but then each transfers its allocated portion to the same single committee. That committee uses the money for coordinated expenditures on behalf of a particular candidate. If that scenario "seems unlikely," the District Court thought so, too. [The] problem, however, is that the District Court's speculation relies on illegal earmarking. Lest there be any confusion, a joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits or earmarking rules. Under no circumstances may a contribution to a joint fundraising committee result in an allocation that exceeds the contribution limits applicable to its constituent parts; the committee is in fact required to return any excess funds to the contributor.

The District Court assumed compliance with the specific allocation rules governing joint

fundraising committees, but it expressly based its example on the premise that the donor would telegraph his desire to support one candidate and that “many separate entities would willingly serve as conduits for a single contributor’s interests.” Regardless whether so many distinct entities would cooperate as a practical matter, the earmarking provision prohibits an individual from directing funds “through an intermediary or conduit” to a particular candidate. 2 U.S.C. § 441a(8). Even the “implicit” agreement would trigger the earmarking provision. See 11 CFR § 110.6(b)(1). So this circumvention scenario could not succeed without assuming that nearly 50 separate party committees would engage in a transparent violation of the earmarking rules (and that they would not be caught if they did).

[The] District Court failed to acknowledge that its \$500,000 example cannot apply to most candidates. It crafted the example around a presidential candidate, for whom donations in the thousands of dollars may not seem remarkable — especially in comparison to the nearly \$1.4 billion spent by the 2012 presidential candidates. The same example cannot, however, be extrapolated to most House and Senate candidates. Like contributions, coordinated expenditures are limited by statute, with different limits based on the State and the office. See 2 U.S.C. § 441a(d)(3). The 2013 coordinated expenditure limit for most House races is \$46,600, well below the \$500,000 in coordinated expenditures envisioned by the District Court. The limit for Senate races varies significantly based on state population. A scheme of the magnitude imagined by the District Court would be possible even in theory for *no* House candidates and the Senate candidates from just the 12 most populous States.

To the extent that the law does not foreclose the scenario described by the District Court, experience and common sense do. The Government provides no reason to believe that many state parties would willingly participate in a scheme to funnel money to another State’s candidates. A review of FEC data of Republican and Democratic state party committees for the 2012 election cycle reveals just 12 total instances in which a state party committee contributed to a House or Senate candidate in another State. No surprise there. The Iowa Democratic Party, for example, has little reason to transfer money to the California Democratic Party, especially when the Iowa Democratic Party would be barred for the remainder of the election cycle from receiving another contribution for its own activities from the particular donor.

These scenarios, along with others that have been suggested, are either illegal under current campaign finance laws or divorced from reality. The three examples posed by the dissent are no exception. The dissent does not explain how the large sums it postulates can be legally rerouted to a particular candidate, why most state committees would participate in a plan to redirect their donations to a candidate in another State, or how a donor or group of donors can avoid regulations prohibiting contributions to a committee “with the knowledge that a substantial portion” of the contribution will support a candidate to whom the donor has already contributed, 11 CFR § 110.1(h)(2).

The dissent argues that such knowledge may be difficult to prove, pointing to eight FEC cases that did not proceed because of insufficient evidence of a donor’s incriminating knowledge. It might be that such guilty knowledge could not be shown because the donors were not guilty.... In any event, the donors described in those eight cases were typically alleged to have exceeded

the base limits by \$5,000 or less. The FEC's failure to find the requisite knowledge in those cases hardly means that the agency will be equally powerless to prevent a scheme in which a donor routes *millions of dollars* in excess of the base limits to a particular candidate. And if an FEC official cannot establish knowledge of circumvention (or establish affiliation) when the same ten donors contribute \$10,000 each to 200 newly created PACs, and each PAC writes a \$10,000 check to the same ten candidates — then that official has not a heart but a head of stone.

The dissent cites three briefs for the proposition that, even with the aggregate limits in place, individuals “have transferred large sums of money to specific candidates” in excess of the base limits.... The dearth of FEC prosecutions, according to the dissent, proves only that people are getting away with it.... This sort of speculation, however, cannot justify the substantial intrusion on First Amendment rights at issue in this case. *Buckley* upheld aggregate limits only on the ground that they prevented channeling money to candidates beyond the base limits. The absence of such a prospect today belies the Government's asserted objective of preventing corruption or its appearance. The improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns.

[The] aggregate limits violate the First Amendment because they are not “closely drawn to avoid unnecessary abridgment of associational freedoms.” *Buckley*, 424 U.S. at 25.... Even when the Court is not applying strict scrutiny, we still require “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’ that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective.” *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Here, because the statute is poorly tailored to the Government's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process.

The Government argues that the aggregate limits are justified because they prevent an individual from giving to too many initial recipients who might subsequently recontribute a donation. Yet all indications are that many types of recipients have scant interest in regifting donations they receive. Experience suggests that the vast majority of contributions made in excess of the aggregate limits are likely to be retained and spent by their recipients rather than rerouted to candidates. In the 2012 election cycle, federal candidates, political parties, and PACs spent a total of \$7 billion, according to the FEC. In particular, each national political party's spending ran in the hundreds of millions of dollars. The National Republican Senatorial Committee (NRSC), National Republican Congressional Committee (NRCC), Democratic Senatorial Campaign Committee (DSCC), and Democratic Congressional Campaign Committee (DCCC), however, spent less than \$1 million each on direct candidate contributions and less than \$10 million each on coordinated expenditures. Including both coordinated expenditures and direct candidate contributions, the NRSC and DSCC spent just 7% of their total funds on contributions to candidates and the NRCC and DCCC spent just 3%. . . . In the 2012 election cycle, the Republican and Democratic state party committees in all 50 States (and the District of

Columbia) contributed a paltry \$17,750 to House and Senate candidates in other States. The state party committees spent over half a billion dollars over the same time period, of which the \$17,750 in contributions to other States' candidates constituted just 0.003%.

As with national and state party committees, candidates contribute only a small fraction of their campaign funds to other candidates. Authorized candidate committees may support other candidates up to a \$2,000 base limit. 2 U.S.C. § 432(e)(3)(B). In the 2012 election, House candidates spent a total of \$1.1 billion. Candidate-to-candidate contributions among House candidates totaled \$3.65 million, making up just 0.3% of candidates' overall spending. The most that any one individual candidate received from all other candidates was around \$100,000. The fact is that candidates who receive campaign contributions spend most of the money on themselves, rather than passing along donations to other candidates. In this arena at least, charity begins at home.¹¹

Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention. The Government has not given us any reason to believe that parties or candidates would dramatically shift their priorities if the aggregate limits were lifted. Absent such a showing, we cannot conclude that the sweeping aggregate limits are appropriately tailored to guard against any contributions that might implicate the Government's anticircumvention interest.

It is worth keeping in mind that the *base limits* themselves are a prophylactic measure. "Restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357. The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit. *Wisconsin Right to Life*, 551 U.S. at 479 (opinion of ROBERTS, C.J.).

There are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding "unnecessary abridgment" of First Amendment rights. The most obvious might involve targeted restrictions on transfers among candidates and political committees. There are currently no such limits on transfers among party committees and from candidates to party committees. A central concern [has] been the ability of party committees to transfer money freely. If Congress agrees that this is problematic, it might tighten its permissive transfer rules. Doing so would impose a lesser burden on First Amendment rights, as compared to aggregate limits that flatly ban contributions beyond certain levels. While the Government has not conceded that transfer restrictions would be a perfect substitute for the aggregate limits, it has

¹¹ The percentage of contributions above the aggregate limits that even *could* be used for circumvention is limited by the fact that many of the modes of potential circumvention can be used only once each election. If one donor gives \$2,600 to 100 candidates with safe House seats in the hopes that each candidate will reroute \$2,000 to Representative Smith, a candidate in a contested district, no other donor can do the same, because the candidates in the safe seats will have exhausted their permissible contributions to Smith.

recognized that they would mitigate the risk of circumvention.

One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Such a solution would address the same circumvention possibilities as the current aggregate limits, while not completely barring contributions beyond the aggregate levels. In addition (or as an alternative), if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees). Such alternatives [properly] refocus the inquiry on the delinquent actor: the recipient of a contribution within the base limits, who then routes the money in a manner that undermines those limits. See *Citizens United, supra*, at 360–361.

Indeed, Congress has adopted transfer restrictions, and the Court has upheld them, in the context of state party spending. So-called “Levin funds” are donations permissible under state law that may be spent on certain federal election activity — namely, voter registration and identification, get-out-the-vote efforts, or generic campaign activities. Levin funds are raised directly by the state or local party committee that ultimately spends them. § 441i(b)(2)(B)(iv). That means that other party committees may not transfer Levin funds, solicit Levin funds on behalf of the particular state or local committee, or engage in joint fundraising of Levin funds. *McConnell* upheld those transfer restrictions as “justifiable anticircumvention measures,” though it acknowledged that they posed some associational burdens. Here, a narrow transfer restriction on contributions that could otherwise be recontributed in excess of the base limits could rely on a similar justification.

Other alternatives might focus on earmarking. Many of the scenarios [hypothesized] involve at least implicit agreements to circumvent the base limits — agreements that are already prohibited by the earmarking rules. The FEC might strengthen those rules [by] defining how many candidates a PAC must support in order to ensure that “a substantial portion” of a donor’s contribution is not rerouted to a certain candidate. § 110.1(h)(2). Congress might also consider a modified version of the aggregate limits, such as one that prohibits donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed. To be sure, the existing earmarking provision does not define “the outer limit of acceptable tailoring.” *Colorado Republican Federal Campaign Comm.*, 533 U.S. at 462. But tighter rules could have a significant effect, especially when adopted in concert with other measures. We do not mean to opine on the validity of any particular proposal. The point is that there are numerous alternative approaches available to Congress to prevent circumvention of the base limits.

Finally, disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part “justified based on a governmental interest in ‘providing the electorate with information’ about the sources of election-related spending.” *Citizens United*, 558 U.S. at 367 (quoting *Buckley, supra*, at 66). They may also “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” Disclosure requirements burden speech, but — unlike the

aggregate limits — they do not impose a ceiling on speech. *Citizens United, supra*, at 366. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech. See, e.g., *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. In 1976, the Court observed that Congress could regard disclosure as “only a partial measure.” *Buckley*, 424 U.S. at 28. That perception was understandable in a world in which information about campaign contributions was filed at FEC offices and was therefore virtually inaccessible to the average member of the public. Today, given the Internet, disclosure offers much more robust protections against corruption. See *Citizens United, supra*, at 370–371. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

The existing aggregate limits may in fact encourage the movement of money away from entities subject to disclosure. Because individuals' direct contributions are limited, would-be donors may turn to other avenues for political speech. See *Citizens United, supra*, at 364. Individuals can, for example, contribute unlimited amounts to 501© organizations, which are not required to publicly disclose their donors. See 26 U.S.C. § 6104(d)(3). Such organizations spent some \$300 million on independent expenditures in the 2012 election cycle.

At oral argument, the Government shifted its focus from *Buckley*'s anticircumvention rationale to an argument that the aggregate limits deter corruption regardless of their ability to prevent circumvention of the base limits. The Government argued that there is an opportunity for corruption whenever a large check is given to a legislator, even if the check consists of contributions within the base limits to be appropriately divided among numerous candidates and committees. The aggregate limits, the argument goes, ensure that the check amount does not become too large. That new rationale for the aggregate limits [does] not wash. It dangerously broadens the circumscribed definition of *quid pro quo* corruption, [and] targets as corruption the general, broad-based support of a political party. In analyzing the base limits, *Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself. *Buckley*'s analysis of the aggregate limit under FECA was similarly confined. The Court noted that the aggregate limit guarded against an individual's funneling — through circumvention — “massive amounts of money to a particular candidate.” We have reiterated that understanding several times. See, e.g., *National Conservative Political Action Comm.*, 470 U.S. at 497.

Of course a candidate would be pleased with a donor who contributed not only to the candidate himself, but also to other candidates from the same party, to party committees, and to PACs supporting the party. But there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate — for which the candidate feels obligated — and money within the base limits given widely to a candidate's party — for which the candidate, like all other members of the party, feels grateful.

When donors furnish widely distributed support within all applicable base limits, all members of the party or supporters of the cause may benefit, and the leaders of the party or cause

may feel particular gratitude. That gratitude stems from the basic nature of the party system, in which party members join together to further common political beliefs, and citizens can choose to support a party because they share some, most, or all of those beliefs. To recast such shared interest, standing alone, as an opportunity for *quid pro quo* corruption would dramatically expand government regulation of the political process.

The Government suggests that it is the *solicitation* of large contributions that poses the danger of corruption, but the aggregate limits are not limited to any direct solicitation by an officeholder or candidate. We have no occasion to consider a law that would specifically ban candidates from soliciting donations — within the base limits — that would go to many other candidates, and would add up to a large sum. For our purposes here, it is enough that the aggregate limits at issue are not directed specifically to candidate behavior.

For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others. As Edmund Burke explained in his famous speech to the electors of Bristol, a representative owes constituents the exercise of his “mature judgment,” but judgment informed by “the strictest union, the closest correspondence, and the most unreserved communication with his constituents.” THE SPEECHES OF THE RIGHT HON. EDMUND BURKE 129–130 (J. Burke ed. 1867). Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.

The Government has a strong interest, no less critical to our democratic system, in combating corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption — *quid pro quo* corruption — in order to ensure that the Government’s efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*. They instead intrude without justification on a citizen’s ability to exercise “the most fundamental First Amendment activities.” *Buckley*, 424 U.S. at 14.

The judgment of the District Court is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice THOMAS, concurring in the judgment.

Buckley denigrates core First Amendment speech and should be overruled. Political speech is “the primary object of First Amendment protection” and “the lifeblood of a self-governing people.” *Colorado II, supra*, at 465–466 (THOMAS, J., dissenting). Contributions to political campaigns, no less than direct expenditures, “generate essential political speech” by fostering discussion of public issues and candidate qualifications. *Shrink Missouri, supra*, at 412 (THOMAS, J., dissenting). Instead of treating political giving and political spending alike,

Buckley distinguished the two, embracing a bifurcated standard of review under which contribution limits receive less rigorous scrutiny. The “analytic foundation of *Buckley* was tenuous from the very beginning and has only continued to erode in the intervening years.” *Shrink Missouri, supra*, at 412 (THOMAS, J., dissenting). *Buckley* relied on the premise that contributions are different in kind from direct expenditures. None of the Court’s bases for that premise withstands careful review. The linchpin of the Court’s analysis was its assertion that “while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.” But that “speech by proxy” rationale quickly breaks down, given that “even in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender’s message — for instance, an advertising agency or a television station.” *Colorado I, supra*, at 638–639 (opinion of THOMAS, J.). [We] have since rejected the “proxy speech” approach as affording insufficient First Amendment protection to “the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.” *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985). The remaining justifications *Buckley* provided are also flawed. For example, *Buckley* claimed that contribution limits entail only a “marginal” speech restriction because “a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.” But this Court has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection. Instead, we have consistently held that speech is protected even “when the underlying basis for a position is not given.” *Shrink Missouri, supra*, at 415, n. 3 (THOMAS, J., dissenting).

Equally unpersuasive is *Buckley*’s suggestion that contribution limits warrant less stringent review because “the quantity of communication by the contributor does not increase perceptibly with the size of his contribution,” and “at most, the size of the contribution provides a very rough index of the intensity of the contributor’s support for the candidate.” Contributions do increase the quantity of communication by “amplifying the voice of the candidate” and “helping to ensure the dissemination of the messages that the contributor wishes to convey.” *Shrink Missouri, supra*, at 415 (THOMAS, J., dissenting). They also serve as a quantifiable metric of the intensity of a particular contributor’s support, as demonstrated by the frequent practice of giving different amounts to different candidates. *Buckley* simply failed to recognize that “we have accorded full First Amendment protection to expressions of intensity.”

Among [the] justifications for the aggregate limits set forth in [BCRA] is that “an individual can engage in the ‘symbolic act of contributing’ to as many entities as he wishes.” That is, the Government contends that aggregate limits are constitutional as long as an individual can still contribute some token amount (a dime, for example) to each of his preferred candidates. The plurality, quite correctly, rejects that argument, noting that “it is no answer to say that the individual can simply contribute less money to more people.” That is so because “to require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.” What

the plurality does not recognize is that the same logic also defeats the reasoning from *Buckley* on which the plurality purports to rely. In sum, what remains of *Buckley* is a rule without a rationale. . . . This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment. . . .

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

Nearly 40 years ago in *Buckley*, this Court considered the constitutionality of laws that imposed limits upon the overall amount a single person can contribute to all federal candidates, political parties, and committees taken together. The Court held that those limits did not violate the Constitution. Today a majority of the Court overrules this holding. It is wrong to do so. Its conclusion rests upon its own, not a record-based, view of the facts. . . . It misconstrues the nature of the competing constitutional interests at stake. It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.

The plurality's first claim — that large aggregate contributions do not “give rise” to “corruption” — is plausible only because the plurality defines “corruption” too narrowly. The plurality describes the constitutionally permissible objective of campaign finance regulation as a prohibition against ‘*quid pro quo*’ corruption.” It then defines *quid pro quo* corruption to mean no more than “a direct exchange of an official act for money” — an act akin to bribery. As the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself. Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented “marketplace of ideas” seeks to form a public opinion that can and will influence elected representatives. Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*.

Corruption breaks the constitutionally necessary “chain of communication” between the people and their representatives. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many. See, e.g., *Buckley*, 424 U.S. at 26–27. That is also why the Court has used the phrase “subversion of the political process” to describe circumstances in which “elected officials are influenced to act contrary to their obligations of office by the prospect of financial

gain to themselves or infusions of money into their campaigns.” *NCPAC*, 470 U.S. at 497. The “appearance of corruption” can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether.

The interests the Court has long described as preventing “corruption” or the “appearance of corruption” are more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people — a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of “corruption” suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries.

Since the kinds of corruption that can destroy the link between public opinion and governmental action extend well beyond those the plurality describes, the plurality's notion of corruption is flatly inconsistent with the basic constitutional rationale I have just described. Thus, it should surprise no one that this Court's case law (*Citizens United* excepted) insists upon a considerably broader definition. In *Buckley*, for instance, the Court said explicitly that aggregate limits were constitutional because they helped “prevent evasion [through] huge contributions to the candidate's political party.” Moreover, *Buckley* upheld the base limits in significant part because they helped thwart “the appearance of corruption stemming from public awareness of the opportunities for abuse *inherent in a regime of large individual financial contributions.*” And it said that Congress could reasonably conclude that criminal laws forbidding “the giving and taking of bribes” did *not* adequately “deal with the reality or appearance of corruption.” Bribery laws, the Court recognized, address “only the most blatant and specific attempts of those with money to influence governmental action.” The concern with corruption extends further.

In *Beaumont*, the Court found constitutional a ban on direct contributions by corporations because of the need to prevent corruption, properly “understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment.” *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 155–156 (2003). In *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 441, 457–460 (2001) (*Colorado II*), the Court upheld limits imposed upon coordinated expenditures among parties and candidates because it found they thwarted corruption and its appearance, again understood as including “undue influence” by wealthy donors.

In *McConnell*, this Court [upheld] new contribution restrictions under the First Amendment for the very reason the plurality today discounts or ignores. Namely, the Court found they thwarted a significant risk of corruption — understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives. *McConnell*

relied upon a vast record that consisted of over 100,000 pages of material and included testimony from more than 200 witnesses. What it showed, in detail, was the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence. No one had identified a “single discrete instance of *quid pro quo* corruption” due to soft money. But what the record did demonstrate was that enormous soft money contributions, ranging between \$1 million and \$5 million among the largest donors, enabled wealthy contributors to gain disproportionate “access to federal lawmakers” and the ability to “influence legislation.” There was an indisputable link between generous political donations and opportunity after opportunity to make one’s case directly to a Member of Congress. Testimony by elected officials supported this conclusion. Furthermore, testimony from party operatives showed that national political parties had created “major donor programs,” through which they openly “offered greater access to federal office holders as the donations grew larger.” We specifically rejected efforts to define “corruption” in ways similar to those the plurality today accepts.

The plurality invalidates the aggregate contribution limits for a second reason. It believes they are no longer needed to prevent contributors from circumventing federal limits on direct contributions to individuals, political parties, and political action committees. Other “campaign finance laws,” combined with “experience” and “common sense,” foreclose the various circumvention scenarios that the Government hypothesizes. Accordingly, the plurality concludes, the aggregate limits provide no added benefit. Here, as in *Buckley*, in the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidates, producing precisely the kind of “corruption” or “appearance of corruption” that previously led the Court to hold aggregate limits constitutional. Those opportunities for circumvention will also produce the type of corruption that concerns the plurality today. The methods for using today’s opinion to evade the law’s individual contribution limits are complex, but they are well known, or will become well known, to party fundraisers. I shall describe three.

NOTES

1. *Predictions Regarding McCutcheon’s Impact.* According to two lawyers who specialize in campaign finance law, “the practical effect of *McCutcheon* is that individuals may now contribute the maximum amount to as many federal candidates, parties, and PACS as they please.” There is “some truth to the contention” that the ruling “will further empower wealthy individuals and large corporations” who “already enjoy an outsized role.” But *McCutcheon* is “unlikely to affect who is financing our campaigns as much as it determines who is being financed to wage those campaigns. And the big winner is likely to be the group that suffers most under today’s regime: political parties.” See Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARV. L. REV. F. 373 (2014).

A different view is provided by another legal expert, who predicts that *McCutcheon* “probably will not have a dramatic effect on the campaign finance system,” because there “are relatively few people who are rich enough to spend more on political contributions than the pre-*McCutcheon* limits allowed and who have the ideological motivation to do so.” The

“fundamental dynamic” of our system today “will remain largely undisturbed by *McCutcheon*,” namely “the legally enforced advantage that outside groups hold over political parties,” which was a result of the *McCain-Feingold* statute upheld in *McConnell v. FEC*, 540 U.S. 93 (2003). For example, the two major parties “aired about two-third of all advertisements” for the 2000 election, “just over one third” in 2004, “under one fourth” in 2008, and only 6% in 2012. Thus, the “rising tide of unregulated outside group spending” is the “dominant drama in our campaign finance system,” and “*McCutcheon* looks like a ripple on the campaign finance pond, not a tsunami.” See Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380 (2014).

2. *FEC Grid Lock*. The Chairwoman of the FEC “has largely given up hope of reining in abuses in the 2016 presidential campaign, which could generate a record \$10 billion in spending.” Her assessment “reflects a worsening stalemate among the agency’s six commissioners. They are perpetually locked in 3-to-3 ties along party lines on key votes[.]” With “no consensus on which rules to enforce, the caseload against violators has plummeted.” A Democratic commissioner said, “The few rules that are left, people feel free to ignore.” A Republican commissioners “defended their decisions to block many investigations, saying Democrats have pushed cases beyond what the law allows.” With “the commission so often deadlocked, the major fines assessed by the commission dropped precipitously last year to \$135,813 from \$627,408 in 2013. According to a Republican commissioner, this decrease “could easily be read as a signal that people are following the law.” The FEC Chairwoman responded: “What’s really going on [is] that the Republican commissioners don’t want to enforce the law, except in the most obvious cases. The rules aren’t being followed, and that’s destructive to the political process.” See Eric Lichtblau, *F.E.C. Can’t Curb 2016 Election Abuse, Commission Chief Says*, THE NEW YORK TIMES, May 2, 2015, http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?_r=0

P. 391: At the end of the existing note, insert the following new note:

In *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), the Court considered a challenge to the Arizona Citizens Clean Elections Act, passed by initiative in 1998, which created a voluntary public financing system to fund the primary and general election campaigns of candidates for state office. Eligibility for state funding was contingent on the collection of a specified number of five-dollar contributions from Arizona voters, and the acceptance of certain campaign restrictions and obligations. Publicly funded candidates were required to agree, among other things, to limit their expenditure of personal funds to \$500, participate in at least one public debate, adhere to an overall expenditure cap, and return all unspent public monies to the state. When certain conditions were met, publicly funded candidates were granted additional “equalizing” or matching funds. Such funds were granted when a privately financed candidate’s expenditures, combined with the expenditures of

independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceeded the primary election allotment of state funds to the publicly financed candidate. A privately financed candidate's expenditures of his personal funds were counted as contributions for purposes of calculating matching funds during a general election. Once matching funds were triggered, each additional dollar that a privately financed candidate spent during a primary resulted in one dollar in additional state funding to each of any of his publicly financed opponents (less a 6% reduction meant to account for fundraising expenses). During a general election, every dollar that a candidate receives in contributions results in roughly one dollar in additional state funding to each of his publicly financed opponents. Matching funds topped out at two times the initial authorized grant of public funding to the publicly financed candidate. However, a privately financed candidate may raise and spend unlimited funds, subject to state-imposed contribution limits and disclosure requirements.

In *Bennett*, the Court struck down the Arizona law. The Court relied on *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), which struck down the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002. The Court noted:

[O]nce a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. That plainly forces the privately financed candidate to "shoulder a special and potentially significant burden" when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well.

The Court also noted that the publicly financed candidate did not have to raise the additional funds, but instead was provided with additional public monies to finance his campaign. If there were two opponents, each of them received the additional funds.

In terms of First Amendment analysis, the Court noted that, because "the Arizona matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, it must be supported by a compelling state interest. As in prior cases, the Court rejected the idea that government has a "compelling" interest in equalizing the resources available to competing candidates. The Court noted that an attempt to equalize campaign resources "might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." Although the Court agreed with prior precedent that an effort to combat corruption, or the appearance of corruption, would constitute a compelling governmental interest, the Court rejected the idea that "[b]urdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest." On the contrary, "reliance on personal funds reduces the threat of corruption." The Court emphasized that Arizona had already imposed severe campaign contribution limitations. The statute would encourage candidates to participate in the public financing system, but the Court held that "the fact that burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the

constitutionality of the matching funds provision.” Justice Kagan, joined by three other Justices, emphasized that public financing of elections “has emerged as a potentially potent mechanism to preserve elected officials’ independence.” She went on to note that Arizona’s matching funds provision “does not restrict, but instead subsidizes, speech.” She further noted: [Any] system of public financing, including the lump-sum model upheld in *Buckley*, imposes a similar burden on privately funded candidates. . . . A person relying on private resources might well choose not to enter a race at all, because he knows he will face an adequately funded opponent. And even if he decides to run, he likely will choose to speak in different ways — for example, by eschewing dubious, easy-to-answer charges — because his opponent has the ability to respond. Indeed, privately funded candidates may well find the lump-sum system *more* burdensome than Arizona’s (assuming the lump is big enough)[.] Like a disclosure rule, the matching funds provision may occasionally deter, but “impose[s] no ceiling” on electoral expression. [*Citizens United*, 130 S.Ct. at 914.]

Impact in Arizona. According to one report, the “greatest beneficiaries of the state’s Clean Elections Act have been conservatives,” including “political neophytes” who “have steadily ousted incumbent Republicans in primaries” with the help of Clean Elections money. Although the law “has helped some populist liberals win Democratic seats,” the law’s “biggest effect” has been to empower “insurgent conservatives” because “the Republican Party dominates state politics” and “the winner of the GOP primary usually wins the election,” especially in legislative races. After the *Bennett* decision, “conservatives are scrambling to come up with new ways” to finance challengers who do not have the ability “to go out and raise \$30,000 [or] \$40,000.” Even though *Bennett* invalidated the matching funds provision, the decision “left the initial public financing intact,” and business groups, such as the Arizona Chamber of Commerce, are supporting “an initiative for the 2010 ballot that would eliminate the entire Clean Elections Act.” These groups “have had a sometimes acrimonious relationship with the new crop of Republicans in the GOP-run Legislature,” as illustrated by disagreements over proposed legislation relating to immigration and temporary sale tax increases. See Nicholas Riccardi, *Arizona Conservatives Scramble After Campaign Finance Law’s Defeat*, L.A. Times, July 5, 2011.

Public Financing of Presidential Elections. In 2014, public funding for presidential nominating conventions was ended by Congress. For some years, bill have been introduced repeatedly, but not enacted, for ending the use of funds to administer the activities for the Presidential Election Campaign Fund.

P. 396-397: After the *Carrigan* opinion on p. 396, insert the new singular heading “NOTE” and move Note 4 from p. 397 to appear as a non-numbered Note under that new heading. Then insert the following new heading [6] and new case:

[6.] Judicial Elections

WILLIAMS-YULEE v. FLORIDA BAR

135 S. Ct. 44 (2015)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part II.

In the early 1970s, four elected Florida Supreme Court justices resigned from office following corruption scandals. Florida voters responded by amending their Constitution. Under the system now in place, appellate judges are appointed by the Governor from a list of candidates proposed by a nominating committee—a process known as “merit selection.” Then, every six years, voters decide whether to retain incumbent appellate judges for another term. Trial judges are still elected by popular vote, unless the local jurisdiction opts instead for merit selection. Amid the corruption scandals of the 1970s, the Florida Supreme Court adopted a new Code of Judicial Conduct. Canon 7C(1) governs fundraising in judicial elections. The Canon, which is based on a provision in the American Bar Association’s Model Code of Judicial Conduct, provides:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate’s campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law.

Judicial candidates can seek guidance about campaign ethics rules from the Florida Judicial Ethics Advisory Committee. The Committee has interpreted Canon 7 to allow a judicial candidate to serve as treasurer of his own campaign committee, learn the identity of campaign contributors, and send thank you notes to donors. Like Florida, most other States prohibit judicial candidates from soliciting campaign funds personally, but allow them to raise money through committees. According to the American Bar Association, 30 of the 39 States that elect trial or appellate judges have adopted restrictions similar to Canon 7C(1).

Lanell Williams-Yulee, who refers to herself as Yulee, has practiced law in Florida since 1991. In September 2009, she decided to run for a seat on the county court for Hillsborough County, a jurisdiction of 1.3 million people that includes the city of Tampa. Shortly after filing paperwork to enter the race, Yulee drafted a letter announcing her candidacy. The letter described her experience and desire to “bring fresh ideas and positive solutions to the Judicial bench.” The letter then stated: “An early contribution of \$25, \$50, \$100, \$250, or \$500, made payable to ‘Lanell Williams-Yulee Campaign for County Judge’, will help raise the funds needed to launch the campaign and get our message out to the public. I ask for your support in meeting the primary election fund raiser goals. Thank you in advance for your support.” Yulee signed the letter and mailed it to local voters. She also posted the letter on her campaign Web site.

Yulee lost the primary to the incumbent judge. Then the Florida Bar filed a complaint against her for violating Canon 7C(1). She argued that the Bar could not discipline her because the First Amendment protects a judicial candidate’s right to solicit campaign funds in an

election. The Florida Supreme Court appointed a referee who recommended a finding of guilt, that Yulee be publicly reprimanded and ordered to pay the costs of the proceeding (\$1,860). The Florida Supreme Court adopted the referee's recommendations. We granted certiorari.

II

In our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). The Florida Bar and several *amici* contend that we should subject the Canon to a more permissive standard: that it be “closely drawn” to match a “sufficiently important interest.” *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*). The “closely drawn” standard is a poor fit for this case. The Court adopted that test in *Buckley* to address a claim that campaign contribution limits violated a contributor’s “freedom of political association.” Here, Yulee does not claim that Canon 7C(1) violates her right to free association; she argues that it violates her right to free speech. We hold that a State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.

III

“It is the rare case” in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. This is one of the rare cases in which a speech restriction withstands strict scrutiny. The Florida Supreme Court adopted Canon 7C(1) to promote the State’s interests in “protecting the integrity of the judiciary” and “maintaining the public’s confidence in an impartial judiciary.” The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. Simply put, Florida and most other States have concluded that the public may lack confidence in a judge’s ability to administer justice without fear or favor if he comes to office by asking for favors.

A State’s interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. Politicians are expected to be appropriately responsive to the preferences of their supporters. The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must “observe the utmost fairness,” striving to be “perfectly and completely independent.” Address of John Marshall, in *Proceedings and Debates of the Virginia State Convention of 1829–1830*, p. 616 (1830).

The vast majority of elected judges in States that allow personal solicitation serve with fairness and honor. But “even if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public’s confidence in the judiciary.” *White*, 536 U.S. at 790 (O’Connor, J., concurring). In the eyes of the public, a judge’s personal solicitation could

result in “a possible temptation which might lead him not to hold the balance nice, clear and true.” *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting.

The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling. As the Supreme Court of Oregon explained, “the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.” *In re Fadeley*, 802 P.2d 31, 41 (Ore. 1990). Moreover, personal solicitation by a judicial candidate “inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate.” *Simes v. Arkansas Judicial Discipline & Disability Comm’n*, 247 S.W.3d 876, 882 (Ark. 2007). Potential litigants then fear that “the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions.” A State’s decision to elect its judges does not require it to tolerate these risks. The Florida Bar’s interest is compelling.

Yulee acknowledges the State’s compelling interest in judicial integrity. She argues, however, that the Canon’s failure to restrict other speech equally damaging to judicial integrity and its appearance undercuts the Bar’s position. Although a law’s underinclusivity raises a red flag, the First Amendment imposes no freestanding “underinclusiveness limitation.” *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests. Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint or chosen means of solicitation. Unlike some laws that we have found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions.

Yulee relies on the provision of Canon 7C(1) that allows solicitation by a candidate’s campaign committee. Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. The candidate has personally invested time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no. However similar the two solicitations may be in substance, a State may conclude that they present

markedly different appearances to the public. Florida's choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges.

Yulee argues that permitting thank you notes heightens the likelihood of actual bias by ensuring that judicial candidates know who supported their campaigns, and ensuring that the supporter knows that the candidate knows. Maybe so. But the State's compelling interest is implicated most directly by the candidate's personal solicitation itself. Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

After arguing that Canon 7C(1) violates the First Amendment because it restricts too little speech, Yulee argues that the Canon violates the First Amendment because it restricts too much. In her view, the Canon is not narrowly tailored to advance the State's compelling interest through the least restrictive means.

By any measure, Canon 7C(1) restricts a narrow slice of speech. Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so.

Yulee concedes that Canon 7C(1) is valid in numerous applications. Yulee acknowledges that Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them. In addition, she says the State "might" be able to ban "direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate." She also suggests that the Bar could forbid "in person" solicitation by judicial candidates. But Yulee argues that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. No one, she contends, will lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience. This argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money. Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the public impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time?

Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be "perfectly tailored." The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. Yulee is correct that some personal solicitations raise greater concerns than others. A judge who passes the hat in the courthouse creates a more serious appearance of impropriety than does a judicial candidate who makes a tasteful plea for support on the radio. But most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

Finally, Yulee contends that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. We disagree. A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of peremptory strike against a judge that would enable transparent forum shopping.

As for campaign contribution limits, Florida already applies them to judicial elections. A State may decide that the threat to public confidence created by personal solicitation exists apart from the amount of money that a judge or judicial candidate seeks. We have never held that adopting contribution limits precludes a State from pursuing its compelling interests through additional means. In any event, a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case. As a result of our decision, Florida may continue to prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees and to otherwise communicate their electoral messages in practically any way.

The judgment of the Florida Supreme Court is *Affirmed*.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins as to Part II, concurring in part and concurring in the judgment.

I join the Court's opinion save for Part II. As explained in my dissenting opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765, 803, 805 (2002), I would not apply exacting scrutiny to a State's endeavor sensibly to "differentiate elections for political offices from elections designed to select those whose office it is to administer justice without respect to persons."

II

I write separately to reiterate the substantial latitude, in my view, States should possess to enact campaign-finance rules geared to judicial elections. “Judges,” the Court rightly recognizes, “are not politicians.” States may therefore impose different campaign-finance rules for judicial elections than for political elections. When the political campaign-finance apparatus is applied to judicial elections, the distinction of judges from politicians dims. Donors, who gain audience and influence through contributions to political campaigns, anticipate that investment in campaigns for judicial office will yield similar returns. Elected judges understand this dynamic.

In recent years, issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not tow a party line or are alleged to be out of step with public opinion. Following the Iowa Supreme Court’s 2009 invalidation of the State’s same-sex marriage ban, for example, national organizations poured money into a successful campaign to remove three justices from that Court. Attack advertisements funded by issue or politically driven organizations portrayed the justices as political actors. Similarly portraying judges as belonging to another political branch, huge amounts have been spent on advertisements opposing retention of judges because they rendered unpopular decisions in favor of criminal defendants.

Disproportionate spending to influence court judgments threatens both the appearance and actuality of judicial independence. Numerous studies report that the money pressure groups spend on judicial elections “can affect judicial decision-making across a broad range of cases.” Brief for Professors of Law, Economics, and Political Science as *Amici Curiae* 14. See J. Shepherd & M. Kang, *Skewed Justice* 1 (2014) (finding that a recent “explosion in spending on television attack advertisements has] made courts less likely to rule in favor of defendants in criminal appeals”).

Multiple surveys over the past 13 years indicate that voters overwhelmingly believe direct contributions to judges’ campaigns have at least “some influence” on judicial decisionmaking. Disquieting as well, in response to a recent poll, 87% of voters stated that advertisements purchased by interest groups during judicial elections can have either “some” or “a great deal of influence” on an elected “judge’s later decisions.” Justice at Stake/Brennan Center National Poll 3, Question 9 (Oct. 22–24, 2013). States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether. Instead, States should have leeway to “balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary.” White, 536 U.S. at 821 (Ginsburg, J., dissenting).

JUSTICE SCALIA, with whom JUSTICE THOMAS, joins, dissenting.

Speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation. There appears to have been no regulation of judicial candidates’ speech throughout the 19th and early 20th centuries. Ethics rules concerning speech of judicial candidates did not achieve widespread adoption until after the Second World War.

Rules against soliciting campaign contributions arrived more recently still. The ABA first proposed a canon advising against it in 1972, and a canon prohibiting it only in 1990. Even now, 9 of the 39 States that elect judges allow judicial candidates to ask for campaign contributions. In the absence of any long-settled custom about judicial candidates' speech in general or their solicitations in particular, we have no basis for relaxing the rules that normally apply to laws that suppress speech because of content.

One need not equate judges with politicians to see that the electoral setting calls for all the more vigilance in ensuring observance of the First Amendment. When a candidate asks someone for a campaign contribution, he tends also to talk about his qualifications for office and his views on public issues. This expression lies at the heart of what the First Amendment is meant to protect. Banning candidates from asking for money personally "favors some candidates over others—incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." *Carey v. Wolnitzek*, 614 F.3d 189, 204 (6th Cir. 2010). This danger of legislated (or judicially imposed) favoritism is the very reason the First Amendment exists.

States have a compelling interest in ensuring that its judges are *seen* to be impartial. I will likewise assume that a judicial candidate's request to a litigant or attorney presents a danger of coercion that a political candidate's request to a constituent does not. But Canon 7C(1) does not narrowly target concerns about impartiality or its appearance; it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate's court. So Canon 7C(1) fails exacting scrutiny and infringes the First Amendment.

Florida must do more than point to a vital public objective brooding overhead. The State must also meet a difficult burden of demonstrating that the speech restriction substantially advances the claimed objective. The Court announces, on the basis of its "intuition," that allowing personal solicitations will make litigants worry that "judges' decisions may be motivated by the desire to repay campaign contributions." But this case is about whether she has the right to *ask* for campaign contributions that Florida's statutory law already allows her to receive. Florida bears the burden of showing that banning *requests* for lawful contributions will improve public confidence in judges—not just a little bit, but significantly.

Neither the Court nor the State identifies the slightest evidence that banning requests for contributions will substantially improve public trust in judges. Nor does common sense make this happy forecast obvious. The peaceful coexistence of judicial elections and personal solicitations for most of our history calls into doubt any claim that allowing personal solicitations would imperil public faith in judges. Many States allow judicial candidates to ask for contributions even today, but nobody suggests that public confidence in judges fares worse in these jurisdictions than elsewhere.

Even if we accept the premise that prohibiting solicitations will significantly improve the public reputation of judges, Florida must show that the ban restricts no more speech than necessary to achieve the objective. Canon 7C(1) falls miles short of satisfying this requirement. The Canon prohibits candidates from asking for money from *anybody*—even from someone who

is neither lawyer nor litigant, even from someone who (because of recusal rules) cannot possibly appear before the candidate as lawyer or litigant. Yulee thus may not call up an old friend, a cousin, or even her parents to ask for a donation to her campaign. The State has not come up with a plausible explanation of how soliciting someone who has no chance of appearing in the candidate's court will diminish public confidence in judges.

No less important, Canon 7C(1) bans candidates from asking for contributions even in messages that do not target any listener in particular—mass-mailed letters, flyers posted on telephone poles, speeches to large gatherings, and Web sites addressed to the general public. Messages like these do not share the features that lead the Court to pronounce personal solicitations a menace to public confidence in the judiciary. Consider online solicitations. They avoid “the spectacle of lawyers or potential litigants directly handing over money to judicial candidates.” People who come across online solicitations do not feel “pressure” to comply with the request. Nor does the candidate’s signature on the online solicitation suggest “that the candidate will remember who says yes, and who says no.” Yet Canon 7C(1) prohibits these and similar solicitations anyway.

Perhaps sensing the fragility of the initial claim that *all* solicitations threaten public confidence in judges, the Court argues that “the lines Yulee asks it to draw are unworkable.” That is a difficulty of the Court’s own imagination. In reality, the Court could have chosen from a whole spectrum of workable rules. It could have held that States may regulate no more than solicitation of participants in pending cases, or solicitation of people who are likely to appear in the candidate’s court, or even solicitation of any lawyer or litigant. And it could have ruled that candidates have the right to make fundraising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or at least fundraising appeals plainly directed to the general public (like requests placed online).

Consider the many real-world questions left open by today’s decision. Does the First Amendment permit restricting a candidate’s appearing at an event where somebody *else* asks for campaign funds on his behalf? Does it permit prohibiting the candidate’s *family* from making personal solicitations? Does it allow prohibiting the candidate from participating in the creation of a Web site that solicits funds, even if the candidate’s name does not appear next to the request?

Even if Florida could show that banning all personal appeals for campaign funds is necessary to protect public confidence in judicial integrity, the state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. The Court’s decision disregards this rule. Canon 7C(1) does not restrict *all* personal solicitations; it restricts only personal solicitations related to campaigns. Although Canon 7C(1) prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm’s luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar’s charges. What could possibly justify these distinctions? Could anyone say with a straight face that it looks *worse* for a candidate to say “please give my campaign \$25” than to say “please give *me* \$25”?

The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued other goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. I respectfully dissent.

JUSTICE KENNEDY, dissenting.

The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court to allow unprecedented content-based restrictions on speech. The Court's decision imperils the content neutrality essential both for individual speech and the election process. Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal.

Assume a judge retires, and two honest lawyers, Doe and Roe, seek the vacant position. Doe is a respected, prominent lawyer who has been active in the community and is well known to business and civic leaders. Roe, a lawyer of extraordinary ability and high ethical standards, keeps a low profile. As soon as Doe announces his or her candidacy, a campaign committee organizes of its own accord and begins raising funds. But few know or hear about Roe's potential candidacy, and no one with resources or connections is available to assist in raising the funds necessary for even a modest plan to speak to the electorate. Today the Court says the State can censor Roe's speech, imposing a gag on his or her request for funds, no matter how close Roe is to the potential benefactor or donor. The result is that Roe's personal freedom, the right of speech, is cut off by the State.

The First Amendment consequences of the Court's ruling do not end with its denial of the individual's right to speak. The very purpose of the candidate's fundraising was to facilitate a larger speech process: an election campaign. By cutting off one candidate's personal freedom to speak, the broader campaign debate that might have followed—a debate that might have been informed by new ideas and insights from both candidates—now is silenced. The First Amendment seeks to make the idea of discussion, open debate, and consensus-building a reality. But the Court decides otherwise. The Court locks the First Amendment out.

Whether an election is the best way to choose a judge is the subject of fair debate. But once the people of a State choose to have elections, the First Amendment protects the candidate's right to speak and the public's ensuing right to open and robust debate. One advantage of judicial elections is the opportunity offered for the public to become more knowledgeable about their courts and their law. This might stimulate discourse over the requisite and highest ethical standards for the judiciary, including whether the people should elect a judge who personally solicits campaign funds. Yet now that teaching process is hindered by state censorship. By allowing the State's speech restriction, the Court undermines the educational process that free speech in elections should facilitate.

Disclosure requirements offer a powerful, speech-enhancing method of deterring corruption—one that does not impose limits on how and when people can speak. Based on disclosures the voters can decide, among other matters, whether the public is well served by an elected judiciary; how each candidate defines appropriate campaign conduct (which may speak

volumes about his or her judicial demeanor); and what persons and groups support or oppose a particular candidate. With detailed information about a candidate's practices in soliciting funds, voters may be better informed in choosing those judges who are prepared to do justice "without fear or favor." The speech the Court now holds foreclosed might itself have been instructive in this regard, and it could have been open to the electorate's scrutiny. Judicial elections, no less than other elections, presuppose faith in democracy.

In addition to narrowing the First Amendment's reach, there is another flaw in the Court's analysis. That is its error in the application of strict scrutiny. The Court's evisceration of that judicial standard now risks long-term harm to what was once the Court's own preferred First Amendment test. This law comes nowhere close to being narrowly tailored. By saying that it survives that vital First Amendment requirement, the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes. On these premises, and for the reasons explained in more detail by Justice Scalia, it is necessary for me to file this respectful dissent.

JUSTICE ALITO, dissenting.

I largely agree with what I view as the essential elements of the dissents filed by Justices Scalia and Kennedy. Florida has a compelling interest in making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role. But the Florida rule is not narrowly tailored to serve that interest. It applies to all solicitations made in the name of a candidate for judicial office—including, as was the case here, a mass mailing. It even applies to an ad in a newspaper. It applies to requests for contributions in any amount, and it applies even if the person solicited is not a lawyer, has never had any interest at stake in any case in the court in question, and has no prospect of ever having any interest at stake in any litigation in that court. If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.

When petitioner sent out a form letter requesting campaign contributions, she was well within her First Amendment rights. The Florida Supreme Court violated the Constitution when it imposed a financial penalty and stained her record with a finding that she had engaged in unethical conduct. I would reverse the judgment of the Florida Supreme Court.

P. 397-398: insert a new problem # 1 that reads as follows, and delete problem # 3. Renumber problem # 1 as #2, and problem # 2 as #3. Then insert the following new problem # 1:

1. *Justice Scalia's Hypothetical Prohibitions.* Assume that the Florida Supreme Court adopts a new provision in the Code of Judicial Conduct, Canon 7D, which creates the following explicit limitations on fund-raising in judicial elections: (1) a prohibition on a judicial candidate's appearance at an event where somebody else asks for campaign funds on behalf of the candidate; (2) a prohibition on a judicial candidate's family from making personal

solicitations on behalf of the candidate; and (3) a prohibition on the participation of a judicial candidate in the creation of a Web site that solicits funds on behalf of the candidate, even when the candidate's name does not appear next to the request. Are these prohibitions constitutional under the First Amendment after the *Williams-Yulee* decision?

P. 398: At the end of the problems, insert the following new problems # 4 and # 5:

4. *Public Endorsement or Opposition.* Assume that a Canon of a state code of judicial conduct states that "a judge or candidate for judicial office is prohibited from publicly endorsing or publicly opposing another candidate for public office, except that they may publicly oppose their own opponent for judicial office." Assume that Jenny is a candidate for judicial office who wishes to both publicly *endorse another* judicial candidate James (not her opponent) who is running for a different judicial office. Jenny also wants to publicly *oppose* the incumbent judge Zeb who is running against James for the latter office. So Jenny challenges the prohibition. Does the Canon violate the First Amendment? *Compare Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010).

5. *Reckless Commitment.* Assume that a Canon of a state code of judicial ethics provides that: "A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court." Is this Canon consistent with the First Amendment? *Compare Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010).

Chapter 6

VAGUENESS, OVERBREADTH, AND PRIOR RESTRAINTS

A. OVERBREADTH AND VAGUENESS

P. 410-411: Delete note # 4.

P. 414: at the end of the problems, add the following new problem:

Obstructing Police Investigations. A police officer pulls over a vehicle for running a stop sign. The vehicle had three occupants. As the officer was questioning the driver, he smelled alcohol coming from the vehicle, and asked the driver to submit to a voluntary field sobriety test. Before the driver could answer, one of the passengers in the vehicle interrupted the officer. As the officer continued to question the driver, the same passenger interrupted again, urging the driver not to do anything. The passenger then stated “that his dad [was] a lawyer and he knows all about the law.” After the second interruption, the deputy threatened Scott with arrest “for obstructing and delaying a peace officer” if he did not remain quiet. After a third interruption, the officer arrested the passenger and called for backup. The passenger is charged under a law which makes it “unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest any member of the police force in the discharge of his official duties.” Does the law suffer from vagueness or ambiguity? *See Scott v. First Judicial District*, 363 P.3d 1159 (Nev. 2016).

B. PRIOR RESTRAINTS

[2] INJUNCTIONS

P. 442: Before the problems, insert the following new notes that read as follows:

NOTES

1. *The WikiLeaks Controversy.* Following the WikiLeaks controversy, in which thousands of U.S. secret documents were stolen from the U.S. government and published by WikiLeaks and in various newspapers, U.S. Army Pfc. Bradley Manning (a/k/a, Chelsea Manning) was convicted of multiple counts of violating the Espionage Act for stealing the documents. Manning was acquitted of “aiding the enemy.” Although the government aggressively sought to determine whether WikiLeaks had collaborated with Manning in stealing the documents, no prosecution was brought against either WikiLeaks or the newspapers that

published the documents. *See Charlie Savage, Manning Is Acquitted of Aiding the Enemy*, INTERNATIONAL HERALD TRIBUNE, July 31, 2013, A-1.

2. *Injunctions Against Trademark Infringement.* Despite the presumption against the validity of prior restraints, courts will sometimes issue injunctions against speech. In one case, a candidate for public office whose last name was “Hershey” sought to use the logo of Hershey’s Chocolate Company on his campaign signs. The Court enjoined the use of the trademarked logo on the basis that the use was likely to cause confusion and to suggest that Hershey’s had endorsed the candidate. *See Hershey Co. v. Friends of Steve Hershey*, 33 F. Supp. 3^d 588 (D. Md. 2014).

P. 442: Insert a new problem # 2, that reads as follows, and then renumber the remaining problems:

2. *Injunctions Against Printable Guns?* Suppose that a man wants to distribute over the Internet instructions regarding how to print 3-D guns (a/k/a “Liberators” or “Wiki weapons”). Although 3-D printers are very expensive, they can manufacture plastic guns that shoot real bullets. The instructions would enable teenagers and felons (who are prohibited from possessing guns) to manufacture them. Moreover, being plastic, the guns could be used to evade metal detectors at airports, courthouses and governmental facilities, and can quickly be melted down and printed into something else (thereby destroying any evidence of a crime). The U.S. government quickly intervenes, claiming that distribution of the instructions violates International Traffic in Arms regulations that prohibit the export from the U.S. of technical data regarding the manufacture of weapons. Is there a First Amendment right to distribute the instructions that prohibits the imposition of a prior restraint? *See Ronald K.L. Colins, Online Instructions on How to Make 3-D Printable Guns – Protected Speech?*, First Amendment News (May 7, 2015).

Chapter 7

FREEDOM OF ASSOCIATION AND COMPELLED EXPRESSION

A. THE RIGHT TO ASSOCIATE

P. 475, at the end of the case, add the following new note:

NOTE: NONDISCRIMINATION POLICIES AT OTHER INSTITUTIONS

Following the holding in *Martinez*, other colleges and universities have adopted similar policies. *See Michael Paulson, Colleges and Evangelicals Collide on Bias Policy*, *The New York Times* A-1 (June 10, 2014).

B. THE RIGHT “NOT TO SPEAK”

P. 481: At the end of the notes, insert the following new problems ## 1-4:

PROBLEMS

1. *Promoting “Social Justice.”* The University of Louisville’s Louis D. Brandeis School of Law decides that its mission should include, among other things, the “promotion of social justice,” and the dean wishes to evaluate faculty for merit purposes based on the extent to which they helped promote the law school’s mission. Suppose that a conservative faculty member objects to the mission statement on the basis that the term “social justice” has no clearly-defined meaning, and is likely to be construed by the dean as requiring faculty to promote a liberal definition of “social justice” to which the faculty member objects. Can the faculty member be required, on pain of a lower annual raise, to promote social justice? Would the policy be permissible if it permits the faculty member to construe the term “social justice” in any way that he/she deems desirable? Would it be permissible for the school to mandate that the faculty member pursue a “liberal” definition of “social justice” (e.g., if he/she discusses affirmative action, he/she must promote affirmative action and may not portray it as “socially unjust” discrimination)?

2. *The School Dress Code.* Suppose that a public elementary school adopts a mandatory dress code. However, rather than imposing a traditional dress code (e.g., plain-colored tops and bottoms), the school requires all students to wear t-shirts bearing the school’s motto: Tomorrow’s Leaders. One student objects to the t-shirt as “stupid” and “embarrassing.” May a public school, consistently with the First Amendment, require a student to wear a t-shirt displaying its motto? *Compare Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014).

3. *Pregnancy Center Disclosures.* The City of New York enacts a law requiring pregnancy centers to disclose to patients whether they have licensed medical providers on their staffs. Is such a requirement valid? Can the City also require centers to disclose whether they provide abortion services, or emergency contraception or prenatal care, and encourage the women to consult licensed medical providers? May the law also require abortion providers to provide patients with notice of an increased suicide risk by women who have abortions? *See The Evergreen Association, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014).

4. *Abortion Sonograms.* A North Carolina statute requires a doctor to perform an ultrasound on a woman seeking an abortion, display the sonogram so that the woman can see it, offer to allow the woman to hear the fetal heartbeat, and recite a medical description of the fetus. The woman may avert her eyes, or refuse to hear the description, but the doctor must describe the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted, and the presence of external members and internal organs, if present and viewable. These provisions are referred to as the “Real-Time View Requirement.” Before the statute was enacted, a doctor was already required under the pre-existing statute to convey the following information: “the risks of the abortion procedure and of carrying the child to term,” “any adverse psychological effects associated with abortion,” “the probable gestational age of

the unborn child,” financial assistance for pregnancy that may be available, that the father of the child is obligated to pay child support, that there are alternatives to abortion, and that the woman “can view on a state-sponsored website materials published by the state which describe the fetus.” The pre-existing statute also required the doctor to “give or mail the woman physical copies of the materials if she wishes,” and to “list agencies that offer alternatives to abortion.” After the later statute was enacted, a group of physicians filed suit to challenge that statute (but not the pre-existing statute) on First Amendment grounds. Does the later statute violate their rights under the “compelled speech” precedents? *Compare Stuart v. Camnitz*, 774 F.3d 230 (4th Cir. 2014).

5. *More on Compelled Speech.* California has enacted the Reproductive FACT act which requires pro-life pregnancy centers to prominently post “in no less than 48 point type” the following message: “California has public programs that provide immediate or free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office.” The statute also requires centers to post a referral phone number. Can California require objecting pro-life centers to post such a notice? Does it/should it matter whether the centers do or do not receive public funding?

6. *Compelled Speech and Transgender Language.* Suppose that the New York Commission on Human Rights can prohibit gender identity and gender expression discrimination under New York City’s Human Rights Law. Can New York impose financial penalties on individuals who refuse to refer to a transgender individual by his/her preferred name, pronoun or title?

P. 491: at the end of the notes, add the following new notes:

4. *Home Health Workers.* In *Harris v. Quinn*, 189 L. Ed. 2d 620 (2014), the Court held that the First Amendment precludes a State from compelling personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that state employees who choose not to join a public-sector union may nevertheless be compelled to pay an agency fee to support union work that is related to the collective-bargaining process. In *Harris*, not only did the Court raise questions regarding the continuing vitality of *Abood*, it concluded that personal service providers were, at best, quasi-public employees and that *Abood*’s holding would not be extended to cover them: “no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.”

5. *Challenging the Validity of Abood.* When plaintiff teachers filed suit to make First Amendment claims that were foreclosed by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court granted review of the Ninth Circuit decision rejecting those claims. After the oral argument was heard, the death of Justice Scalia precluded the Court from reaching a majority decision and the judgment below was affirmed. See *Friedrichs v. California Teachers Association*, 2014 WL 10076847 (9th Cir.) (Nov. 18, 2014), *affirmed by an equally divided*

court, 136 S. Ct. 1083 (2016). The plaintiffs presented two questions to the Court: “(1) whether *Abood v. Detroit Board of Education* should be overruled and public-sector “agency-shop” arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.”

Chapter 8

THE GOVERNMENT AS EMPLOYER, EDUCATOR, AND SOURCE OF FUNDS

A. FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES

[2] Other Employee Speech

P. 505: Insert the following new note # 1 and renumber the remaining notes:

1. *Garcetti and Subpoenaed Employees.* In *Lane v. Franks*, 189 L. Ed. 2d 312 (2014), the Court held that the *Pickering* test protected an employee who provided truthful testimony, in response to a subpoena, regarding matters that he discovered in the course of his employment. The question was whether the government has “an adequate justification for treating the employee differently from any other member of the public” based on the government’s needs as an employer. Although the Court noted the employer’s legitimate “interests in the effective and efficient fulfillment of their responsibilities to the public,” including “promoting efficiency and integrity in the discharge of official duties,” and “maintaining proper discipline in public service,” it concluded that the employer’s side of the *Pickering* scale was “entirely empty” because they did not “assert, and cannot demonstrate, any government interest that tips the balance in their favor on such facts. There was no evidence that Lane’s testimony at Schmitz’ trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.” As a result, the Court concluded that Lane’s speech was protected under the First Amendment.

P. 508: Insert the following new problem # 1 and renumber the remaining problems:

1. *Burning the U.S. Flag.* Suppose that a high school teacher, in an effort to teach students about the right to free speech, burns a small U.S. flag in class and then asks his students to write an essay about it. On learning about the incident, the school’s principal decides to reassign the teacher to non-instructional duties. The principal, who was besieged by parents complaining about the burning of a U.S. flag, cited safety issues for his decision. A school board member suggested that the burning could have been offensive, especially to students with parents in the military. The teacher claimed academic freedom. Was it appropriate to discipline the teacher under these circumstances? See Chris Kenning, *Teacher Burns U.S. Flag in Class, Louisville Courier-Journal* A-1 (Aug. 22, 2006).

P. 508: At the end of problem # 1 (which will become # 2), at the end of subpart “a.”, insert the following citation:

See Dahlia v. Rodriguez, 735 F.3d 1060 (9th Cir. 2013).

P. 508: At the end of problem # 1 (which will become # 2), at the end of subpart “g.”, insert the following citations:

See Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); *Adams v. Trustees of the University of North Carolina Wilmington*, 640 F.3d 550 (4th Cir. 2011).

P. 509: At the end of problem 3 (which will become problem # 4), insert the following citation:

See Tom Loftus, Political Blogs Off-Limits for State Workers, Louisville Courier-Journal B-1 (June 22, 2006).

P. 510: Following the problems, add the following new problems:

8. *The Dismissed Principal.* A school district has announced that it will close an award winning school that had been created for students who have been suspended from other schools. It did so even though, the school had recently progressed from an 11% graduation rate to a 67% rate. When the Board scheduled a meeting with parents, so that it could explain its reasons for closing the school, the principal spoke out against closure even though the board’s decision had already been made. The principal did not allege that the school board was corrupt or had engaged in other unlawful conduct. She did claim that some of the students would not fare well in other schools. May the school board terminate her for taking a position inconsistent with the Board’s position? *See Rock v. Levinski*, 2015 WL 3939020, — F.3d — A(10th Cir. 2015).

9. *The Cop’s Rant.* A police officer, upset with the police chief, posts negative comments about the chief on the mayor’s Facebook page, and calls for the chief’s removal. The comments related to the fact that police officers did not attend the funeral of a fellow officer killed in the line of duty. The chief decides to fire the officer for “insubordination” on the basis that the police are a para-military organization, that has greater authority to regulate or discipline employees, and that the posts were disruptive. *See Graziosi v. City of Greenville*, (5th Cir. 2015).

P. 518: at the end of the problems, add the following new problem:

11. *Applying Pickering.* Suppose that a school teacher maintains a private blog on which

she comments about various issues. The blog is entitled “Where are we going, and why are we in this handbasket?” The blog is not open to the public, but is only available to certain of the teacher’s friends. Although the blog discusses various issues, most of which had nothing to do with her school, she did make a number of posts that discussed her co-workers, the School District administration, her students, and their parents. In one of her posts, she makes derogatory statements about her students: “there was a depiction of a school bus with a ‘Short Bus’ sign and the following heading: ‘I DON’T CARE IF YOU LICK THE WINDOWS, TAKE THE SPECIAL BUS OR OCCASSIONALLY PEE ON YOURSELF ... YOU HANG IN THERE SUNSHINE, YOU'RE FRIGGIN SPECIAL.’ ” She also made a number of other derogatory statements about her students. Students and parents eventually became aware of the blog, and the superintendent received numerous protests. She received an “unsatisfactory” merit evaluation for the year which referenced her blog posts as inappropriate. After she received a second unsatisfactory merit evaluation the following year, which did not mention the blog posts, she was terminated. Were the teacher’s free speech rights violated when her first evaluation took her blog into account in rating her “unsatisfactory?” *See Munroe v. Central Bucks School District*, 805 F.3d 454 (3rd Cir. 2015).

P. 518: At the end of the problems, insert the following new case:

HEFFERNAN v. CITY OF PATERSON
136 S.Ct. 1412 (2016).

Justice BREYER delivered the opinion of the Court.

The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee’s engagement in constitutionally protected political activity. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). In this case a government official demoted an employee because the official believed, but *incorrectly* believed, that the employee had supported a particular candidate for mayor. The question is whether the official’s factual mistake makes a critical legal difference. Even though the employee had not in fact engaged in protected political activity, did his demotion “deprive” him of a “right secured by the Constitution”? 42 U.S.C. § 1983. We hold that it did.

To decide the legal question presented, we assume the following, somewhat simplified, version of the facts: In 2005, Jeffrey Heffernan, petitioner, was a police officer in Paterson, New Jersey. He worked in the office of the Chief of Police, James Wittig. At that time, the mayor of Paterson, Jose Torres, was running for reelection against Lawrence Spagnola. Torres had appointed to their current positions both Chief Wittig and a subordinate who directly supervised Heffernan. Heffernan was a good friend of Spagnola’s.

During the campaign, Heffernan’s mother, who was bedridden, asked Heffernan to drive downtown and pick up a large Spagnola sign. She wanted to replace a smaller Spagnola sign, which had been stolen from her front yard. Heffernan went to a Spagnola distribution point and

picked up the sign. While there, he spoke for a time to Spagnola's campaign manager and staff. Other members of the police force saw him, sign in hand, talking to campaign workers. Word quickly spread throughout the force.

The next day, Heffernan's supervisors demoted Heffernan from detective to patrol officer and assigned him to a "walking post." In this way they punished Heffernan for what they thought was his "overt involvement" in Spagnola's campaign. In fact, Heffernan was not involved in the campaign but had picked up the sign simply to help his mother. Heffernan's supervisors had made a factual mistake.

Heffernan subsequently filed this lawsuit in federal court. He claimed that Chief Wittig and the other respondents had demoted him because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech. They had thereby "deprived" him of a "right secured by the Constitution." Rev. Stat. § 1979, 42 U.S.C. § 1983.

The District Court found that Heffernan had not engaged in any "First Amendment conduct," and, for that reason, respondents had not deprived him of any constitutionally protected right. The Court of Appeals for the Third Circuit affirmed. We agreed to decide whether the Third Circuit's legal view was correct.

With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. See *Elrod v. Burns*, *supra*; *Branti v. Finkel*, *supra*. The basic constitutional requirement reflects the First Amendment's hostility to government action that "prescribes what shall be orthodox in politics." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). The exceptions take account of "practical realities" such as the need for "efficiency" and "effectiveness" in government service. *Waters v. Churchill*, 511 U.S. 661 (1994), and *Branti*, *supra*, at 518.

In order to answer the question presented, we assume that the exceptions do not apply here. We assume that the activities that Heffernan's supervisors *thought* he had engaged in are of a kind that they cannot constitutionally prohibit or punish, see *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990), but that the supervisors were mistaken about the facts. Heffernan had not engaged in those protected activities. Does Heffernan's constitutional case consequently fail?

The text of the relevant statute does not answer the question. The statute authorizes a lawsuit by a person "deprived" of a "right secured by the Constitution." 42 U.S.C. § 1983. But is it a right that primarily focuses upon (the employee's) actual activity or a right that primarily focuses upon (the supervisor's) motive, insofar as that motive turns on what the supervisor believes that activity to be? The text does not say.

Neither does precedent directly answer the question. In some cases we have used language that suggests the "right" at issue concerns the employee's actual activity. In *Connick v. Myers*, 461 U.S. 138 (1983), we said that a court should first determine whether the plaintiff spoke "as a citizen" on a "matter of public concern." We added that, if the employee has not engaged in what can "be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge." We made somewhat similar statements in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *Pickering v. Board of Ed. of*

Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968).

These cases, however, did not present the kind of question at issue here. In *Connick*, for example, no factual mistake was at issue. Both the employer and the employee were at every stage in agreement about the underlying facts: that the employer dismissed the employee because of her having circulated within the office a document that criticized how the office was being run (that she had in fact circulated). The question was whether the circulation of that document amounted to constitutionally protected speech. If not, the Court need go no further. Neither was any factual mistake at issue in *Pickering*. The Court assumed that both the employer (a school board) and the employee understood the cause for dismissal, namely, a petition that the employee had indeed circulated criticizing his employer's practices. The question concerned whether the petition was protected speech. *Garcetti* is substantially similar. In each of these cases, the only way to show that the employer's motive was unconstitutional was to prove that the controversial statement or activity—in each case the undisputed reason for the firing—was in fact protected by the First Amendment.

Waters v. Churchill, 511 U.S. 661 (1994), is more to the point. In that case the Court did consider the consequences of an employer mistake. The employer wrongly, though reasonably, believed that the employee had spoken only on personal matters not of public concern, and the employer dismissed the employee for having engaged in that unprotected speech. The employee, however, had in fact used words that did not amount to personal “gossip” (as the employer believed) but which focused on matters of public concern. The Court asked whether, and how, the employer's factual mistake mattered. The Court held that, as long as the employer (1) had reasonably believed that the employee's conversation had involved personal matters, not matters of public concern, and (2) had dismissed the employee because of that mistaken belief, the dismissal did not violate the First Amendment. In a word, it was the employer's motive, and in particular the facts as the employer reasonably understood them, that mattered. In *Waters*, the employer reasonably but mistakenly thought that the employee *had not* engaged in protected speech. Here the employer mistakenly thought that the employee *had* engaged in protected speech. If the employer's motive (and in particular the facts as the employer reasonably understood them) is what mattered in *Waters*, why is the same not true here? After all, in the law, what is sauce for the goose is normally sauce for the gander. We conclude that, as in *Waters*, the government's reason for demoting Heffernan is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.

A rule of law finding liability in these circumstances tracks the language of the First Amendment more closely than would a contrary rule. Unlike the Fourth Amendment, which begins by speaking of the “right of the people to be secure in their persons, houses, papers, and effects,” the First Amendment begins by focusing upon the activity of the Government. It says that “Congress shall make no law ... abridging the freedom of speech.” The Government acted upon a constitutionally harmful policy whether Heffernan did or did not in fact engage in

political activity. That which stands for a “law” of “Congress,” namely, the police department’s reason for taking action, “abridges the freedom of speech” of employees aware of the policy. Heffernan was directly harmed, namely, demoted, through application of that policy.

We also consider relevant the constitutional implications of a rule that imposes liability. The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities. The discharge of one tells the others that they engage in protected activity at their peril. See, e.g., *Elrod*, 427 U.S., at 359. Hence, we do not require plaintiffs in political affiliation cases to “prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance.” *Branti*, 445 U.S., at 517. The employer’s factual mistake does not diminish the risk of causing precisely that same harm. Neither is that harm diminished where an employer announces a policy of demoting those who, say, help a particular candidate in the mayoral race, and all employees (including Heffernan), fearful of demotion, refrain from providing any such help. The upshot is that a discharge or demotion based upon an employer’s belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.

Finally, contrary to respondents’ assertions, a rule of law that imposes liability despite the employer’s factual mistake will not normally impose significant extra costs upon the employer. To win, the employee must prove an improper employer motive. In a case like this one, the employee will, if anything, find it more difficult to prove that motive, for the employee will have to point to more than his own conduct to show an employer’s intent to discharge or to demote him for engaging in what the employer (mistakenly) believes to have been different (and protected) activities. We concede that, for that very reason, it may be more complicated and costly for the employee to prove his case. But an employee bringing suit will ordinarily shoulder that more complicated burden voluntarily in order to recover the damages he seeks.

We have assumed that the policy that Heffernan’s employers implemented violated the Constitution. There is some evidence in the record suggesting that Heffernan’s employers may have dismissed him pursuant to a different and neutral policy prohibiting police officers from overt involvement in any political campaign. Whether that policy existed, whether Heffernan’s supervisors were indeed following it, and whether it complies with constitutional standards, are all matters for the lower courts to decide. Without expressing views on the matter, we reverse the judgment of the Third Circuit and remand the case for such further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice ALITO joins, dissenting.

To state a claim for retaliation in violation of the First Amendment, public employees like Heffernan must allege that their employer interfered with their right to speak as a citizen on a matter of public concern. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006). If the employee has not spoken on a matter of public concern, “the employee has no First Amendment cause of

action based on his or her employer's reaction to the speech." If the employee did speak as a citizen on a matter of public concern, then the Court looks to "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." Under this framework, Heffernan's claim fails at the first step. He has denied that, by picking up the yard sign, he "spoke as a citizen on a matter of public concern." In fact, Heffernan denies speaking in support of or associating with the Spagnola campaign. He has claimed that he picked up the yard sign only as an errand for his bedridden mother. Demoting a dutiful son who aids his elderly, bedridden mother may be callous, but it is not unconstitutional. At bottom, Heffernan claims that the City tried to interfere with his constitutional rights and failed. But it is not enough for the City to have attempted to infringe his First Amendment rights. To prevail on his claim, he must establish that the City *actually* did so. The City's attempt never ripened into an actual violation of Heffernan's constitutional rights because, unbeknownst to the City, Heffernan did not support Spagnola's campaign.

To get around this problem of factual impossibility, the majority reframes Heffernan's case as one about the City's lack of power to act with unconstitutional motives. Under the majority's view, the First Amendment prohibits the City from taking an adverse employment action intended to impede an employee's rights to speak and assemble, regardless of whether the City has accurately perceived an employee's political affiliation. But § 1983 does not provide a cause of action for unauthorized government acts that do not infringe the constitutional rights of the § 1983 plaintiff. Of course the First Amendment "focuses upon the activity of the Government." And here, the "activity of Government" has caused Heffernan harm, namely, a demotion. But harm alone is not enough; it has to be the right kind of harm. Section 1983 provides a remedy only if the City has violated Heffernan's constitutional *rights*, not if it has merely caused him harm. Restated in the language of tort law, Heffernan's injury must result from activities within the zone of interests that § 1983 protects.

If the facts are as Heffernan has alleged, the City's demotion of him may be misguided or wrong. But, because Heffernan concedes that he did not exercise his First Amendment rights, he has no cause of action under § 1983. I respectfully dissent.

B. THE FIRST AMENDMENT IN THE PUBLIC SCHOOLS

P. 531: At the end of the problems, add the following new problems ## 3-6:

3. *The Anarchist Club.* Suppose that a public high school allows students to form clubs for a variety of purposes, and allows clubs related to chess, fencing, 4H, Republicans; and Democrats. However, when a student asks for permission to start an anarchist club designed to promote tolerance, and to oppose the U.S. bombing of Afghanistan, the school denies the request on the basis that the club would "disrupt the educational process." When fliers are found on the student's desk promoting the club, she is suspended because "she was told not to foster, try to advance, or try to start an anarchy club." Under *Tinker*, was the suspension constitutionally

permissible? See Michelle Saxton, *Judge Prohibits School Anarchist Club*, *The Courier-Journal* C 1-4 (Nov. 2, 2001).

4. *The Cinco de Mayo Event.* A school decides to ban students from wearing American flag t-shirts to its Cinco de Mayo celebration. There had been violent altercations at the school before between Caucasian and Hispanic students, including altercations at the most recent Cinco de Mayo celebration, and there had been threats of violence regarding this particular celebration. Even though the school banned American flag t-shirts, it allowed students to wear t-shirts promoting Cinco de Mayo. Did the school act permissibly? See *Dariano v. Morgan Hill Unified School District*, 745 F.3d 354 (9th Cir. 2014).

5. *The Horror Essay.* Students at a public middle school were asked to write “scary” Halloween stories as part of a school project. Students were supposed to assume that they were “home alone” and heard “scary noises.” One student writes an essay that refers to a shotgun and accidentally shooting his teacher. Can the student be disciplined for the essay? See Associated Press, *7th-Grader Jailed Over Violent Essay*, *Louisville Courier-Journal* A-3 (Nov. 4, 1999).

6. *Rap and Sexual Harassment Allegations.* A student, responding to allegations that two male coaches had sexually harassed female students, created a rap song with “vulgar” lyrics regarding the two coaches. In the song, he identifies the coaches by name and states the following

Dirty ass niggas like some fucking coacha roaches
Started fucking with the whites and now they fucking with the blacks
That pussy ass nigga Wildmon got me turned up the fucking max.
Fucking with the students and he just had a baby
Ever since I met that cracker I knew that he was crazy
Always talking shit cause he know I'm from the city
The reason he fucking around cause his wife ain't got no titties.
This nigga telling students that they sexy, betta watch your back
I'm a serve this nigga like I serve the junkies with some crack
Quit the damn basketball team / The coach a pervert
Can't stand the truth so to you these lyrics going to hurt
What the hell was they thinking when they hired Mr. Rainey
Dreadlock Bobby Hill the second / He the same see
Talking about you could have went pro to the NFL
Now you just another pervert coach, fat as hell
Talking about you gangsta / Drive your mama's PT Cruiser
Run up on T-Bizzle / I'm going to hit you with my rueger
Think you got some game / Cuz you fucking with some juveniles
You know this shit the truth so don't you try to hide it now
Rubbing on the black girls' ears in the gym
White hoes, change your voice when you talk to them
I'm a dope runner, spot a junkie a mile away
Came to football practice high, remember that day

I do, to me you a fool nigga
30 years old fucking with students at the school
Hahahah You's a lame and it's a damn shame
Instead you was lame, eat shit, the whole school got a ring
mutherfucker.
Heard you textin' number 25/ You want to get it on
White dude, guess you got a thing for them yellow bones
Looking down girls' shirts / Drool running down your mouth
You fucking with the wrong one / Going to get a pistol down your
mouth/Pow
OMG took some girls in the locker room in PE
Cut off the lights you motherfucking freak
Fucking with the youngins Because your pimpin game weak How he get the head
coach I don't really fucking know
But I still got a lot of love for my nigga Joe
And my nigga Makaveli and my nigga Cody
Wildemon talk shit bitch don't even know me
Middle fingers up if you hate that nigga
Middle fingers up if you can't stand that nigga
Middle fingers up if you want to cap that nigga
Middle fingers up / he get no mercy nigga.

The student recorded the song at a studio that was not affiliated with the school, and uploaded it from his private computer at home. The school responded by suspending the student for “threatening, harassing and intimidating” school employees. Should the suspension be upheld? See *Bell v. Itawamba County School Board*, 774 F.3d 280 (5th Cir. 2014).

P. 541: At the end of problem # 3, add the following:

At the university level, can a public university require the student newspaper to submit copy for review, in advance of publication, and also require that they print more “positive news” about the university? See Fran Ellers, *KSU Regents Chairman to Investigate Dispute Over School Newspaper*, *The Louisville Courier-Journal*, B-3 (Feb. 17, 1995).

Pp. 548-552: Before the problems, add the following new note:

NOTE: STUDENT SPEECH OUTSIDE OF THE SCHOOL ENVIRONMENT

Tinker dealt with student speech in the context of the school environment. Of course, student speech can also occur outside of the school grounds, but such speech may have an impact on those who work at or attend the school. For example, students may use social media to

convey their ideas, or they may communicate via text message or e-mail. In a number of recent cases, schools have attempted to discipline students for these electronic communications. The cases have produced divergent results.

P. 548-552: Move problems ## 3, 4, 5 & 15 to p. 531 as problems ## 5, 6, 7 & 8, and then renumber the remaining problems on pp. 548-552.

P. 550: At the end of problem # 9, add the following:

May a student be disciplined for a social media posting that involves a rap song referring to his Spanish teacher in crude and vulgar terms? *See State v. Kaleb K*, 841 N.W.2d 581 (Wis. App. 2013).

P. 579: After the first full paragraph, insert the following new paragraph:

To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. Public library staffs necessarily consider content in making collection decisions. A public library provides Internet access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. Most libraries already exclude pornography from their print collections, and it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason.

P. 583: After the *American Library Association* case, insert the new heading NOTE and the following new notes # 1 and # 2.

NOTES

1. *Public Library Computers*. Between 1994 and 2002 (the year before the decision in *American Library Association*), the Internet connectivity of public libraries increased from 20.9% to 98.7%. See John Carlo Bertot & Charles R. McClure, *Public Libraries and the Internet 2002: Internet Connectivity and Networked Services*, Information Use Management and Policy Institute, School of Information Studies, Florida State University, Information Institute, <http://www.ii.fsu.edu/content/download/15122/98709>. One 2014 report found that 60% of urban libraries and 70% of urban libraries “are the only providers of free public access to computers and the internet in their communities.” Also, 83% of adult library users regard the “computer access, training, and support provided by libraries” as “important or very important.” Internet filters “are expensive to operate and maintain,” and local libraries “have marginal control over

the content that is filtered,” because the filters are operated by entities such as “a state library, library consortium, or local or state government system.” One study found that “half of all libraries with internet filters received requests from adult patrons to unblock the filters for legitimate purposes,” such as web-based email and websites needed “to research prescription drugs and to complete school projects.” *See* Kristen R. Batch, *Fencing Out Knowledge: Impacts of the Children’s Internet Protection Act 10 Years Later*, Policy Brief No. 5, June 2014, ALA Library Association,

2. *Speech Blocked under CIPA.* The FCC website Guide for CIPA states that schools or libraries (that receive discounts for Internet access through federal funding) must “certify that they have an Internet safety policy that includes technology protection measures,” which “must block or filter Internet access to *pictures* that are (a) obscene; (b) child pornography; or © harmful to minors (for computers that are accessed by minors).” *See* Children’s Internet Protection Act Guide, <https://www.fcc.gov/guides/childrens-internet-protection-act>. In 2008, Congress enacted an additional requirement that the Internet safety policy “must include monitoring the online activities of minors and must provide for educating minors about appropriate online behavior including interacting with other individuals on social networking websites and in chatrooms and cyberbullying awareness and response.” *See* Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future, <https://www.fcc.gov/document/schools-and-libraries-universal-service-support-mechanism-national-broadband-plan-our-fut-1>. However, CIPA does not “authorize any tracking of the internet use of anyone in an identifiable manner. The FCC also has not defined “harmful to minors” to include online social media sites, such as Facebook. *See* Children’s Internet Protection Act Guide, <https://www.fcc.gov/guides/childrens-internet-protection-act>. Notably, “[the] FCC has not established “specific criteria for what constitutes effective filtering and has never found a school or library out of compliance since CIPA first went into effect in 2001.” *See* Deborah Caldwell-Stone, *Filtering and the First Amendment: When is it okay to block speech online?*, American Libraries Magazine, April 2, 2013, <http://americanlibrariesmagazine.org/2013/04/02/filtering-and-the-first-amendment/>.

3. *Blocking Beyond CIPA Restrictions.* According to a 2014 report, “many libraries and schools filter well beyond the statutory requirements of the law.” For example, “schools, in particular, do not limit filtering to visual images as [CIPA] mandates. In the name of CIPA’s filtering mandate, schools increasingly block access to entire social media and social networking sites and to any site that is interactive or collaborative, such as blogs, wikis, or even Google Docs. The application of filters also is expanding as schools rely (mistakenly) on filtering to deal with issues of hacking, copyright infringement, and cyberbullying, denying access to certain websites and technologies.” *See* Kristen R. Batch, *Fencing Out Knowledge: Impacts of the Children’s Internet Protection Act 10 Years Later*, Policy Brief No. 5, June 2014, ALA Library Association, http://www.ala.org/offices/sites/ala.org.offices/files/content/oitp/publications/issuebriefs/cipa_report.pdf.

P. 583: Insert the following new problem in place of the existing problems (one of which will be moved after the Walker case (to be inserted) and the other is to be deleted.

PROBLEM

The *American Library Association* opinion rejected a facial challenge to the CIPA, not an “as applied” challenge. The plurality opinion also emphasized that any “concerns” about “erroneous overblocking” by software programs “are dispelled by the ease with which patrons may have the filtering software disabled.” For adult users, CIPA “expressly authorizes library officials to ‘disable’ a filter altogether ‘to enable access for bona fide research or other lawful purposes.’” During oral argument, the Solicitor General assured the Court that a patron would not “have to explain why he was asking a site to be unblocked or the filtering to be disabled.” Assume that a regional library system with 30 branches decides to use the “FortiGuard Web Filtering Service,” which “sorts web sites into 76 categories based on predominant content.” These categories include :

1. Adult Materials: Mature content websites (18+ years and over) that feature or promote sexuality, strip clubs, sex shops, etc. excluding sex education, without the intent to sexually arouse.
2. Gambling: Sites that cater to gambling activities such as betting, lotteries, casinos, including gaming information, instruction, and statistics.
3. Nudity: Mature content websites (18+ years and over) that depict the human body in full or partial nudity without the intent to sexually arouse.
4. Web Chat: Websites that promote Web chat services.
5. Instant Messaging: Websites that allow users to communicate in “real-time.”
6. The “personals” section of craigslist.org.

The library system also adopts a policy that the Internet filter will not be disabled at the request of an adult patron as long as the website fits one of the 76 categories. If a request is made and the library determines that the website does not fit one of these categories, then the library will treat the website as erroneously blocked and grant the request for unblocking.

What arguments could be made to challenge this policy on First Amendment grounds? What reasoning could be used to reject this challenge? *Compare Bradburn v. North Central Regional Library District*, 231 P.3d 166 (Wash. 2010) (en banc).

P. 584: Following the problems, insert the following new case, notes and problems:

**JOHN WALKER, III v.TEXAS DIVISION,
SONS OF CONFEDERATE VETERANS, INC.
135 S.Ct. 2218 (2015).**

Justice Breyer delivered the opinion of the Court.

Texas requires all motor vehicles operating on the State’s roads to display valid license

plates. Drivers may choose to display the State's general-issue license plates [which] contain the word "Texas," a license plate number, a silhouette of the State, a graphic of the Lone Star, and the slogan "The Lone Star State." In the alternative, drivers may choose from an assortment of specialty license plates [which] contain the word "Texas," a license plate number, and one of a selection of designs prepared by the State. Finally, Texas law provides for personalized plates (also known as vanity plates). Pursuant to the personalization program, a vehicle owner may request a particular alphanumeric pattern for use as a plate number, such as "BOB" or "TEXPL8."

Here we are concerned with the second category of plates, specialty license plates. Texas offers a variety of specialty plates, generally for an annual fee. Texas selects the designs for specialty plates through three processes. First, the state legislature may specifically call for the development of a specialty license plate. The legislature has enacted statutes authorizing, for example, plates that say "Keep Texas Beautiful" and "Mothers Against Drunk Driving," plates that "honor" the Texas citrus industry, and plates that feature an image of the World Trade Center towers and the words "Fight Terrorism." Second, the Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization. Among the plates created through the private-vendor process are plates promoting the "Keller Indians" and plates with the slogan "Get it Sold with RE/MAX." Third, the Board may create new specialty license plates on its own initiative or on receipt of an application from a nonprofit entity seeking to sponsor a specialty plate. A nonprofit must include in its application "a draft design of the specialty license plate." Texas law vests in the Board authority to approve or to disapprove an application. The Board "may refuse to create a new specialty license plate" for a number of reasons, for example "if the design might be offensive to any member of the public or for any other reason established by rule." Specialty plates that the Board has sanctioned through this process include plates featuring the words "The Gator Nation," together with the Florida Gators logo, and plates featuring the logo of Rotary International and the words "SERVICE ABOVE SELF."

In 2009, the Sons of Confederate Veterans, Texas Division (a nonprofit entity), applied to sponsor a specialty license plate through this last-mentioned process. SCV's application included a draft plate design. At the bottom of the proposed plate were the words "SONS OF CONFEDERATE VETERANS." At the side was the organization's logo, a square Confederate battle flag framed by the words "Sons of Confederate Veterans 1896." A faint Confederate battle flag appeared in the background on the lower portion of the plate. Additionally, in the middle of the plate was the license plate number, and at the top was the State's name and silhouette. The Board's predecessor denied this application.

In 2010, SCV renewed its application. The Board invited public comment on its website and at an open meeting. After considering the responses, including a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuing the plate. The Board explained that it had found "it necessary to deny the plate design application, specifically the confederate flag portion of the design, because public comments had shown that many members of the general public find the design offensive, and because such comments are

reasonable.” The Board added “that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.”

SCV and two of its officers brought this lawsuit against the chairman and members of the Board. SCV argued that the Board’s decision violated the Free Speech Clause of the First Amendment, and it sought an injunction requiring the Board to approve the proposed plate design. The District Court entered judgment for the Board. A divided panel of the Court of Appeals for the Fifth Circuit reversed. We granted the Board’s petition for certiorari, and reverse.

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v. Summum*, 555 U. S. 460 (2009). That freedom reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. See *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217 (2000). Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. See *Johanns v. Livestock Marketing Assn.*, 544 U. S. 550 (2005). Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate. See *Stromberg v. California*, 283 U. S. 359, 369 (1931).

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? “It is not easy to imagine how government could function if it lacked the freedom” to select the messages it wishes to convey.

We have refused “to hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.” *Rust v. Sullivan*, 500 U. S. 173 (1991). A contrary holding “would render numerous Government programs constitutionally suspect.” Cf. *Keller v. State Bar of Cal.*, 496 U. S. 1, 12–13 (1990) (“If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed”). We have made clear that “the government can speak for itself.” *Southworth, supra*, at 229.

That is not to say that a government’s ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. The Free Speech Clause itself may constrain the government’s speech if, for example, the government seeks to compel private persons to convey the government’s speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a

policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.

In our view, specialty license plates issued pursuant to Texas's statutory scheme convey government speech. Our reasoning rests primarily on *Summum*. Our precedents regarding government speech provide the appropriate framework through which to approach the case. In *Summum*, we considered a religious organization's request to erect in a 2.5-acre city park a monument setting forth the organization's religious tenets. In the park were 15 other permanent displays. At least 11 of these—including a wishing well, a September 11 monument, a historic granary, the city's first fire station, and a Ten Commandments monument—had been donated to the city by private entities. The religious organization argued that the Free Speech Clause required the city to display the organization's proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments. We held that the city had not “provided a forum for private speech” with respect to monuments. Rather, the city, even when “accepting a privately donated monument and placing it on city property,” had “engaged in expressive conduct.” The speech at issue was “best viewed as a form of government speech” and “therefore was not subject to scrutiny under the Free Speech Clause.”

We based our conclusion on several factors. First, “governments have long used monuments to speak to the public.” Thus, “when a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.” Second, it “is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.” “Persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.” “Observers” of such monuments, as a consequence, ordinarily “appreciate the identity of the speaker.” Third, we found relevant that the city maintained control over the selection of monuments. “Throughout our Nation’s history, the general government practice with respect to donated monuments has been one of selective receptivity.” The city government in *Summum* “‘effectively controlled’ the messages sent by the monuments in the park by exercising ‘final approval authority’ over their selection.” In light of these and other relevant considerations, the Court concluded that the expression at issue was government speech. The Court rejected the premise that the involvement of private parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own public park.

Summum leads us to the conclusion that here, too, government speech is at issue. First, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. New Hampshire plates have featured the profile of the “Old Man of the Mountain,” Massachusetts plates have included a representation of the Commonwealth’s famous codfish, and Wyoming plates have displayed a rider atop a bucking bronco. In 1928, Idaho became the first State to include a slogan on its plates. The 1928 Idaho plate proclaimed “Idaho Potatoes” and featured an illustration of a brown potato, onto which the license plate number was superimposed in green. The brown potato did

not catch on, but slogans on license plates did. Over the years, state plates have included the phrases “North to the Future” (Alaska), “Keep Florida Green” (Florida), “Hoosier Hospitality” (Indiana), “The Iodine Products State” (South Carolina), “Green Mountains” (Vermont), and “America’s Dairyland” (Wisconsin). States have used license plate slogans to urge action, to promote tourism, and to tout local industries. Texas, too, has selected various messages to communicate through its license plate designs. In 1995, Texas plates celebrated “150 Years of Statehood.” Additionally, the Texas Legislature has specifically authorized specialty plate designs stating, among other things, “Read to Succeed,” “Houston Livestock Show and Rodeo,” “Texans Conquer Cancer,” and “Girl Scouts.”

Second, Texas license plate designs “are often closely identified in the public mind with the State.” Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The State places the name “TEXAS” in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. Texas dictates the manner in which drivers may dispose of unused plates. Texas license plates are, essentially, government IDs. Issuers of ID “typically do not permit” the placement on their IDs of “messages with which they do not wish to be associated.” Consequently, “persons who observe” designs on IDs “routinely—and reasonably—interpret them as conveying some message on the issuer’s behalf.” A person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas’s license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State “has sole control over the design, typeface, color, and alphanumeric pattern for all license plates.” The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. And the Board and its predecessor have actively exercised this authority. The State has rejected at least a dozen proposed designs. Like the city government in *Summum*, Texas “has ‘effectively controlled’ the messages conveyed by exercising ‘final approval authority’ over their selection.” This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida’s oranges as far better. And Texas offers plates that say “Fight Terrorism.” But it need not issue plates promoting al Qaeda.

These considerations, taken together, convince us that specialty plates are similar enough to the monuments in *Summum* to call for the same result. That is not to say that every element of *Summum* is relevant here. For instance, *Summum* emphasized that monuments were “permanent” and that “public parks can accommodate only a limited number of permanent monuments.” The

speech at issue was government speech rather than private speech in part because we found it “hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.” A State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial. But those characteristics of *Summum* were particularly important because the government speech at issue occurred in public parks, which are traditional public forums for “the delivery of speeches and the holding of marches and demonstrations” by private citizens. By contrast, license plates are not traditional public forums for private speech.

Other features of the designs on Texas’s specialty license plates indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas, through its Board, selects each design featured on the State’s specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying “TEXAS” as the issuer of the IDs. “The designs that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”

SCV believes that Texas’s specialty license plate designs are not government speech, at least with respect to the designs (comprising slogans and graphics) that were initially proposed by private parties. According to SCV, the State does not engage in expressive activity through such slogans and graphics, but rather provides a forum for private speech by making license plates available to display the private parties’ designs. We cannot agree. We have previously used “forum analysis” to evaluate government restrictions on purely private speech that occurs on government property. But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply. Texas’s specialty license plates are not a “traditional public forum,” such as a street or a park, “which has immemorially been held in trust for the use of the public and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U. S. 37, 45–46 (1983). “The Court has rejected the view that traditional public forum status extends beyond its historic confines.” *Arkansas Ed. Television Comm’n v. Forbes*, 523 U. S. 666, 678 (1998). And state-issued specialty license plates lie far beyond those confines. It is clear that Texas’s specialty plates are neither a “designated public forum,” which exists where “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose,” *Summum, supra*, at 469, nor a “limited public forum,” which exists where a government has “reserved a forum for certain groups or for the discussion of certain topics,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). A government “does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius*, 473 U. S., at 802. In order “to ascertain whether a government intended to designate a place not traditionally open to assembly and debate as a public forum,” this Court “has looked to the policy and practice of the government” and to “the nature of the property and its compatibility

with expressive activity.”

Texas’s policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State’s name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas’s specialty license plates are not a “nonpublic forum,” which exists “where the government is acting as a proprietor, managing its internal operations.” *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U. S. 672, 678 (1992). Texas is not simply managing government property, but instead is engaging in expressive conduct. We reach this conclusion based on the historical context, observers’ reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas’s specialty license plate designs “are meant to convey and have the effect of conveying a government message.” *Summum*, 555 U. S., at 472. They “constitute government speech.” The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government’s role into that of a mere forum-provider. In *Summum*, private entities “financed and donated monuments that the government accepted and displayed to the public.” Here private parties propose designs that Texas may accept and display on its license plates. In this case, the “government entity may exercise its freedom to express its views” even “when it receives assistance from private sources for the purpose of delivering a government-controlled message.” And in this case, as in *Summum*, forum analysis is inapposite.

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But *Summum* was not dependent on the precise number of monuments found within the park. The permanent displays in New York City’s Central Park also constitute government speech. There were 52 such displays. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas’s desire to communicate numerous messages does not mean that the messages conveyed are not Texas’s own. The fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, the existence of government profit alone is insufficient to trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result would have been any different. Here, we think it clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plates are a nonpublic forum.

This case does not resemble other cases in which we have identified a nonpublic forum. This case is not like *Perry Ed. Assn.*, where we found a school district's internal mail system to be a nonpublic forum for private speech. There, a number of private organizations, including a teachers' union, had access to the mail system. It was therefore clear that private parties, and not only the government, used the system to communicate. Here, each specialty license plate design is formally approved by and stamped with the imprimatur of Texas. Nor is this case like *Lehman*, where we found the advertising space on city buses to be a nonpublic forum. There, the messages were located in a context (advertising space) that is traditionally available for private speech. The advertising space bore no indicia that the speech was owned or conveyed by the government. Nor is this case like *Cornelius*, where we determined that a charitable fundraising program directed at federal employees constituted a nonpublic forum. That forum lacked the kind of history present here. The fundraising drive had never been a medium for government speech. It was established "to bring order to a solicitation process" which had previously consisted of ad hoc solicitation by individual charitable organizations. The drive "was designed to minimize disruption to the federal workplace," not to communicate messages from the government. Further, the charitable solicitations did not appear on a government ID under the government's name. In contrast to the instant case, there was no reason for employees to "interpret the solicitation as conveying some message on the government's behalf."

Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. Drivers who display a State's selected license plate designs convey the messages communicated through those designs. And we have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. See *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943). But here, compelled private speech is not at issue. Just as Texas cannot require SCV to convey "the State's ideological message," SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

We hold that Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design. Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit is

Reversed.

Justice Alito, with whom The Chief Justice, Justice Scalia, and Justice Kennedy join, dissenting.

The Court's decision passes off private speech as government speech and establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment, the distinction between government speech and private speech is critical. When government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U. S. 460 (2009). By contrast, "in the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995).

The Court holds that all the privately created messages on specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct? Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver. Would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas’s out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns’ opponents? When a car zipped by with a plate that reads “NASCAR – 24 Jeff Gordon,” would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government? The Court says that it is essential that government be able to express its own viewpoint, because otherwise, how would it promote its programs, like recycling and vaccinations? So when Texas issues a “Rather Be Golfing” plate, but not a “Rather Be Playing Tennis” or “Rather Be Bowling” plate, it is furthering a state policy to promote golf but not tennis or bowling. When Texas allows motorists to obtain a Notre Dame license plate but not a University of Southern California plate, it is taking sides in that long-time rivalry.

Specialty plates may seem innocuous. They make motorists happy, and they put money in a State’s coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (*e.g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. What Texas did here was to reject one of the messages that members of a private group wanted to post on some of these billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination. Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. Suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional? What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not.

Once the idea of specialty plates took hold, the number of varieties quickly multiplied,

and today, Texas motorists can choose from more than 350 messages, including many designs proposed by nonprofit groups or by individuals and for-profit businesses through the State's third-party vendor. Drivers can select plates advertising organizations and causes like 4-H, the Boy Scouts, the American Legion, Be a Blood Donor, the Girl Scouts, Insure Texas Kids, Mothers Against Drunk Driving, Marine Mammal Recovery, Save Texas Ocelots, Share the Road, Texas Reads, Texas Realtors ("I am a Texas Realtor"), the Texas State Rifle Association ("WWW.TSRA.COM"), the Texas Trophy Hunters Association, the World Wildlife Fund, the YMCA, and Young Lawyers. There are plates for fraternities and sororities and for in-state schools, both public (Texas A & M and Texas Tech) and private (Trinity University and Baylor). An even larger number of schools from out-of-state are honored: Arizona State, Brigham Young, Florida State, Michigan State, Alabama, and South Carolina. There are political slogans, like "Come and Take It" and "Don't Tread on Me," and plates promoting the citrus industry and the "Cotton Boll." There are plates advertising Remax ("Get It Sold with Remax"), Dr. Pepper ("Always One of a Kind"), and Mighty Fine Burgers.

The SCV is composed of descendants of Confederate soldiers. Their proposed design featured a controversial symbol, the Confederate battle flag, surrounded by the words "Sons of Confederate Veterans 1896" and a gold border. The Texas Department of Motor Vehicles Board invited public comments and considered the plate design in April 2011. At that meeting, board member deadlocked on whether to approve the plate. The Board reconsidered the plate in November 2011. This time, many opponents of the plate turned out to voice objections. The Board voted unanimously against approval and issued an order stating: "The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." The Board also saw "a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a possible public safety issue." It thought that the public interest required rejection of the plate design because the controversy surrounding the plate was so great that "the design could distract or disturb some drivers to the point of being unreasonably dangerous." At the same meeting, the Board approved a Buffalo Soldiers plate design by a 5-to-3 vote. Proceeds from fees paid by motorists who select that plate benefit the Buffalo Soldier National Museum in Houston, which is "dedicated to preserving the legacy and honor of the African American soldier." "Buffalo Soldiers" is a nickname that was originally given to black soldiers in the Army's 10th Cavalry Regiment, which was formed after the Civil War. The original Buffalo Soldiers fought with distinction in the Indian Wars, but the "Buffalo Soldiers" plate was opposed by some Native Americans. One leader commented that he felt "the same way about the Buffalo Soldiers" as African-Americans felt about the Confederate flag. "When we see the U. S. Cavalry uniform," he explained, "we are forced to relive an American holocaust."

Relying almost entirely on *Summum*, the Court holds that messages that private groups succeed in placing on Texas license plates are government messages. As we said in *Summum*, governments have used monuments since time immemorial to express important government messages, and there is no history of governments giving equal space to those wishing to express

dissenting views. Governments have always used public monuments to express a government message, and members of the public understand this. The history of messages on license plates is quite different. After the beginning of motor vehicle registration in 1917, more than 70 years passed before the proliferation of specialty plates in Texas. It was not until the 1990's that motorists were allowed to choose from among 10 messages, such as "Read to Succeed" and "Keep Texas Beautiful." Up to this point, the words on the Texas plates can be considered government speech. The messages were created by the State, and they promoted state programs. When, at some point within the last 20 years, the State began to allow private entities to secure plates conveying their own messages, Texas crossed the line. The contrast between the history of public monuments, which have been used to convey government messages for centuries, and the Texas license plate program could not be starker. The Texas specialty plate program does not exhibit the "selective receptivity" present in *Summum*. To the contrary, Texas's program is *not* selective by design. The Board's chairman, who is charged with approving designs, explained that the program's purpose is "to encourage private plates" in order to "generate additional revenue for the state." Most of the time, the Board "bases its decisions on rules that primarily deal with reflectivity and readability."

Pressed to come up with any evidence that the State has exercised "selective receptivity," Texas (and the Court) rely primarily on sketchy information not contained in the record, specifically that the Board's predecessor (might have) rejected a "pro-life" plate and perhaps others on the ground that they contained messages that were offensive. But even if this happened, it shows only that the present case may not be the only one in which the State has exercised viewpoint discrimination. Texas's only other evidence of selectivity concerns a proposed plate that was thought to create a threat to the fair enforcement of the State's motor vehicle laws. This proposed plate was a Texas DPS Troopers Foundation plate. The Board considered that proposed plate at an August 2012 meeting, at which it approved six other plate designs without discussion, but rejected the Troopers plate due to apparent concern that the plate could give the impression that those displaying it would receive favored treatment from state troopers. The constitutionality of this Board action does not necessarily turn on whether approval of this plate would have made the message government speech. If the Texas specialty plate program created a limited public forum, private speech may be excluded if it is inconsistent with the purpose of the forum. *Rosenberger*, 515 U. S., at 829. Thus, even if Texas's extrarecord information is taken into account, the picture here is different from that in *Summum*. Texas does not take care to approve only those proposed plates that convey messages that the State supports. Instead, it proclaims that it is open to all private messages—except those, like the SCV plate, that would offend some.

The Court believes that messages on privately created plates are government speech because motorists want a seal of state approval for their messages and therefore prefer plates over bumper stickers. This is dangerous. There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech. Many private speakers would welcome a sign of government approval. But in the realm of private speech, government regulation may not favor one viewpoint

over another.

A final factor that was important in *Summum* was space. A park can accommodate only so many permanent monuments. The only absolute limit on the number of specialty plates that a State could issue is the number of registered vehicles.

In sum, the Texas specialty plate program has none of the factors that were critical in *Summum*, and the Texas program exhibits a very important characteristic that was missing in that case: Individuals who want to display a Texas specialty plate, instead of the standard plate, must pay an increased annual registration fee. How many groups or individuals would clamor to pay \$8,000 (the cost of the deposit required to create a new plate) in order to broadcast the government's message as opposed to their own? If Texas really wants to speak out in support of, say, Iowa State University (but not the University of Iowa) or "Young Lawyers" (but not old ones), why must it be paid to say things that it really wants to say? States have not adopted specialty license plate programs like Texas's because they are now bursting with things they want to say on their license plates. Those programs were adopted because they bring in money. The program brings in many millions of dollars every year. Texas has space available on millions of little mobile billboards. Texas, in effect, sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech.

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (*i.e.*, motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. See *Rosenberger*, 515 U. S., at 829. But that is exactly what Texas did here. The Board rejected Texas SCV's design, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." These statements indisputably demonstrate that the Board denied Texas SCV's design because of its viewpoint. The Confederate battle flag is controversial. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. To others, it symbolizes slavery, segregation, and hatred. Whatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.

If the Board's candid explanation of its reason for rejecting the SCV plate were not alone sufficient to establish this point, the Board's approval of the Buffalo Soldiers plate at the same meeting dispels any doubt. The proponents of both the SCV and Buffalo Soldiers plates saw them as honoring soldiers who served with bravery and honor in the past. To the opponents of both plates, the images on the plates evoked painful memories. The Board rejected one plate and approved the other.

Like these two plates, many other specialty plates have the potential to irritate and

perhaps even infuriate those who see them. Texas allows a plate with the words “Choose Life,” but the State of New York rejected such a plate because the message “is so incredibly divisive.” Texas allows a specialty plate honoring the Boy Scouts, but the group’s refusal to accept gay leaders angers some. Virginia issues plates for controversial organizations like the National Rifle Association, controversial commercial enterprises (raising tobacco and mining coal), controversial sports (fox hunting), and a professional sports team with a controversial name (the Washington Redskins). Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination.

The Board’s decision cannot be saved by its suggestion that the plate “could distract or disturb some drivers to the point of being unreasonably dangerous.” This rationale cannot withstand strict scrutiny. Other States allow specialty plates with the Confederate Battle Flag, and Texas has not pointed to evidence that these plates have led to incidents of road rage or accidents. Texas does not ban bumper stickers bearing the image of the Confederate battle flag. Nor does it ban any of the many other bumper stickers that convey political messages and other messages that are capable of exciting the ire of those who loathe the ideas they express.

Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here.

NOTES

1. *Confederate Battle Flag Plates in Other States.* At the time of the *Walker* decision, nine states offered specialty license plates honoring the Sons of Confederate Veterans (SCV) that included an image of the Confederate Battle Flag. They included Alabama, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. The ruling in *Walker* was issued on the morning of June 18, 2015. On the night of June 17, nine African-American parishioners at a Bible Study group were shot and killed at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. The suspect, Dylann Roof, was arrested on June 18 and charged with nine counts of murder. On June 20, a photograph of Roof posing with a Confederate Battle Flag and handgun was discovered on a website registered to Roof, and the photograph was widely publicized by the media. See Frances Robles, *Dylan Roof Photos and a Manifesto Are Posted on Website*, THE NEW YORK TIMES, June 20, 2015, <http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html>. In the ensuing days, the South Carolina Governor called for the Confederate Battle Flag to be removed from the state capitol grounds. After an emotional debate, South Carolina’s legislature voted to do just that. Alabama’s Governor ordered Confederate Battle Flags to be taken down from the state capitol, and in Mississippi, the Republican Speaker of the House and the two Republican Senators called for the removal of the flag symbol from Mississippi State Flag. Calls for the removal of the flag and other symbols of the Confederacy were made across the country. See Jeremy Diamond & Eugene Scott, *Confederate flag debate sweeps South*, CNN, June 25, 2015, <http://www.cnn.com/2015/06/23/politics/confederate-flags-southern-states-debate-legislators/>.

In a matter of days, officials in five states announced their opposition to retaining the Confederate Battle Flag on SCV plates and some took action toward achieving that result. Virginia's Governor announced that such plates would be replaced "as quickly as possible" and Virginia's Attorney General filed a motion to seek reversal of a Fourth Circuit decision that ordered issuance of the SCV plate. Changes in the design of the SCV plate were ordered in Georgia. The Governors of North Carolina and Tennessee called for the flag to be removed from the license plates in their states, and legislation was introduced in Tennessee to remove the flag from the plates. The Maryland Governor announced that he would take action to pull the SCV plates. See, e.g., Jeremy Diamond & Eugene Scott, *Confederate flag debate sweeps South*, CNN, June 25, 2015, <http://www.cnn.com/2015/06/23/politics/confederate-flags-southern-states-debate-legislators>.

2. *Choose Life Plates*. In terms of litigation, the two most controversial specialty plates have been the SCV plate and the "Choose Life" plate that is available in a majority of states. Before *Walker*, the federal circuit courts were divided on the constitutionality of a state's decision to approve a Choose Life plate, while failing to make a plate available with a pro-choice message. See, e.g., *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (finding First Amendment violation); *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (finding no First Amendment violation). Over two dozen states issue a Choose Life plate and a handful of states issue pro-choice plates.

PROBLEMS

1. *Highway Billboards*. In describing the *Walker* ruling as a dangerous precedent, the dissent offered two hypotheticals while noting that "the future uses of today's precedent remain to be seen." First, "suppose that a State erected electronic billboards along its highways. It posted some government messages on these billboards, and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. But the State allowed only those messages that it liked or found not too controversial." Second, "what if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty?" The dissent opined that there was no doubt "that these examples of viewpoint discrimination would violate the First Amendment." Is that true after *Walker*?

2. *Alphanumeric Plates*. Consider the third license plate option in Texas, under the law that provides for personalized plates for owners who request "a particular alphanumeric pattern for use as a plate number." The *Walker* dissent expressly noted that "this opinion does not address" whether the choice of these "patterns" by motorists would constitute "private speech." Assume that the Texas DMV Board rejected the request of one car owner who asked for the alphanumeric pattern of "HELL 666." How would the *Walker* majority analyze this case? How would the *Walker* dissent decide whether to treat this pattern as government speech or private speech?

3. Move problem # 1 from p. 583 here as problem # 3.

4. Move problem # 4 from p. 332 here as problem # 4.

P. 584: at the end, insert the following new case:

**AGENCY FOR INTERNATIONAL DEVELOPMENT v. ALLIANCE
FOR OPEN SOCIETY INTERNATIONAL, INC.**
133 S. CT. 2321 (2013)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U.S.C. §7601 *et seq.*, outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. Congress passed the Leadership Act after finding that HIV/AIDS had “assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation.” According to congressional findings, more than 65 million people had been infected by HIV and more than 25 million had lost their lives, making HIV/AIDS the fourth highest cause of death worldwide. In sub-Saharan Africa alone, AIDS had claimed the lives of more than 19 million individuals and was projected to kill a full quarter of the population of that area over the next decade. The disease not only directly endangered those infected, but also increased the potential for social and political instability and economic devastation, posing a security issue for the entire international community. In the Leadership Act, Congress directed the President to establish a “comprehensive, integrated” strategy to combat HIV/AIDS around the world. The Act sets out 29 different objectives the President’s strategy should seek to fulfill, reflecting a multitude of approaches to the problem. The strategy must include, among other things, plans to increase the availability of treatment for infected individuals, prevent new infections, support the care of those affected by the disease, promote training for physicians and other health care workers, and accelerate research on HIV/AIDS prevention methods, all while providing a framework for cooperation with international organizations and partner countries to further the goals of the program.

The Act “makes the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts.” The Act’s approach to reducing behavioral risks is multifaceted. The President’s strategy for addressing such risks must, for example, promote abstinence, encourage monogamy, increase the availability of condoms, promote voluntary counseling and treatment for drug users, and, as relevant here, “educate men and boys about the risks of procuring sex commercially” as well as “promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers.” Congress found that the “sex industry, the trafficking of individuals into such industry, and sexual violence” were factors in the spread of the HIV/AIDS epidemic,

and determined that “it should be the policy of the United States to eradicate” prostitution and “other sexual victimization.”

The United States has enlisted the assistance of nongovernmental organizations to help achieve the many goals of the program. Such organizations “with experience in health care and HIV/AIDS counseling,” Congress found, “have proven effective in combating the HIV/AIDS pandemic and can be a resource in [providing] treatment and care for individuals infected with HIV/AIDS.” Since 2003, Congress has authorized the appropriation of billions of dollars for funding these organizations’ fight against HIV/AIDS around the world.

Those funds, however, come with two conditions: First, no funds made available to carry out the Leadership Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” §7631(e). Second, no funds made available may “provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.” §7631(f). It is this second condition — the Policy Requirement — that is at issue here.

The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing implementation of the Leadership Act. To enforce the Policy Requirement, the agencies have directed that the recipient of any funding under the Act agree in the award document that it is opposed to “prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.” 45 CFR §89.1(b) (2012).

Respondents are a group of domestic organizations engaged in combating HIV/AIDS overseas. In addition to substantial private funding, they receive billions annually in financial assistance from the United States, including under the Leadership Act. Their work includes programs aimed at limiting injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India. Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes. Respondents Alliance for Open Society International and Pathfinder International commenced this litigation, seeking a declaratory judgment that the Government’s implementation of the Policy Requirement violated their First Amendment rights. Respondents sought a preliminary injunction barring the Government from cutting off their funding under the Act for the duration of the litigation, from unilaterally terminating their cooperative agreements with the United States, or from otherwise taking action solely on the basis of respondents’ own privately funded speech. The District Court granted such a preliminary injunction.

While the appeal was pending, HHS and USAID issued guidelines on how recipients of Leadership Act funds could retain funding while working with affiliated organizations not bound

by the Policy Requirement. The guidelines permit funding recipients to work with affiliated organizations that “engage in activities inconsistent with the recipient’s opposition to the practices of prostitution and sex trafficking” as long as the recipients retain “objective integrity and independence from any affiliated organization.” 45 CFR §89.3. Whether sufficient separation exists is determined by the totality of the circumstances, including “but not limited to” (1) whether the organizations are legally separate; (2) whether they have separate personnel; (3) whether they keep separate accounting records; (4) the degree of separation in the organizations’ facilities; and (5) the extent to which signs and other forms of identification distinguish the organizations. 45 CFR §§89.3(b)(1)-(5).

The District Court continued its preliminary injunction. The Court of Appeals affirmed. We granted certiorari.

It is a basic First Amendment principle that “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

The Spending Clause of the Federal Constitution grants Congress the power “to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Art. I, §8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the “general Welfare,” including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. *Rust v. Sullivan*, 500 U.S. 173 (1991). As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights. See, e.g., *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003) (plurality opinion); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 546 (1983). At the same time, however, we have held that the Government “‘may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.’” *Forum for Academic and Institutional Rights*, *supra*, at 59 (quoting *American Library Assn.*, *supra*, at 210). In some cases, a funding condition can result in an unconstitutional burden on First Amendment rights. See *Forum for Academic and Institutional Rights*, *supra*, at 59. The dissent thinks that can only be true when the condition is not relevant to the objectives of the program, or when the condition is actually coercive, in the sense of an offer that cannot be refused. Our precedents are not so limited. The relevant distinction is between conditions that define the limits of the government spending program — those that specify the activities Congress wants to subsidize — and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition

of a particular program can always be manipulated to subsume the challenged condition. We have held that “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547 (2001).

Two cases help illustrate the distinction: In *Regan*, the Court upheld a requirement that nonprofit organizations seeking tax-exempt status under 26 U.S.C. §501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status “had much the same effect as a cash grant to the organization.” By limiting §501(c)(3) status to organizations that did not attempt to influence legislation, Congress had merely “chosen not to subsidize lobbying.” In rejecting the nonprofit’s First Amendment claim, the Court highlighted the fact that the condition did not prohibit that organization from lobbying Congress altogether. The nonprofit could continue to claim §501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its §501(c)(4) capacity with separate funds. Maintaining such a structure, the Court noted, was not “unduly burdensome.” The condition thus did not deny the organization a government benefit “on account of its intention to lobby.”

In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was “barred absolutely from all editorializing.” Unlike *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds “to make known its views on matters of public importance.” The prohibition thus went beyond ensuring that federal funds not be used to subsidize “public broadcasting station editorials,” and instead leveraged the federal funding to regulate the stations’ speech outside the scope of the program. In *Rust*, we considered Title X of the Public Health Service Act, a Spending Clause program that issued grants to nonprofit health-care organizations “to assist in the establishment and operation of voluntary family planning projects to offer a broad range of acceptable and effective family planning methods and services.” The organizations received funds from a variety of sources other than the Federal Government for a variety of purposes. The Act, however, prohibited the Title X federal funds from being “used in programs where abortion is a method of family planning.” To enforce this provision, HHS regulations barred Title X projects from advocating abortion as a method of family planning, and required grantees to ensure that their Title X projects were “physically and financially separate” from their other projects that engaged in the prohibited activities. A group of Title X funding recipients brought suit, claiming the regulations imposed an unconstitutional condition on their First Amendment rights. We rejected their claim. Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply “designed to ensure that the limits of the federal program are observed,” and “that public funds are spent for the purposes for which they were authorized.” “Title X expressly distinguishes between a Title X grantee and a Title X

project.” The regulations governed only the scope of the grantee’s Title X projects, leaving it “unfettered in its other activities.” “The Title X *grantee* can continue to engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.” Because the regulations did not “prohibit the recipient from engaging in the protected conduct outside the scope of the federally funded program,” they did not run afoul of the First Amendment.

The distinction drawn in these cases — between conditions that define the federal program and those that reach outside it — is not always self-evident. Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line. It is important to recall that the Leadership Act has two conditions relevant here. The first — unchallenged in this litigation — prohibits Leadership Act funds from being used “to promote or advocate the legalization or practice of prostitution or sex trafficking.” The Government concedes that §7631(e) by itself ensures that federal funds will not be used for the prohibited purposes. The Policy Requirement therefore must be doing something more. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations “who believe in its ideas to carry them to fruition.” Whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients’ speech and activities, a ground for terminating a grant after selection is complete. As the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Rather, it explains, “Congress has expressed its purpose ‘to eradicate’ prostitution and sex trafficking, and it wants recipients *to adopt* a similar stance.” This case is not about the Government’s ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding.

By demanding that funding recipients adopt the Government’s view on an issue of public concern, the condition by its very nature affects “protected conduct outside the scope of the federally funded program.” *Rust*, 500 U.S., at 197. A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.

The Government contends that the affiliate guidelines, established while this litigation was pending, save the program. Under those guidelines, funding recipients are permitted to work with affiliated organizations that do not abide by the condition, as long as the recipients retain “objective integrity and independence” from the unfettered affiliates. The Government suggests the guidelines alleviate any unconstitutional burden on the respondents’ First Amendment rights by allowing them to either: (1) accept Leadership Act funding and comply with Policy Requirement, but establish affiliates to communicate contrary views on prostitution; or (2) decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby “cabining the effects” of the Policy Requirement within the scope of the federal program.

Neither approach is sufficient. When we have noted the importance of affiliates in this context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program. Affiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy. The guidelines themselves make that clear. See 45 CFR §89.3 (allowing funding recipients to work with affiliates whose conduct is “inconsistent with *the recipient’s opposition* to the practices of prostitution and sex trafficking” (emphasis added)).

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient’s private funds “to be used to promote prostitution or sex trafficking.” That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government’s argument were correct, *League of Women Voters* would have come out differently, and much of the reasoning of *Regan* and *Rust* would have been beside the point. The Government contends that “if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public *or private* funds, it would undermine the government’s program and confuse its message opposing prostitution and sex trafficking.” But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government’s policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S., at 642.

The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained. The judgment of the Court of Appeals is affirmed.

It is so ordered.

KAGAN, J., took no part in the consideration or decision of this case.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government’s chosen strategy to eradicate HIV/AIDS. That is perfectly permissible under the Constitution. The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own:

competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common sense. One of the purposes of America's foreign-aid programs is the fostering of good will towards this country. If the organization Hamas — reputed to have an efficient system for delivering welfare — were excluded from a program for the distribution of U.S. food assistance, no one could reasonably object. And that would remain true if Hamas were an organization of United States citizens entitled to the protection of the Constitution. So long as the unfunded organization remains free to engage in its activities (including anti-American propaganda) "without federal assistance," *United States v. American Library Assn., Inc.*, 539 U.S. 194, 212 (2003) (plurality), refusing to make use of its assistance for an enterprise to which it is opposed does not abridge its speech. The same is true when the rejected organization is not affirmatively opposed to, but merely unsupportive of, the object of the federal program, which appears to be the case here. (Respondents do not promote prostitution, but neither do they wish to oppose it.) The constitutional prohibition at issue here is not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment's prohibition against the coercing of speech. I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one runs afoul of that prohibition even when the condition is irrelevant to the goals of the program. Not every disadvantage is a coercion.

The views that the Government demands an applicant forswear [are] relevant to the program in question. The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors. It would not, for example, permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure prostitution. But here a central part of the Government's HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.

The most obvious manner in which the admission to a program of an ideological opponent can frustrate the purpose of the program is by freeing up the opponent's funds for use in its ideological opposition. Perhaps that problem does not exist in this case since the respondents do not affirmatively promote prostitution. But the Court's analysis categorically rejects that justification for ideological requirements in *all* cases, demanding "record indication" that "federal funding will simply supplant private funding, rather than pay for new programs." The economic reality is that when NGOs can conduct their AIDS work on the Government's dime, they can expend greater resources on policies that undercut the Leadership Act. The Government need not establish by record evidence that this will happen. To make it a valid consideration in determining participation in federal programs, it suffices that this is a real and obvious risk.

None of the cases the Court cites for its holding provide support. I have already discussed *Rust*. As for *Regan*, that case *upheld* rather than invalidated a prohibition against lobbying as a condition of receiving 26 U.S.C. §501(c)(3) tax-exempt status. As for *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), the ban on editorializing at issue there was disallowed precisely because it did not further a relevant, permissible policy of the Federal Communications Act — and indeed was simply incompatible with the Act’s “affirmative encouragement” of the “vigorous expression of controversial opinions” by licensed broadcasters.

The Court makes a head-fake at the unconstitutional conditions doctrine, but that doctrine is of no help. There is no case of ours in which a condition that is relevant to a statute’s valid purpose and that is not in itself unconstitutional (*e.g.*, a religious-affiliation condition that violates the Establishment Clause) has been held to violate the doctrine. Moreover, the contention that the condition here “coerces” respondents’ speech is on its face implausible. Those organizations that wish to take a different tack with respect to prostitution “are as unconstrained now as they were before the enactment of the Leadership Act.” *National Endowment for Arts v. Finley*, 524 U.S. 569, 595 (1998) (Scalia, J., concurring in judgment). As the Court acknowledges, “[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds,” and to draw on its own coffers. The majority cannot credibly say that this speech condition is coercive, so it does not. It pussyfoots around the lack of coercion by invalidating the Leadership Act for “*requiring* recipients to profess a specific belief” and “*demanding* that funding recipients adopt — as their own — the Government’s view on an issue of public concern.” It is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject. Section 7631(f) “defines the recipient” only to the extent he decides that it is in his interest to be so defined.

Ideological-commitment requirements such as the one here are quite rare; but making the choice between competing applicants on relevant ideological grounds is undoubtedly quite common. See, *e.g.*, *Finley, supra*. As far as the Constitution is concerned, it is quite impossible to distinguish between the two. If the government cannot demand a relevant ideological commitment as a condition of application, neither can it distinguish between applicants on a relevant ideological ground. And that is the real evil of today’s opinion. One can expect, in the future, frequent challenges to the denial of government funding for relevant ideological reasons. What Congress has done here — requiring an ideological commitment relevant to the Government task at hand — is approved by the Constitution itself. Americans need not support the Constitution; they may be Communists or anarchists. But “the Senators and Representatives[, and] the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support the Constitution.” U.S. Const., Art. VI, cl. 3. The Framers saw the wisdom of imposing affirmative ideological commitments prerequisite to assisting in the government’s work. And so should we.

CHAPTER 9

P. 595: at the end of the problems, insert the following new problem:

3. *The Privilege Against Self-Incrimination.* In *Convertino v. U.S. Department of Justice*, 795 F.3d 587 (6th Cir. 2015), the Department of Justice sought discovery regarding the sources that a reporter relied on in a newspaper article. Discovery was sought because information regarding a police investigation of defendant had been allegedly illegally leaked to the reporter. The reporter refused to cooperate, relying on his Fifth Amendment Privilege Against Self-Incrimination. The reporter claims that various federal statutes criminalize the illegal receipt of classified information. Even though the reporter cannot rely on the reporter's privilege, can he assert the privilege against self-incrimination as a basis for not revealing the requested information? Are there other ways that DOJ might go about obtaining information regarding the reporter's sources?

Chapter 10

NEW TECHNOLOGIES AND THE FIRST AMENDMENT

P. 632: change the caption of the note from “NOTE: LIMITING PRESS ACCESS” to: NOTES

P. 632: at the beginning of the note, add the following new note and insert 2. *Limits Press Access* at the beginning of the existing note:

1. *Regulating Lawyer Speech.* In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Court held that “the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press.” The Court emphasized that “lawyers have special access to information through discovery and client communications,” and therefore “their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative.” In *United States v. Brown*, 218 F.3d 415 (5th Cir.2000), the court upheld a gag order “directed at trial participants,”

P. 634: at the end of the problem, add the following new problems:

7. *Lawyer’s Use of Social Media to Influence Proceedings.* Suppose that a Louisiana attorney is involved in an adoption proceeding for two young girls that is taking place in Louisiana. When the proceeding was filed, the mother of the children is involved in a bitter custody dispute with the girls’ biological father that is taking place in the Mississippi courts. Unhappy with rulings made in the Mississippi case, the attorney posts an online petition on a site entitled change.org and she titles the petition “Justice for H & Z.” In that petition, she discusses the case, provides contact information for the courts, and urges those who read the petition to contact the judges. She goes on to state “Insist that Judge Amacker and Judge Gambrell do their jobs! If you want more info, go to [website] and read the writ application to the LA supreme court. Please sign the petition, circulate it to all of your friends and families and call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won’t follow the law and protect these children. Let them know you’re watching and expect them to do their job and most of all, make sure these precious little girls are safe! Call the Louisiana Supreme Court and tell them you want the law to protect these girls [phone number]. [A]sk **4 about the writ pending that was filed by attorney Nanine McCool on Friday, August 12, 2011.” The attorney also faxed a copy of the petition to the judge in the Louisiana case. The attorney also made a number of other online postings

challenging the handling of the custody proceedings. For example, she used her Twitter account to promote the online petition. Suppose that the attorney is charged with spreading false and misleading information about the judges, as well as attempting to make ex parte contact with the courts, and trying to prejudicially influence the courts. Does the First Amendment provide the attorney with a defense?" May the lawyer be disciplined for these comments consistently with the First Amendment? *See in re McCool*, 172 So.3d 1058 (La. 2015).

8. *More on Corruption Allegations.* Suppose that a lawyer makes statements regarding the qualifications and integrity of a judge. Does a lawyer have the right, under principles of free expression, to make allegations against a judge profession? Does it matter whether her statements were false and in reckless disregard for the truth? Should there be a "breathing space" for free expression in this context, or does the court's right to protect the integrity of the profession permit the imposition of punishment? *See in re Mire*, 2016 WL 686651, — So.3d — (La. 2016); *Lawyer Disciplinary Board v. Hall*, 234 W. Va. 298 (2014).

P. 606: before the case, add the following new problem:

Problem: *Access to Information and Freedom of Expression*

One of the reasons that free speech receives special protection in the United States is because of its connection to the democratic process. If citizens are going to exercise their free speech rights, they need access to information regarding the inner workings of government. In some instances, they can gain that access through state and federal open records laws. However, suppose that plaintiff is an activist in a township that does not have an open records law, and governmental officials have denied him access to information regarding the inner workings of the township. Is there/should there be a free speech right of access to governmental information? *See Eggenberger v. West Albany Township*, 2016 WL 1593790, — F.3d — (8th Cir. 2016).

B. POST-BROADCASTING TECHNOLOGY

P. 682: At the beginning of the notes, insert a new note # 1 that reads as follows, and then renumber the remaining notes:

1. *Net Neutrality.* In 2015, the Federal Communications Commission moved to impose so-called "net neutrality" on Internet Service Providers. Essentially, the rules would treat Internet service providers as public utilities that provide telecommunications services, and are therefore subject to "just and reasonable" regulation under Title II of the Communications Act. Under the proposed rules, broadband providers would be prohibited from elevating one kind of content over another, as well as from degrading or disfavoring content that they dislike.

See Rebecca R. Ruiz, *F.C.C. Sets Net Neutrality Rules*, *The New York Times* B-1 (Mar. 13, 2015).

Chapter 11

ATTEMPTS TO DEFINE RELIGION

B. DEFINING THE SUBJECT MATTER OF THE RELIGION CLAUSES

P. 705: At the end of note # 3, add the following:

See also Hutterville Hutterian Brethren, Inc. v. Sveem. 776 F.3d 547 (8th Cir. 2015) (court refused to decide which competing group rightly controls church property).

P. 711: At the end of the problems, add the following new problem # 3:

3. *Applying the Religion Clauses.* Of course, there are no end to possible quirky religions. For example, can the “Beer Church” be regarded as a “religion” for purposes of the religion clauses? See www.beerchurch.com What about the Church of Body Modification? See <http://uscobm.com> Or a church dedicated to the use of marijuana? If courts are unable to define the term “religion,” or unwilling to do so, is it realistic to expect them to vigorously enforce the mandates of the free exercise clause? As you read the cases in Chapter 13, particularly the *Smith* decision, consider whether (and to what extent) the Court’s inability to define religion makes it less willing to create exceptions in favor of religions.

Chapter 12

THE ESTABLISHMENT CLAUSE

B. SCHOOL PRAYER

P. 753: Following the notes and before the problems, add the following new case:

TOWN OF v. GALLOWAY

134 S.Ct. 1811 (2014).

Justice KENNEDY delivered the opinion of the Court, except as to Part II-B.

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), that no violation of the Constitution has been shown.

I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Aubreger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Aubreger would invite a local clergyman to deliver an invocation. After the prayer, Aubreger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures. The town followed an informal method for selecting prayer givers, all of whom were unpaid. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. A minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too. Greece neither reviewed the prayers in advance nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting

and bestow blessings on the community. Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine.

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers. They requested an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief. The District Court upheld the prayer practice as consistent with the First Amendment. The Court of Appeals for the Second Circuit reversed. This Court now reverses.

II

In *Marsh*, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," rather than a first, treacherous step towards establishment of a state church. *Marsh* is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time. When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Marsh, supra*, at 792.

Marsh must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches that the

Establishment Clause must be interpreted “by reference to historical practices and understandings.” *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. In the 1850's, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, no faith was excluded by law, nor any favored, and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers. *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.

A

Respondents maintain that a prayer is fitting for the public sphere only if it contains the “most general, nonsectarian reference to God,” and eschews mention of doctrines associated with any one faith. They argue that prayer which contemplates “the workings of the Holy Spirit, the events of Pentecost, and the belief that God ‘has raised up the Lord Jesus’ and ‘will raise us, in our turn, and put us by His side’ ” would be impermissible, as would any prayer that reflects dogma particular to a single faith tradition. An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could “coexist with the principles of disestablishment and religious freedom.” The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first chaplains gave prayers that included the Lord's Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, and a prayer seeking “the grace of our Lord Jesus Christ, &c.” The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds. See, e.g., 160 Cong. Rec. S1329 (Mar. 6, 2014) (Dalai Lama).

The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny* that was disputed when written and has been repudiated by later

cases. There the Court held that a crèche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had “the effect of endorsing a patently Christian message.” Four dissenting Justices disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the “forthrightly religious” Thanksgiving proclamations issued by nearly every President since Washington. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. To the contrary, the Court instructed that the “content of the prayer is not of concern to judges,” provided “there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior. *Engel v. Vitale*, 370 U.S. 421 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.

Respondents argue that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

The Court does not imply that no constraints remain on content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the

prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not “exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794–795.

It is possible to discern in the prayers offered to Congress a commonality of theme and tone. While these prayers vary in their degree of religiosity, they often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws. From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.

The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a “spirit of cooperation” among town leaders. Respondents point to invocations that disparaged those who did not accept the town’s prayer practice. One guest minister characterized objectors as a “minority” who are “ignorant of the history of our country,” while another lamented that other towns did not have “God-fearing” leaders. Although these two remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.

Finally, the Court disagrees with the view that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The

quest to promote “a ‘diversity’ of religious views” would require the town “to make wholly inappropriate judgments about the number of religions it should sponsor and the relative frequency with which it should sponsor each,” *Lee*, 505 U.S. at 617 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach.

B

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform. It is an elemental First Amendment principle that government may not coerce its citizens “to support or participate in any religion or its exercise.” *County of Allegheny*, 492 U.S. at 659 (KENNEDY, J., concurring in judgment in part and dissenting in part). The Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

The prayer opportunity must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of “God save the United States and this honorable Court” at the opening of this Court's sessions. See *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. See *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000). That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. *Marsh* described the prayer exercise as “an internal act” directed at the Nebraska Legislature's “own members,” rather than an effort to

promote religious observance among the public. Many members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions. Nothing indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

Respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. If the pattern and practice of ceremonial, legislative prayer is a means to coerce or intimidate others, the objection can be addressed in the regular course. The showing has not been made here, where the prayers neither chastised dissenters nor attempted lengthy disquisition on religious dogma. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood. But legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate.

This case can be distinguished from *Lee v. Weisman*, 505 U.S. 577. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. The circumstances confronted there are not present in this case. Nothing suggests that members of the public are dissuaded from leaving

the meeting room during the prayer, arriving late, or even making a later protest. In this case, as in *Marsh*, board members and constituents are “free to enter and leave with little comment and for any number of reasons.” *Lee, supra*, at 597. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. Should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who “presumably” are “not readily susceptible to religious indoctrination or peer pressure.” *Marsh*, 463 U.S. at 792.

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs. The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers. Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents. The judgment of the U.S. Court of Appeals for the Second Circuit is reversed.

It is so ordered.

Justice ALITO, with whom Justice SCALIA joins, concurring.

All the houses of worship listed in the local Community Guide were Christian churches. That is unsurprising given the small number of non-Christians in the area. Of the county residents who have a religious affiliation, about 3% are Jewish, and for other non-Christian faiths, the percentages are smaller. There are no synagogues within the borders of the town of Greece, but there are several not far away across the Rochester border. Because these synagogues fall outside the town's borders, they were not listed in the town's local directory,

and the responsible town employee did not include them on her list.¹² As a result of this procedure, for some time all the prayers at the beginning of town board meetings were offered by Christian clergy, and many of these prayers were distinctively Christian. Respondents do not claim that the list was attributable to religious bias or favoritism, and the town had “no religious animus.” When complaints were received, the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. The most recent list of persons available to provide an invocation includes representatives of many non-Christian faiths.

The prayer took place at the beginning of the meetings. The board then conducted what might be termed the “legislative” portion of its agenda, during which residents were permitted to address the board. After this portion of the meeting, a separate stage of the meetings was devoted to such matters as formal requests for variances. No prayer occurred before this second part of the proceedings, and I do not understand this case to involve the constitutionality of a prayer prior to an adjudicatory proceeding. While matters considered by the board during the initial part of the meeting might involve specific questions, such as the installation of a traffic light or stop sign at a particular intersection, that does not transform the nature of this part of the meeting.

According to the principal dissent, the town could have avoided any constitutional problem in either of two ways. First, “if the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint.” From the beginning, many Christian prayers were offered in the House and Senate, and when rabbis and other non-Christian clergy have served as guest chaplains, their prayers have often been couched in terms particular to their faith traditions. If a town attempts to go beyond simply *recommending* that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may “invite clergy of many faiths.” If, as the dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent’s quarrel with the town of Greece really boils down to this: The town’s clerical employees did a bad job in compiling the list of potential guest chaplains. But the mistake was at worst careless, and it was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.) When a municipality like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in *Marsh v. Chambers*, 463 U.S. 783 (1983), was largely based, that municipality should not be held to have violated the Constitution simply because its

¹² There is one non-Christian house of worship, a Buddhist temple, within the town's borders, but it was not listed in the town directory. While respondents “lived in the Town more than thirty years, neither was personally familiar with any mosques, synagogues, temples, or other non-Christian places of worship within the Town.”

method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal.

Justice THOMAS, with whom Justice SCALIA joins as to Part II, concurring in part and concurring in the judgment.

The Establishment Clause is “best understood as a federalism provision.” The relationship between church and state in the fledgling Republic was far from settled at the time of ratification. Although the remaining state establishments were ultimately dismantled — Massachusetts, the last State to disestablish, would do so in 1833, that outcome was far from assured when the Bill of Rights was ratified in 1791. That lack of consensus suggests that the First Amendment was simply agnostic on the subject of state establishments; the decision to establish or disestablish religion was reserved to the States.

Even if the Establishment Clause were properly incorporated against the States, the municipal prayers in this case bear no resemblance to the coercive state establishments that existed at the founding. In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. Even assuming that the framers of the Fourteenth Amendment reconceived the nature of the Establishment Clause as a constraint on the States, nothing in the history of the intervening period suggests a fundamental transformation in their understanding of *what constituted an establishment*. To the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts — not the “subtle coercive pressures” allegedly felt by respondents in this case.

Justice BREYER, dissenting.

During more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. All of these occurred in 2008. That inclusivity arose only in response to the complaints that presaged this litigation. The town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening prayer. The evident reasons why the town consistently chose Christian prayer givers are that the Buddhist and Jewish temples mentioned above were not listed in the Community Guide or the Greece Post and that the town limited its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits. In a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing.

It is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups (or perhaps even a moment of silence) are not compatible with their faith. But the U.S. House of Representatives provides its guest chaplains with the following guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation: “The guest

chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions. The prayer should not exceed 150 words. The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy.” The town made no effort to promote a similarly inclusive prayer practice here. The town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's prayer practice violated the Establishment Clause.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For centuries, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger. However those individuals worship, they count as full and equal American citizens. Each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. When each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American. Greece's prayer practices violate that norm of religious equality. I agree with the decision in *Marsh* upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. Pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But the practice at issue here differs from the one sustained in *Marsh*.

The prayers given in Greece, addressed directly to the Town's citizenry, were *more* sectarian, and *less* inclusive, than anything sustained in *Marsh*. The Nebraska Legislature's floor sessions — like those of the U.S. Congress and other state assemblies — are of, by, and for elected lawmakers. Greece's town meetings, both by design and in operation, allow citizens to actively participate in the Town's governance — sharing concerns, airing grievances, and both shaping the community's policies and seeking their benefits. The chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing — the 10 or so members of the public, perhaps including children. He typically addresses those people as though he is “directing his congregation.” He almost always begins with some version of “Let us all pray together.” Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. He refers, constantly, to a collective “we” — to “our” savior, for example, to the presence of the Holy Spirit in “our” lives, or to “our brother the Lord Jesus Christ.” In essence, the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.

Marsh characterized the prayers in the Nebraska Legislature as “in the Judeo–Christian tradition,” and stated, as a relevant (even if not dispositive) part of its analysis, that the

chaplain had removed all explicitly Christian references at a senator's request. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. After a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. Two-thirds of the prayers given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. Many prayers contained elaborations of Christian doctrine or recitations of scripture. And the prayers usually close with phrases like "in the name of Jesus Christ" or "in the name of Your son." The prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint. If the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as Congress does. So Greece had multiple ways of incorporating prayer into its town meetings — reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide. But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed — as those who share, and those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith. When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines.

P. 817: At the end of the problems, insert the following new problem:

12. *The Jewish Eruv.* An "eruv" is a designated geographic area where Jews who subscribe to a certain interpretation of Jewish law can perform certain activities that are otherwise prohibited on the Jewish Sabbath and on Yom Kippur. An eruv can be established simply by attaching plastic strips, known as "lechis," to utility poles. When a village allowed a Jewish group to attach the plastic strips to poles, and thereby create an eruv, the decision was challenged on Establishment Clause grounds. Unless one looked closely, the average person might not even notice the plastic strips. Should the creation of the eruv be viewed as an establishment of religion? What result under the *Lemon* test? Under the endorsement test? See *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, (2d Cir. 2015).

Chapter 13

FREE EXERCISE

A. BURDENS ON RELIGION

[3] Modern Cases

P. 838: Insert the following new notes ## 3 & 4, and then renumber the remaining notes:

3. *RFRA and the Affordable Care Act.* In *Burwell v. Hobby Lobby Stores, Inc.*, 189 L. Ed. 2d 675 (2014), the Court held that RFRA precluded the U.S. Department of Health and Human Services (HHS) from requiring three closely held corporations to provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. The Court rejected the argument that the owners of the corporations forfeited all RFRA protection when they organized their businesses as corporations, rather than as sole proprietorships or general partnerships, and the Court found a substantial burden on the owners' religious beliefs. In addition, although the Court determined that Congress had a "compelling" governmental interest in mandating contraceptive coverage, the Court concluded that there were less restrictive means for achieving this objective. Indeed, the Court noted that HHS had already devised and implemented a system that sought to provide contraceptive coverage while respecting the religious liberty of religious nonprofit corporations. However, the courts have generally rejected other religiously-based challenges to the ACA. After receiving religious objections, the Obama administration placed the responsibility for providing contraceptive coverage on group health plans and third party payers rather than on nonprofit religious organizations that object to providing such coverage. Nevertheless, a number of religious organizations sued. The D.C. Circuit concluded that the government's interest was compelling and that the plan was structured in such a way as to avoid religious conflicts. See *Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014). However, in *Zubik v. Burwell*, 136 S.Ct. 1557 (2016), dealt with a federal regulation that required petitioners to provide contraceptives as part of their health plans, unless they submit a form either to their insurer or to the Federal Government, stating that they object on religious grounds to providing contraceptive coverage. In that case, their policy need not cover contraceptives, but the insurer must provide them anyway. Petitioners argued that submitting the notice substantially burdened the exercise of their religion, in violation of the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* The Court requested supplemental briefing from the parties on the question of "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners." Both petitioners and the Government

confirmed that such an option is feasible, and petitioners clarified that their religious exercise is not infringed where they “need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception,” even if their employees receive cost-free contraceptive coverage from the same insurance company. The Government confirmed that the challenged procedures “for employers with insured plans could be modified to operate in the manner posited in the Court’s order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.” As a result, the Court remanded the cases to the lower courts for further consideration in light of this new information.

4. *Proliferating RFRA and RLUIPA Claims.* The adoption of RFRA has led to a growing number of claims for religious exemptions. In *Holt v. Hobbs*, 190 L.Ed.2d 747 (2015), the Court held that the Arkansas Department of Corrections could not prohibit an inmate from wearing a short beard in accordance with the dictates of his religious faith. A number of other RFRA claims have been asserted. For example, three Kentucky death row inmates claim that they have the right to a sweat lodge, and to conduct powwows, and to consume buffalo meat. See Brett Barrouquere, *Prison Suit on Religion Revisited: Court Reinstates Cases Over Indian Rites*, *The Courier-Journal* A-4 (Aug. 16, 2014); see also *Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014). Another inmate sued when he was denied the right to obtain Santeria beads, necklaces and cowrie shells that had been dipped in the blood of animals. See *Davilla v. Gladden*, 777 F.3d 1198 (11th Cir. 2015). Individuals have also claimed the right to exemptions from bans on the possession of bald and gold eagle feathers. See *McAllen Grace Bretheren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014). Likewise, under RLUIPA, a synagogue sued a local historic commission regarding its denial of a proposed synagogue expansion. See *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic District Commission*, 768 F.3d 183 (2d Cir. 2014).

P. 838: Insert the following new problems ## 3-4, and renumber the remaining problems:

3. *The Collision Between Gay Rights and Religious Beliefs.* A number of state and local laws prohibit businesses from discriminating based on an individual’s sexual preferences. Suppose that a woman, who runs a small photography business, objects on religious grounds to homosexuality. When a gay couple asks her to take pictures at the wedding, the woman refuses. She tells the gay couple that she is religiously opposed to homosexuality, would not feel comfortable taking pictures at a gay wedding, and is concerned that her work product would be of poor quality. The gay couple files a discrimination complaint against the photographer. Is the photographer entitled to a religious exemption from the discrimination law? See *Elaine Photography LLC v. Willock*, 309 P.3d 53 (N.M. 2013). Would you draw a distinction between the photographer and a large department store which also claims an exemption allowing it to exclude same-sex couples from patronizing its store? What about a baker who does not wish to bake cakes for same-sex weddings?

4. *More on the Collision.* Would you view the situation differently as applied to a religious official or a religious organization? In light of a local or state law prohibiting discrimination based on sexual preferences, could a minister who holds a religiously-based belief that marriage can only be between a man and a woman refuse to perform marriages for same-sex couples? Could the minister preach that same-sex relationships are “sinful?” Suppose that a state civil rights commission interprets state law as banning churches from expressing their views on human sexuality if they would “directly or indirectly” make “persons of any particular gender identity” feel “unwelcome” in conjunction with church services, events, and other religious activities. Does the interpretation run afoul of the free exercise clause? What about the free speech clause?

5. *Same-Sex Marriages and Religious Colleges.* Could a religious college, whose underlying doctrine provides that marriage can only be between a man and a woman, treat same-sex couples differently than opposite-sex married couples regarding benefits, housing and other benefits? Of course, many religiously-based colleges received federal funding of various sorts for the construction of buildings, student financial aid, etc. If the state otherwise respects a college’s decision to deny benefits to same-sex couples, can it withhold financial aid from colleges that do so?

6. *Religious Exemptions.* Could a state create an exemption from its anti-discrimination law for “sincerely held religious beliefs?” Should it create such an exemption? In Indiana, there was considerable controversy after the state passed a religious freedom law that some believed would have authorized discrimination against gays and lesbians. See Cara Anthony, *Thousands Protest “Religious Freedom” Law*, *The Courier-Journal* 2B (Mar. 29, 2015). In response to the controversy, Indiana amended the law. However, comparable legislation has been introduced into Congress.

P. 855: At the end of problem # 4, insert the following:

Likewise, suppose that a religious sect leader and his wife receive a vision from God telling them to feed only the mother’s breast milk to their one-year old child. According to the prosecution, the child was malnourished and died. Can the sect leader and his wife be prosecuted for refusing to provide solid food to the child? See Associated Press, *Sect Leader Convicted in Starvation Death of Son*, *Louisville Courier-Journal* C-1 (June 15, 2002).

P. 864: Following problem # 2, insert the following new problems and then renumber the remaining problems:

3. *Prohibiting Oral Circumcision.* A city passes an ordinance specifically prohibiting the Jewish ritual act of direct oral suction on a circumcision wound on grounds of hygiene. The city believes that the act poses a risk of spreading the herpes simplex virus to the infant.

Does the ordinance target religious beliefs and practices? If so, can it satisfy strict scrutiny? *See Central Rabbinical Congress of the United States & Canada v. N.Y.C. Department of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014). Could the law be framed in a non-discriminatory way?

4. *Humanist-Led Weddings.* Suppose that the State of Indiana allows certain elected officials to perform weddings, as well as certain religious clergy and certain enumerated religions that do not have clergy, but prohibits anyone else from doing so. Plaintiffs are secular humanists, a group that believes in ethical living and has no belief in a deity. Under Indiana law, their leaders are prohibited from performing marriages. As a “secular humanist,” can plaintiffs claim protection under the Free Exercise clause? In other words, is their right to “freely exercise” a religion being impinged? *See Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014).

B. DISCRIMINATION AGAINST RELIGION

P. 866: Insert the following new problem # 6 and renumber the remaining problems:

6. *Muslim Dress in Public Schools.* May a public school prohibit Muslim girls from wearing the niqab (a full-face Muslim veil) in school? Suppose that school officials seek to justify the ban on the basis that it makes non-Muslims feel “uncomfortable.” *See Alan Cowell, Britain Proposes Allowing Schools to Forbid Full-Face Muslim Veils, The New York Times* A-10 (Mar. 21, 2007). Would you view the ban differently if the school had asserted an interest in being able to identify students, and make sure that they have the right to be there? What if the school had asserted that the wearing of the niqab is inconsistent with notions of equality for all because it seems to place girls in a subservient position?

Chapter 14

ESTABLISHMENT VERSUS FREE EXERCISE AND FREE SPEECH CONCERNS

P. 882: At the end of problem # 4, insert the following citation:

See Bronx Household of Faith v. Board of Education, 750 F.3d 184 (2d Cir. 2014).