2022 SUPPLEMENT

TO

The First Amendment

Cases, Problems, and Materials

Sixth Edition

RUSSELL L. WEAVER
Professor of Law and Distinguished University Scholar
University of Louisville Louis D. Brandeis School of Law

CATHERINE HANCOCK
Geoffrey C. Bible & Murray H. Bring Professor of Constitutional Law
Tulane University School of Law

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Chapter 1

Historical Intentions and Underlying Values

On p. 15, before the notes, add the following new case:

Houston Community College System v. Wilson
142 S.Ct. 1253 (2022).

Justice GORSUCH delivered the opinion of the Court.

The Houston Community College System is a public entity that operates community colleges in Texas. Its Board of Trustees consists of nine members, each of whom is elected from a single-member district. Wilson was elected to the Board in 2013. From the start, his tenure was stormy. Often and strongly, he disagreed with many of his colleagues about the direction of HCC and its best interests. He brought lawsuits challenging the Board's actions. By 2016, these escalating disagreements led the Board to reprimand Wilson publicly. Wilson responded by promising that the Board's action would "never stop me." In the ensuing months, Wilson charged the Board in various media outlets with violating its bylaws and ethical rules. He arranged robocalls to the constituents of certain trustees to publicize his views. He hired a private investigator to surveil another trustee, seeking to prove she did not reside in the district that had elected her. He also filed new lawsuits. In the first, Wilson alleged that the Board had violated its bylaws by allowing a trustee to vote via video conference. When his colleagues excluded him from a meeting to discuss the lawsuit, Wilson filed a second suit contending that the Board and HCC had "prohibited him from performing his core functions as a Trustee." These two lawsuits cost HCC over $20,000 in legal fees. That was on top of more than $250,000 in legal fees incurred due to Wilson's earlier litigation. At a 2018 meeting, the Board responded by adopting another public resolution "censuring" Wilson. The resolution stated that Wilson's conduct was "not consistent with the best interests of the College" and "not only inappropriate, but reprehensible." The Board also imposed penalties. It provided that Wilson was "ineligible for election to Board officer positions for the 2018 calendar year," that he was "ineligible for reimbursement for any College-related travel," and that his future requests to "access funds in his Board account for community affairs" would require Board approval. The Board recommended that Wilson "complete additional training relating to governance and ethics."

Wilson asserted that the Board's censure violated the First Amendment. He sought injunctive and declaratory relief as well as damages for mental anguish, punitive damages, and attorney's fees. Wilson amended his complaint to drop his colleagues from the suit, leaving HCC as the sole defendant. HCC moved to dismiss. The District Court granted the motion, concluding that Wilson lacked standing under Article III. The Fifth Circuit reversed, holding that a verbal "reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983." Next, the court reasoned that the Board's

imposition of other punishments—such as limiting Wilson's eligibility for officer positions and his access to certain funds—did "not violate his First Amendment rights" because Wilson did not have an "entitlement" to those privileges. HCC asked us to review the Fifth Circuit's judgment that Wilson may pursue a First Amendment claim based on a purely verbal censure. [Wilson sought to challenge the Board's nonverbal punishments but failed to file a cross-petition for review].

The First Amendment prohibits laws "abridging the freedom of speech." The government usually may not impose prior restraints on speech. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). "As a general matter," the First Amendment prohibits government officials from subjecting individuals to "retaliatory actions" after the fact for having engaged in protected speech. Wilson argues that the Board's censure resolution represents exactly that kind of impermissible retaliatory action. No one has cited any evidence that a purely verbal censure analogous to Wilson's has ever been widely considered offensive to the First Amendment. As early as colonial times, the power of assemblies to censure their members was "more or less assumed." M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 184 (1943). Assemblies often exercised the power to censure members for views they expressed and actions they took "both within and without the legislature." The United States Senate issued its first censure in 1811, after a Member read aloud a letter from former President Jefferson that the body had placed under an "injunction of secrecy." 22 Annals of Cong. 65–83. The House of Representatives followed suit in 1832, censuring one of its own for "insulting the Speaker." 2 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1248, pp. 799 (1907). In 1844, the Senate issued a censure after a Member divulged to the New York Evening Post a confidential message from President Tyler "outlining the terms of an annexation agreement with Texas." U. S. Senate Historical Office, A. BUTLER & W. WOLFF, UNITED STATES SENATE: ELECTION, EXPULSION, AND CENSURE CASES 1793–1990, p. 47 (1995). During the Civil War, Congress censured several Members for expressing support for the Confederacy. See HINDS § 1253, at 803. In 1954, the Senate "condemned" Senator Joseph McCarthy for bringing "the Senate into dishonor," citing his conduct and speech within that body and before the press. 100 Cong. Rec. 16392. The House and Senate continue to exercise the censure power today. Congress has censured Members not only for objectionable speech directed at fellow Members but also for comments to the media, public remarks disclosing confidential information, and conduct or speech thought damaging to the Nation. Censures along these lines have proven more common at the state and local level. Justice Story observed that even "the humblest assembly" in this country historically enjoyed the power to prescribe rules for its own proceedings. 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 835, p. 298. Throughout history many state and local bodies have employed that authority to prescribe censure processes for their members. Elected bodies in this country issued no fewer than 20 censures in August 2020 alone.

Under the Fifth Circuit's holding, a purely verbal censure by an elected assembly of one of its own members may offend the First Amendment. We have no evidence suggesting prior generations thought an elected representative's speech might be "abridged" by that kind of countervailing speech from his colleagues. History suggests a different understanding of the First Amendment—one permitting "free speech on both sides and for every faction on any side."

Thomas v. Collins, 323 U.S. 516 (1945) (Jackson, J., concurring). A plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an "adverse action" in response to his speech that "would not have been taken absent the retaliatory motive." *Nieves*, 139 S.Ct., at 1722. Some adverse actions may be easy to identify—an arrest, a prosecution, or dismissal from governmental employment. "Deprivations less harsh than dismissal" can sometimes qualify too. At the same time, no one would think that a mere frown from a supervisor constitutes a sufficiently adverse action to give rise to an actionable First Amendment claim.

Any fair assessment of the materiality of the Board's conduct in this case must account for two things. First, Wilson was an elected official. In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes. When individuals "consent to be a candidate for a public office," they necessarily "put their character in issue, so far as it may respect their fitness and qualifications for the office." *White v. Nicholls*, 3 How. 266, 290, 11 L.Ed. 591 (1845). Second, the only adverse action before us is a form of speech from Wilson's colleagues that concerns the conduct of public office. The First Amendment surely promises an elected representative like Wilson the right to speak freely on questions of government policy. Just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same. The role that elected officials play in that process "makes it all the more imperative that they be allowed to freely express themselves." *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

We do not see how the Board's censure could qualify as a materially adverse action. The censure was a form of speech by elected representatives. It concerned the public conduct of another elected representative. Everyone involved was an equal member of the same deliberative body. The censure did not prevent Wilson from doing his job, it did not deny him any privilege of office, and Wilson does not allege it was defamatory. In these circumstances, we do not see how the censure could have materially deterred an elected official like Wilson from exercising his right to speak. Wilson does not suggest that the Board's criticism of him deterred him from speaking his mind. Instead, he submits that the Board's second resolution offended the First Amendment only because it was denominated a disciplinary "censure." By invoking its "censure" authority the Board added a measure of sting. But we cannot see how that changed the equation and materially inhibited Wilson's ability to speak freely.

It may be that government officials who reprimand or censure students, employees, or licensees may in some circumstances materially impair First Amendment freedoms. See generally *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994) (licensing); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) (same). Likewise, we do not address questions concerning legislative censures accompanied by punishments, or those aimed at private individuals. Nor do we pass on the First Amendment implications of censures or reprimands issued by government bodies against government officials who do not serve as members of those bodies. History could hold different lessons for cases like these. Following the Whiskey Rebellion, Federalists supported by President Washington introduced a proposal in Congress to denounce "self-created societies" they believed had "misrepresented the conduct of the Government." 4 Annals of Cong. 899

(1794). James Madison and others opposed, and ultimately defeated, the effort in the House of Representatives. Madison insisted that, in a Republic like ours, "the censorial power is in the people over the Government, and not in the Government over the people." *Id.*, at 934. When the government interacts with private individuals as sovereign, employer, educator, or licensor, its threat of a censure could raise First Amendment questions. But those cases are not this one.

Wilson directs us to *Bond v. Floyd*, 385 U.S. 116 (1966). There, a state legislature refused to seat a duly elected representative. According to the legislature, the representative's comments criticizing the Vietnam War were incompatible with the State's required loyalty oath. This Court held that the legislature's action violated the First Amendment. But the legislature's action implicated not only the speech of an elected official, it also implicated the franchise of his constituents. And it involved not just counter speech from colleagues but exclusion from office. In *Powell* v. *McCormack*, the Court held that Congress possesses no power to exclude duly elected representatives who satisfy the prerequisites for office prescribed in Article I of the Constitution. 395 U.S. 486, 550 (1969). The Court took pains to emphasize that the power to exclude and the power to issue other, lesser forms of discipline "are not fungible" under our Constitution.

The differences between exclusion and censure also undermine Wilson's alternative argument concerning John Wilkes. In 1763, Wilkes "published an attack on a recent English peace treaty with France, calling it the product of bribery and condemning the Crown's ministers as the tools of despotism and corruption." *Powell*, 395 U.S., at 527. Parliament responded by expelling Wilkes from office and later refusing to seat him despite his reelection. Only in 1782 did Parliament relent, voting to expunge its prior resolutions and resolving that its actions had been "subversive of the rights of the whole body of electors of this kingdom." The framers may well have had the Wilkes episode in mind when they crafted Clauses in the Constitution limiting Congress's ability to impose its own ad hoc qualifications for office or to expel Members. Wilson cites nothing in the Wilkes affair to support his much more ambitious suggestion that the founding generation understood the First Amendment to prohibit representative bodies from censuring members. If anything, counsels a very different conclusion.

Our case involves a censure of one member of an elected body by members of the same body. It does not involve expulsion, exclusion, or any other form of punishment. It entails only a First Amendment retaliation claim. The Board's censure spoke to the conduct of official business, and was issued by individuals seeking to discharge their public duties. Even the censured member concedes the content of the censure would not have offended the First Amendment if it had been packaged differently. Neither history nor this Court's precedents support finding a viable First Amendment claim. Argument and "counterargument," not litigation, are the "weapons available" for resolving this dispute. *Wood v. Georgia*, 370 U.S. 375, 389 (1962). The judgment of the Fifth Circuit is

Reversed.

On p. 16, at the end of the notes, add the following new notes that read as follows:

4. *Bivens and First Amendment Violations*. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court authorized a damages action against federal officials for alleged violations of the Fourth Amendment. In *Egbert v. Boule*, 142 S.Ct. 1793 (2022), the Court held that a *Bivens* action cannot be based on alleged First Amendment violations.

5. *Private Speech Platforms*. Modern communication systems, including social media platforms, post-dated Emerson's writings. While social media companies are not government entities, and therefore arguably are not bound by the First Amendment, some of these companies articulate pro free speech policies. According to the CEO of Facebook, Mark Zuckerberg, "We've been pretty clear on our policy that we think it wouldn't be right for us to do fact checks for politicians." However, they have also engaged in aggressive censorship of private speech, an issue that we will examine more later.

On p. 19, after problem # 10, insert the following new problem and renumber the remaining problem:

11. *Societal Change and Censorship*. Does freedom of speech deserve special protection because of its power to bring about social and legal change? During the 1960s Civil Rights Movement, numerous First Amendment rulings protected the speech of those seeking to challenge Jim Crow segregation, providing an indirect route for the ultimate achievement of desegregation remedies that the Equal Protection Clause did not effectively establish or enforce. Did Emerson fail to focus sufficient attention on the negative aspects of an absence of free speech protections? What additional justifications for the special character of speech protections might he have discerned if he had contemplated the damage that can be done by regimes of censorship?

Chapter 2

Advocacy of Illegal Action

A. Early Decisions

On p. 24, at the end of the notes, add the following new note # 3:

3. *Seditious Conspiracy Today*. The crime of seditious conspiracy has not entirely disappeared. Following the January 6, 2021, assault on the U.S. Capitol Building, nearly a dozen members of the "Oath Keepers" were charged with the crime for attempting to prevent certification of the election of Joe Biden as President. The indictments against these defendant suggest that defendants talked about the need for a civil war, coordinated travel to Washington, D.C., provided training in paramilitary tactics, and set up staging areas for equipment (e.g., knives, batons, tactical vests, helmets, eye protection and radio equipment) prior to the assault.

E. Modern Standards

On p. 50, move existing note # 2 to p. 232, then substitute the following new note # 2:

2. *After Brandenburg*. Between 1969 and 2010, the Supreme Court addressed the issue of "advocacy of illegal action" in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Professor L.A. Powe summarized the unanimous decision in *Claiborne Hardware* as follows:

> In 1966 the NAACP and local civil rights leaders organized a boycott of white merchants in Port Gibson, Mississippi, and its surrounding county. The boycott lasted seven years and was backed up by both persuasion and intimidation. Enforcers, called "Black Hats," stood outside stores and took down names. Those African-Americans who patronized white merchants had their names published and read aloud during meetings. There was some violence. On two occasions, shots were fired into a house; on another, a brick was thrown through a windshield. In a speech, Charles Evers [the Field Director of the NAACP in Mississippi] "stated that boycott violators would be 'disciplined' by their own people. . . . Two days later in another speech he stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck" The Mississippi courts imposed civil liability on the NAACP and Evers, but the Supreme Court reversed, finding the boycott was protected activity. The Court stated, "The emotionally charged rhetoric of Charles Evers'[s] speeches did not transcend the bounds of protected speech set forth in *Brandenburg*." The violence occurred weeks or months after his speeches, and there was no evidence that he "authorized, ratified, or directly threatened acts of violence."

L. A. Powe, Jr., *Brandenburg, Then and Now*, 44 TEXAS TECH L. REV. 69, 75-76, 76-77 (2011).

On p. 50, change the heading "Notes" to "Notes and Questions"

On p. 51, at the end of the notes, create a new note # 3 with existing problem # 1 (from p. 51).

On p. 51, at the beginning of the problems, insert the following new problems and renumber the remaining problems:

1. *The Assault on the Capitol Building*. In a speech delivered before the Jan. 6, 2021, assault on the U.S. Capitol Building, President Trump claimed to have won the 2020 election, that it had been stolen by "radical-left Democrats" and the "fake news media," that the "country has had enough" and "will not take it anymore," and that the people needed to "stop the steal." Trump went on to state that "We will not let them silence your voices. We're not going to let it happen, I'm not going to let it happen." He concluded by stating that:

> [I]t is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down . . .to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them. Because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.

Members of the crowd subsequently conducted an assault on the Capitol Building. Under the *Brandenburg* test, can Trump be charged with criminal advocacy? Is your position affected by the fact that Trump concluded by saying that the protestors should act "peacefully and patriotically?"

2. *Charging Trump with Conspiracy?* Congress' January 6th hearings have focused on Trump as an insigator of the January 6th assault on the Capitol Building. What kind of proof would a prosecutor need to present in order to convict Trump of being a co-conspirator? Would it be enough to show that Trump knew that some individuals were armed who were going to the Capitol? Or would he have to show that he was in direct contact with the assaulters and directly conspired with them?

3. *Majority Leader Schumer's Comments*. In the spring of 2022, a draft U.S. Supreme Court decision overruling *Roe v. Wade* was leaked to the media. Following the leak, U.S. Senate Majority Leader Chuck Schumer made a speech in front of the Court where he made the following statements: I want to tell you, Gorsuch, I want to tell you, Kavanaugh, you have released the whirlwind and you will pay the price," Schumer, who was then minority leader, said at the time. "You won't know what hit you if you go forward with these awful decisions." Not long afterwards, a man was caught near Justice Kavanaugh's home, and he admitted that he was

planning to assassinate Kavanaugh. Under an appropriately worded law, could Schumer be charged with incitement?

4. *Maxine Waters' Comments*. Right before jury deliberations began in the Derek Chauvin trial, U.S. Congresswoman Maxine Waters went to Minneapolis (the site of the trial), and spoke to protestors, encouraging them to "stay on the street" and "get more confrontational" if the jury doesn't return a guilty verdict in the trial regarding the death of George Floyd. House Minority Leader Kevin McCarthy Tuesday to censure Waters, calling her comments "beneath the dignity" of the House and characterizing them as having "raised the potential for violence, directed lawlessness, and may have interfered with a co-equal branch of government." If the verdict had been "not guilty," and the protestors had engaged in violence, could Waters have been charged with illegal advocacy under the *Brandenburg* test?

5. *The Pandemic Protest*. An Orthodox Jewish leader, a vocal opponent of various coronavirus pandemic restrictions, is upset about limits on the number of worshipers allowed into synagogues. When a journalist is spotted, the leader and members of his congregation surround and scream at him. One member of the congregation kicked the journalist. Can the leader be convicted of inciting a riot?

On p. 51, at the end of problem # 4, add the following new citation:

See United States v. Fullmer, 584 F.3d 132 (3d Cir. 2009).

On p. 53, insert the following new problems # 10 and # 11, and then renumber the remaining problem:

9. *Liability for Violent Protester*. When a Black Lives Matter demonstration blocked a public highway in front of the Police Department, police officers were ordered to make arrests. Some protesters started throwing rocks at the police and one unidentified protester threw a rock that hit an officer in the head. The injured officer brought a tort negligence suit against Mckesson, one of the organizers of the demonstration, alleging that he was liable for the protester's conduct. The officer's complaint alleges that Mckesson led the demonstrators to block the highway, then "did nothing to prevent the violence or to calm the crowd," and negligently allowed the violence to occur. Does *Claiborne Hardware* create a First Amendment shield for Mckesson from tort liability for the rock thrower's criminal act? *See Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019), *judgment vacated and remanded*, *McKesson v. Doe*, 141 S. Ct. 48 (2020).

10. *Rioting Statute*. The South Dakota legislature enacted a statute in 2019 that provided three bases for tort liability for rioting: (1) any person who participates in any riot and who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence;" 2) "any person who does not personally participate in any riot but who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence;" (3) "any person who upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied

by immediate power of execution, by three or more persons, acting together and without authority of law." Do the two new riot statutes unduly burden expressive activity or freedom of association? In a pre-enforcement challenge to these statutes, how can plaintiffs argue that the statutes fail the requirements of *Brandenburg* and *Claiborne Hardware*? *See Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874 (D.S.D. 2019).

On p. 57, delete the string citation at the end of problem # 3 and substitute the following new citation:

See Nwanguma v. Trump, 903 F.3d 604 (6th Cir. 2018).

On p. 58, at the end of the text of problem # 8, delete the words "the prior problem?" and substitute the words "problem 4?"

On p. 59, at the end of problem # 10, delete the period and add the following new citation:

, *rev'd* 140 S. Ct. 157 (2020).

On p. 59, after the problems, add the following new problem:

11. *Encouraging a Riot*. The federal Anti-Riot Act was enacted in 1968 and includes provisions that encompass speech tending to "encourage" or "promote" a riot, as well as speech "urging" others to riot and "involving" advocacy of violence. The Act also provides that the terms "to incite a riot," or "to organize, promote, encourage, participate in, or carry on a riot" "shall not be deemed to mean the mere oral or written advocacy of ideas or expression of belief, not involving advocacy of any act or acts of violence." Are these provisions consistent with *Brandenburg*? Are they constitutionally overbroad because they sweep protected speech into the coverage of the criminal prohibitions established in the Act? *See United States v. Massey*, 2022 WL 79870 (N.D. Ill., January 7, 2022); *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020); *United States v. Rundo*, 990 F.3d 709 (9th Cir. 2021). *See United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020); *United States v. Rundo*, 990 F.3d 709 (9th Cir. 2021).

Chapter 3

Content-Based Speech Restrictions: *Chaplinsky* and the Concept of Excluded Speech

A. "Fighting Words"

B. Hostile Audiences

On p. 86, at the end of problem # 4, delete the period and add the following new citation:

; *Smith v. Collin*, 578 F.2d 1197 (7th Cir. 1978).

On p. 87, at the end of problem # 7, delete the citation and add the following new citation:

Bible Believers v. Wayne County, 805 F.3d 228 (6th Cir. 2015) (en banc).

On p. 87, after the problems, add the following new problem:

8. *More on the "Heckler's Veto."* For more than fifty years, a city has maintained a content-neutral permit system for displays in Palisades Park, California. Every year, a religious group has applied for an obtained a permit to establish a display. Recently, a group of atheists decided to flood the city's first come, first served, system with applications to establish displays at the same time, hoping to crowd out the religious display. In response, the Park decided to ban all such displays. Does the flood of atheist applications involve an inappropriate "heckler's veto?" Is there a basis for challenging the city's decision to ban all such displays? *See Santa Monica Nativity Scenes Commission v. City of Santa Monica*, 784 F.3d 1286 (9th Cir. 2015).

C. Defamation

[1] The Constitutionalization of Defamation

On p. 99, after the first paragraph, add the following:

In *Coral Ridge Ministeries Media, Inc. v. Southern Poverty Law Center*, — S.Ct. —, 2022 WL 2295074 (2022), involved Coral Ridge Ministries Media, Inc., a Christian non-profit group committed to spreading the "Gospel of Jesus Christ" and "a biblically informed view of the world, using all available media." When Coral Ridge sought to raise donations through AmazonSmile, a program that allows Amazon customers to contribute to approved nonprofits, it was blocked because the Southern Poverty Law Center (SPLC) had designated it as an "Anti-LGBT hate group" because of its biblical views concerning human sexuality and marriage. Coral Ridge sued SPLC for defamation, contending that, although it "opposes homosexual conduct" based on its religious beliefs, it is in no sense a "hate group." To the contrary, it "has nothing but love for people who engage in homosexual conduct" and "has never attacked or maligned anyone on the basis of engaging in homosexual conduct." Coral Ridge alleged that SPLC was aware that it was not a "hate group," but falsely labeled it one anyway to "destroy the Ministry" by "dissuading people and organizations from donating to it." SPLC responded that its "hate group" designation was protected by the First Amendment. The District Court dismissed the complaint. The lower courts ruled against Coral Ridge with the Court of Appeals concluding that Coral Ridge could not satisfy the "actual malice" standard. The Court rejected Coral Ridge's request that it reconsider the "actual malice" standard. Justice Thomas dissented from the denial of certiorari and again called for a re-examination of the actual malice standard:

> "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." *McKee*, 139 S.Ct.. at 676 (opinion of THOMAS, J.). Those decisions have "*no relation* to the text, history, or structure of the Constitution." *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251 (C.A.D.C. 2021) (Silberman, J., dissenting). This case is one of many showing how *New York Times* and its progeny have allowed media organizations and interest groups "to cast false aspersions on public figures with near impunity." *Tah*, 991 F.3d, at 254 (opinion of Silberman, J.). SPLC's "hate group" designation lumped Coral Ridge's Christian ministry with groups like the Ku Klux Klan and Neo-Nazis. It placed Coral Ridge on an interactive, online "Hate Map" and caused Coral Ridge concrete financial injury by excluding it from the AmazonSmile donation program. Nonetheless, unable to satisfy the "almost impossible" actual-malice standard this Court has imposed, Coral Ridge could not hold SPLC to account for what it maintains is a blatant falsehood. Because the Court should not "insulate those who perpetrate lies from traditional remedies like libel suits" unless "the First Amendment requires" us to do so. I respectfully dissent from the denial of certiorari.

On p. 99, at the end of note # 13, add the following:

Some believe that there is a growing tendency towards "libel tourism": defamation plaintiffs seeking our jurisdictions with laws that are more favorable to defamation plaintiffs. For example, Virginia's SLAPP (Strategic Laws Against Public Participation) law does not permit prevailing defamation suit defendants to recover attorneys fees. As a result, there is a tendency on the part of some California defamation plaintiffs to sue California defendants in Virginia.

On p. 100, insert new problems # 7, and renumber the remaining problems:

7. *What Standard of Proof Should Apply?* When plaintiff company claims to have been defamed, and the matter involves the "public interest," what standard of proof should apply? For example, during the 2020 Presidential election campaign, and the challenges that came afterward, Donald Trump's lawyer, Rudy Giuliani, allegedly pushed false election fraud claims related to voting machine irregularities. DominionVoting Systems, which creates and manufactures such machines, claimed that Giuliani's claims damaged its business. Should a reviewing court apply the "actual malice" standard or a lower standard to a case like this? If so, which one? *See Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42 (D.D.C. 2021).

[2] "Public Figures" and "Private Plaintiffs"

On p. 110, at the end of note # 4, add the following:

Nick Sandmann, the teenager, ultimately entered into a confidential settlement with the *Washington Post*.

On p. 111, insert a new note # 7, and renumber the remaining notes:

7. *Trump & Stormy Daniels*. Adult film star "Stormy Daniels" claimed that then President Donald Trump defamed her in a 2018 Tweet. Allegedly, a man threatened her in a Las Vegas parking lot after she agreed to sell her story regarding an alleged affair with Trump. Trump tweeted a photo of the sketch that was produced of her description of the man, commenting that the depicted strongman was "nonexistent," that Daniels' story was a "total con job," and that she was "playing the Fake News Media for fools." Daniels law suit was ultimately dismissed on the basis that Trump's later Tweet involved a statement of opinion rather than assertion of fact. *See Clifford v. Trump*, 818 Fed. Appx. 746 (9th Cir. 2020).

On p. 112, insert the following new notes ## 9 & 10, and renumber the following note:

9. *Alex Jones and the Sandy Hook Massacre*. Following the Sandy Hook massacre of schoolchildren Alex Jones and his InfoWars website claimed that allegations of mass shooting were a "giant hoax," and he accused the parents of faking their children's deaths. Some of the parents sued Jones for defamation and intentional infliction of mental and emotional distress. After Jones repeatedly refused to comply with court-ordered discovery requests, default judgments were entered against him in both Connecticut and Texas.

10. *The Gibson's Bakery Case*. When a clerk at the bakery believed that two students had stolen bottles of wine, the clerk chased and tackled them. Following the incident, the college allowed students to use school computers and printers to print fliers, and the Dean of Students helped pass out the fliers, which alleged that Gibson's was a "RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." Gibson's Bakery won a defamation judgment against Oberlin College's Vice President and Dean of Students at the trial court level. The bakery initially won a $44 million judgment which was reduced to $25 million. The judgment was affirmed on appeal. *See Gibson Bros., Inc. v. Oberlin College*, 187 N.E.3d 629 (Ohio App. 2022).

On p. 112, replace problem # 2 with the following problems and renumber the remaining problems:

2. *Defining the term "Public Figure."* In 2012, children were murdered at a school in Newton, Connecticut. Afterwards, Alex Jones used his Infowars website to speculate that the attack had been staged, and that crisis actors had been used to make it appear real. Plaintiff, a father of one of the murdered children, was alleged to have lied about the death of his son in order to promote stronger gun laws. Is the father a "public figure?" In deciding whether he is a public figure, should it matter that he gave media interviews regarding the Newton incident? What if he actively campaigned for stricter gun controls, including testifying before the legislature and pushing the White House for reform? *See Jones v. Heslin*,587 S.W.3d 134 (Tex.App. 2020).

3. *More on the Public Figure Standard*. A music producer sues a singer for defamation, claiming that she made false allegations of sexual assault. The producer admits that he is an acclaimed producer," but is not a "household name." Should he be treated as a "public figure" and required to satisfy the "actual malice" standard? *See Gottwald v. Sebert*, 193 A.D.3d 573, 148 N.Y.S.3d 37 (2021).

[3] Application of the "Actual Malice" Standard

On p. 120, at the end of problem # 3, add the following new citation:

See Lohrenz v. Donnelly, 350 F.3d 1272 (D.C. Cir. 2003).

On p. 120, at the end of the problems, add the following new problem:

5. *Remove the Section 230 Shield?* President Trump, upset that certain social media companies flagged some of his tweets for "fact checking," questioned whether they should retain their Section 230 exemption from liability. As a result, President Trump issued an Executive Order designed to prompt reconsideration of the exemption. Executive Order on Preventing Online Censorship (May 28, 2020). That order does several things: 1) directs the Secretary of Commerce to file a petition with the FCC asking the FCC to more clearly define the limits of Section 230; 2) directs the head of each executive agency to review any advertising and marketing funds spent with online firms and assess whether those online firms are "problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices; 3) directs the Federal Trade Commission to investigate practices of online platforms that "restrict speech in ways that do not align with those entities' public representations about those practices; & 4) envisions the creation of a working group of state attorneys general with respect to the enforcement of state laws prohibiting deceptive practices. Is the Executive Order sound?

[4] Fact versus Opinion

On p. 127, after the notes, add the following new note:

3. *Implying First-Hand Knowledge*. In *NetScout Systems, Inc. v. Gartner, Inc*., 334 Conn. 396, 414, 223 A.3d 37 (2020), the court emphasized that defamation liability may attach "when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, firsthand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact." By contrast, the court noted that "an opinion that is based on the opinions of others does not imply defamatory facts and, therefore, is not actionable." In *Rockoff v. Annulli*, 2020 WL 4333864 (Conn. Super. Ct., July 2, 2020), the plaintiff real estate agent brought a defamation claim against the defendant home buyer. The plaintiff represented the seller. The defendant posted the following review on www.yelp.com: "He's "a train wreck ... disorganized and lacks the knowledge required for a real estate transaction[,] did not uphold his fiduciary obligation to his client by making many careless mistakes ... and claimed to be more of a hobbies realtor. [I later] "learned that he had given our deposit checks to his client and did not hold them in escrow. That is illegal!" Under the *Gartner* standard, the *Rockoff* Court held that the defendant's statement contained both non-actionable opinion and actionable false fact based on the implication of first-hand knowledge.

4. *Verifiably False Facts.* Defendants in the defamation suits by Dominion Voting System (referred to earlier) included not only Rudy Giuliani but also Sidney Powell, another attorney for President Trump. Powell alleged that Dominion "paid kickbacks" to "families of public officials" "who helped [Dominion obtain] government contracts," that the "founder of Dominion admits he can change a million votes," and that Dominion's voting machines were "created to produce

altered voting results in Venezuela for Hugo Chavez and then shipped internationally to manipulate votes, including in this country." Powell argued that these were statements of opinion and that no reasonable person would conclude they were statements of fact. She also contended that her statements represent her "own interpretation of the facts, leaving the reader to draw their own conclusions." In denying Powell's motion for summary judgment, the district court rejected Powell's arguments, finding instead that a reasonable person could conclude that the statements expressed or implied verifiably false facts. *See Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42 (D.D.C. 2021).

D. Emotional Distress

On p. 145, at the end of note # 1, add the following new citation:

See also People v. Austin, 2019 IL 123910, 155 N.E.3d 439 (2019) (applying intermediate scrutiny to law criminalizing the non-consensual dissemination of private sexual images).

On p. 149, at the end of problem # 11, add the following:

An Illinois law prohibits "stalking" and "cyberstalking" by forbidding willful or negligent communications "to or about" a person that would cause a "reasonable person" to suffer emotional distress. Is the Illinois law valid? *See People v. Relerford*, 104 N.E.3d 341 (Ill. 2017); *but see United States v. Gonzalez*, 905 F.3d 165 (3d Cir. 2018) (applying federal cyberstalking law).

On p. 150, after the problems, insert the following new problem:

13. *Trolling Campaign*. When the University of Kentucky lost a game in the NCAA Basketball Tournament, the team's fans blamed the officiating of a particular referee, who then "became the target of an online campaign orchestrated by Kentucky fans." A talk show host with a call-in program criticized the referee's officiating during several broadcasts and a writer for the station's website published critical articles saying that the referee's business "was getting crushed on its Facebook page" and reproduced some of the "fake and abusive reviews" being posted by fans. As a result of the trolling campaign, the referee had to close his Facebook page, his voicemail system crashed, his business ratings collapsed, his family was threatened, and his business received over 800 threatening calls. The referee sued the radio station, alleging that its "post-game coverage of him," including the speech of the talk show host and the website writer, incited the harassment by fans that caused his business losses. His complaint alleged intentional infliction of emotional distress, invasion of privacy, tortious interference with a business relationship, and civil conspiracy. The radio station moved to dismiss on the ground that the speech of the talk show host and writer were protected by the First Amendment. Should the court

grant the motion to dismiss? *See Higgins v. Kentucky Sports Radio, LLC*, 951 F.3d 728 (6th Cir. 2020).

On p. 156, at the end of note #3, add the following new note #4, and renumber the remaining notes:

5. *Public versus Private Concerns*. Some state have codified the right of publicity tort, as exemplified in the Illinois Right of Publicity Act, which prohibits "using an individual's identity for commercial purposes without having obtained previous written consent." In *Lukis v. Whitepages, Inc*., 542 F. Supp. 3d 831 (N.D. Ill. 2020), plaintiffs sued Whitepages based on its ownership and operation of websites that sell "background reports" about people, alleging that "the websites violate the IRPA by using Plaintiffs' identities to promote the sale of Defendant's background report services." Whitepages supplies "free previews" to "promote" its "products" and "services," particularly it "paywalled background reports." A search for plaintiff Lukis in the free previews revealed "her name, age range, phone number, current and previous addresses, and relatives," allowing her to be uniquely identified. The *Lukis* Court found that the use of the plaintiffs' identities by Whitepages satisfied the "commercial purposes" definition of the IRPA – and did not fit the statutory exemption for "core First Amendment speech," covering the "use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign." This exemption incorporates the First Amendment "distinction between speech on matters of public concern and speech of solely private concern." the *Lukis* Court relied on the definitions of this distinction in *Snyder v. Phelps*, 562 U.S. 443 (2011) and *Dunn & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985). The court concluded that the background reports "are properly characterized as private concern, not public concern, speech."

On p. 159, at the end of problem # 10, delete the citation and add the following new citation:

See Foster v. Svenson, 128 A.D. 3d 150 (N.Y. 2015).

E. Invasion of Privacy

On p. 158, insert the following new problem # 7, and renumber the remaining problems:

7. *"Lamarvelous."* Lamar Jackson is a quarterback for the Baltimore Ravens football team in the National Football League (NFL). Jackson, who won the Heisman Trophy as a college football player, won the NFL's Most Valuable Player award in 2019. Several names and phrases are associated with Jackson, including "Action Jackson," "Lamarvelous" and "Not Bad For A Running Back." Suppose that items are selling on Amazon with these phrases. Can Lamar

recover for misappropriate of his personality? *See Jackson v. Amazon.com, Inc*., 2020 WL l7332886 (June 29, 2020, S.D. Fla.).

8. *The Clash Between Trademark Protection & Expressive Freedom*. Jack Daniels has a trademark on the bottle design for its Black Label Tennessee Whiskey, and regards the trademark as an "idealized image" of its brand as a representation of product excellence. VIP Products has decided to produce a rubber dog toy that resembles the appearance of the Jack Daniels bottle. The toy is called the "Bad Spaniels Silly Squeaker" and claims to be "43% poo by volume." Since the toy is a parody of the Jack Daniels bottle, is it protected expression? Should Jack Daniels be able to obtain an injunction against production of the toy on trademark infringement grounds? *See Jack Daniels Properties, Inc. v. VIP Products*, LLC, 953 F.3d 1170 (9th Cir. 2020).

9. *"Catch and Kill" Agreements*. In some instances, news outlets have purchased the exclusive rights to news stories which include an agreement by the source not to disclose the information to anyone else. In some instances, these agreements are legitimate in that a media outlet is paying for the exclusive right to a story. In other instances, the purchaser is trying to kill the story by purchasing the exclusive rights with no intention of ever airing the story. Should these so-called "catch and kill" agreements be enforceable? Do they violate public policy because they keep legitimate information from the public? Are there situations when catch and kill agreements might have legitimate purposes?

On p. 159, at the end of problem # 10, delete the citation and substitute the following new citation:

See Foster v. Svenson, 128 A.D.3d 150, 7 N.Y.S.3d 96 (2015).

F. Obscenity

On p. 171, at the end of problem # 3, add the following new citation:

See FCC v. Pacifica, 438 U.S. 726 (1978).

On p. 176, at the end of problem # 1, add the following new citation:

See Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992).

Chapter 4

Content-Based Speech Restrictions: Post-*Chaplinsky* Categorical Exclusions

A. "Offensive" Speech

On p. 194, at the end of note # 5, delete the period and add the following new citation:

; *Churchill v. University of Colorado at Boulder*, 285 P.3d 986 (Colo. 2012) (en banc).

On p. 195, insert the following new problem # 2 and renumber the remaining problems:

2. *Ban on Profanity*. After *Cohen*, can a state prohibit the utterance of profane speech? Many states have now repealed their bans on profanity. Would a law that makes it illegal to utter "vulgar and indecent language . . . in the presence of two or more persons" be constitutional? *See*, *e.g.*, *People v. Boomer*, 655 N.W.2d 255 (Mich. Ct. App. 2002).

On p. 196, after the problems, add the following new problems:

6. *Facebook Insult*. Assume that during an exchange of Facebook comments, a student defended President Trump's response to the pandemic and the Chair of the Political Science Department at a state university called the student a "neo-nazi murderer-lover" who should "drop dead." Does *Cohen* provide First Amendment protection for the professor's comment? Does the university have a significant interest in disciplining the professor? *See* Alex Morey*, Columbia cannot punish professor who told CUNY student to 'drop dead,' on social media,* THEFIRE.ORG, May 18, 2020, https://www.thefire.org/columbia-cannot-punish-professor-who-told-cuny-student-to-drop-dead-on-social-media/

7. *Flicking Off an Officer*. Assume that after Al dropped off his kids at school, Officer Baker was outside the school and shouted at him to slow down. Al shouted back that he was going five miles under the speed limit, which was true. When Al drove back to the school in the afternoon, he saw Officer Baker parked in her squad car. This time, Al stuck his hand out the window, extended his middle finger, and pointed it at Officer Baker as he drove past her. She pulled Al's car over. She told Al: "You drove by and flicked me off." When Al asked whether his conduct was illegal, Officer Baker stated that, "There was a woman with her children at the school gate who may have seen you. When you flicked me off, that constituted disorderly

conduct, so you are under arrest." Can he be convicted of disorderly conduct? *See Garcia v. City of New Hope*, 984 F.3d 655 (8th Cir. 2021).

On p. 198, insert new problems ## 7 & 8, and renumber the remaining problem:

7. *The Comedian's Insult*. In Canada, a comedian by the name of Mike Ward mocked a disabled teenage singer in a standup comedy routine. In addition to calling the singer "ugly," Ward claimed that he sang off-key and made fun of the singer's hearing aid. When the singer didn't die of an illness, as expected, Ward joked that he tried to drown him. The comedian was charged with having discriminated against the singer because of his disability. Ward lost before a human rights tribunal, and the case ultimately made its way to Canada's Supreme Court. Had the case been brought in the U.S., could Ward have been sanctioned for purportedly discriminating against the singer?

8. *Facebook Insult*. Assume that during an exchange of Facebook comments, a student defended President Trump's response to the pandemic and the Chair of the Political Science Department at a state university called the student a "neo-nazi murderer-lover" who should "drop dead." If the university seeks to discipline the professor for the comment, does *Cohen* provide First Amendment protection for the professor's comment? *See* Alex Morey*, Columbia cannot punish professor who told CUNY student to 'drop dead,' on social media,* THEFIRE.ORG, May 18, 2020, https://www.thefire.org/columbia-cannot-punish-professor-who-told-cuny-student-to-drop-dead-on-social-media/

On p. 197, at the end of problem # 3, delete the citation and substitute the following new citation:

See Survivors Network of Those Abused by Priests, Inc. v. Joyce, 779 F.3d 785 (8th Cir. 2015).

On p. 197, at the end of problem # 4, delete the period and add the following new citation:

; Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

B. "Hate" Speech

On p. 213, at the end of the notes, add the following new note:

4. *Princeton and Free Speech*. A survey of students at Princeton University found that 76% of Princeton students would be uncomfortable with the idea of expressing unpopular views on social media, and that 52% would be uncomfortable with the idea of disagreeing with a

professor. Students were particularly reluctant to discuss such issues as Israel/Palesinte and transgender issues, but that they were also reluctant to discuss race and affirmative action.

On p. 213, delete "3. "Other Grounds for Prosecution" from problem # 3, and place the beginning of the next sentence at the end of the prior problem and renumber the remaining problems.

On p. 214, at the end of problem # 6, add the following new citation:

See Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir. 2001).

On p. 214, problem # 8, change the title to the problem to :Striking a Balance" and then delete the first paragraph of the problem.

On p. 214, at the end of problem # 8, add the following:

A university prohibits students from engaging in speech that involves "harassment, intimidation, rudeness, incivility or bias." May the university invoke such a policy to prohibit students from taking pro-life positions, questioning affirmative action and same-sex marriage, or suggesting that Justice Kavanaugh was treated unfairly during his confirmation hearings? *See Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020).

On p. 221, change the heading "Notes" to "Notes and Questions.

On p. 221, move problem # 1 above the heading "Problems" (so that it becomes a "note") and change it's number from 1 to 3, and then renumber the remaining problems. In the new note, delete the citation and substitute the following new citation:

United States v. Miller, 767 F.3d 585 (6th Cir. 2014).

On p. 221, replace problem # 2 (now problem # 1) with the following new problem:

1. *Anti-Harassment Laws*. A federal statute makes it a crime to use any telecommunications device anonymously "with the intent to abuse, threaten, or harass any specific person." Weiss, who lives in California, sent emails to Senator Mitch McConnell through the U.S. Senate website which referred to McConnell as a "motherf*cker" and a Russian asset,

disparaged his wife's ethnicity (she is Asian-American), and claimed that the resistance should have put a bullet in his head. Is Weiss' speech constitutionally protected or can he be successfully prosecuted for harassment? Does it constitute a true threat? Suppose that a separate law makes it a crime to "harass" someone else that makes the other feel "oppressed, persecuted or intimidated." Suppose that defendant yells the following at an annual gay rights celebration: "You're giving us AIDS" and "There are no homosexuals in heaven." Can defendant be convicted? *See United States v. Weiss,* 475 F.3d 1015 (N.D. Cal. 2020), *rev'd* 2021 WL 616629 (9th Cir., December 27, 2021).

On p. 220, at the end of problem # 6, add the following new citation:

See Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir. 2001).

On p. 221, at the end of problem # 1, delete the citation and add the following new citation:

United States v. Miller, 767 F.3d 585 (6th Cir. 2014).

On p. 223, at the end of the problems, add the following new problem:

14. *Ethnic Intimidation Ordinance*. The Columbus City Council enacted the following ordinance: Section 1: "No person shall violate [one of 14 sections] of the city code when done by reason of or where one of the motives, reasons or purposes for the commission of the offense is the victim's race, sex, sexual orientation, gender identity or expression, color, religion, national origin, ancestry, age, disability, familial status or military status." Section 2: "In a prosecution under this [ordinance] the offender's motive, reason or purpose for the commission of the offense may be shown by the offenders temporarily related conduct or statements before, during or after the offense, including ethnic, sexual orientation, religious or racial slurs, and by the totality of the facts, circumstances and conduct surrounding the commission of the offense." Are these provisions valid according to *R.A.V.* and *Mitchell? See City of Columbus v. Fabich*, 166 N.E.3d 101 (Ohio App. 2020).

On p. 238, at the end of problem # 9, delete the final period and replace it with the following:

; *see also Commonwealth v. Walters*, 472 Mass. 680, 37 N.E.3d 980 (Mass. 2015) (man posted a Facebook picture of a man holding a gun and included statements about seeking justice against two people).

C. True Threats

On p. 232, replace existing note # 2 with the following:

2. *Mental State for "True Threats."* There continues to be controversy regarding the mental state for "true threats." In *United States v. Elonis*, 575 U.S. 723 (2015), the Court refused to definitively state the mental state required for a true threat under the First Amendment. The governing statute, 18 U.S.C. § 875 makes no reference to a mental state and simply prohibits "any communication containing any threat . . . to injure the person of another." In *Elonis*, defendant posted rap lyrics on his Facebook which contained violent language and imagery along with disclaimers that his lyrics referred to a real person, and he claimed that he was simply exercising his First Amendment rights. However, his estranged wife, his co-workers, and the FBI agents did view it as threatening. As a result, Elonis was charged with making a true threat against his wife.

At trial, Elonis argued that he could not be convicted unless he had the "intent to communicate a true threat," but the trial court rejected that argument and Elonis was convicted. The U.S. Supreme Court overturned the conviction, holding that a court must imply a mental state sufficient to separate "wrongful conduct from otherwise innocent conduct." In the Court's view, a true threat prosecution must be focused on the "threatening nature of the communication." Thus, a "reasonable person" or "negligence" standard ("whether a reasonable person would foresee that the statement would be interpreted as a threat") is inadequate, but a conviction could be based on either the purpose to communicate a threat, or the knowledge that the statement would be regarded as such. On remand, Elonis' conviction was affirmed on the basis that he knew that his statement would be regarded as a threat. *See United States v. Elonis*, 841 F.3d 589 (3d Cir. 2016).

In *Elonis*, the Court refused to decide whether a conviction could be based on the mental state of "recklessness" because that issue was not brief or argued. That issue has been decided by some lower courts. For example, in *Kansas v. Boettger*, 450 P.3d 805 (Kan. 2016), *cert. denied*, 140 S.Ct. 1956 (2020), the Kansas Supreme Court held that a conviction could not be based on the mental state of "recklessness." The Court referenced language from *Black* which provided that: " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." As a result, a conviction "requires more than a purpose to communicate just the threatening words. It is requiring that the speaker want the recipient to believe that the speaker intends to act violently." If a conviction is based simply on "an awareness that words may be seen as a threat" creates a risk "that one is merely uttering protected political speech, even though aware some might hear a threat."

On p. 232, after note # 1, insert note # 2 from p. 50 and renumber the remaining notes.

On p. 235, after the notes, add the following new note:

7. *Disinformation Campaigns*. Jack boasted to journalists about his plan to influence the November 2020 election through disinformation campaigns. Jack's organization was the source of robocall messages with these false statements: (1) that police will use vote-by-mail information to track persons with outstanding warrants; (2) that vote-by-mail information will be used by debt collectors; and (3) that the Centers for Disease Control and Prevention ("CDC") is seeking access to vote-by-mail information to conduct mandatory vaccination efforts. Approximately 85,000 robocalls conveyed this message to the telephone numbers of people in urban areas with significant populations of Black voters. Voters who received these robocalls filed suit for an injunction to stop the robocalls under the Voting Rights Act. That statute prohibits "threats and intimidation" to deter individuals "from exercising their voting rights," including not only threats of bodily harm but also "threats of economic harm, legal action, dissemination of personal information, and surveillance can qualify depending on the circumstances." Jack's counsel argued that the robocall messages were protected speech and not "true threats" under the First Amendment. The court observed that the *Black* opinion did not "suggest that the government can ban only threats of physical harm." Therefore, the court found that the messages were true threats and violated the Voting Rights Act, reasoning that "the threat of severe non-bodily harm can engender as much fear and disruption as the threat of violence." *See National Coalition on Black Civil Participation*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020)

On p. 235, at the beginning of problem # 3, delete "3. Other Comparable Symbols?", attach the remainder of the paragraph to the end of problem # 2, and renumber the remaining problems

On p. 238, problem # 11, delete "11. More on Bagdasarian.", add the remainder of the paragraph to the end of the prior problem and renumber the remaining problem.

On p. 238, at the end of problem # 9, delete the final period and replace it with the following:

; *see also Commonwealth v. Walters*, 472 Mass. 680, 37 N.E.3d 980 (Mass. 2015) (man posted a Facebook picture of a man holding a gun and included statements about seeking justice against two people); *People v. Warren*, 2022 WL 1441117 (Ill., May 5, 2022).

On p. 239, after existing problem #15 (now problem # 13), insert the following new problems and renumber the remaining problem:

14. *Mother's Threat*. After her son died during a traffic stop, McGuire blamed Officer Dodd, who was present during the stop, even though her son was on meth. She was charged with harassment based on several statements that she posted on Facebook (fyi, McGuire was not one of

her Facebook friends): "He set my son up to die and y'all better watch out cuz I'm coming for all of you. I'm comn for u to u better watch out this mother is on a rampage and ready to shoot to kill." At the end of one post, McGuire wrote: "FUCK KPD OFFICER JERemy DODD yes I said it loud and proud." McGuire argues that her speech is protected under the First Amendment and the prosecutor argues that it was an unprotected "true threat." What result? *See McGuire v. State*, 132 N.E.3d 438 (Ind. App. 2019).

15. *School Board Harassment*. In 2021, parents protested at school board meetings regarding Covid-19 restrictions and the introduction of critical race theory into school curricula. After the National School Boards Association sent a letter to President Biden asking for assistance in dealing with "the growing number of threats and acts of intimidation" against school boards, Attorney General Merrick Garland announced that the U.S. Department of Justice would take steps to stop the "rise in criminal conduct" directed towards school personnel, including "harassment, intimidation, and threats of violence." Can parents be prosecuted for making statements that school officials regard as "harassment" and "intimidation?" What types of conduct would qualify for prosecution?

16. *Killing Elected Leaders*. Following the attack on the Capitol Building on January 6, 2021, Hunt posted the following message on the video-sharing platform Bitchute: "We need to go back to the U.S. Capitol when all of the Senators and a lot of the Representatives are there, and this time we should carry our guns. W need to slaughter these motherfuckers. Our government at this point is basically a handful of traitors – so we to take up arms, get to D.C., probably the inauguration – so called inauguration of this motherfucking communist Joe Biden. That's the best time to do this, get your guns, show up to D.C., and literally spray these motherfuckers." Does this message qualify as political hyperbole or is it an unprotected true threat? Assume that the Government must prove that "an ordinary, reasonable recipient who is familiar with the context of the communication would interpret it as involving a threat of death or serious injury," and conclude that it was made with the 'intent to impede, intimidate, or interfere with governmental officials in the performance of their official duties," or "to retaliate against such officials on account of the performance of their official duties.'" Can Hunt be convicted? *See United States v. Hunt*, 534 F. Supp. 3d 233 (E.D.N.Y. 2021).

17. *Individualized Toe Tags*. When Child Protective Services took custody of Mrozinski's children away from her, she delivered an envelope to the CPS Office that contained a note (saying, "Childhood is not forever. Death, on the other hand, is. Sleep tight, bitches! (Perhaps I should say, sleep with one eye open?") and four toe tags. Each tag contained the handwritten name of one of the CPS officials associated with Mrozinski's loss of custody. Assume that each toe tag also included a handwritten address for "place of death," the "date of birth," and "TBD" for "date of death." Each of the four people identified on the tags changed their routines and took additional safety precautions. Has Mrozinski made a "true threat?" Is the law under which she is prosecuted (which states "Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another or in a reckless disregard of the risk of causing such terror." *See State v. Mrozinski*, 971 N.W.2d 233 (Minn. 2022).

D. Child Pornography

On p. 247, replace the heading with the Problems heading, renumber the existing problem as problem #1, then add the following new problem #2:

Problems

1. *Photographing the Child*.

2. Expanding Definitions of Ferber Crime. The Texas legislature has enacted a definition of unprotected "*Ferber* speech" that is more broad than the New York statute in the *Ferber* case, as reflected in the text of the Texas Penal Code crime:

"(1) the person knowingly or intentionally possesses, or knowingly or intentionally accesses with intent to view, visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct, including a child who engages in *sexual conduct* as a victim of an offense under [four specified sections] and

(2) the person knows that the material depicts the child as described by section (1).

(3) "*Sexual conduct*" is defined as: "Sexual contact, actual or *simulated* sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola."

(4) "*Simulated*" is defined as: "The explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks."

Assume that defendant is charged under the statute with knowingly possessing material that visually depicts children of 17 years of age or less who are engaging in sexual conduct as defined in the Texas statute. Defendant argues that the Texas statute is substantially overbroad based on two arguments. First, "the Supreme Court has never included in its definition of 'child pornography' anything resembling the Texas statute's prohibition of the lewd exhibition of body parts other than genitalia." Second, the Supreme Court has not endorsed the expansion of the statute to children who are 17 or 18 – the *Ferber* case involved only children under 16. How will the Texas court respond to these overbreadth arguments? *See Ex parte Dehnert*, 605 S.W.3d 885 (Tex. App. 2020).

E. Pornography as Discrimination Against Women

On p. 267, at the end of the problems, add the following new problem:

3. *Prohibiting Harmful Depictions*. The United Kingdom's Advertising Standards Agency prohibits depictions of gender that "are likely to cause harm or to create serious or widespread offense." Would such a prohibition be permissible in the United States? In one instance, an advertisement depicted two male astronauts in space, and a male athlete with a prosthetic leg doing the leg jump and then showed a mother sitting next to a stroller on a park bench. In the

U.S., could this advertisement be prohibited? *See* Rob Picheta, *Volkswagen and Philadelphia Cream Cheese Ads Banned Over Gender Stereotypes*, CNN (Aug. 14, 2019).

F. Possible Additional Categories for Exclusion From Speech Protection

On p. 273, delete the existing problem and title and replace them with the following:

Problem: Prohibiting Gay Conversion Therapy

Suppose that a state law prohibits mental health providers (including physicians, psychologists and psychotherapists) from attempting to change the sexual orientation of gays and lesbians, and stating that any provider who engages in such conduct with a person under the age of eighteen years is deemed to have engaged in unprofessional conduct. The law defines such therapy as a "harmful practice." The law does not prohibit providers from providing acceptance, support and understanding for a client's sexual orientation. Suppose that a licensed therapist and family counselor, who is an ordained minister, and who operates a non-profit counseling center, seeks to challenge the law. He strongly believes that "human sexuality is to be expressed only in a monogamous lifelong relationship between one man and one woman within the framework of marriage." As a result, he has historically provided "gay conversion" therapy of a kind that would violate the new law. Does the law constitute a content-based restriction on speech? Can it survive a First Amendment challenge? *See Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020); *Welch v. Brown*, 834 F.3d 1031 (9th Cir. 2016); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013).

On p. 284, before the Alvarez case, insert the following new problem:

Problem: *Prohibiting the Teaching of Critical Race Theory*

Believing that it tends to promote leftist ideology, a state legislature decides to ban the teaching of critical race theory, an academic framework created by law scholars in the 1970s which argues that racism persists through seemingly race-neutral American laws, policies, and institutions. As the governor of one state said: "The woke class wants to teach kids to hate each other, rather than teaching them how to read, but we will not let them bring nonsense ideology into Florida's schools." Can a state legislature ban the teaching of critical race theory? Can legislatures also ban schools from teaching students about homosexual relationships and transgenderism? Would the analysis be different for elementary schools than for colleges? What about middle schools and high schools?

On p. 297, change the headings "Notes" to "Notes and Questions."

On p. 297, insert the following new note # 1, and renumber the remaining notes:

1. *The Proposed Disinformation Governance Board*. In April, 2022, the U.S. Department of Homeland Security (DHS) proposed to create a new Disinformation Governance Board (DGB). The goal was to combat "disinformation" (defined as "false information that is deliberately spread with the intent to deceive or mislead") that could be connected with violent threats against the U.S. DHS suggested that the goal would be to combat disinformation related to such things as Russian cyber attacks and election interference, efforts to undermine false narratives peddled by human traffickers operating near the U.S.-Mexico border, guidance to the U.S. telecom industry to debunk false claims suggesting 5G cell towers spread COVID-19, and fraud alerts warning of criminals who take advantage of disaster survivors in the wake of super storms. DHS claims that the Board will not "censor" communications, but simply respond. The idea for the Board was ultimately placed on pause after suffering withering criticism. Some complained about the proposed Director's views regarding the Hunter Biden laptop controversy, as well as her statements regarding the Steele Dossier controversy, as indicating that she is not able to be fair and impartial. Would a censorial DGB be constitutional? Would it be permissible for the DGB to simply respond with speech to disinformation? Would governmental responses constitute an effective way to respond to disinformation?

On p. 299, after problem # 4, add the following new problems, and renumber the remaining problems:

5. *False Information about the Coronavirus Pandemic*. Emerson's justifications for protecting speech do not speak directly to the many different governmental justifications that could be offered for restricting speech. Justice Holmes famously declared his support for free speech, but argued that "when a nation is at war," many utterances "will not be endured so long as men fight." *Schenck v. United States*, 249 U.S. 47 (1919). What if a nation is in a pandemic and limitations are imposed on freedom of speech and assembly, in an effort to combat a virus "that has killed" "more than 100,000 nationwide," and for which "there is no known cure, no effective treatment, and no vaccine"? *See South Bay Pentecostal United Church v. Newsom*, 140 S. Ct. 1613 (2020) (denying cert.). Should restrictions on protesting or the dissemination of allegedly false information be permitted during a pandemic when they would not otherwise be allowed?

6. *More on False Information about the Pandemic*. In a Fox News program on March 9, 2020, Sean Hannity and Trish Regan made statements on the air regarding the pandemic. Hannity opined, for example, that, "I didn't like how we're scaring people unnecessarily [about the virus]." "I see it, again, as like, let's bludgeon Trump with this new hoax." Based on those comments, the Washington League for Increased Transparency and Ethics, a nonprofit entity, filed suit against Fox News, arguing that Hannity had "deceived people about the pandemic" and claiming that his statements violated a state consumer protection law in Washington. The defendant Fox News files a motion to dismiss the suit on First Amendment grounds. Why will the state trial judge grant this motion? *See Washington League for Increased Transparency and Ethics v. Fox Corporation*, 2020 WL 2759011 (Wash. Super., May 27, 2020) (Trial Order); Wendy

Davis, *Fox News Defeats Lawsuit Over COVID-19 Comments*, MEDIA DAILY NEWS, May 27, 2020, https://www.mediapost.com/publications/article/351870/fox-news-defeats-lawsuit-over-covid-19-comments.html?edition=118551

7. *The Newton Tragedy*. In 2012, children were murdered at school in Newton, Connecticut. Afterwards, Alex Jones used his Infowars website speculated that the attack had been staged, and that crisis actors had been used to make it appear real. Plaintiff, a father of one of the murdered children, was alleged to have lied about the death of his son in order to promote stronger gun laws. Can plaintiff recover for defamation against Jones and Infowars? *See Jones v. Heslin*, 2020 WL 4742834 (Tex. App., August 14, 2020).

On p. 300, after the problems, add the following new problem:

8. *Mental State for Stolen Valor Crime*. A state statute provides that it is a crime "if, with intent to obtain money, property or other benefit, a person fraudulently holds himself out to be any of the following: (1) A member or veteran of any branch of the armed forces of the United States or of any of the several states; (2) The recipient of any decoration or medal authorized by the Congress of the United States for the armed forces of the United States or any of the service medals or any decoration awarded to members of the armed forces of the United States or of any of the several states." Is the statute overbroad? *See Commonwealth v. Crawford*, 254 A.3d 761 (Pa. Super. 2021).

G. Near Obscene

On p. 311, after the problems, add the following new problem:

2. *Dissemination Statute*. Almost every state has enacted a statute that criminalizes the nonconsensual dissemination of private sexual images. For example, the Illinois legislature enacted a "dissemination" in 2015, which provides as follows"

> A person commits non-consensual dissemination of private sexual images when he or she:
>
> (1) intentionally disseminates an image of another person:
>
> (A) who is at least 18 years of age; and
>
> (B) who is identifiable from the image itself or information displayed in connection with the image; and
>
> © who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and
>
> (2) who obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
>
> (3) knows or should have known that the person in an image has not consented to the dissemination.

(4) Definitions: (A)"Image" includes a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body; (B) "Intimate parts" means the fully unclothed, partially unclothed or transparently clothed genitals, pubic area, anus, or if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing.

© "Sexual act" includes "sexual penetration, masturbation, or sexual activity," and "sexual activity" includes the "knowing touching or fondling by the victim or another person of the intimate parts of the victim or another person for the purpose of sexual gratification or arousal."

The Illinois Supreme Court upheld the statute under an intermediate level of scrutiny, concluding that it is a content-neutral time, place, and manner restriction that regulates a purely private matter." Should the Court reverse the Illinois Supreme Court's decision? On what theory? *See People v. Austin*, 2019 IL 123910, 155 N.E.3d 439 (2019). *See also State v. Casillas,* 952 N.W.2d 629 (Minn. 2020); *State v. VanBuren*, 214 A.3d 791 (Vt. 2018).

H. Commercial Speech

On p. 332, before the problems, add the following new case:

Barr v. American Association of Political Consultants, Inc.
140 S.Ct. 2335 (2020).

Justice Kavanaugh announced the judgment of the Court and delivered an opinion, in which The Chief Justice and Justice Alito join, and in which Justice Thomas joins as to Parts I and II.

The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019. The States likewise field a constant barrage of complaints. For nearly 30 years, the people's representatives in Congress have been fighting back. As relevant here, the Telephone Consumer Protection Act of 1991, known as the TCPA, generally prohibits robocalls to cell phones and home phones. But a 2015 amendment to the TCPA allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts. This case concerns robocalls to cell phones. Plaintiffs are political and nonprofit organizations that want to make political robocalls to cell phones. Invoking the First Amendment, they argue that the 2015 government-debt exception unconstitutionally favors debt-collection speech over political and other speech. They urge us to invalidate the entire 1991 robocall restriction.

I

In 1991, Congress passed and President George H. W. Bush signed the Telephone Consumer Protection Act. The Act responded to a torrent of vociferous consumer complaints about intrusive robocalls. A growing number of telemarketers were using equipment that could automatically dial a telephone number and deliver an artificial or prerecorded voice message. At the time, more than 300,000 solicitors called more than 18 million Americans every day.

Consumers were "outraged" and considered robocalls an invasion of privacy "regardless of the content or the initiator of the message." In enacting the TCPA, Congress found that banning robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." The TCPA imposed various restrictions on the use of automated telephone equipment. One restriction prohibited "any call (other than a call made for emergency purposes or with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to "any telephone number assigned to a paging service, *cellular telephone service*, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." The TCPA prohibited almost all robocalls to cell phones. In 2015, Congress passed and President Obama signed the Bipartisan Budget Act. In addition to making other changes, that Act amended the TCPA's restriction on robocalls to cell phones. It stated: "(a) In General.—Section 227(b) of the Communications Act of 1934 is amended—(1) in paragraph (1)—(A) in subparagraph (A)(iii), by inserting 'unless such call is made solely to collect a debt owed to or guaranteed by the United States' after 'charged for the call.' " In other words, Congress carved out a new government-debt exception to the general robocall restriction. The TCPA imposes tough penalties for violating the robocall restriction. Private parties can sue to recover up to $1,500 per violation or three times their actual monetary losses, which can add up quickly in a class action. States may bring civil actions against robocallers on behalf of their citizens. And the Federal Communications Commission can seek forfeiture penalties for willful or repeated violations of the statute.

Plaintiffs are the American Association of Political Consultants and three other organizations that participate in the political system. Plaintiffs and their members make calls to citizens to discuss candidates and issues, solicit donations, conduct polls, and get out the vote. Plaintiffs believe that their political outreach would be more effective and efficient if they could make robocalls to cell phones. But because plaintiffs are not in the business of collecting government debt, § 227(b)(1)(A)(iii) prohibits them from making those robocalls. The U. S. District Court for the Eastern District of North Carolina determined that the robocall restriction with the government-debt exception was a content-based speech regulation, thereby triggering strict scrutiny. But the court concluded that the law survived strict scrutiny. The U. S. Court of Appeals for the Fourth Circuit vacated the judgment. We granted certiorari.

II

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." Above "all else, the First Amendment means that government" generally "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). The Court's precedents restrict the government from discriminating "in the regulation of expression on the basis of the content of that expression." *Hudgens* v. *NLRB*, 424 U. S. 507, 520 (1976). Content-based laws are subject to strict scrutiny. See *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015). A law is content-based if "a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed,* 576 U. S., at 163. That description applies to a law that "singles out specific subject matter for differential treatment." *Id.*, at 169. 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." *Ibid.* Under § 227(b)(1)(A)(iii), the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.

The Government advances three main arguments for deeming the statute content-neutral, but none is persuasive. *First*, the Government suggests that § 227(b)(1)(A)(iii) draws distinctions based on speakers (authorized debt collectors), not based on content. But this statute singles out calls "made solely to collect a debt owed to or guaranteed by the United States," not all calls from authorized debt collectors. Indeed, the Court has held that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U. S., at 170. *Second*, the Government argues that the legality of a robocall under the statute depends simply on whether the caller is engaged in a particular economic activity, not on the content of speech. We disagree. The law here focuses on whether the caller is *speaking* about a particular topic. *Third*, according to the Government, if this statute is content-based because it singles out debt-collection speech, then so are statutes that *regulate* debt collection, like the Fair Debt Collection Practices Act. That argument is unpersuasive. As we explained in *Sorrell*, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." The courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech. The issue before us concerns only robocalls to cell phones. Our decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity.

In short, the robocall restriction with the government-debt exception is content-based. Under the Court's precedents, a "law that is content based" is "subject to strict scrutiny." *Reed*, 576 U.S., at 165. The Government concedes that it cannot satisfy strict scrutiny to justify the government-debt exception. Although collecting government debt is a worthy goal, the Government concedes that it has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like.

III

Having concluded that the 2015 government-debt exception created an unconstitutional exception to the 1991 robocall restriction, we must decide whether to invalidate the entire 1991 robocall restriction, or instead to invalidate and sever the 2015 government-debt exception. The correct result in this case is to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction.[12]

It is so ordered.

Justice Sotomayor, concurring in the judgment.

The government-debt exception in 47 U. S. C. § 227(b) fails intermediate scrutiny because it is not "narrowly tailored to serve a significant governmental interest." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). The Government has not explained how a debt-collection robocall about a government-backed debt is any less intrusive or could be any less harassing than a debt-collection robocall about a privately backed debt. The Government could have employed far less restrictive means to further its interest in collecting debt, such as "securing consent from the debtors to make debt-collection calls" or "placing the calls itself." Nor has the Government "sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like." I agree that the offending provision is severable.

Justice Breyer, with whom Justice Ginsburg and Justice Kagan join, concurring in the judgment with respect to severability and dissenting in part.

There is no basis here to apply "strict scrutiny" based on "content-discrimination." "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer* v. *Grant*, 486 U. S. 414, 421 (1988). The free marketplace of ideas is not simply a debating society for expressing thought. It is in significant part an instrument for "bringing about political and social change." *Meyer*, 486 U. S., at 421. Our First Amendment jurisprudence has long reflected these core values. This Court's cases have provided heightened judicial protection for political speech, public forums, and the expression of all viewpoints on any given issue. "Governments must not be allowed to choose which issues are worth discussing or debating." *Reed*, 576 U. S., at 182 (Kagan, J., concurring).

From a democratic perspective, it is equally important that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse. The strictest scrutiny should not apply indiscriminately to the very "political and social changes desired by the people." *Meyer*, 486 U. S., at 421. Otherwise, our democratic system would fail, not through the inability of the people to speak or to transmit their views to government, but because of an elected government's inability to translate those views into action. Thus, it is not surprising that this Court has applied less strict standards when reviewing speech restrictions embodied in government regulatory programs. This Court, for example, has applied a "rational basis" standard for reviewing those restrictions when they have only indirect impacts on speech. And it has applied a mid-level standard of review—often termed "intermediate scrutiny"—when the government directly restricts protected commercial speech. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980).

To reflexively treat all content-based distinctions as subject to strict scrutiny regardless of context or practical effect is to engage in an analysis untethered from the First Amendment's objectives. In this case, strict scrutiny is inappropriate. Regulation of debt collection does not fall on the first side of the democratic equation. It has next to nothing to do with the free marketplace of ideas or the transmission of the people's thoughts and will to the government. It has everything to do with the government response to the public will through ordinary commercial regulation. To apply the strictest level of scrutiny to the economically based exemption here is remarkable. Much of human life involves activity that takes place through speech. And much regulatory

activity turns upon speech content. Treating all content-based distinctions on speech as presumptively unconstitutional is unworkable and would obstruct the ordinary workings of democratic governance.

The Court has held that entire categories of speech—for example, obscenity, fraud, and speech integral to criminal conduct—are generally unprotected by the First Amendment entirely because of their content. See *Miller* v. *California*, 413 U. S. 15, 23 (1973). As Justice Stevens pointed out, "our entire First Amendment jurisprudence creates a regime based on the content of speech." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 420 (1992) (concurring). Given that this Court looks to the nature and content of speech to determine whether, or to what extent, the First Amendment protects it, it makes little sense to treat *every* content-based distinction Congress has made as presumptively unconstitutional. Our First Amendment jurisprudence has always been contextual and has defied straightforward reduction to unyielding categorical rules. That said, I am not arguing for the abolition of the concept of "content discrimination." There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate. Neither of those situations is present here. Outside of these circumstances, content discrimination can at times help determine the strength of a government justification or identify a potential interference with the free marketplace of ideas.

Given that the government-debt exception does directly impact a means of communication, a proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so. Narrow tailoring in this context does not necessarily require the use of the least-restrictive means of furthering those objectives. We have called this approach "intermediate scrutiny." As Justice Kavanaugh notes, the government-debt exception provides no basis for undermining the general cell phone robocall restriction. Indeed, looking at the government-debt exception in context, we see that the practical effect of the exception, taken together with the rest of the statute, is to put *non*-government debt collectors at a disadvantage. Their speech operates in the same sphere as government-debt collection speech, communicates comparable messages, and yet does not have the benefit of a particular instrument of communication (robocalls). While this is a speech-related harm, debt-collection speech is both commercial and highly regulated. The speech-related harm at issue here —and any related effect on the marketplace of ideas—is modest. The purpose of the exception is to further the protection of the public fisc. That protection is an important governmental interest. Private debt typically involves private funds; public debt typically involves funds that, in principle, belong to all of us, and help to implement numerous governmental policies that the people support. Congress has minimized any speech-related harm by tying the exception directly to the Government's interest in preserving the public fisc. Calls will only fall within the bounds of that exception if they are "made *solely* to collect" Government debt. Thus, the exception cannot be used to permit communications unrelated or less directly related to that public fiscal interest.

Justice Gorsuch, with whom Justice Thomas joins as to Part II, concurring in the judgment in part and dissenting in part.

II

The TCPA's rule against cellphone robocalls is a content-based restriction that fails strict scrutiny. [I am unable] to support the remedy the Court endorses today. Respectfully, if this is what modern "severability doctrine" has become, it seems to me all the more reason to reconsider our course.

On p. 332, insert the following new problem # 3, and renumber the remaining problems:

3. *Regulating Fake Meats*. A Missouri statute makes it a crime for any seller of food to engage in deceptive practices. In particular, the law makes it a crime to misrepresent a product as "meat" when it is not derived from poultry, livestock, or captive cervid carcass or part thereof. Violations of the law are misdemeanors punishable by up to one year in jail and a fine of up to $1,000. The state justifies the law on the basis that it is designed to prevent consumer deception, and the law specifically prohibits the use of terms like "burger" or "sausage" in reference to plant-based products. The law is challenged by a company that markets a product called "Tofurky" – a tofu-based dish that is designed to be like a turkey – in packages that use labels and marketing that clearly indicate the product is made of plants, is meatless, and is either vegetarian or vegan. It also markets "veggie burgers." The company claims that its name is not "deceptive." Under the *Central Hudson* test, is the law valid? Does the name "Tofurky," or the use of the words "veggie burger," create consumer confusion about whether the product is plant-based or meat-based? *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021).

On p. 333, at the end of problem # 6, add the following citation:

See First Choice Chiropractic LLC v. DeWine, 979 F.3d 675 (6th Cir. 2020), *cert. denied*, 141 S.Ct. 1389 (2021).

On p,. 335, at the end of problem # 14, delete the citation and substitute the following new citation:

See Centro De La Communidad Hispana De Locust Valley v. Town of Oyster Bay, 868 F.3d 104 (2d Cir. 2017).

On p. 337, after the problems, add the following new problems:

19. *Transgender Referrals*. The State of Arkansas enacts a law prohibiting doctors from referring transgender kids for "gender-affirming" care. Arkansas views the law as a legitimate regulation of professional conduct. The law is challenged on the basis that it unduly restricts the autonomy of doctors to determine the best course of care for their patients. Does the law represent

an unconstitutional content-based or viewpoint-based restriction on speech? Does it matter that the American Medical Association regards such referrals as legitimate medical treatment? *See Brandt v. Rutledge*, 551 F.Supp.3d 882 (E.D. Ark. 2022).

20. *The False Advertising Litigation*. Ariix, a nutritional supplement maker, claims that NutriSearch Corp., publisher of the Nutrisearch Comparative Guide to Nutritional Supplements, is publishing rigged ratings that favor Ariix's competitor, Usana Health Sciences. Indeed, Ariix claims that NutriSearch created the guide simply to increase sales of Usana's products, and that Usana pays it hundreds of thousands of dollars a year in promotional fees. Ariix also claims that NutriSearch adjusts it criteria to favor Usana and to prevent Ariix from receiving its top rating. Should the guide be regarded as commercial speech, and should NutriSearch be liable for damages or injunctive relief if its results are rigged in favor of Usana? *See Ariix, LLC v. NutriSearch Corp.*, 140 S. Ct. 2717 (2020).

21. *Ads on Taxi TV.* In 2001, a New York City ordinance was enacted that bans advertisements in both for-hire vehicles (FHVs) and taxi cabs. The city originally enacted the ban because passengers claimed to be annoyed by video ads. However, the city amended the law to authorize a limited category of ads to appear on the screens of "Taxi TV"; equipment that was installed in taxis to allow passengers to pay by credit card. The ads were justified as a way to allow taxi drivers to install the newly mandated Taxi TV equipment. Vugo, Inc., wants to sell an advertising software platform, but the ban on ads in FHVs prevents it from doing so. Vugo files suit to challenge the ban on the ground that it violates the *Central Hudson* test. What result and why? *See Vugo, Inc. v. City of New York*, 931 F.3d 42 (2019).

22. *Debt Collection*. Massachusetts' Attorney General issues an emergency regulation "to protect consumers from unfair and deceptive debt collection practice during the Covid Emergency. The ACA, a non-profit trade association composed of members who work in the credit-and-collection industry, seek to challenge the regulation on First Amendment grounds. The regulation and governmental interests are described as follows:

> The Regulation prohibits debt collectors from initiating telephone calls to debtors and from initiating a lawsuit to collect a debt. [But] there are exceptions. Persons seeking to collect mortgage debts, tenant debts, or debts for telephone, gas, or electric utility companies may file lawsuits and resort to their existing remedies. Debt collectors may initiate telephone conversations if the sole purpose of the call is to discuss rescheduling court appearances, or to collect a mortgage or tenant debt.
>
> The Regulation also exempts six classes of collectors from its prohibitions by excluding them from its definition of "Debt Collector." These include certain nonprofit entities, federal employees, persons collecting fiduciary-[related] or escrow-related debts, and anyone serving legal process to judicially enforce a debt. ACA members complain that their only alternative to telephone calls for the foreseeable future is letters, which "rarely yield collection results for a large proportion of the accounts in inventory and are largely used to convey the consumers' rights under federal and state law.
>
> The Attorney General invokes three separate governmental interests as substantial: "(1) shielding consumers from aggressive debt collection practices that wield undue influence in view of the coronavirus pandemic; (2) protecting residential tranquility while

citizens have largely had to remain at home during the coronavirus pandemic; and (3) temporarily vouchsafing citizens' financial well-being during the coronavirus pandemic."

When the court applies the *Central Hudson* test to the regulation, what result and why? *See ACA International v. Healey*, 457 F. Supp. 3d 17 (D. Mass. 2020).

23. *Nude Cartoon Character*. The Flying Dog Brewery brews and sells craft beer for distribution in North Carolina. The image that appears on the label for FDB's "Freezin' Season Winter Ale" is a nude cartoon figure standing next to a campfire. Advertising of alcoholic beverages such as the Winter Ale must comply with an Alcoholic Beverage Control Commission, rules which provides that "a product label on any alcoholic product sold or distributed in this State "shall not contain any statement, design, device, or representation" which "depicts the use of alcoholic beverages in a scene that is determined by the Commission to be undignified, immodest, or in bad taste." Should the court recognize the proffered government interest as "substantial" – namely, preventing parents and children from being surprised by sexually explicit and vulgar modes of advertising on ubiquitous beer labels" and "protecting children from exposure to vulgar language and speech that is sexually profane"? Does the Commission's rule satisfy the requirements of the *Central Hudson* test? "*See Flying Dog Brewery, LLC v. North Carolina Alcoholic Beverage Control Commission*, 2022 WL 1553258 (E.D.N.C., May 16, 2022).

24. *Required Signage about Bathroom Use*. The Tennessee legislature enacts a statute that applies to "any public or private entity or business that operates a building or facility open to the general public and that, as a matter of formal or informal policy, allows a member of either *biological* sex to use any public restroom within the building or facility." Such an entity or business is required to post the following notice on all its entrances: "This Facility Maintains a Policy of Allowing the Use of Restrooms by Either Biological Sex, Regardless of the Designation on the Restroom." The sponsors of the legislation argue that it is possible that hypothetical sexual predators might "take advantage of" trans-inclusive public restroom policies to "assault" or "rape" other restroom users. They also contend that it is "shocking and a danger to people when they walk into a restroom marked 'men' or 'women' when someone of the opposite sex is inside because it could scare them or provoke violence." Assume that a restaurant has two multiple-user restrooms bearing "sex designations."The restaurant also has an "informal policy to allow people to use the sex-designated restroom that best matches their *gender identity*." When the restaurant owner files suit to invalidate the statute, will the court view the statute as posing a problem of "compelled speech"? If so, is the law constitutional because it simply compels commercial actors to disclose "purely factual and uncontroversial information about the terms under which services will be available"? If not, can the government satisfy the strict scrutiny test? *See Bongo Productions, LLC v. Lawrence*, 2022 WL 1557664 (M.D. Tenn., May 17, 2022).

Chapter 5

Content-Neutral Speech Restrictions: Symbolic Speech and Public Fora

A. Symbolic Speech

On p. 349, insert the following new problems, and renumber the remaining problems:

4. *Bikini Barista Stands*. Assume that drive-through businesses employ women to serve coffee while wearing bikinis. The City Council enacts an ordinance that requires all employees at "quick-service facilities" to wear clothing that covers "minimum body areas" that cover the area "three inches below the buttocks to three inches above the shoulder blades." The owner of a bikini barista stand challenges the "minimal clothing requirement on the theory that the wearing of bikinis is protected symbolic speech that project a message of "women's strength" and "body positivity." Can the owner satisfy the *Spence* test? If so, will the court uphold the ordinance under *O'Brien*? *See Edge v. City of Everett*, 929 F.3d 657 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1297 (2020).

5. *Prohibiting Handshakes During a Pandemic*. Can a handshake be regarded as symbolic speech? If so, can it be prohibited during the coronavirus pandemic in order to prevent the spread of the disease?

On p. 349, after the problems, add the following new problems:

7. *Unvaccinated Children*. The New York legislature repeals the religious exemption for unvaccinated children who attend public or private schools, and requires all children either to be vaccinated or be home schooled. The parents of some children file suit on their behalf, claiming that the new law violates the First Amendment, claiming that the act of receiving a vaccination is symbolic speech, and that the requirement compels the children to rejection their religious beliefs. What result and why? *See F. F. ex.rel Y.F. v. State*, 114 N.Y.S.3d 852 (Sup. Ct. 2019).

8. *Undercover Journalist.* Project Veritas, a non-profit entity, engages in undercover journalism. PV staff members investigates candidates for office by secretly seeking to record their statements, both in public places and in other locations in which the interactions candidates and staffers may be observed. A complaint is brought against PV before the Ohio Election Commission for violations of an Ohio campaign statute because PV placed an "operative" at the

campaign office of the Hillary Clinton campaign in Ohio. While pretending to be a "volunteer," the operative recorded the conversations between campaign workers and PV later published a video with clips of these recordings. Under the statute, the Commission is authorized to act upon complaints by hearing evidence and then either issue a public reprimand, imposing a fine, or refer the matter to a state prosecutor. The criminal statute provides as follows:

> No person, during the course of any campaign for nomination or election to public office or office of a political party, shall knowingly and with intent to affect the outcome of such campaign do any of the following: (1) Serve, or place another person to serve, as an agent or employee in the election campaign organization of a candidate for the purpose of reporting information to the employee's employer or the agent's principal without the knowledge of the candidate or the candidate's organization. . . .

How should a court analyze this challenge? Does the First Amendment apply? If so, what type of scrutiny should the court use? If the court applies the *O'Brien* standard, will the plaintiff PV obtain an injunction to invalidate the statute? *See Project Veritas v. Ohio Election Commission*, 418 F. Supp. 3d (S.D. Ohio 2019).

On p. 355, after the problems, add the following new problem:

4. *Homeless Encampment*. Assume that a city has a policy of evicting people who are living in tents or homemade shelters on public property which authorizes police to arrest anyone in a homeless encampment and remove their belongings after giving them 72-hours notice. The city mandates that the police must clear illegal encampments "through any lawful means, including arrest" during "all times when space is available in shelters for the homeless," and space is always available. Plaintiffs who reside in homeless encampments, challenge the city's policy as a violation of their First Amendment rights. Plaintiffs allege that "by living in groups of 40 people in tents or makeshift shelters for 24 hours a day in downtown locations, or anywhere open and obvious to the public, plaintiffs are engaged in symbolic political speech calling attention to the City's affordable housing crisis." Does plaintiffs' conduct meet the *Spence* test? If so, are the city's policy and injunction content-neutral? Are they "justified without reference to the content of the regulated speech" or "were they adopted by the government 'because of disagreement with the message [the speech] conveys?" Does the policy satisfy the intermediate scrutiny test of *O'Brien*? Do the terms of the city's injunction satisfy the heightened scrutiny test of *Madsen*? *See Phillips v. Cincinnati*, 479 F. Supp. 3d 611 (S.D. Ohio 2020).

On p. 364, after the problems, add the following new problems:

7. *Wearing Guy Fawkes Mask*. Don was arrested in the summer of 2019 for wearing the Guy Fawkes mask like those worn in the 2005 movie, *V for Vendetta*. The mask is white with a thin black mustache and a black goatee; it covers the entire face except for two cut-outs for the eyes. Don is charged with violating this Louisiana statute: "No person shall use or wear in any public place of any character whatsoever, or in any open place in view thereof, a hood or mask, or

anything in the nature of either, or any facial disguise of any kind or description, calculated to conceal or hide the identity of the person or to prevent his being readily recognized." Don's conduct did not qualify for any of the statutory exceptions that relate to holidays or parades. Don testified at trial about his purpose for wearing the mask as follows: "I basically set myself out to be a martyr -- to show why we cannot give up our – civil rights. Everybody knows what is going on in the world, the terrorists and all these other -- ... crazy things. And, so – so, if we – if we give up our essential liberties for a little bit of safety, it doesn't keep us safe. Our constitutional rights are like a spare tire, if you will. You don't know you need them until you need them. And that's essentially what this is about." Should the court find that Don's wearing of the mask satisfies the *Spence* test for symbolic speech? What if Don wore the mask at a demonstration in the summer of 2020? *See State v. McGough*, 309 So. 3d 1006 (La. App. 2021).

B. Public Forum Doctrine

[1] Foundational Principles

On p. 366, in the citation at the end of the note, insert a comma after "Apel"

On p. 367, at the end of problem # 3, delete the period and insert the following citation:

, *cert. granted and judgment vacated sub. nom. Biden v. Knight First Amendment Institute at Columbia University*, 141 S. Ct. 1220 (2021), *dismissed as moot*, 2021 WL 5548367 (2d Cir. 2021). *See also Sammons v. McCarthy*, 2022 WL 2065976 (D. Md., June 8, 2022).

On p. 368, at the end of the problems, add the following new problem:

7. *Public Fora in a Pandemic.* During the Covid-19 pandemic, when social distancing is advised, and public gatherings have been prohibited, traditional free speech fora (e.g., parks and sidewalks) seem to be less important than online communication sources (e.g., Zoom). However, since most social media is controlled by private companies, individuals do not have the guaranteed access that they have with traditional public fora.

On p. 371, insert the following new problem # 1, and renumber the remaining problems:

1. *Roadway Mediams*. A city ordinance makes it illegal to sit or stand on certain unpaved medians, or any median which is less than 36 inches wide, for any period of time. The city seeks to justify the prohibition on public safety grounds, and claims that it is a content-neutral time, place and manner restriction. Evans wants to engage in First Amendment activities on the median,

and he claims that the median is an effective way to reach people. Is the prohibition valid? *See Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019).

On p. 372, at the end of problem # 3, delete the period and add the following new citation:

; *American Civil Liberties Union of Colorado, City and County of Denver*, 569 F. Supp. 2d 1142 (D. Colo. 2008).

On p. 372, at the end of the problems, insert the following new problem:

7. *Prohibiting Panhandling in Public Places*. An Indiana law makes it illegal to solicit donations within 50 feet of an automatic teller machine, or any location where a "financial transaction occurs." Since no solicitations can take place near where "financial transactions occur," the law would prohibit panhandling near such places as restaurants, businesses, parking meters and public monuments, and in virtually all of downtown Indianapolis. As a result, groups like the ACLU cannot solicit memberships or contributions on public streets on Constitution Day. Should panhandling be regarded as protected speech? Is the law valid? *See Civil Liberties Foundation, Inc. v. Superintendent*, 470 F. Supp. 3rd 888 (S.D. Ind. 2020).

On p. 378, at the end of note # 1, add the following:

Likewise, a lower court has held that YouTube's conduct does not qualify as state action. *See Prager University v. Google*, 951 F.3d 991 (9th Cir. 2020).

On p. 381, delete the citation in the case name at the end of problem # 1 and replace with the following new citation:

29 F.4th 1239 (11th Cir. 2022).

On p. 381, at the end of the problems, insert the following new problems:

3. *More on Bus Advertisements*. As noted in *Lehman v. Shaker Heights*, *supra*, public bus systems generally have the authority to prohibit political messages in the "card space" on buses. But, if they allow political messages, can they prohibit messages that are "scornful" or that subject anyone to "ridicule?" A group wants to run an advertisement which reads as follows: "Fatwa on your head? Is your family or community threatening you? Leaving Islam?" Can the bus company reject the advertisement because it is scornful or ridiculing regarding Islam? *See*

American Freedom Defense Initiative v. Suburban Mobility Authority, 978 F.3d 481 (6th Cir. 2020).

2. *Graduation Dress Code*. Students who choose to participate in a high school's graduation must abide by a dress code that requires them "to wear a cap and gown with tassel without adornment or alteration." The purposes of this prohibition are: 1) to preserve the "tradition of honoring the academic achievements of all students equally and thereby demonstrating class unity"; and 2) to maintain the "serenity and sanctity of a ceremony that is conducted without any disruption that might occur if students could alter their graduation caps." One graduating student, a member of the Sioux tribe, requests an exemption from the dress code so that she can wear a beaded cap adorned with an eagle plume designed to symbolize the passage into adulthood as per the cultural and religious practice of the Sioux. When the school denies the request, the student and her parents sue. Is the high school graduation ceremony a "limited public forum?" *See Waln v. Dysart School District*, 2021 WL 1255521 (D. Ariz., February 28, 2021).

On p. 389, at the end of the problem, add the following new citation:

Compare Burson v. Freeman, 504 U.S. 191 (1992); *DeRosier v. Czarny*, 2019 WL 4691251 (N.D.N.Y., September 26, 2009).

On p. 389, delete the problem heading, substitute the following "Problems" heading, insert the heading for problem # 1, and add the following new problem # 2:

Problems

1. *Redrafting the Statute.*

2. Is a "Political" Ad Ban Capable of Reasoned Application? When a nonprofit group seeks to purchase advertising space on Richmond buses to state its opposition to animal experimentation, the proposed ad is rejected because it violates the transit company's policy against accepting "political" ads. That policy declares that buses are not "a public forum for dissemination, debate, or discussion of public issues." But the terms "political" and "public issues" have no formal definition in the company's policy. Instead, the unwritten and informal definition is that a "political" ad is any ad "expressing a viewpoint" or is an ad from a "political action group," defined as a group that "engages in a specific targeted policy advocacy that would be related to their one side of the political issue. Is "transit advertising space" a nonpublic forum? Does the transit company have "a legitimate interest in avoiding politically charged advertisements." The evidence shows that the transit company "has run advertisements for the vice-presidential debate, a free-expression exhibit at an art museum, and an anti-dog-fighting nonprofit asking readers to spay and neuter their dogs." By contrast, it rejected ads from the Physicians Committee for Responsible Medicine encouraging local hospitals to 'EAT MORE CHICKPEAS!,' and an ad from "a hospital association advocating for increased government healthcare funding." The transit company states that "an advertisement stating 'Support our troops' would not be political if run by the United States but would be political if run by someone

else." Also, some ads that "do not relate to the government, such as one calling for a boycott of the NFL or McDonald's," would qualify as "political." Is the company's policy "capable of reasoned application" as required by *Minnesota Voters Alliance? See White Coat Waste Project v. Greater Richmond Transit Company,* 35 F.4th 179 (4th Cir. 2022).

On p. 389, after the problem, add the following new problem:

2. *Custom Stamps with Political Content*. The U.S. Postal Service allows individuals to create customized stamps, but prohibits (at one time) all "controversial" content. The rule was amended to prohibit all political content on custom stamps. An art gallery operator wishes to have custom stamps that are critical of the Court's decision in *Citizens United* (a campaign finance case). In particular, he wants to promote a gallery exhibit with a stamp which states that "Democracy is Not for Sale." The USPS refuses to print the stamp because it contains political content. Is the prohibition on political content valid? *See Zukerman v. U.S.P.S.*, 961 F.3d 431 (D.C. Cir. 2020).

[2] Restrictions on Public Forum Use

On p. 395, insert the following new problems, and then renumber the remaining problems:

2. *Prohibiting Protests During the Coronavirus Pandemic*. We know that citizens have the right to peacefully assemble, as well as to petition government for a redress of their grievances. However, we also know that governments have the right to impose reasonable "time, place and manner"restrictions on the use of public spaces for protest purposes. During the coronavirus pandemic, many states imposed "lock downs," requiring people to stay-at-home. During this time, a group of citizens applies for a permit to demonstrate against the lock down. Can you city deny the request on the basis that it is "too dangerous" to allow mass gatherings? Would it matter that the protestor's application includes a promise to maintain "appropriate social distancing and wear masks as per the Center for Disease Control guidelines?"

3. *Key Infrastructure Assets*. In recent years, individuals have protested against the construction of oil pipelines. Kentucky passed a law that prohibits individuals from entering or trespassing on such assets, including military bases and petroleum refineries. Would it be permissible for Kentucky to amend the law to prohibit all actions that "inhibit" or "impedes" the functioning of a key infrastructure asset?

On p. 396, at the end of newly numbered problem # 6, add the following new citation:

See Pen American Center, Inc. v. Trump, 448 F. Supp. 3d 309 (S.D.N.Y., 2020).

On p. 397, at the end of newly numbered problem # 8, after the text and before the citation, add the following new citation:

Texas ex rel. Texas Transportation Commission v. Knights of the Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995). *But see*

On p. 403, insert the following new problem # 1 and renumber the remaining problems:

1. *Anti-Abortion Slogans*. Washington D.C. has passed the Defacing of Public or Private Property Criminal Penalty Act which prohibits people from writing, marking, drawing or painting on public or private property, including streets and sidewalks. D.C. allowed a "Black Lives Mural" to be painted on a public street, and a "Defund the Police" message beside it. However, when an anti-abortion group asked for permission to paint a "Black Pre-Born Lives Matter" slogan on the sidewalk, the request was denied. Was the denial permissible or appropriate? *See Frederick Douglass Foundation, Inc. v. District of Columbia*,531 F. Supp. 3d 316 (D.D.C. 2021).

On p. 403, delete problem ## 2 and 3, and replace them with the following:

2. *Covid-19 Size Limits*. In response to the pandemic, Illinois enacts a law limiting the size of public gatherings to 50 people. However, Illinois makes an exception for religious gatherings which are not subject to any size limits. Does the Illinois law involve a content-based restriction on speech? Can the distinction between religious gathering, and non-religious gatherings, be justified as an accommodation of religion? *See Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

3. *Noise Ordinances*. A Maine law makes it a crime to "make noise that can be heard within a building where health services are being delivered." The ordinance is enacted to protect the health and well being of those receiving health services inside the facility. When abortion providers complain about the noise being created by a protestor, a police officer does not ask him to stop protesting, but does ask him to "tone it down." When he refuses to do so, the officer arrests him. Is a noise ordinance a permissible content-neutral time, place and manner restriction on speech? Is the law unduly vague? *See March v. Frey*, 458 F. Supp.3d 16 (D. Maine 2020); *see also Harmon v. City of Norman*, 981 F.3d 1141 (10th Cir. 2020).

On p. 404, replace problems ## 4 & 5 with the following, and then renumber the remaining problems:

4. *Occupy Columbia and the Emergency Regulation*. *See Occupy Columbia v. Haley*, 738 F.3d 107 (4th Cir. 2013);

On p. 405, at the end of problem # 6, delete the citation and add the following new citation:

See First Vagabonds Church of God v. City of Orlando, 638 F.3d 756 (11th Cir. 2011).

On p. 406, in the first citation at the end of problem # 7, insert the "v." abbreviation for versus between the names of the parties "Luce" and "Town of Campbell".

On p. 415, at the end of the text and before the citation at the end of problem # 5, add the following new citation:

See International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997).

On page 429, at the end of note #2, add the following new citation:

See Price v. City of Chicago, 915 F.3d 1107 (7th Cir. 2019) (finding that definitions of "content-neutrality" laws and "narrow tailoring" in *Hill v. Colorado* have been modified by *McCullen v. Coakley* and *Reed v. Town of Gilbert*, but declining to find that either case overruled *Hill*), *cert denied*, ___ S. Ct. ___ (2020).

On p. 429, in the fourth line of problem # 1, delete the word "disputed" and insert the word "assumed"

On page 429, at the end of problem # 1, delete the period and add the following new citations:

, 941 F.3d 73 (3d Cir. 2020). *Compare Reilly v. City of Harrisburg*, 790 Fed.Appx. 468 (3d Cir. 2019) (upholding 20-foot buffer zone).

On p. 430, at the end of the problems, add the following new problem:

3. *Courthouse Buffer Zone*. A state statute creates a 200 foot buffer zone around courthouses, prohibiting protests relating to ongoing trials. The state seeks to justify the law as a way of shielding trial participants from suffering undue influence while entering or exiting the courthouse. Should the law be regarded as a content-based restriction on speech and therefore subject to strict scrutiny? Does it matter that the law prohibits all protest activities within the buffer zone, and not just those activities that are disruptive of court proceedings? Does the fact

that the state already has laws prohibiting anyone from obstructing public sidewalks? Is the law valid? *See Picard v. Clark*, 475 F. Supp.3d 198 (S.D.N.Y. 2020).

On p. 440, before the problems, insert the following new case:

City of Austin, Texas v. Reagan National Advertising of Austin, LLC

142 S.Ct.1464 (2022).

Justice SOTOMAYOR delivered the opinion of the Court.

American jurisdictions have regulated outdoor advertisements for well over a century. By some accounts, the proliferation of conspicuous patent-medicine advertisements on rocks and barns prompted States to begin regulating outdoor advertising in the late 1860s. Federal, state, and local governments have long distinguished between signs (such as billboards) that promote ideas, products, or services located elsewhere and those that promote or identify things located onsite. For example, this Court in 1932 reviewed and approved of a Utah statute that prohibited signs advertising cigarettes and related products, but allowed businesses selling such products to post onsite signs identifying themselves as dealers. *Packer Corp. v. Utah*, 285 U.S. 105. On-/off-premises distinctions proliferated following the enactment of the Highway Beautification Act of 1965 (Act), 23 U.S.C. § 131. In the Act, Congress directed States receiving federal highway funding to regulate outdoor signs in proximity to federal highways. Approximately two-thirds of States have implemented similar on-/off-premises distinctions. "Tens of thousands of municipalities nationwide" adopted analogous on-/off-premises distinctions in their sign codes. The City of Austin is one such municipality. The City distinguishes between on-premises and off-premises signs, and specially regulates the latter, in order to "protect the aesthetic value of the city and to protect public safety."

During the time relevant to this dispute, the City's sign code defined the term "off-premise sign" to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Austin, Tex., City Code § 25–10–3(11) (2016). This definition was analogous to the one used in the federal Highway Beautification Act and many other state and local codes. The code prohibited the construction of any new off-premises signs, but allowed existing off-premises signs to remain as grandfathered "non-conforming signs." An owner of a grandfathered off-premises sign could "continue or maintain it at its existing location" and could change the "face of the sign," but could not "increase the degree of the existing nonconformity," "change the method or technology used to convey a message," or "increase the illumination of the sign." By contrast, the code permitted the digitization of on-premises signs.

Respondents, Reagan National Advertising of Austin, LLC and Lamar Advantage Outdoor Company, L.P., are outdoor-advertising companies that own billboards in Austin. In 2017, Reagan sought permits to digitize some of its off-premises billboards. The City denied the applications. Reagan filed suit alleging that the code's prohibition against digitizing off-premises signs, but not on-premises signs, violated the Free Speech Clause of the First Amendment. The District Court

held that the sign code provisions were content neutral under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The Court of Appeals reversed.[1] This Court granted certiorari.

A regulation of speech is facially content based under the First Amendment if it "targets speech based on its communicative content"—that is, if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. The Court of Appeals interpreted *Reed* to mean that if "a reader must ask: who is the speaker and what is the speaker saying" to apply a regulation, then the regulation is content based. This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent. Unlike *Reed*, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny.

Reed confronted a very different regulatory scheme: a comprehensive sign code that "singled out specific subject matter for differential treatment." The town of Gilbert applied size, placement, and time restrictions to 23 different categories of signs. The Court focused its analysis on three categories defined by whether the signs displayed ideological, political, or certain temporary directional messages. The code gave the most favorable treatment to "Ideological Signs," defined as those "communicating a message or ideas for noncommercial purposes" with certain exceptions. It offered less favorable treatment to "Political Signs," defined as those "designed to influence the outcome of an election." Most restricted of all were "Temporary Directional Signs Relating to a Qualifying Event," with qualifying events defined as gatherings "sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Reed* determined that these restrictions were facially content based. "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." Applying these principles, the Court reasoned that "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 would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." By treating ideological messages more favorably than political messages, and more

---

[1] The City [claims] that the contested code provisions regulate commercial speech and so are subject to intermediate scrutiny. However, Reagan's billboards also display noncommercial messages. More importantly, the code provisions admit of no exception for noncommercial speech. The only way in which they differentiate speech is by distinguishing between on-premises and off-premises signs.

favorably than temporary directional messages, "the Code singled out specific subject matter for differential treatment, even if it did not target viewpoints within that subject matter."[2]

In this case, enforcing the City's challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some offsite location. Unlike the sign code in *Reed*, the City's provisions do not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, a sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation.

This Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral. The First Amendment allows for regulations of solicitation—that is, speech "requesting or seeking to obtain something" or "an attempt or effort to gain business." To identify whether speech entails solicitation, one must read or hear it first. Restrictions on solicitation are not content based and do not inherently present "the potential for becoming a means of suppressing a particular point of view," so long as they do not discriminate based on topic, subject matter, or viewpoint. *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). Thus, in 1940, the Court invalidated a statute prohibiting solicitation for religious causes but observed that States were "free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Cantwell v. Connecticut*, 310 U.S. 296, 306. Decades later, the Court reviewed a time, place, and manner regulation restricting all solicitation at the Minnesota State Fair, as well as all sale or distribution of merchandise, to a specific location. *Heffron*, 452 U.S. at 643. The State had applied the restriction against a religious practice that included "soliciting donations for the support of the Krishna religion." As a result, members of the religion were free to roam the fairgrounds and discuss their beliefs, but they were prohibited from asking for donations outside of a designated location. The Court upheld this restriction as content neutral, emphasizing that it "applied evenhandedly to all who wished to solicit funds," whether for "commercial or charitable" reasons.

The Court has understood distinctions between on-premises and off-premises signs to be content neutral. In 1978, the Court dismissed an appeal "for want of a substantial federal question" where a state court had approved of an on-/off-premises distinction as a permissible time, place, and manner restriction under the Free Speech Clause. *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978). Three years later, the Court upheld an ordinance that

---

[2] The concurrence in *Reed* explained that "content-based laws merit the protection" of strict scrutiny "because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth."

prohibited all off-premises commercial advertising but allowed on-premises commercial advertising. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 503 (1981). *Metromedia* did not decide whether the off-premises prohibition was content based, as it regulated only commercial speech and so was subject to intermediate scrutiny. Shortly thereafter the Court described the off-premises prohibition as "a *content-neutral* prohibition against the use of billboards." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Underlying these cases is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, regulations that discriminate based on "the topic discussed or the idea or message expressed" are content based. *Reed*, 576 U.S. at 171. The sign code provisions challenged here do not discriminate on those bases.

Reagan asserts that the City's sign code "defines off-premises signs based on their 'function or purpose.' " The principle *Reed* articulated is more straightforward. While overt subject-matter discrimination is facially content based (for example, "Ideological Signs," defined as those "communicating a message or ideas for noncommercial purposes"), so, too, are subtler forms of discrimination that achieve identical results based on function or purpose (for example, "Political Signs," defined as those "designed to influence the outcome of an election"). A regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a "function or purpose" proxy that achieves the same result. That does not mean that any classification that considers function or purpose is *always* content based. Nor did *Reed* cast doubt on the Nation's history of regulating off-premises signs. Off-premises billboards were not present in the founding era, but as large outdoor advertisements proliferated in the 1800s, regulation followed. As early as 1932, the Court had already approved a location-based differential for advertising signs. For the last 50-plus years, federal, state, and local jurisdictions have repeatedly relied upon on-/off-premises distinctions to address the distinct safety and esthetic challenges posed by billboards and other methods of outdoor advertising. The unbroken tradition of on-/off-premises distinctions counsels against the adoption of Reagan's novel rule.

This Court's determination that the City's ordinance is facially content neutral does not end the First Amendment inquiry. If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, that restriction may be content based. See *Reed*, 576 U.S. at 164. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Because the Court of Appeals did not address these issues, the Court leaves them for remand and expresses no view on the matters.

For these reasons, the judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER, concurring.

I continue to believe that *Reed* was wrong. The First Amendment[']s] purposes are often better served when judge-made categories (like "content discrimination") are treated, not as bright-line rules, but instead as rules of thumb. And, where strict scrutiny's harsh presumption of unconstitutionality is at issue, it is particularly important to avoid jumping to such presumptive

conclusions without first considering "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *Id.,* at 179 (BREYER, J., concurring). The First Amendment, by protecting the "marketplace" and the "transmission" of ideas, helps to protect the basic workings of democracy. Courts help protect democratic values by strictly scrutinizing categories of laws that threaten to "drive certain ideas or viewpoints from the marketplace." *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992). First Amendment values are in danger when the government imposes restrictions upon "core political speech," *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186 (1999); when it discriminates against "particular views taken by speakers on a subject," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); and, in some contexts, when it removes "an entire topic" of discussion from public debate.

Not all laws that distinguish between speech based on its content fall into a category of this kind. Many ordinary regulatory programs turn on the content of speech without posing any "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. Consider laws regulating census reporting requirements, securities-related disclosures, copyright infringement, labeling of prescription drugs, or consumer electronics, highway signs, tax disclosures, confidential medical records, robocalls, workplace safety warnings, panhandling, solicitation on behalf of charities, signs at petting zoos, and many more. If *Reed* is taken as setting forth a formal rule that courts must strictly scrutinize regulations simply because they refer to particular content, we have good reason to fear the consequences of that decision.

The Court remands for the lower courts to assess the constitutionality of this regulation. A strong presumption of unlawfulness is out of place here. Billboards and other roadside signs can generally be categorized as a form of outdoor advertising. Regulation of outdoor advertising in order to protect the public's interest in "avoiding visual clutter," or minimizing traffic risks, is unlikely to interfere significantly with the "marketplace of ideas." In this case, there is no evidence that the City regulated off-premises signs in order to censor a particular viewpoint or topic, or that its regulations have had that effect in practice. There is consequently little reason to apply a presumption of unconstitutionality to this kind of regulation.

Justice ALITO, concurring in the judgment in part and dissenting in part.

"Normally, a plaintiff bringing a facial challenge must 'establish that no set of circumstances exists under which the law would be valid,' or show that the law lacks 'a plainly legitimate sweep.' " *Americans for Prosperity Foundation* v. *Bonta*, 141 S.Ct. 2373, 2387 (2021). A somewhat less demanding test applies when a law affects freedom of speech. Under our First Amendment "overbreadth" doctrine, a law restricting speech is unconstitutional "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460 (2010). The Court of Appeals did not apply either of those tests, and it is doubtful that they can be met. Many situations in which the relevant provisions may apply involve commercial speech, and regulations of commercial speech are analyzed differently. It is questionable whether those code provisions are unconstitutional as applied to most of respondents' billboards. Most are located off-premises. All but one appears to be located on vacant land. Thus, they are clearly off-premises signs, and because they were erected before the enactment of the code provisions, the only relevant restriction they face is that

they cannot be digitized. The distinction between a digitized and non-digitized sign is not based on content, topic, or subject matter.

Today's decision goes further and holds flatly that "the sign code provisions do not discriminate" on the basis of "the topic discussed or the idea or message expressed." The provisions defining on- and off-premises signs clearly discriminate on those grounds, and at least in some situations, strict scrutiny should be required. Under the provisions in effect when petitioner's applications were denied, a sign was considered to be off-premises if it "advertised" a "person, activity, or service not located on the site where the sign is installed" or if it "directed persons to any location not on that site." Consider what this definition would mean as applied to signs posted in the front window of a commercial establishment, say, a little coffee shop. If the owner put up a sign advertising a new coffee drink, the sign would be classified as on-premises, but if the owner mounted a sign in the same location saying: "Contribute to X's legal defense fund" or "Free COVID tests available at Y pharmacy" or "Attend City Council meeting to speak up about Z." All those signs would fall within the definition of an off-premises sign and thus be disallowed. Providing disparate treatment for the sign about a new drink and the signs about social and political matters constitutes discrimination on the basis of topic or subject matter.

Justice THOMAS, with whom Justice GORSUCH and Justice BARRETT join, dissenting.

Austin's off-premises restriction is content based. It discriminates against certain signs based on the message they convey—*e.g.*, whether they promote an on- or off-site event, activity, or service. The Court nevertheless holds that the off-premises restriction is content neutral because it proscribes a sufficiently broad category of communicative content and, therefore, does not target a specific "topic or subject matter." This misinterprets *Reed*'s clear rule for content-based restrictions and replaces it with an incoherent and malleable standard.

A content-based law is "presumptively invalid," and may generally be upheld only if the government proves that the regulation is narrowly tailored to serve compelling state interests, *R. A. V. v. St. Paul*, 505 U.S. 377 (1992).[3] In *Reed*, we held that a speech regulation is content based if it "targets speech based on its communicative content." While "some facial distinctions based on a message are obvious," others could be "more subtle, defining regulated speech by its function or purpose." Whether a law is characterized as targeting a "topic," "idea," "subject

[3] For categories of historically unprotected speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, the government ordinarily may enact content-based restrictions without satisfying strict scrutiny. This Court's precedents have also declined to apply strict scrutiny to content-based restrictions, including laws targeting "commercial speech." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980). Austin's off-premises sign rule is not limited to any of these categories.

matter," or "communicative content," the law is content based if it draws distinctions based in any way "on the message a speaker conveys."[4]

Gilbert urged us to define "content based" as a "term of art that 'should be applied flexibly' with the goal of protecting 'viewpoints and ideas from government censorship or favoritism.' " Such a functionalist test, Gilbert argued, could ferret out illicit government motives while obviating the need to subject reasonable laws to strict scrutiny. We rejected Gilbert's attempt to cast the phrase "content based" as a "term of art" because "innocent motives do not eliminate the danger of censorship presented by a facially content-based statute." "One could easily imagine a Sign Code compliance manager who disliked a 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." Thus, "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."

Under *Reed*'s approach, Austin's off-premises sign restriction is content based. The code defines "off-premises signs" as those "advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed," or as signs "directing persons to any location not on that site." This broad definition sweeps in a wide swath of signs, from 14- by 48-foot billboards to 24- by 18-inch yard signs. The sign code prohibits new off-premises signs and makes it difficult (or impossible) to change existing off-premises signs, including by digitizing them. Like the town of Gilbert, Austin has identified a "category of signs based on the type of information they convey, and then subjected that category to different restrictions." A sign that conveys a message about off-premises activities is restricted, while one that conveys a message about on-premises activities is not. Per *Reed*, it does not matter that Austin's code "defines regulated speech by its function or purpose"—*i.e.*, advertising or directing passersby elsewhere. All that matters is that the regulation "draws distinctions based on" a sign's "communicative content," which the off-premises restriction plainly does.

In the majority's view, the off-premises restriction is not content based because it does not target a specific "topic or subject matter." The upshot of the majority's reasoning appears to be that a regulation based on a sufficiently general or broad category of communicative content is not content based. Such a rule is incoherent and unworkable. The "message on the sign matters" when applying Austin's sign code. That concession should end the inquiry. But the majority nonetheless finds the sign code to be content neutral by recasting facially content-based restrictions as only those that target sufficiently specific categories of communicative content and not those that depend on communicative content *simpliciter*. *Reed* defined content-based restrictions as those that "draw distinctions based on the *message* a speaker conveys." As a result, the majority contends that a law targeting directional messages concerning "events generally,

---

[4] In *Reed*, we acknowledged that some decisions had skipped over this facial analysis and applied a justification-focused test. But the justification-focused test implicated a "separate and additional category of laws that, though facially content neutral, are content-based regulations because they cannot be 'justified without reference to the content of the regulated speech,' or were adopted by the government 'because of disagreement with the message the speech conveys.' " This second type of content-based regulation is not at issue here.

regardless of topic," would not be content based, but one targeting "directional messages concerning *specific* events" (*e.g.*, "religious" or "political" events) would be. This understanding of content-based restrictions contravenes *Reed*, which held that a law is content based if it "targets speech based on its communicative content"—not "specific" or "substantive" categories of communicative content. We have held many capacious speech regulations to be content based, including restrictions on "advice or assistance derived from scientific, technical or other specialized knowledge," "advertising, promotion, or any activity used to influence sales or the market share of a prescription drug," "editorializing," "publication for philatelic, numismatic, educational, historical, or newsworthy purposes," and "anonymous speech." These speech categories are no more "specific" or "substantive" than messages regarding off-premises activities. And some of these examples, like "editorializing" or publishing "newsworthy" information, are clearly *less* so. What unites these speech restrictions is that their application turns "on the nature of the message being conveyed," not whether they regulate specific or general categories of speech, or whether they address substantive or non-substantive categories of speech.

The majority openly admits that off-premises regulations "were not present at the founding." This Court has never hinted that the government can, with a few decades of regulation, subject "new categories of speech" to less exacting First Amendment scrutiny. If Austin had met its burden of identifying a historical tradition of analogous regulation—as can be done, say, for obscenity or defamation—that would not make the off-premises rule content neutral. It might simply mean that the off-premises rule is a constitutional form of content-based discrimination.

Sanctioning certain content-based classifications but not others ignores that even seemingly reasonable content-based restrictions are ready tools for those who would "suppress disfavored speech." The content-based distinction drawn by Austin's off-premises speech restriction is "by no means clear," and plainly lends itself "to suppressing disfavored speech."

[3] Content-Based Restrictions

On p. 441, at the end of problem # 3, add the following new citation:

See Williams v. City of Atlanta, 2018 WL 2284374 (M.D. Ga., March 30, 2018).

On p. 441, insert a new problem # 5, and renumber the remaining problems:

5. *University of Texas Bias Response Team*. The University of Texas (UT) creates a Campus Climate Response Team to investigate and sanction speech that is deemed to be discriminatory based on race, color, religion, national origin, gender, gender identity, gender expression, age, disability, citizenship, veteran status, sexual orientation, ideology, political views, or political affiliation. Speech should be reported if it is perceived as "offensive, insulting, insensitive, or derogatory" and which occurs in a classroom, on social media, at a party or at a student organization event. A student group seeks to challenge the Team's existence as a violation of its First Amendment rights, and as having a chilling impact on its speech. Should it matter

whether the Team has sanctioned anyone? *See Speech First, Inc. v. Fenves*, 384 F. Supp. 3d 732 (W.D. Tex. 2019); *see also Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019).

On p. 442, at the end of the problems, add the following new problems:

11. *Bill of Rights Nativity Exhibit*. At the Texas Capitol Building, citizens can apply to erect displays that help promote the "health, education, safety, morals, general welfare, security, and prosperity of all of the inhabitants or residents within the state." The Freedom From Religion Foundation (FFRF) sought permission to set-up an exhibit showing Benjamin Franklin, Thomas Jefferson, George Washington, and the Statute of Liberty gathered around a manger containing the Bill of Rights. Capitol administrators granted the permit. However, when Texas' Governor saw the exhibit, he ordered that it be removed (and it was). Did the Governor violate FFRF's rights? *See Freedom From Religion Foundation v. Abbott*, 955 F.3d 417 (5th Cir. 2020).

12. *Altering the Protest Zone During the Pandemic*. Kentucky allows protestors to come quite near the state capitol building. During the coronavirus pandemic, Kentucky's Governor does a daily newsbriefing regarding the impact of the virus on the Commonwealth. The briefing airs on radio stations and on television. One day, during the briefing, it is possible to hear protestors in the background (protesting the fact that the Governor has closed their businesses and is therefore preventing them from working). The next day, the Governor creates a no-protest zone in the area closest to the capitol building, thereby forcing protestors to remain so far away from the building that they cannot be heard during his news conference. Was it permissible for the Governor to move the protest zone so far away? Was his decision content-based?

13. *Stay-at-Home Orders*. In *Yang v. Powers*, 1:20-cv-00760 (E.D. Wisc., May 20, 2020), plaintiffs filed suit to challenge "Safer at Home" restrictions imposed in some counties after the Wisconsin Supreme Court invalidated the State's similar stay-at-home order one week earlier. Plaintiffs included "salon owners, a pastor, a protest organizer and a candidate for Congress, all of whom argue that the local orders infringe in some way on their First Amendment rights." Assume that the plaintiffs object to the violations of the freedom of assembly and the freedom of speech. Do plaintiffs have a right to protest that overcomes the orders? *Compare Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418 (E.D. Va. 2020); *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100 (D.N.M. 2020); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214 (D. Md. 2020). *See* Shawn Johnson, *Federal Lawsuit Challenges Local Stay-at-Home Orders*, WPR, May 21, 2020, https://www.wpr.org/federal-lawsuit-challenges-local-stay-home-orders

14. *Portable Signs*. Lon is a street preacher who distributes free literature and carries portable signs. However, the *Town code prohibits portable signs, which are defined as "any movable sign not* permanently attached to the ground." When Lon files suit to challenge this prohibition under the First Amendment, his counsel argues that Lon is being denied the right to carry portable signs because of a regulation that is "content-based" and requires strict scrutiny under *Reed*. His counsel argues that signs that are "*temporarily placed* in the ground" should be interpreted as "portable signs," which category would encompass "for sale" real estate signs and campaign signs." Since there is no prohibition in the code against such signs, Lon's similarly portable signs are being treated differently in a way that amounts to a content-based regulation.

What result? *See Lacroix v. Town of Fort Myers Beach*, 2021 WL 1087217 (M.D. Fla. March 22, 2021).

C. Campaign Finance Laws [Online Material]

[1] Modern Foundations

After the last paragraph in heading [1] on Modern Foundations, add the following new text:

In *Thompson v. Hebdon*, 140 S. Ct. 348 (2019), the Court considered whether the $500 limit in Alaska was too low for individual contributions to a candidate or an "election-oriented group other than a political office." The Court noted that even though the most recent precedent regarding "a non-aggregate contribution limit" was *Randall v. Sorrell*, 548 U.S. 230 (2006), the Ninth Circuit in *Thompson* "declined to apply *Randall*" when evaluating the Alaska contribution limits. In *Randall*, the Court invalidated contribution limits in Vermont because they were too low. These limits were $400 for gubernatorial candidates, $300 for candidates for state senator, and $200 for state representative candidates. The Court noted that the Alaska limits shared several of the characteristics of the Vermont limits. Both limits were "substantially lower" than other limits upheld by the Court, "substantially lower" than "comparable limits" in other states, and not adjusted for inflation. Therefore, the Court vacated the judgment and remanded the *Thompson* case to the Ninth Circuit "to revisit" the question whether the Alaska limits are constitutional.

Federal Election Commission v. Cruz

142 S.Ct. 1638 (2022).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Candidates for federal office may, consistent with federal law, use various sources to fund their campaigns. A candidate may spend an unlimited amount of his own money in support of his campaign. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). His campaign—a legal entity distinct from the candidate himself—may borrow an unlimited amount from third-party lenders or from the candidate himself. And campaigns may accept contributions directly from other organizations or from individuals, subject to monetary limitations. Individual contributions are capped at $2,900 for the primary and $2,900 for the general election. Campaigns may continue to receive contributions after election day, so long as those contributions go toward repaying campaign debts.

Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 98, 52 U.S.C. § 30116(j), further restricts the use of post-election funds. Under that provision, a candidate who loans money to his campaign may not be repaid more than $250,000 of such loans from contributions made to the campaign after the date of the election. To implement that limit, the Federal Election Commission (FEC) has promulgated regulations establishing three rules pertinent here: First, a campaign may repay up to $250,000 in candidate loans using contributions made "at any time before, on, or after the date of the election." 11 C.F.R. § 116.12(a). Second, to

the extent the loans exceed $250,000, a campaign may use pre-election funds to repay the portion exceeding $250,000 only if the repayment occurs "within 20 days of the election." Third, if more than $250,000 remains unpaid when the 20-day post-election deadline expires, the campaign must treat the portion above $250,000 as a contribution to the campaign, precluding repayment.

Appellee Ted Cruz represents Texas in the U.S. Senate. This case arises from his 2018 reelection campaign, which was, at the time, the most expensive Senate race in history. Before election day, Cruz loaned $260,000 to the Ted Cruz for Senate (Committee). At the end of election day, the Committee was in the red by approximately $340,000. It eventually began repaying Cruz's loans, but by that time the 20-day post-election window for repaying amounts over $250,000 had closed. The Committee repaid Cruz only $250,000, leaving $10,000 of his personal loans unpaid. Cruz and the Committee filed this action, alleging that Section 304 of BCRA violates the First Amendment. They also raised challenges to the FEC's implementing regulation. A three-judge panel granted summary judgment, holding that the loan-repayment limitation burdens political speech without sufficient justification. The Government appealed.

[After examining whether appellees had standing to challenge the law, and concluding that they did, the Court moved on to the constitutional question]. 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 (1971). It safeguards the ability of a candidate to use personal funds to finance campaign speech, protecting his freedom "to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54. This broad protection "reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.*, at 14.

The Government seems to agree with appellees that the loan-repayment limitation abridges First Amendment rights, to some extent. This provision, by design and effect, burdens candidates who wish to make expenditures on behalf of their own candidacy through personal loans. See 52 U.S.C. § 30101(9)(A)(i). By restricting the sources of funds that campaigns may use to repay loans, Section 304 increases the risk that such loans will not be repaid. That in turn inhibits candidates from loaning money to their campaigns in the first place, burdening core speech. The data bear out the deterrent effect of Section 304. After BCRA was passed, there appeared a "clear clustering of candidate loans right at the $250,000 threshold." A. OVTCHINNIKOV & P. VALTA, DEBT IN POLITICAL CAMPAIGNS 26 (2020). There was no such clustering before the loan-repayment limitation went into effect. The percentage of loans by Senate candidates for exactly $250,000 has increased tenfold since BCRA was passed. Section 304, has altered "the propensity of many politicians to make large loans." OVTCHINNIKOV, DEBT 26. It has predictably restricted a candidate's speech on behalf of his own candidacy.

The burden on First Amendment expression is "evident and inherent" in the choice that candidates and their campaigns must confront. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011). Although Section 304 "does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right." That penalty is the significant risk that a candidate will not be repaid if he chooses to loan his campaign more than $250,000. That risk may deter some candidates from loaning money to their campaigns when they otherwise would, reducing the amount of political speech. This "drag" on a candidate's First Amendment right to

use his own money to facilitate political speech is no less burdensome "simply because it attaches as a consequence of a statutorily imposed choice." The "drag," is no small matter. Debt is a ubiquitous tool for financing electoral campaigns. The raw dollar amount of loans made to campaigns in any one election cycle is in the nine figures, "significantly exceeding" the amount of independent expenditures. Personal loans from candidates themselves constitute the bulk of this financing. In fact, candidates who self-fund usually do so using personal loans.

The ability to lend money to a campaign is especially important for new candidates and challengers. Personal loans will sometimes be the only way for an unknown challenger with limited connections to front-load campaign spending. And early spending—and thus early expression—is critical to a newcomer's success. A large personal loan also may be a useful tool to signal that the political outsider is confident enough in his campaign to have skin in the game, attracting the attention of donors and voters. By inhibiting a candidate from using this critical source of campaign funding, Section 304 raises a barrier to entry—thus abridging political speech. The dissent cannot and does not claim that Section 304 imposes no burden on candidate speech. The dissent instead dismisses that burden as minor and insignificant. The extent of the burden may vary depending on the circumstances of a particular candidate and particular election. But there is no doubt that the law does burden First Amendment electoral speech, and any such law must at least be justified by a permissible interest.

The parties debate whether strict or "closely drawn" scrutiny should apply. *Buckley*, 424 U.S. at 25. We need not resolve this dispute because, under either standard, the Government must prove that it is pursuing a legitimate objective. See *McCutcheon*, 572 U.S. at 210. It has not done so here. This Court has recognized only one permissible ground for restricting political speech: the prevention of "*quid pro quo"* corruption or its appearance. We have consistently rejected attempts to restrict campaign speech based on other legislative aims. For example, we have denied attempts to reduce the amount of money in politics, to level electoral opportunities by equalizing candidate resources, and to limit the general influence a contributor may have over an elected official, see *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). However well intentioned such proposals may be, the First Amendment prohibits such attempts to tamper with the "right of citizens to choose who shall govern them." *McCutcheon*, 572 U.S. at 227.

The Government argues that the contributions raise a heightened risk of corruption because of the use to which they are put: repaying a candidate's personal loans. It maintains that post-election contributions are particularly troubling because the contributor will know—not merely hope—that the recipient, having prevailed, will be in a position to do him some good. We greet the assertion of an anticorruption interest here with a measure of skepticism. Individual contributions to candidates for federal office, including those made after the candidate has won the election, are already regulated in order to prevent corruption or its appearance. Such contributions are capped at $2,900 per election, and nontrivial contributions must be publicly disclosed. The dissent's dire predictions about the impact of today's decision elide the fact that the contributions remain subject to these requirements. And the requirements are themselves prophylactic measures, given that "few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357. Such a prophylaxis-upon-prophylaxis approach, is a significant indicator that the regulation may not be necessary for the interest it seeks to protect. See *McCutcheon*, 572 U.S. at 221.

Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than "simply posit the existence of the disease sought to be cured." *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 618 (1996). It must point to "record evidence or legislative findings" demonstrating the need to address a special problem. We have "never accepted mere conjecture as adequate to carry a First Amendment burden." *McCutcheon*, 572 U.S. at 210. Yet the Government is unable to identify a single case of *quid pro quo* corruption in this context—even though most States do not impose a limit on the use of post-election contributions to repay candidate loans. Our previous cases have found the absence of such evidence significant. See *Citizens United*, 558 U.S. at 357; *McCutcheon*, 572 U.S. at 209, n. 7. The Government instead puts forward a handful of media reports and anecdotes that it says illustrate the special risks associated with repaying candidate loans after an election. But those reports "merely hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate." That is not the type of *quid pro quo* corruption the Government may target consistent with the First Amendment. See *McCutcheon*, 572 U.S. at 207. "The Government may not seek to limit the appearance of mere influence or access." *McCutcheon*, 572 U.S. at 208. Influence and access "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." *Id.*, at 192. The "line between *quid pro quo* corruption and general influence may seem vague, but the distinction must be respected in order to safeguard basic First Amendment rights." *Id.*, at 209,. In drawing that line, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Ibid.*

In the absence of direct evidence, the Government contends that a scholarly article, a poll, and statements by Members of Congress show that these contributions carry a heightened risk of the appearance of corruption. Essentially the Government's evidence concerns the sort of "corruption," loosely conceived, that we have repeatedly explained is not legitimately regulated under the First Amendment. The academic article concludes that "indebted politicians" are "more likely to switch their votes" if they receive contributions from the banking or insurance industries. But the authors cannot distinguish between voting pattern changes traceable to legitimate donor influence or access, and voting pattern changes as part of an illicit *quid pro quo*. Our precedents demand adherence to that distinction. The authors also state that their analysis is merely a "first step" in understanding whether politicians' self-funding decisions impact voting behavior, because they cannot "pin down a causal link"

The online poll similarly misses the mark. The poll, conducted for this litigation, reports that most respondents thought it "very likely" or "likely" that a person who "donates money to a candidate's campaign after the election expects a political favor in return." But it failed to ask whether those same respondents thought it likely that donors who contribute to a campaign *before* the election also are likely to expect political favors in return. Nor did the poll mention that the individual base limits still apply to such contributions. And it failed to define the term "political favor," leaving unclear the critical issue whether the respondents associated such contributions with the direct exchange of money for official acts, which Congress may regulate, or simply increased influence and access, which Congress may not.

The Government places great weight on statements made by certain Members of Congress during debates that preceded the enactment of BCRA. One Senator remarked that without the loan-repayment limitation, a winning candidate who loaned money to his campaign could "get it back from his constituents at fundraising events" where he could ask, "How would you like me to vote now that I am a Senator?" 147 Cong. Rec. S2462 (March 19, 2001) (remarks of Sen. Domenici). Another stated that candidates "have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it." 147 Cong. Rec. S2541 (March 20, 2001) (remarks of Sen. Hutchison). Nothing these legislators said, however, constitutes actual evidence that the loan-repayment limitation was necessary to prevent *quid pro quo* corruption or its appearance. A few stray floor statements are not the same as "legislative findings" that might suggest a special problem to be addressed. *Colorado Republican Federal Campaign Comm.*, 518 U.S. at 618.

All the above is meager, given that we are considering restrictions on "the most fundamental First Amendment activities"—the right of candidates for political office to make their case to the American people. *Buckley*, 424 U.S. at 14. In any event, the legislative record helps appellees as much as the Government, given that some Senators evidently viewed the limit as designed to protect incumbents like themselves from wealthy challengers. That the limit may have been designed to protect incumbents should come as no surprise. Section 304 was enacted as part of the "Millionaire's Amendment" to BCRA, designed to hobble wealthy candidates mounting self-financed campaigns. It was debated together with another provision we have already held unconstitutional, in part because it pursued the same impermissible goal of "leveling electoral opportunities for candidates of different personal wealth." The connection between these two provisions casts further doubt on the anticorruption interest the Government asserts.

The Government falls back on what it calls a "common sense" analogy: Post-election contributions used to repay a candidate's loans are akin to a "gift" because they "add to the candidate's personal wealth" as opposed to the campaign's treasury. The risk of corruption is thus greater, the Government argues, because the donor is lining the pockets of a legislator or legislator-elect. The dissent makes the same argument. But we are talking about repayment of a *loan*, not a gift. If the candidate did not have the money to buy a car before he made a loan to his campaign, repayment of the loan would not change that. Contributions that go toward retiring a candidate's debt could only enrich the candidate if the candidate does not otherwise expect to be repaid. The Government's gift comparison is meaningful only if the baseline is that the campaign will default. The Government provides no reason to believe that most or even many *winning* candidates—the only candidates with whom its anticorruption interest is concerned—expect not to be repaid by their campaigns. To the contrary, the Government has recognized throughout this litigation that winning candidates are commonly repaid in full. For such a candidate, post-election contributions bear little resemblance to a gift, because there is less of a chance that his campaign will default. Such contributions instead restore the candidate to the status quo ante, a position to which he legitimately expected to return. As for losing candidates, they are of course in no position to grant official favors, and the Government does not provide any anticorruption rationale to explain why post-election contributions to those candidates should be restricted.

By the Government's logic, post-election contributions to retire candidate loans are little different from gifts given directly to the candidate. But that logic is belied by how the

Government treats the two categories of purported "gifts." Federal law flatly prohibits candidates from using campaign contributions for personal purposes. And it forbids Senators from accepting gifts worth $250 or more. By contrast, the postulated "gift-by-loan-repayment" limits are simply the individual contribution limits, which are now more than ten times higher than the gift limit: $2,900 per election. And Section 304 allows over 86 such "gifts" before a campaign hits the Act's $250,000 cap. Either the Government is openly tolerating a significant number of "gifts" far more generous than what it would normally think fit to allow, or post-election contributions that go toward retiring campaign debt are in no real sense "gifts" to a candidate. We find the latter answer more persuasive.

The Government claims that if the matter is otherwise in doubt, we should defer to Congress's "legislative judgment" that Section 304 furthers an anticorruption goal. Such deference, the Government contends, is grounded "in part on the understanding that Congress 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.' " But the evidence is scant, and Congress's judgment is hardly based on "vast amounts of data." Moreover, deference to Congress would be especially inappropriate where, as here, the legislative act may have been an effort to "insulate legislators from effective electoral challenge." *Shrink Missouri Government PAC*, 528 U.S. at 404 (BREYER, J., concurring). In the end, it remains our role to decide whether a particular legislative choice is constitutional. Here the Government has not shown that Section 304 furthers a permissible anticorruption goal, rather than the impermissible objective of simply limiting the amount of money in politics.

For the reasons set forth, we conclude that Cruz and the Committee have standing to challenge the threatened enforcement of Section 304 of BCRA. We also conclude that this provision burdens core political speech without proper justification. The judgment of the District Court is affirmed.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption. The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return. Donors well understand his situation, and are eager to take advantage of it. In short, incentives are stacked to enhance the risk of dirty dealing. Even if an illicit exchange does not occur—the public will predictably perceive corruption in post-election payments directly enriching an officeholder. Congress enacted Section 304 to protect against those harms. In striking down the law, the Court greenlights all the sordid bargains Congress thought right to stop.

This Court's decisions distinguish between restricting expenditures and restricting contributions. See, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (*per curiam*). Expenditure restrictions—caps on a campaign's or candidate's electoral spending—impose the greatest burdens on expression. By contrast, laws focused on third-party contributions to a campaign typically "entail only a marginal restriction" on First Amendment interests. *Buckley*, 424 U.S. at 20. Section 304 "entails only a marginal restriction" on speech, because it regulates contributions

alone. The provision leaves a campaign free to spend any amount of money for speech. Likewise, it leaves the candidate himself—here, Senator Ted Cruz—free to do so. The candidate can "use personal funds to finance campaign speech" without limit; if he wishes, he can devote his whole fortune to "speech on behalf of his own candidacy." Section 304 restricts only the use of third-party contributions to support his efforts—which imposes a far more modest First Amendment burden.

Chapter 6

Vagueness, Overbreadth, and Prior Restraints

A. Overbreadth & Vagueness

On p. 469, at the end of problem # 4, delete the citation and add the following new citation:

See Seals v. McBee, 898 F.3d 587 (5th Cir. 2018).

On p. 469, at the end of the problems, add the following new problem:

5. *Anti-Rioting Statute*. In response to the Black Lives Matter protests, states have enacted new anti-rioting statutes. For example, Florida enacted a law that prohibits "rioting" which it defines as willfully participating in a violent public disturbance involving an assembly of three of more persons, acting with common intent to assist each other in violent and disorderly conduct that results in injury to another person. Does the law suffer from undue vagueness or overbreadth? What does the term "willfully participate" mean? Is there uncertainty about whether someone can be prosecuted if violence occurs, but they continue to protest? *See Dream Defenders v. DeSantis*, 559 F.Supp.3d 1238 (N.D. Fla. 2021).

6. *Lawyer Misconduct*. When the Disciplinary Board of the State Bar adopts a rule defining professional misconduct, the following provision is challenged as vague and overbroad: "It is professional misconduct for a lawyer to, in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status." What result? *See Greenberg v. Goodrich*, 2022 WL 874953 (E.D. Pa., March 24, 2022).

7. *Intent to Harass*. Moreno repeatedly sent emails to his ex-wife that included vulgar and insulting comments, calling her a "snake" and a "whore with an STD," and requesting to see his children. Moreno is charged with the crime of harassment under the following statute: "A person commits harassment if, with intent to harass, annoy, or alarm another person, he or she directly or indirectly initiates communication with a person or directs language toward another person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, computer system, or other interactive electronic medium in a manner intended to harass or threaten bodily injury or property damage, or makes any

comment, request, suggestion, or proposal by telephone, computer, computer network, computer system, or other interactive electronic medium that is obscene." Can Moreno successfully challenge the law on vagueness and overbreadth grounds? *See People v. Moreno*, 506 P.3d 849 (Colo. 2022).

On p. 474, at the end of problem # 5, delete the period and add the following new citation:

; *Davis v. Monroe County*, 525 U.S. 1052 (1999).

On p. 474, insert a new problem #6 and renumber the remaining problems:

6. *Discriminatory Harassment*. A University policy provides: "Discriminatory harassment may take many forms, including verbal acts, name-calling, graphic or written statements (via the use of cell phones or the Internet), or other conduct that may be humiliating or physically threatening. Discriminatory harassment consists of verbal, physical, electronic or other conduct based upon an individual's race, color, ethnicity, national origin, religion, non-religion, age, genetic information, sex (including pregnancy and parental status, gender identity or expression, or sexual orientation), marital status, physical or mental disability (including learning disabilities, intellectual disabilities, and past or present history of mental illness), political affiliations, veteran's status (as protected under the Vietnam Era Veterans' Readjustment Assistan[ce] Act), or membership in other protected classes set forth in state or federal law that interferes with that individual's educational or employment opportunities, participation in a university program or activity, or receipt of legitimately-requested services meeting the description of Hostile Environment Harassment." The latter type of harassment is defined as "Discriminatory harassment that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education (e.g., admission, academic standing, grades, assignment); employment (e.g., hiring, advancement, assignment); or participation in a university program or activity (e.g., campus housing), when viewed from both a subjective and objective perspective." When university students challenge the policy as vague and overbroad, what result should the court reach and why? The policy *See Speech First, Inc. v.. Cartwright*, 32 F4.th 1110 (11thCir. 2022).

On p. 475, at the end of problem # 8, add the following new citation:

See Newsom ex rel Albemarle County School Board, 354 F.3d 249 (4th Cir. 2003).

On p. 476, at the end of the problems, add the following new problems:

11. *Telephone Harassment*. Wash. Rev. Code § 9.61.230 prohibits telephone harassment which it defines as a phone call made the with the "intent to harass, intimidate, torment or embarrass any other person" and using "any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act . . ." Is the law unduly vague? *See City of Bellevue v. Lorang*, 992 P.2d 496 (Wash. 2000) (en banc).

12. *Threatening Public Officials*. Suppose that a state law makes it a crime to threaten a public official, and also prohibits "public intimidation" which is defined as "the use of violence, force, or threats upon" a public officer or employee "with the intent to influence his conduct in relation to his position, employment, or duty." Is the law overbroad? Might it be used against an individual who threatens to sue a police officer, or to challenge an incumbent office holder? If so, might the law be regarded as "substantially overbroad?" *See Seals v. McBee*, 898 F.3d 587 (5th Cir. 2018).

13. *Intertwined Message*. The Los Angeles City Council enacted an ordinance to limit expressive activities on the Venice Beach Boardwalk in order to achieve three governmental interests: to alleviate noise, to improve crowd control, and to enhance access for emergency service providers. Violations of the ordinance are punished by criminal fines or jail terms. The ordinance provides as follows: "On the Venice Beach Boardwalk, no person shall hawk, peddle, vend, or sell, or request or solicit donations for, any goods, wares, merchandise, foodstuffs, or refreshments. This prohibition does not apply to the sale of merchandise constituting, carrying or making a religious, political, philosophical or ideological message or statement which is inextricably intertwined with the merchandise." Don sells sticks of his original incense, along with incense holders displaying symbols such as yin-yang, dragons, stars and moon, and yin-yang, accompanied by flyers that explain the religious and/or mythological significance of the symbols. After he is threatened with arrest under the ordinance, Don files suit to challenge the ordinance, arguing that it is void for vagueness. What result and why? *See Hunt v. City of Los Angeles*, 638 F.3d 703 (2011).

14. *"Divisive Concepts."* Less than two months before the November 2020 election, President Trump signed Executive Order 13950, which prohibited federal agencies and contractors, as well as the U. S. Uniformed Services, from promoting a list of nine "divisive concepts" in workplace diversity trainings. These "divisive concepts" included, for example, the concept that "the United States is fundamentally racist or sexist"; that "an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive"; and that "an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex." The executive order also directed agency heads to "identify grant programs for which grants may be conditioned" based on the certification by the recipient "that it will not use federal funds to promote" the "divisive concepts." The plaintiffs who filed suit to challenge the executive order included "non-profit community organizations and consultants" serving the LGBT community and people living with HIV. What vagueness arguments could be presented by the plaintiffs? *See Santa Cruz Lesbian & Gay Community Center v. Trump*, 508 F. Supp. 3d 521 (N.D. Cal. 2020).

15. *Encouraging Unlawful Immigration.* Hansen challenged his conviction on appeal on both vagueness and overbreadth grounds, after his conviction under 18 U.S.C. 1324, which provides as follows: "Any person who encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law shall be punished [as provided]. For each alien in respect to whom such a violation occurred, in which the offense was done for the purpose of commercial advantage or private financial gain, a person shall be fined or imprisoned or both [as provided.] In addressing Hansen's arguments, the court determined that "to encourage" means "to inspire with courage, spirit , or hope; to spur on; to give help or patronage to," and noted that "encouraged" has been equated with "helped. "Induce" means "to move by persuasion or influence." "Alien" requires the "object of encouragement or inducement to be a specific alien or specific aliens." The phrase "in violation of law" "covers both criminal and civil violations." What result? *See United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022).

B. Prior Restraints

[1] Licensing

On p. 478, add the following new notes, and renumber the remaining note:

2. *National Security and Intelligence Agency Pre-Publication Review*. The federal government requires pre-publication review of books or articles that national security or intelligence officials wish to publish. As part of that process, the government reserves the right to require redaction or modification of information that might damage national security or intelligence interests. Despite the general prohibition against pre-publication review systems, courts have upheld restrictions in these areas provided that they are reasonable. *See Edgar v. Coats*, 454 F. Supp. 3d 502 (D. Md. 2020).

3. *Injunction Not a Remedy*. The Department of Justice failed to obtain an injunction against Simon & Schuster to block the publication of THE ROOM WHERE IT HAPPENED, a memoir by former National Security Advisor John Bolton about his eighteen months working for the Trump administration. The DOJ argued that the content of the book includes classified information that would harm national security, and that Bolton violated non-disclosure agreements that failing to obtain final approval from the National Security Counsel before publication. The federal district court judge found that since the book had been printed and shipped to a national audience, with advance copies in the possession of reviewers, it was too late to stop the publication and an injunction was no longer an appropriate remedy. However, the judge noted that the release of Bolton's book "may indeed have caused the country irreparable harm," that if the book does contain classified information, Bolton "stands to lose his profits from the book deal, exposes himself to criminal liability, and imperils national security." Harper Neidig & Jesse Byrnes, *Judge Denies Request to Block Bolton Book*, THE HILL, June 20, 2010, https://thehill.com/regulation/court-battles/503695-judge-denies-request-to-block-bolton-book

On p.480, place problem # 4, p. 503, here as problem # 5.

On p.480, at the end of the problems, insert the following new problems:

6. *Licensing for Adult Entertainers*. In an effort to stop human trafficking, the City of Jacksonsville adopts a licensing scheme for adult entertainers. The law provides that "Any person desiring to perform in an adult entertainment establishment licensed under this Chapter must obtain a Work Identification Card from the Sheriff. No person shall act as a performer in an adult entertainment establishment without having previously obtained said Work Identification Card, except as permitted during the Grace Period as set forth in this section. Additionally, no license holder or establishment manager shall employ, contract with or otherwise allow any performer to perform in an adult entertainment establishment who does not possess a valid and effective Work Identification Card except as permitted during the Grace Period as set forth in this section." Is the licensing scheme constitutional? *See Wacko's Too, Inc. v. City of Jacksonville*,522 F. Supp. 3d 1132 (M.D. Fla. 2021).

7. *National Park Permitting Scheme*. The Department of the Interior has established a permitting scheme for commercial filming in national parks. In order to "protect the national parks," the scheme requires anyone who creates a commercial film in national parks to obtain a permit and pay a fee. News gatherers are exempt from the permit requirement, but it applies to feature films, videography, television shows, documentaries and "other similar projects." Is the permit requirement valid? Does it discriminate based on content? Does the distinction between "newsgatherers" and other produces make sense in light of the Department's goal to protecting the national parks? *See Price v. Barr*, 514 F. Supp. 3d 171 (D.D.C. 2021).

On p. 490, at the end of the problem, add the following new citation:

See United States v. Kalb, 234 F.3d 827 (3d Cir. 2000).

[2] Injunctions

On p. 496, at the end of the notes, add the following new note:

3. *Allegations of Patent Infringement.* In *Myco Industries, Inc. BlephEx*, LLC, 955 F.3d 1 (Fed. Cir. 2020), the maker of an eye treatment disorder devices alleges that a competitor's product infringes its patent. The Federal Circuit overturned an injunction against the allegation, noting that noting that "speech is not to be enjoined lightly." However, the court suggested that an injunction might be appropriate in this context if there were proof that the allegation was false or misleading.

On p. 496, delete problem # 2, and replace it with the following new problem:

2. *The Student Evaluations*. Suppose that a student at a public university urges her fellow students to leave "honest" end-of-term evaluations for a professor with which she had a dispute. A university administrator steps in and tells the student that she is "banned" from talking about the professor with her fellow students. Does the ban constitute an impermissible prior restraint? *See Thompson v. Holland*, 23 F.4th 1252 (10th Cir. 2022).

On p. 497, at the end of the problems, add the following new problem:

5. *Fraudulent Speech During a Pandemic*. While commercial speech receives First Amendment protection, the Court applies an intermediate standard of review rather than strict scrutiny. Suppose that, during the coronavirus pandemic, defendant advertises a bogus cure (essentially, alcohol spiked molasses). Should the government be able to enjoin defendant's advertisement?

6. *Confidential Information*. Suppose that defendant works for ABC Enterprises as a production engineer. When he accepted his employment offer, he signed a nondisclosure agreement which precluded him for revealing information about the company's internal operations to outsiders, and non-compete agreement which precluded him from working for a competitor for five years. If defendant accepts employment with a competitor, and there appears to be a serious threat that he will reveal proprietary information to a competitor, can ABC obtain injunctive relief precluding defendant from revealing confidential information to the competitor? Would your answer be different if defendant remained with ABC, but was threatening to reveal illegality to federal administrative officials?

On p. 503, insert the following new problems # 2-4, and renumber the remaining problems:

2. *Project Veritas*. The *N.Y. Times* obtained copies of attorney client memos sent by outside counsel to Project Veritas regarding the legality of various news gathering tactics. The memos were obtained by the *Times* from an unnamed individual who was not authorized to release them. When the *N.Y. Times* published the memos on its website, Project Veritas sought an injunction requiring that the memos be removed and prohibiting further disclosures. If the memos were obtained by "irregular" means, can a court enjoin their publication? *See Project Veritas v. New York Times Co.*, 74 Misc.3d 515, 161 N.Y.S.3d 700 (Sup. Ct., Westchester Cty., 2021).

3. *The John Bolton "Tell All" Book*. The Department of Justice failed to obtain an injunction against Simon & Schuster to block the publication of THE ROOM WHERE IT HAPPENED, a memoir by former National Security Advisor John Bolton about his eighteen months working for the Trump administration. The DOJ argued that the content of the book includes classified information that would harm national security, and that Bolton violated non-disclosure agreements that failing to obtain final approval from the National Security Counsel before publication. The federal district court judge found that since the book had been printed and

shipped to a national audience, with advance copies in the possession of reviewers, it was too late to stop the publication and an injunction was no longer an appropriate remedy. *See United States v. Bolton*, 496 F. Supp. 3d 146 (D.D.C. 2020). However, might DOJ be entitled to recover all of the profits that Bolton made from the book? Could he be criminally prosecuted for illegal publication of national security information? *See Snepp v. United States*, 444 U.S. 507 (1980).

4. *Injunctions and Confidentiality Agreements*. Should a court be more inclined to grant an injunction when information is published in violation of a confidentiality agreement? Then President Donald Trump's niece (Mary Trump) wanted to publish a book entitled TOO MUCH AND NEVER ENOUGH, HOW MY FAMILY CREATED THE WORLD'S MOST DANGEROUS MAN. Donald's brother sued sues, claiming that publication would violate a non-disclosure agreement (NDA) that Mary signed as part of a 2001 settlement agreement concerning the assets of President Trump's father's estate. That NDA provided that neither Mary Trump nor "her agents" could publish anything about the settlement or her relationship with family members, including President Trump. Should the existence of the confidentiality agreement override the usual presumption against the constitutionality of prior restraints? Mary claims that her book involves "core political speech" relating to Donald's upcoming (2020) reelection campaign? Would the NDA bind Mary's publisher, Simon and Schuster? If the book is published, and the niece receives royalties, may her uncles recover those royalties from her on a restitution theory? *See* Josh Gerstein, *Court narrows restraining order against Mary Trump book*, Politico.com, July 1, 2020, https://www.politico.com/news/2020/07/01/book-mary-trump-restraining-order-347769

On p. 503, at the end of problem # 2, delete the citations and replace them with the following:

See State v. Defense Distributed, 2020 WL 4332902 (9th Cir. 2020).

Delete existing problem # 3.

On p. 503, at the end of problem # 2, add the following word before the citation:

See

On p. 503, at the end of problem # 2, delete the second citation and replace it with:

Washington v. U.S. Department of State, 443 F. Supp. 3d 1245 (W.D. Wash. 2020).

On p. 504, at the end of problem # 5, add the following new citation:

See American Target Advertising v. Giani, 199 F.3d 1241 (10th Cir. 2000).

On p. 505, at the end of the problems, add the following new problem:

8. *Nondisparagement Orders*. When the mother of a six-year-old filed for divorce, she also obtained an emergency order removing the father from the marital home and giving her sole custody of the child. The mother then sought an order prohibiting the father from posting disparaging remarks on social media. The judge issued the following nondisparagement orders against both the father and the mother: "Neither party shall disparage the other – nor permit any third party to do so – especially when within hearing range of the child. Neither party shall post any comments, solicitations, references or other information regarding this litigation on social media." The judge's order stated that, "These orders are a means to protect the psychological well-being of the child and are justified given the demonstrated breakdown in the relationship between the mother and father." Is the order a permissible prior restraint? *See Shak v. Shak*, 484 Mass. 658, 144 N.E.3d 274 (2020); *S.B. v. S.S.*, 243 A.3d 90 (Pa. 2020).

On page 512, at the end of problem #3, add the following text:

Is the *Madsen* test the same test used in *McCullen v. Coakley*, 573 U.S. 464 (2014)?

On p. 512, at the end of problem # 4, add the following new citation:

See St. John's Church in the Wilderness v. Scott, 296 P.3d 273 (Colo. App. 2012).

On page 512, at the end of the problems, add the following new problem:

4. *Prohibiting Sidewalk Counseling*. A Pittsburgh ordinance creates a fifteen-foot buffer zone around the entrances to hospitals and healthcare facilities, providing in relevant part that "no person or persons shall knowingly congregate, patrol, picker or demonstrate" in the buffer zone. Plaintiffs seek to engage peaceful one-on-one conversations ("sidewalk conversations") conducted "at a normal conversational level and distance," but designed to discourage women entering the clinic from obtaining abortions. Is the ordinance valid? *See Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019).

Chapter 7

Freedom of Association and Compelled Expression

A. The Right to Associate

On p. 520, insert the following new problems, and renumber the remaining problems:

2. *NRA Affiliations*. A city ordinance requires city contractors to disclose any contracts that they have with the National Rifle Association (NRA), and whether they offer any discounts to the NRA. The city enacted the ordinance in response to recent shootings and its sense that the NRA is acting to block "sensible gun safety reform." The ordinance does not require contractors to disclose whether they are NRA members or whether they support gun rights generally. Does the ordinance violate the associational rights of the NRA or of city contractors who perceive that the city intends to discriminate against them?

3. *Disclosure of Donors*. Can a state require any organization that seeks to solicit money in the state to disclose the names of all donors who have contributed more than $5,000 to the organization in a single year? What sort of injury must the organizations show in order to successfully challenge the disclosure requirement? *See Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir.), *cert. denied*, 136 S.Ct. 480 (2015).

On p. 521, in the citation at the end of problem # 5, insert "6th" after the word "See".

On p. 523, delete problem # 6 and insert the following case in its place:

Americans for Prosperity Foundation v. Bonta

141 S. Ct. 2373 (2021)

Chief Justice Roberts delivered the opinion of the Court, except as to Part II–B–1.

To solicit contributions in California, charitable organizations must disclose to the state Attorney General's Office the identities of their major donors. The State contends that having this information on hand makes it easier to police misconduct by charities. We must decide whether California's disclosure requirement violates the First Amendment right to free association.

I

The California Attorney General's Office is responsible for statewide law enforcement, including the supervision and regulation of charitable fundraising. Under state law, the Attorney General is authorized to "establish and maintain a register" of charitable organizations and to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." Cal. Govt. Code Ann. § 12584 (West 2018). In order to operate and raise funds in California, charities generally must register with the Attorney General and renew their registrations annually. Over 100,000 charities are currently registered in the State. The Attorney General requires charities renewing their registrations to file copies of their Internal Revenue Service Form 990, along with any attachments and schedules. Form 990 contains information regarding tax-exempt organizations' mission, leadership, and finances. Schedule B to Form 990—the document that gives rise to the present dispute—requires organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year (or, in some cases, who have given more than 2 percent of an organization's total contributions). See 26 CFR §§ 1.6033–2(a)(2)(ii)(f), (iii) (2020).

The petitioners are tax-exempt charities that solicit contributions in California and are subject to the Attorney General's registration and renewal requirements. Americans for Prosperity Foundation is a public charity that is "devoted to education and training about the principles of a free and open society, including free markets, civil liberties, immigration reform, and constitutionally limited government." Thomas More Law Center is a public interest law firm whose "mission is to protect religious freedom, free speech, family values, and the sanctity of human life." Since 2001, each petitioner has renewed its registration and has filed a copy of its Form 990 with the Attorney General, as required. Out of concern for their donors' anonymity, however, the petitioners have declined to file their Schedule Bs (or have filed only redacted versions) with the State. For many years, the petitioners' reluctance to turn over donor information presented no problem because the Attorney General was not particularly zealous about collecting Schedule Bs. That changed in 2010, when the California Department of Justice "ramped up its efforts to enforce charities' Schedule B obligations, sending thousands of deficiency letters to charities that had not complied with the Schedule B requirement." The Law Center and the Foundation received deficiency letters in 2012 and 2013, respectively. When they continued to resist disclosing their contributors' identities, the Attorney General threatened to suspend their registrations and fine their directors and officers. Petitioners responded by filing suit. They alleged that the Attorney General had violated their First Amendment rights and the rights of their donors. Petitioners alleged that disclosure of their Schedule Bs would make their donors less likely to contribute and would subject them to the risk of reprisals. Both organizations challenged the disclosure requirement on its face and as applied to them. In each case, the District Court granted preliminary injunctive relief prohibiting the Attorney General from collecting their Schedule B information. The Ninth Circuit vacated and remanded. On remand, the District Court entered judgment for the petitioners and permanently enjoined the Attorney General from collecting their Schedule Bs. The Ninth Circuit again vacated the District Court's injunctions, and this time reversed and remanded for entry of judgment in favor of the Attorney General. We granted certiorari.

II

A

The First Amendment prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984). Protected association furthers "a wide variety of political, social, economic, educational, religious, and cultural ends," and "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Ibid*. Government infringement of this freedom "can take a number of forms." For example, freedom of association may be violated where a group is required to take in members it does not want, where individuals are punished for their political affiliation, or where members of an organization are denied benefits based on the organization's message, see *Healy* v. *James*, 408 U. S. 169, 181 (1972).

"Compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as other forms of governmental action." *NAACP* v. *Alabama ex rel*. *Patterson*, 357 U. S. 449, 462 (1958). *NAACP* v. *Alabama* involved this chilling effect in its starkest form. The NAACP opened an Alabama office that supported racial integration in higher education and public transportation. In response, NAACP members were threatened with economic reprisals and violence. As part of an effort to oust the organization from the State, the Alabama Attorney General sought the group's membership lists. We held that the First Amendment prohibited such compelled disclosure. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and we noted "the vital relationship between freedom to associate and privacy in one's associations." Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest "sufficient to justify the deterrent effect" of disclosure, we concluded that the State's demand violated the First Amendment.

B

1

NAACP v. *Alabama* did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure. We have since settled on a standard referred to as "exacting scrutiny." *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*). Under that standard, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe* v. *Reed*, 561 U. S. 186, 196 (2010). "To withstand scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ibid*. Such scrutiny is appropriate given the "deterrent effect on the exercise of First Amendment rights" that arises as an "inevitable result of the government's conduct in requiring disclosure." *Buckley*, 424 U. S., at 65. The Law Center argues that we should apply strict scrutiny. Under strict scrutiny, the government must adopt "the least restrictive means of achieving a compelling state interest," *McCullen* v. *Coakley*, 573 U. S. 464, 478 (2014), rather than a means substantially related to a sufficiently important interest. We first enunciated the exacting scrutiny standard in a campaign finance case. We have since invoked it in other election-

related settings. *Buckley* derived the test from *NAACP* v. *Alabama* itself. Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.

2

While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest. *Shelton* v. *Tucker* considered an Arkansas statute that required teachers to disclose every organization to which they belonged or contributed. 364 U. S., at 480. *Shelton* stands for the proposition that a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. Narrow tailoring is crucial where First Amendment activity is chilled—even indirectly—"because First Amendment freedoms need breathing space to survive." *Button*, 371 U. S., at 433. A substantial relation is not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters. Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end. When it comes to "a person's beliefs and associations," "broad and sweeping state inquiries into these protected areas discourage citizens from exercising rights protected by the Constitution." *Baird* v. *State Bar of Ariz*., 401 U. S. 1, 6 (1971) (plurality opinion). Nor does *Reed* suggest that narrow tailoring is required only for laws that impose severe burdens. A reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.

III

A

The Foundation and the Law Center renew their facial challenge, and they argue in the alternative that they are entitled to as-applied relief. We conclude that California's blanket demand for Schedule Bs is facially unconstitutional. Exacting scrutiny requires that there be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," *Reed*, 561 U. S., at 196, and that the disclosure requirement be narrowly tailored to the interest it promotes. We do not doubt that California has an important interest in preventing wrongdoing by charitable organizations. There is a "substantial governmental interest in protecting the public from fraud." *Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620, 636 (1980). The Attorney General receives complaints each month that identify a range of misconduct, from "misuse, misappropriation, and diversion of charitable assets," to "false and misleading charitable solicitations," to other "improper activities by charities soliciting charitable donations." Such offenses cause serious social harms. There is a dramatic mismatch, however, between the interest that the Attorney General seeks to promote and the disclosure regime. 60,000 charities renew their registrations each year, and nearly all are required to file a Schedule B. Each Schedule B contains information about a charity's top donors. This information includes donors' names and the total contributions they have made to the charity, as well as their addresses. Given the amount and sensitivity of this information, one would expect Schedule B collection to form an integral part of California's fraud detection efforts. To the contrary, that there was not "a single, concrete instance

in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." Even if the State relied on up-front collection in some cases, its showing falls far short of satisfying the means-end fit that exacting scrutiny requires. California is not free to enforce *any* disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives.

The Attorney General and the dissent contend that alternative means of obtaining Schedule B information—such as a subpoena or audit letter—are inefficient and ineffective compared to up-front collection. It became clear at trial that the Office had not even considered alternatives to the current disclosure requirement. The Attorney General and the dissent also argue that a targeted request for Schedule B information could tip a charity off, causing it to "hide or tamper with evidence." But the States' witnesses failed to substantiate that concern. Nor do the actions of investigators suggest a risk of tipping off charities under suspicion, as the standard practice is to send audit letters asking for a wide range of information early in the investigative process. Even if tipoff were a concern, the State's indiscriminate collection of Schedule Bs in all cases would not be justified. The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints. California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation. The need for up-front collection is particularly dubious given that California—one of only three States to impose such a requirement, did not rigorously enforce the disclosure obligation until 2010. This is not a regime "whose scope is in proportion to the interest served." *McCutcheon*, 572 U. S., at 218. In reality, California's interest is less in investigating fraud and more in ease of administration. This interest cannot justify the disclosure requirement. The Attorney General may prefer to have every charity's information close at hand, just in case. But administrative convenience does not remotely "reflect the seriousness of the actual burden" that the demand for Schedule Bs imposes on donors' association rights. *Reed*, 561 U. S., at 196.

B

Normally, a plaintiff bringing a facial challenge must "establish that no set of circumstances exists under which the law would be valid," *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), or show that the law lacks "a plainly legitimate sweep," *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449 (2008). In the First Amendment context, however, we have recognized "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U. S. 460, 473 (2010). The Attorney General's disclosure requirement is overbroad. The lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny.

The Attorney General tries to downplay the burden on donors, arguing that "there is no basis on which to conclude that California's requirement results in any broad-based chill." He

emphasizes that "California's Schedule B requirement is confidential," and he suggests that certain donors—like those who give to noncontroversial charities—are unlikely to be deterred from contributing. He also contends that disclosure to his office imposes no added burdens on donors because tax-exempt charities already provide their Schedule Bs to the IRS. We are unpersuaded. Disclosure requirements can chill association "even if there is no disclosure to the general public." *Shelton*, 364 U. S., at 486. In *Shelton*, we noted the "constant and heavy" pressure teachers would experience simply by disclosing their associational ties to their schools. Exacting scrutiny is triggered by "state action which *may* have the effect of curtailing the freedom to associate," and by the "*possible* deterrent effect" of disclosure. *NAACP* v. *Alabama*, 357 U. S., at 460.

The disclosure requirement "creates an unnecessary risk of chilling" in violation of the First Amendment indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous. The petitioners here, for example, introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence. Such risks seem to grow with each passing year, as "anyone with access to a computer can compile a wealth of information about" anyone else, including such sensitive details as a person's home address or the school attended by his children. The gravity of the privacy concerns is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California. The dissent argues that a facial challenge cannot succeed unless a plaintiff shows that donors to a substantial number of organizations will be subjected to harassment and reprisals. Plaintiffs may be required to bear this evidentiary burden where the challenged regime is narrowly tailored to an important government interest. Such a demanding showing is not required, however, where—as here—the disclosure law fails to satisfy these criteria.

Finally, California's demand for Schedule Bs cannot be saved by the fact that donor information is already disclosed to the IRS as a condition of federal tax-exempt status. For one thing, each governmental demand for disclosure brings with it an additional risk of chill. For another, revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California's disclosure requirement, which can prevent charities from operating in the State altogether. We are left to conclude that the Attorney General's disclosure requirement imposes a widespread burden on donors' associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important. We therefore hold that the up-front collection of Schedule Bs is facially unconstitutional, because it fails exacting scrutiny in "a substantial number of its applications judged in relation to it] plainly legitimate sweep." *Stevens*, 559 U. S., at 473.

The dissent concludes by saying that it would be "sympathetic" if we "had simply granted as-applied relief to petitioners based on our reading of the facts." But the facts are the same across

the board: Schedule Bs are not used to initiate investigations. California has not considered alternatives to indiscriminate up-front disclosure. And the State's interest in amassing sensitive information for its own convenience is weak. When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, "because First Amendment freedoms need breathing space to survive." *Button*, 371 U. S., at 433. The District Court correctly entered judgment in favor of the petitioners and permanently enjoined the Attorney General from collecting Schedule Bs. The judgment of the Ninth Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Thomas, concurring in Parts I, II–A, II–B–2, and III–A, and concurring in the judgment.

I would approach three issues differently. First, the bulk of "our precedents require application of strict scrutiny to laws that compel disclosure of protected First Amendment association." *Doe* v. *Reed*, 561 U. S. 186, 232 (2010) (Thomas, J., dissenting). Laws directly burdening the right to associate anonymously, including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights. Second, I continue to have "doubts about" our "overbreadth doctrine." The Court has no power to enjoin the *lawful* application of a statute just because that statute might be unlawful as-applied in other circumstances. Third, a declaration that the law is "facially" unconstitutional "seems to me no more than an advisory opinion—which a federal court should never issue." 593 U. S., at ___ (Thomas, J., concurring). I join Part III–A, which finds that California's law fails exacting scrutiny, because the Court simply (and correctly) holds that the District Court properly enjoined the law *as applied* to petitioners. I join Parts I, II–A, II–B–2, and III–A of the majority's opinion and concur in the judgment.

Justice Alito, with whom Justice Gorsuch joins, concurring in Parts I, II–A, II–B–2, and III, and concurring in the judgment.

The exacting scrutiny standard requires both narrow tailoring and consideration of alternative means of obtaining the sought-after information. California's blunderbuss approach to charitable disclosures fails exacting scrutiny. For the same reasons, California's approach necessarily fails strict scrutiny. This Court decided its seminal compelled disclosure cases before it developed modern strict scrutiny doctrine. Because the choice between exacting and strict scrutiny has no effect on these cases, I see no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment.

Justice Sotomayor, with whom Justice Breyer and Justice Kagan join, dissenting.

Exacting scrutiny requires [that] there must be "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' government interest," and "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Reed*, 561 U. S., at 196. Petitioners have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are

made public. California's Schedule B regulation, however, is a nonpublic reporting requirement, and California has implemented security measures to ensure that Schedule B information remains confidential. Nor have petitioners shown that their donors, or any organization's donors, will face threats, harassment, or reprisals if their names remain in the hands of a few California state officials.

Given the modesty of the First Amendment burden, California may justify its Schedule B requirement with a correspondingly modest showing that the means achieve its ends. California easily meets this standard. California collects Schedule Bs to facilitate supervision of charities that operate in the State. Schedule B and other parts of Form 990 help attorneys in the Charitable Trusts Section of the California Department of Justice uncover whether an officer or director of a charity is engaged in self-dealing, or whether a charity has diverted donors' charitable contributions for improper use. It helps them identify red flags, such as discrepancies in reporting contributions across different schedules. And it helps them determine whether a charity has inflated the value of a donor's in-kind contribution in order, for instance, to overstate how efficiently the charity expends resources. In sum, California's confidential reporting requirement imposes trivial burdens on petitioners' associational rights and plays a meaningful role in Section attorneys' ability to identify and prosecute charities engaged in malfeasance. Disclosure assists California in its decisions whether to advance or end an investigation. The Court insists that California can rely on alternative mechanisms, such as audit letters or subpoenas, to obtain information. But it is not feasible for the Section, which has limited staff and resources, to conduct that many audits. The subpoena process is time consuming. Audit letters and subpoenas can [alert] an organization to the existence of an investigation, giving it a chance to hide assets or tamper with evidence.

The Court concludes that California's reporting requirement is unconstitutional on its face. "In the First Amendment context," such broad relief requires proof that the requirement is unconstitutional in "a substantial number of applications judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U. S. 460, 473 (2010). The Court points to not a single piece of evidence showing that California's reporting requirement will chill "a substantial number" of top donors from giving to their charities of choice. A significant number of the charities registered in California engage in uncontroversial pursuits. Research shows that the vast majority of donors prefer to publicize their charitable contributions. It is always possible that an organization is inherently controversial or for an apparently innocuous organization to explode into controversy. The answer is to ensure that confidentiality measures are sound or, in the case of public disclosures, to require a procedure for governments to address requests for exemptions in a timely manner. It is not to hamper all government law enforcement efforts by forbidding confidential disclosures en masse. Just over a decade ago, in *Reed*, petitioners demonstrated that their own supporters would face reprisal if their opposition to expanding domestic partnership laws became public. That evidence did not support a facial challenge because the "typical referendum petition concerned tax policy, revenue, budget, or other state law issues," and "there was no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case." Petitioners' "facial challenge therefore must fail."

Today's decision discards decades of First Amendment jurisprudence recognizing that reporting and disclosure requirements do not directly burden associational rights. *Reed* did the opposite of what the Court does today. First, it demanded objective evidence that disclosure risked exposing supporters to threats and reprisals; second, it required only a loose means-end fit in light of the "modest" burden it found; and third, it rejected a facial challenge given petitioners' failure to establish that signatories to the "typical" referendum had any reason to fear disclosure. Petitioners have shown that their donors reasonably fear reprisals if their identities are publicly exposed. If the Court had granted as-applied relief to petitioners based on its reading of the facts, I would be sympathetic, although my own views diverge. But the Court's decision jettisons completely the longstanding requirement that plaintiffs demonstrate an actual First Amendment burden before the Court will subject government action to close scrutiny. It then invalidates a regulation in its entirety, even though it can point to no evidence demonstrating that the regulation is likely to chill a substantial proportion of donors.

On p. 538, following the note, insert the following:

Problem: Leadership in Christian Organizations

The University of Iowa prohibits student groups from limiting access to leadership or membership positions based on race, creed, color, religion, sex and other characteristics protected by the University's human rights policy. However, the evidence shows that the University had enforced its non-discrimination selectively. If so, can it sanction a fundamentalist Christian group for its failure to allow an openly gay student to assume a leadership role? *See Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021).

B. The Right Not to Speak

On p. 545, insert the following new problems ## 2 & 3, and renumber the remaining problems:

2. *Anti-Discrimination & Compelled Speech*. Colorado's Anti-Discrimination Act prohibits a place of public accommodation from refusing individuals service because of their sexual orientation. A website designer creates custom wedding sites, but refuses to do so for same-sex weddings because to do so would contravene her religious beliefs. Would it constitute unconstitutional compelled speech to force her to service same-sex weddings? *See 303 Creative v. Elenis*, 6 F.4th 1160 (10th Cir.), *cert. granted*, 142 S.Ct. 1106 (2021).

3. *Mandating "Preferred Pronouns."* University policy requires teachers to refer to their "preferred pronouns." Suppose that a professor holds religious beliefs which state the following: "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and it cannot be changed, regardless of an individual's feelings or desires." The professor also believes that his religious beliefs preclude him from "affirming as true ideas and concepts that are not true." As a result, he refuses to refer to students by their "preferred

pronouns." Can the university discipline the professor for failing to refer to students by their preferred pronouns? Could the professor solve the problem by only referring to students by their surnames? *See Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Kluge v. Brownsboro Community School Corp.*, 548 F.Supp.3d 814 (S.D. Ind. 2021).

On p. 546, at the end of problem # 5, delete the citation and add the following new citation:

See American Beverage Ass'n v. San Francisco, 916 F.3d 749 (9th Cir. 2019).

On p. 546, at the end of the problems, add the following new problems:

9. *Farenheit 9/11*. A college student objects to watching the movie Farenheit 9/11 in one of his classes. The student complains that his teacher has a strong left-wing bias, that the student is not allowed to articulate conservative views in class, and that he receives bad grades on papers and projects unless he articulates liberal/progressive ideas regarding helping the poor or advancing social justice. If the student's claims can be validated, may he prevail on a claim that his teacher retaliated against him for expressing conservative views and for his failure to watch the movie? *See Felkner v. Rhode Island College,* 203 A.3d 433 (R.I. 2019).

10. *Cell Phone Warnings*. Can a city require retailers to disclose to consumers that carrying cell phones that are connected to cellular phone networks can expose them to an excessive level of radio-frequency radiation? *See The Wireless Association v. City of Berkeley*, 928 F.3d 832 (9th Cir.), *cert. denied*, 140 S.Ct. 658 (2019).

On p. 556, after the first paragraph, add the following new problems:

Problems

1. *Janus's Impact*. Bear in mind that *Southworth* relies heavily on the *Abood* decision which has now been overruled. It also relies on *Keller*. After *Janus*, should *Keller* and *Southworth* be overruled as well? Do the underpinnings of those decisions remain intact?

2. *Objecting to Exclusive Union Representation*. Pursuant to state law, a union was elected as the exclusive representative of home care workers. A group of workers, who refused to join the union or to pay union dues, objected to the Union representation as a violation of their right of association. After *Janus*, does the mandatory representation violate the workers' right to freedom of association? *See Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018).

3. *Objecting to Mandatory Bar Membership*. In earlier cases, the U.S. Supreme Court held that states could mandate membership by attorneys in their state bar associations, and that this compelled membership does not violate their right to freedom of association provided that membership dues were used to support the bar's regulatory function and to help ensure the quality of legal services. However, those cases relied hardily on *Abood* which was overruled by *Janus*. After the holding in Janus, can a lawyer legitimately object to being forced to be a member of the

bar in order to practice law? *See Taylor v. Buchanan*, 4 F.4th 406 (6th Cir. 2021), *cert. denied*, 142 S.Ct. 1441 (2022); *Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019), *cert. denied*, 140 S.Ct. 1294 (2020).

4. *More on Mandatory Bar Memberships*. Suppose that the bar makes political statements (e.g., giving its own perspectives on racism, racist violence and discrimination), but some bar members consider those perspectives to be unduly political and wish to disassociate themselves. Can bar dues be used to force to pay for such statements or can they object? Can they refuse to join (or remain a member of) a bar that makes statements to which they object? *See Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021).

On p. 559, replace problem # 1 with the following new problem:

1. *Provost's Decision*. A University of Minnesota program charges students $443 a semester student service fee. Student groups can apply for funding from those fees. However, all applications must be made to the Vice Provost for Student Affairs who has exclusive authority to determine who receives funding. There are no guidelines for making decisions, no time frame, public deliberations aren't required, and all decisions are final. Is the University of Minnesota program distinguishable from the one at issue in Southworth? *See Viewpoint Neutrality Now! v. Regents of the University of Minnesota,* 516 F. Supp. 3d 904 (D. Minn. 2021).

Chapter 8

The Government as Employer, Educator, and Source of Funds

A. First Amendment Rights of Public Employees

[1] Prohibiting Electioneering

On p. 574, at the end of the notes, add the following new problem:

Problem: Additional Restrictions

The Administrative Office of the U.S. Courts (AO) provides financial, technological, managerial and other support to the federal courts. The AO decided to impose additional restrictions on its employees (beyond the restrictions already imposed by the Hatch Act), including prohibiting donations to political campaigns, attendance at partisan rallies, driving voters to the polls, organizing political events for candidates, and expressing political views on social media. The AO seeks to justify the restrictions as necessary to preserve the public's confidence in the integrity and impartiality of the judicial branch, and to ensure that the other branches of government do not view AO employees as politically motivated in their actions related to the court system. Does the AO's asserted interests justify these registrations? Are some of these activities more objectionable than other of the listed activities? Should a distinction be made between low-level AO employees and high-level employees? *See Guffey v. Duff*, 459 F. Supp. 3d 227 (D.D.C. 2020).

[2] Other Employee Speech

On p. 581, at the end of note # 2, insert the following new paragraph:

Should the same rule apply when a superintendent of schools discovers corruption by prior school officials, and reports it to governmental authorities. By law, the report was required. When the school board learns about the report, it terminates the superintendent. Was the superintendent's speech protected by the First Amendment? *See Waronker v. Hempstead Union Free School District*, 788 Fed. Appx. 788 (2d Cir. 2019), *cert. denied*, 140 S.Ct. 2669 (2020).

On p. 585, problem # 1, delete the sub-problems (b), (d), and (f), re-letter the remaining sub-problems, and then inset a new sub-problem (e) which reads as follows:

> (e) Following the election of Donald Trump as President of the U.S., an employee in the city's Emergency Communications Center participated in a discussion about the election on Facebook. During that discussion, she states "Thank god we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for trump too!" The city terminates the woman, concluding that the post would undermine confidence in the operation of the Communications Center. Her post was not private, and her account indicated that she worked for the city. Was the termination proper? *See Bennett v. Metro Government of Nashville*, 977 F.3d 530 (6th Cir. 2020).

On p. 585, delete problem # 2, and renumber the remaining problems.

On p. 585, problem # 3, after the colon, delete the last sentence before the colon, and the remainder of the problem, and replace it with the following:

Advise the Governor regarding whether he can prohibit state employees from accessing internet websites, especially political blogs, during work hours.

On pp. 586-587, delete problems # 4, 5 & 6, and replace them with the following:

4. *Covid-19 and Co-Workers*. When a co-worker's wife was diagnosed with Covid-19, and the co-worker went into quarantine, Woolslayer felt this he should notify his university co-workers. He talked to his supervisor and the university's human resources department, and both recommended that he not advise his co-workers. When Woolslayer went forward with the notification, he was dismissed from his job. Does *Garcetti* mandate that Woolslayer's communication should be regarded as unprotected private speech? *See Woolslayer v. Driscoll*, 2020 WL 5983078 (W.D. Pa.).

5. *The School Odor*. An English teacher claims that there is a "terrible chemical odor" at her school that is making kids and staff members sick. To alert parents, she posts information about the odor on her Facebook page. The school board decided to suspend and then transfer the teacher to another school. Under *Garcetti*, is her speech protected? *See Trinidad v. City of East Chicago*, 2021 WL 534802 (N.D. Ind.).

6. *Anti-Muslim Tweets*. An attorney (Morgan), who works for the Tennessee Supreme Court's Board of Responsibility, was fired for Tweeting anti-Islamic statements (e.g., "the # 1 issue of our time—stopping Muslims"). The Tweets came to the Board's attention when an Islamic attorney, who was being subjected to discipline, moved to disqualify Morgan for anti-Islamic bias. Is the Board justified in dismissing a Board member who has an anti-Islamist bias? *See Morgan v. Board of Professional Responsibility*, 2022 WL 628514 (M.D. Tenn. 2021).

On pp. 587, delete problem # 8, and replace it with the following problem.

8. *The Officer's Facebook Post*. Moser, a sniper on the police department's SWAT team, was upset after a police officer was ambushed by a citizen. On a friend's Facebook page, Moser posted that it was a "shame" that the suspect didn't have any holes in him. Does the post constitute protected free speech? Was he speaking as a private citizen? Can the post be regarded as disrupting the department, interfering with discipline, or as simply inappropriate for a police officer? *See Moser v. Las Vegas Metro Police Department*, 984 F.3d 900 (9th Cir. 2021).

On pp. 587-589, delete problems # 14, and replace it with the following:

14. *The Requirement to Recant*. A fireman publicly expressed concerns (in a newspaper article) regarding problems with the New York Fire Department's attempts to diversify. Essentially, he argued that promotions should be based on merit rather than on race and gender. Over the following ten years, the fireman was steadily promoted until he reached the position of deputy assistant chief. When he was nominated for assistant chief, he was instructed to withdraw his prior comments or he would be denied the promotion. Consistently with the First Amendment, can he be denied the promotion if he refuses to recant? *See Gala v. City of New York*, 525 F. Supp. 3d 425 (E.D.N.Y. 2021).

On pp. 587-589, replace problems # 16 with the following problem:

5. *Failure to Disclose*. Does a university have a legitimate interest in requiring a professor to reveal all of his blogs and outside social media accounts, or does the required disclosure involve an infringement on the professor's First Amendment rights? *See Tracy v. Florida Atlantic University Board of Trustees*, 980 F.3d 799 (11th Cir. 2020).

On pp. 587-589, delete problem # 17, and renumber the remaining problems.

On p. 589, after the problems, add the following additional problem:

18. *Pandemic Whistleblower*. Dr. Rick Bright was demoted from his post as director of the Biomedical Advanced Research and Development Authority (BARDA) after testifying before Congress. In that testimony, he pushed for coronavirus funding to go only for 'safe and scientifically vetted solutions, and not for drugs, vaccines and other technologies that lack scientific merit, and was reluctant to promote use of the anti-malarial drug hydroxychloroquine to treat patients with COVID-19, which had been touted by Trump and others. What protections under the First Amendment may be claimed by Dr. Bright? *See* Brian Naylor, *Ousted Scientist Says His Pandemic Warnings Were Dismissed as 'Commotion*,' NPR, May 14, 2020, https://

www.npr.org/2020/05/14/855254610/ousted-scientist-says-window-of-opportunity-to-fight-coronavirus-is-closing

On p. 594, delete problem # 2 and renumber the remaining problems.

On p. 595, delete problem # 6 and renumber the remaining problems.

On p. 596, delete problem # 9 and renumber the remaining problems.

[3] Associational Rights

On p. 605, at the end of the problems, insert the following new problem:

3. *Deputy Sheriffs*. A sheriff, who was a Republican, seeks to dismiss two deputy sheriffs for backing his opponent, an independent. Should a deputy sheriff be regarded as a "policymaker" so that political loyalty is an important criteria for retention? Does it matter that the sheriff is an elected official, that deputies are "at will" officials who serve at the sheriff's pleasure, and that they are sworn to "engage in law enforcement activities on behalf of the sheriff?" *See Curtis v. Christian County*, 963 F.3d 777 (8th Cir. 2020).

B. The First Amendment in the Public Schools

On p. 611, insert the heading "Notes & Questions" after the case, and then place the first two problems under that heading (rather than under the "Problems" heading, and then renumber the remaining problems.

On p. 612, at the end of problem # 5, insert the following:

Would you reach the same result if a student attempted to wear pro-LGBTQ t-shirts (with slogans such as "Queen Queer!" and "Lady Lesbian"), but were ordered to remove them? Or a t-shirt with an anti-LGBTQ+ slogan? *See B.A.P. v. Overton County Board of Education*, 2022 WL 1256657 (M.D. Tenn., April 27, 2022). Or a t-shirt with firearms-related symbols? *See N.J. by Jacob v. Sonnabend*, 37 F.4th 412 (7th Cir. 2022).

On p. 613, insert the following new problems, and then renumber the remaining problem:

9. *Who Would You Kill?* During lunch at a school cafeteria, students are asked who they would kill "if they were to do a school shooting." J.R., at 12-year old student, states that he would kill one of his teachers with a pistol. Although J.R.'s family has guns, they do not own a pistol. Can J.R. be expelled for stating that he would kill the teacher? Or should his statements be regarded as unthreatening because they were made as part of a "game" that various children were playing? *See J.R. v. Penns Manor Area School District*, 373 F. Supp.3d 123 (W.D. Pa. 2019).

On p. 613, at the end of problem # 9 (now numbered as # 7), add the following sentences and citation:

Suppose instead of an essay, a student was disciplined because a teacher overheard the student when they were engaged in a factual conversation with a classmate about a highly publicized mass shooting at a high school in another state. Assume that the disciplined student made remarks about how the shooter's possession of explosives gave them the capability of doing even more harm than had occurred and how the failure of law enforcement to confront the shooter earlier was inexplicable. Is the teacher's decision to discipline the student for the conversation justified? *See Starbuck v. Williamsburg James City County School Board*, 28 F.4th 529 (4th Cir. 2022).

On p. 613, move problem # 1 from p. 630 and insert as new problem # 9.

On p. 623, insert the following new problem # 2, and renumber the remaining problems:

2. *The Gay Rights Essay*. A fourth grader wrote an essay about LGBTQ rights. The principal decided that it was not age-appropriate and therefore decided not to include it in a class booklet. Did the principal act consistently with the First Amendment? *See Robertson v. Anderson Mill Elementary School*, 989 F.3d 282 (4th Cir. 2021).

On p. 613, insert problem # 1 from p. 630, but insert it as problem # 10.

On p. 613, insert problems ## 7, 9 & 11 after the new problem # 10, but label them as problems ## 11, 12 & 13.

On p. 623, insert the following new problems # 3-4 and renumber the remaining problems:

3. *The Opinion Poll*. For a class, a student was charged with creating a public opinion poll addressed to other students for her AP Government class. The survey involved an online poll with thirty questions, three of which focused on the school district's superintendent of schools. When

the superintendent found out about the poll, she ordered that it be taken down. Did the superintendent have legitimate pedagogical justifications for deleting the online poll? *See Hutton v. Blaine County School District # 61,* — F. Supp.3d —, 2020 WL 1339120 (D. Idaho 2020).

4. *The Student Petition*. In the same school district, a second student wanted to submit a report to the school board on behalf of her fellow students. Among other things, the report expressed displeasure with the board's decision to change the graduation date. The superintendent required that all references to the graduation date be deleted from the report. Did the superintendent have "legitimate pedagogical reasons" for deleting all references to the graduation date? *See Hutton v. Blaine County School District # 61,* 2020 WL 1339120 (D. Idaho).

On p. 630, before the note, add the following new case and problem:

Mahanoy Area School District v. B.L.
141 S.Ct. 2038 (2021).

Justice Breyer delivered the opinion of the Court.

B. L. (who, together with her parents, is a respondent) was a student at Mahanoy Area High School, a public school in Pennsylvania. At the end of her freshman year, B. L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team. B. L. did not accept the coach's decision with grace, particularly because the squad coaches had placed an entering freshman on the varsity team. That weekend, B. L. and a friend visited a local convenience store. There, B. L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B. L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group (B. L. had about 250 "friends") to view the images for a 24 hour period. The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." The second image was blank but for a caption, which read: "Love how me and another student get told we need a year of jv before we make varsity but that doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji. B.L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B. L.'s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about B. L.'s posts. Questions about the posts persisted during an Algebra class taught by one of the two coaches.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year. B. L.'s subsequent apologies did not move school officials. The school's

athletic director, principal, superintendent, and school board, all affirmed B. L.'s suspension from the team. In response, B. L., together with her parents, filed this lawsuit. The District Court found in B. L.'s favor. It granted a temporary restraining order and a preliminary injunction ordering the school to reinstate B. L. to the cheerleading team. The District Court found that B. L.'s Snapchats had not caused substantial disruption at the school. Cf. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969). Consequently, the District Court declared that B. L.'s punishment violated the First Amendment, and it awarded B. L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record. A panel of the Third Circuit affirmed. The school district filed a petition for certiorari, asking us to decide "whether *Tinker*, which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." We granted the petition.

Students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." *Tinker*, 393 U. S., at 506. But we have made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 266 (1988). One such characteristic is the fact that schools at times stand *in loco parentis*, *i.e.*, in the place of parents. See *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 684 (1986). This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds; (2) speech, uttered during a class trip, that promotes "illegal drug use," see *Morse* v. *Frederick*, 551 U. S. 393, 409 (2007); and (3) speech that others may reasonably perceive as "bearing the imprimatur of the school," such as that appearing in a school-sponsored newspaper. Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

We do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. Several types of off-campus behavior may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Even B. L. herself would redefine the Third Circuit's off-campus/on-campus distinction, treating as on campus: all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones. And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B. L.'s proposed rule. We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts. Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on

such a list. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

We can mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway. *First*, the doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility. *Second*, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. Courts must be skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention. *Third*, the school has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.

Consider B. L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B. L.'s posts, while crude, did not amount to fighting words. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). And while B. L. used vulgarity, her speech was not obscene as this Court has understood that term. See *Cohen* v. *California*, 403 U. S. 15, 19 (1971). To the contrary, B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. See *id.*, at 24; cf. *Snyder* v. *Phelps*, 562 U. S. 443, 461 (2011). Consider too when, where, and how B. L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the

school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless diminish the school's interest in punishing B. L.'s utterance.

But what about the school's interest, here an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that interest into three parts. *First*, the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. The strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time. See *Morse*, 551 U. S., at 405. B. L. spoke under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B. L.'s parents had delegated to school officials their control of B. L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B. L.'s posts encompassed a message, an expression of B. L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B. L.'s interest in free expression. *Second*, we find no evidence of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. *Tinker*, 393 U. S., at 514. Discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats. When one of B. L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking about it," she responded simply, "No." As we said in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The alleged disturbance here does not meet *Tinker*'s demanding standard. *Third,* one of the coaches testified that the school decided to suspend B. L., not because of any specific negative impact upon a particular member of the school community, but "based on the fact that there was negativity that could impact students in the school." There is little that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have said, simple "undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression." *Tinker*, 393 U. S., at 508.

It might be tempting to dismiss B. L.'s words as unworthy of robust First Amendment protections. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." *Cohen*, 403 U. S., at 25. We agree that the school violated B. L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed.

It is so ordered.

Justice Alito, with whom Justice Gorsuch joins, concurring.

It is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom. In a math class, for example, the teacher can insist that students talk about math, not some other subject. Practical necessity dictates that teachers and school administrators have related authority with respect to other in-school activities like auditorium programs attended by a large audience. By enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights. Courts have analyzed the issue by adapting the common-law doctrine of *in loco parentis*. Parents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree—for example, by giving permission for a child to participate in an extracurricular activity or to go on a school trip. During the entire school day, a school must have the authority to protect everyone on its premises, and therefore schools must be able to prohibit threatening and harassing speech. But even when students are on school premises during regular school hours, they are not stripped of their free-speech rights. *Tinker* teaches that expression that does not interfere with a class cannot be suppressed unless it "involves substantial disorder or invasion of the rights of others."

The decision to enroll a student in a public school cannot be treated as a complete transfer of parental authority over a student's speech. Parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). It would be far-fetched to suggest that enrollment implicitly confers the right to regulate what a child says or writes at all times of day and throughout the calendar year. The question that courts must ask is whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question. One category of off-premises student speech falls easily within the scope of the authority that parents implicitly or explicitly provide. This category includes speech that takes place during or as part of what amounts to a temporal or spatial extension of the regular school program, *e.g.,* online instruction at home, assigned essays or other homework, and transportation to and from school. Also included are statements made during other school activities in which students participate with their parents' consent, such as school trips, school sports and other extracurricular activities that may take place after regular school hours or off school premises, and after-school programs for students who would otherwise be without adult supervision during that time. Abusive speech that occurs while students are walking to and from school may also fall into this category on the theory that it is school attendance that puts students on that route and in the company of the fellow students who engage in the abuse. The imperatives that justify the regulation of student speech while in school—the need for orderly and effective instruction and student protection—apply more or less equally to these off-premises activities.

There is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies

at the heart of the First Amendment's protection, see *Lane* v. *Franks*, 573 U. S. 228, 235 (2014); *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997). If a school tried to regulate such speech, the most that it could claim is that offensive off-premises speech on important matters may cause controversy and recriminations among students and may thus disrupt instruction and good order on school premises. But it is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas that are "offensive or disagreeable." *Texas* v. *Johnson*, 491 U. S. 397 (1989). It is unreasonable to infer that parents who send a child to a public school thereby authorize the school to take away such a critical right. Even if such speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out; "that would be a heckler's veto." When a student engages in oral or written communication of this nature, the student is subject to whatever restraints the student's parents impose, but the student enjoys the same First Amendment protection against government regulation as all other members of the public. And these rights extend to speech that is couched in vulgar and offensive terms. See, *e.g.*, *Iancu* v. *Brunetti*, 588 U. S. ___ (2019); *Matal*, 582 U. S. ___. Between these two extremes lie the categories of off-premises student speech that appear to have given rise to the most litigation. One group of cases involves perceived threats to school administrators, teachers, other staff members, or students. Laws that apply to everyone prohibit defined categories of threats, but schools have claimed that their duties demand broader authority. Another common category involves speech that criticizes or derides school administrators, teachers, or other staff members. Schools may assert that parents who send their children to a public school implicitly authorize the school to demand that the child exhibit the respect that is required for orderly and effective instruction, but parents surely do not relinquish their children's ability to complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence. Perhaps the most difficult category involves criticism or hurtful remarks about other students. Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech.

The present case does not fall into any of these categories. Instead, it simply involves criticism (albeit in a crude manner) of the school and an extracurricular activity. Unflattering speech about a school or one of its programs is different from speech that criticizes or derides particular individuals, and the school's justifications for punishing B. L.'s speech were weak. She sent the messages and image in question on her own time while at a local convenience store. They were transmitted via a medium that preserved the communication for only 24 hours, and sent to a select group of "friends." She did not send the messages to the school or to any administrator, teacher, or coach, and no member of the school staff would have even known about the messages if some of B. L.'s "friends" had not taken it upon themselves to spread the word. The school did not claim that the messages caused any significant disruption of classes. They "upset" some students (including members of the cheerleading squad), caused students to ask some questions about the matter during an algebra class taught by a cheerleading coach, and put out "negativity that could impact students in the school." The freedom of students to speak off-campus would not be worth much if it gave way in the face of such relatively minor complaints. Speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting, and the

algebra teacher had the authority to quell in-class discussion of B. L.'s messages and demand that the students concentrate on the work of the class.

As for the messages' effect on the morale of the cheerleading squad, the coach of a team sport may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time, but this authority has limits. Here, the school did not simply take B. L.'s messages into account in deciding whether her attitude would make her effective in doing what cheerleaders are primarily expected to do: encouraging vocal fan support at the events where they appear. Instead, the school imposed punishment: suspension for a year from the cheerleading squad despite B. L.'s apologies. There are parents who would not have been pleased with B. L.'s language and gesture, but whatever B. L.'s parents thought, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity. Many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.

Justice Thomas, dissenting.

Unlike *Tinker*, this case involves speech made in one location but capable of being received in countless others. Because off-campus speech made through social media can be received on campus (and can spread rapidly), it often will have a greater proximate tendency to harm the school environment than will an off-campus in-person conversation. Where it is foreseeable and likely that speech will travel onto campus, a school has a stronger claim to treating the speech as on-campus speech. Here, it makes sense to treat B. L.'s speech as off-campus speech. There is little evidence that B. L.'s speech was received on campus.

Problem: Posts about COVID-19

In March 2020, a high school student, Amyiah, posted on Instagram about being diagnosed by her doctor as having COVID-19 symptoms and told to self-quarantine. When her symptoms worsened, she was hospitalized and tested for COVID-19. Even though the test came back negative, the doctor told Amyiah and her parents that she "may still have had COVID-19 and simply missed the window for testing positive." She and her parents were told to continue to quarantine. Amyiah posted on Instagram, saying that she had "beaten the corona virus." The County Health Department, as well as the School District, received a lot of phone calls from people who saw Amyiah's post and were frightened about COVID-19. Therefore, officials from the C.D. and the School District officials asked the County Sheriff's Office to make Amyiah remove her post. The CSO told Amyiah that, "If [the posts] don't come down, the Sheriff has directed me either to issue disorderly conduct citations or to start taking people to jail." Faced with this threat, Amyiah removed her posts. The School District Superintendant sent an email message to all parents that, "It was brought to my attention that there was a rumor floating out there that one of our students contracted Covid-19. Let me assure you there is no truth to this. This was a foolish means to get attention and the student will be disciplined accordingly." Amyiah was suspended for one week on the ground that she violated the student conduct code by "lying" in her post. Did the CSO and the School District violate Amyiah's First Amendment rights? *See Cohoon v. Konrath*, 563 F. Supp. 3d 881 (E.D. Wis. 2021).

On pp. 630-631, renumber problems ## 2-5 as problems ## 1-4, and problems ## 8 & 10 (p. 632) as problems ## 5 & 6.

On p. 632, before current problem # 6 (which should be renumbered problem # 9) insert the following new problems ## 7 & 8:

7. *Limiting Parental Speech*. Does a public school district have the right to limit or control what parents (of children who go to school in the district) say about the schools? Suppose that a school adopts a "Parent Code of Conduct" which provides that parents should not use social media to "campaign against or fuel outrage against individual staff members, the school or policies implemented by the school of district." Parents who violate the policy can be removed from school or banned from entering school grounds in the future. Is the Code of Conduct valid under the First Amendment?

8. *Blocking Parents from Social Media*. When parents were blocked from commenting on the Facebook and Twitter pages of the school district where their children attended school, the school district justified the blocking as necessary because the parents' comments "disrupted" the original posts. The parents claimed that this reason was pretextual and that the blocking was impermissibly content-based because the prior comments of the parents criticized the school district. The school district argued that the blocking was content-neutral and narrowly tailored to achieve a significant government interest, and that the blocking left open ample alternative channels of communication. Assume that the court found that the school district's Facebook and Twitter pages are public fora and that the initial blocking was justified based on the arguments made by the school district. Should the court also find that the *continued* blocking satisfied First Amendment doctrine? *See Garnier v. O'Connor-Ratcliff*, 513 F. Supp. 3d 1229 (S.D. Cal. 2021).

C. Government Financed Speech

On p. 645, at the beginning of the problems, insert the following new problem and then renumber the remaining problems:

1. *Anti-Abortion Slogans*. Washington D.C. has passed the Defacing of Public or Private Property Criminal Penalty Act which prohibits people from writing, marking, drawing or painting on public or private property, including streets and sidewalks. D.C. allowed a "Black Lives Mural" to be pained on a public street, and a "Defund the Police" message beside it. However, when an anti-abortion group asked for permission to paint a "Black Pre-Born Lives Matter" slogan on the sidewalk, the request was denied. Was the denial permissible or appropriate? *See Women for America First v. DeBlasio,* 2022 WL 1714896 (2d Cir., May 27, 2022) (S.D.N.Y. 2021); *Frederick Douglass Foundation, Inc. v. District of Columbia,*531 F. Supp. 3d 316 (D.D.C. 2021) (D.D.C. 2021).

On p. 653, following the problem, insert the following new case:

Shurtleff v. City of Boston

142 S.Ct. 1583 (2022)

Justice Breyer delivered the opinion of the Court.

Boston City Hall sits on City Hall Plaza. Inspired by open public spaces like the Piazza del Campo in Siena, the plaza was designed to be "Boston's fairground," a "public gathering space" for the people. On the plaza stand three 83-foot flagpoles. Boston flies the American flag from the first pole (along with a banner honoring prisoners of war and soldiers missing in action). From the second, it flies the flag of the Commonwealth of Massachusetts. And from the third, it usually flies Boston's flag—a sketch of the "City on a Hill" encircled by a ring against a blue backdrop. Boston acknowledges that the plaza is a "public forum." The city's policy is, "where possible," "to accommodate all applicants seeking to take advantage of the City of Boston's public forums," including the plaza and the area at the flagpoles' base. Since 2005, the city has allowed groups to hold flag-raising ceremonies on the plaza. Participants may hoist a flag of their choosing on the third flagpole (in place of the city's flag) and fly it for a couple of hours. Most ceremonies have involved the flags of other countries marking the national holidays of Bostonians' many countries of origin. But several flag raisings have been associated with other kinds of groups or causes, such as Pride Week, emergency medical service workers, and a community bank. Between 2005 and 2017, Boston approved about 50 unique flags, raised at 284 ceremonies. Boston has no record of refusing a request before this case.

In 2017, Harold Shurtleff, director of Camp Constitution, asked to hold a flagraising event. The event would "commemorate the civic and social contributions of the Christian community" and feature remarks by local clergy. The organization wished to raise what it described as the "Christian flag." To the application, Shurtleff attached a photo of the proposed flag: a red cross on a blue field against a white background.The commissioner of Boston's Property Management Department said no. The commissioner worried that flying a religious flag at City Hall could violate the Constitution's Establishment Clause. Shurtleff and Camp Constitution sued. Petitioners claimed that Boston's refusal to let them raise their flag violated, among other things, the First Amendment's Free Speech Clause. The District Court held that the city acted within its constitutional authority in declining to raise Camp Constitution's flag. The First Circuit affirmed.

The question is whether Boston's flag-raising program constitutes government speech. If so, Boston may refuse flags based on viewpoint. The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. See *Pleasant Grove City* v. *Summum*, 555 U. S. 460 (2009). When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. See *Walker* v. *Texas Div.*, *Sons of Confederate Veterans*, *Inc.*, 576 U. S. 200 (2015). Boston could not easily congratulate the Red Sox on a victory were the city powerless to decline to simultaneously transmit the views of disappointed Yankees fans. The Constitution relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks. The boundary between government speech and private expression

can blur when government invites people to participate in a program. In those situations, when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views?

In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is driven by context rather than the rote application of rigid factors. Our past cases have looked to the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. See *Walker*, 576 U. S., at 209. Considering these indicia in *Summum*, we held that permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated. In *Walker*, license plate designs proposed by private groups also amounted to government speech because the State "maintained direct control over the messages conveyed" by "actively" reviewing designs and rejecting over a dozen proposals. In *Matal* v. *Tam*, 582 U. S. ___ (2017), on the other hand, we concluded that trademarking words or symbols generated by private registrants did not amount to government speech. Though the Patent and Trademark Office had to approve each proposed mark, it did not exercise sufficient control over the nature and content of those marks to convey a governmental message.

Applying the government-speech analysis, we look to the history of flag flying, particularly at the seat of government. Were we to consider only that history, we would find that it supports Boston. Flags *symbolize* civilization. Little wonder that the Continental Congress, seeking to define a new nation, "resolved" on June 14, 1777, "that the Flag of the United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation." 8 Journals of the Continental Congress 1774–1789, p. 464 (W. Ford ed. 1907). Today, the American flag continues to symbolize our Nation, a constellation of 50 stars standing for the 50 States. Other contemporary flags, both state and local, reflect their communities. Boston's flag bears the city's seal and motto rendered in blue and buff—the colors of the Continental Army's Revolutionary War uniforms. Not just the content of a flag, but also its presence and position have long conveyed important messages about government. The early morning sight of the stars and stripes above Fort McHenry told Francis Scott Key (and, through his poem, he told the rest of us) that the great experiment—the land of the free—had survived the British attack on Baltimore Harbor. No less familiar, a flag at half staff tells us that the government is paying its "respect to the memory" of someone who has died.

Flags on Boston's City Hall Plaza usually convey the city's messages. On a typical day, the American flag, the Massachusetts flag, and the City of Boston's flag wave from three flagpoles. Boston's flag, when flying there at full mast, symbolizes the city. When flying at halfstaff, it conveys a community message of sympathy or somber remembrance. When displayed at other public buildings, it marks the mayor's presence. While this history favors Boston, it is only our starting point. The question remains whether, when Boston allowed private groups to raise their own flags, those flags, too, expressed the city's message. Next, we consider whether the public would tend to view the speech at issue as the government's. On an ordinary day, a passerby on Cambridge Street sees three government flags representing the Nation, State, and city. Those flags wave "in unison, side-by-side, from matching flagpoles," just outside "the entrance to Boston's

seat of government." Like the monuments in the public park in *Summum*, the flags "play an important role in defining the identity that [the] city projects to its own residents and to the outside world." So, like the license plates in *Walker*, the public seems likely to see the flags as "conveying some message" on the government's "behalf." But Boston allowed its flag to be lowered and other flags to be raised with some regularity. These other flags were raised in connection with ceremonies at the flagpoles' base and remained aloft during the events. Petitioners say that a pedestrian glimpsing a flag other than Boston's on the third flagpole might simply look down onto the plaza, see a group of private citizens conducting a ceremony without the city's presence, and associate the new flag with them, not Boston. Thus, even if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here.

Finally, we look at the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent. The answer is not at all. Boston maintained control over an event's date and time to avoid conflicts. It maintained control over the plaza's physical premises, presumably to avoid chaos. And it provided a hand crank so that groups could rig and raise their chosen flags. But it is Boston's control over the flags' content and meaning that is key; that type of control would indicate that Boston meant to convey the flags' messages. Boston says that all (or at least most) of the 50 unique flags it approved reflect particular city-approved values or views. Flying flags associated with other countries celebrated Bostonians' many different national origins; flying other flags, Boston adds, was not "wholly unconnected" from a diversity message or "some other day or cause the City or Commonwealth had already endorsed." That may well be true of the Pride Flag raised annually to commemorate Boston Pride Week. But it is more difficult to discern a connection to the city as to, say, the Metro Credit Union flag raising, a ceremony by a local community bank.

Boston told the public that it sought "to accommodate all applicants" who wished to hold events at Boston's "public forums," including on City Hall Plaza. The application form asked only for contact information and a brief description of the event, with proposed dates and times. The city employee who handled applications testified that he had previously "never requested to review a flag or requested changes to a flag in connection with approval"; nor did he even see flags before the events. The city's practice was to approve flag raisings, without exception. It has no record of denying a request until Shurtleff's. Boston acknowledges it "hadn't spent a lot of time really thinking about" its flag-raising practices until this case. True to its word, the city had no written policies or clear internal guidance about what flags groups could fly and what those flags would communicate. Compare the extent of Boston's control over flag raisings with the degree of government involvement in our most relevant precedents. In *Summum*, Pleasant Grove City always selected which monuments it would place in its park (whether or not the government funded those monuments), and it typically took ownership over them. In *Walker*, a state board "maintained direct control" over license plate designs by "actively" reviewing every proposal and rejecting at least a dozen. The facts of this case are closer to *Matal* v. *Tam*. There, we held that trademarks were not government speech because the Patent and Trademark Office registered all manner of marks and normally did not consider their viewpoint, except occasionally to turn away marks it deemed "offensive." Boston's come-one-come-all attitude—except, that is, for Camp Constitution's religious flag—is similar.

Boston could easily have done more to make clear it wished to speak for itself by raising flags. The City of San Jose, California, for example, provides in writing that its "flagpoles are not intended to serve as a forum for free expression by the public," and lists approved flags that may be flown "as an expression of the City's official sentiments." The city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech.

Boston acknowledges that it denied Shurtleff's request because it believed flying a religious flag at City Hall could violate the Establishment Clause. And it admits this concern proceeded from the premise that raising the flag would express government speech. But we have rejected that premise in the preceding pages. We must therefore consider Boston's actions in light of our holding. When a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination." *Good News Club* v. *Milford Central School*, 533 U. S. 98, 112 (2001). Applying that rule, we have held, for example, that a public university may not bar student-activity funds from reimbursing only religious groups. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). Here, Boston concedes that it denied Shurtleff's request solely because the Christian flag he asked to raise "promoted a specific religion." That refusal discriminated based on religious viewpoint and violated the Free Speech Clause. We conclude that Boston's flag-raising program does not express government speech. As a result, the city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment. We reverse the First Circuit's contrary judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Kavanaugh, concurring.

A government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like. A government *violates* the Constitution when (as here) it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like. See, *e.g., Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. ___ (2020). Under the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second-class.

Justice Alito, with whom Justice Thomas and Justice Gorsuch join, concurring.

Courts must be careful when a government claims that speech by private speakers is actually government speech. It can be difficult to tell whether the government is using the doctrine "as a subterfuge for favoring certain private speakers over others based on viewpoint," and the doctrine becomes "susceptible to dangerous misuse," *Matal* v. *Tam*, 582 U. S. ___ (2017). Speech by a private individual or group cannot constitute government speech if the government does not attempt to control the message. But control is also an essential element of censorship.

To establish that expression constitutes government speech exempt from First Amendment attack, the government must satisfy two conditions. First, it must show that the challenged activity constitutes government speech in the literal sense—purposeful communication of a

governmentally determined message by a person acting within the scope of a power to speak for the government. Second, the government must establish it did not rely on a means that abridges the speech of persons acting in a private capacity. Our precedents recognize two ways in which a government can speak using private assistance. First, the government can "enlist private entities to convey its own message" by deputizing private persons as its agents. See *Johanns*, 544 U. S., at 560. In that situation, private persons assume a public or quasi-public capacity that empowers them to speak on behalf of the government. Second, the government can "adopt" a medium of expression created by a private party and use it to express a government message. *Summum*, 555 U. S., at 473. For the adopted expression to qualify as the government's, the private party must alienate control over the medium of expression to the government. And government actors must put the medium to use to intentionally express a government message. Otherwise, the government is simply providing a forum for private parties to submit their own productions and usual First Amendment principles apply.[5] When the government's role is limited to applying a standard of assessment to determine a speaker's eligibility for a benefit, the government is regulating private speech, and ordinary First Amendment principles apply. When examination of the government's "policy and practice" indicates that the government has "intentionally opened a nontraditional forum for public discourse," a court may immediately infer that private-party expression in the forum is not government speech. There is no need to consider history, public perception, or control in the abstract.

The flag displays were plainly private speech within a forum created by the City, not government speech. The City never rejected any request to raise a flag submitted by any private party. The City did nothing to indicate an intent to communicate a message. Nor did it deputize private speakers or appropriate private-party expressive content. Indeed, the City disclaimed virtually all messages expressed by characterizing the flagpoles as a "public forum" and adopting access criteria consistent with generalized public use. The requirement of viewpoint neutrality applies to any forum of this kind. Excluding religious messages from public forums that are open to other viewpoints is a "denial of the right of free speech" indicating "hostility to religion" that would "undermine the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U. S., at 845.

Counsel argued that the City actually *did* intend to express support for "the diverse national heritage of the City's population." This argument is a transparent attempt to reverse engineer a governmental message. Neither the application guidance nor the 2018 written policy singled out a connection with a nationality commemoration as a condition of access to the flagpoles. And the City approved flags that had nothing to do with nationality or official holidays, such as the "Metro Credit Union Flag Raising." Even if the City *had* reserved the flagpoles for nationality commemorations and official holidays, that would only mean that the City had reserved the flagpoles "for certain groups or for the discussion of certain topics" and created a

---

[5] In *Walker*, the government actually did "own the designs on its license plates." But it was not obvious how designs such as "Rather Be Golfing" could possibly express a government message. The government did not have any purpose to communicate, and instead allowed private parties to use personal plates to communicate their own messages. *Walker* "likely marks the outer bounds of the government-speech doctrine."

nonpublic forum, not that it had engaged in government speech. Having created a forum with those characteristics, the City could not reject Shurtleff's application on account of the religious viewpoint he intended to express.

Justice Gorsuch, with whom Justice Thomas joins, concurring in the judgment.

How did the city get it so wrong? At least some of the blame traces back to *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). *Lemon* sought to devise a one-size-fits-all test for resolving Establishment Clause disputes. Instead of bringing clarity, *Lemon* produced chaos. In time, this Court abandoned *Lemon*, and returned to a jurisprudence centered on the Constitution's original meaning. Yet, the city chose to follow *Lemon* anyway. It proved a costly decision, and Boston's travails supply a cautionary tale for other localities and lower courts.

On p. 646, after the problems, add the following new problems:

4. *Amending Boston's Policy*. After the decision in Shurtleff, the City of Boston wants to amend its policy to make clear that flag raisings constitution government speech. How would it achieve that objective?

5. *Objection to Memorial*. Raymond Herisse, a Haitian-American man, was shot and killed by Miami Beach police officers shot and killed a Haitian-American man, Raymond Herisse, during Urban Beach Weekend (UBW) in 2011. In 2019, the City decided to commission the design of art installations to be displayed on Miami Beach during the UBW events. The City selected several local Black artists to create the "ReFrame Miami Beach" installations, which included a vinyl portrait of Raymond Herisse. The written text on a plaque by the portrait stated, "This memorial is to honor Herisse, to affirm #blacklivesmatter, and call into question the excessive force, racial discrimination, violence, and aggression often present in interactions between police and unarmed black civilians." When the Miami Beach Police Department objected to the Herisse Memorial, the City Manager ordered its removal and stated that the memorial did not " create an opportunity for inclusiveness and mutual exchange," which was the goal of the "Reframe" project. The City Manager also said that he had the power to remove the memorial because the City was paying for it. The Mayor supported that decision. The artists sued the City and the City Manager and Mayor, arguing that the removal of the memorial violated their First Amendment rights. The defendants argued that this action did not implicate First Amendment rights due to the government speech doctrine. What result? *See McGriff v. City of Miami Beach*, 2022 WL 939809 (S.D. Fla., March 29, 2022).

6. *Restrictive Covenants*. In 1890, the Virginia Governor signed a deed that was authorized by a joint resolution of the General Assembly of Virginia which purported to bind future administrations to maintain a monument to General Robert E. Lee on Monument Avenue in perpetuity. However, civil rights demonstrations and protests in 2020 led the Governor to approve of the removal of the monument. The Governor defended the decision on the ground that any covenant or obligation to maintain the Lee Monument on its 1890 site in perpetuity would violate public policy. Does the government speech doctrine apply to this scenario and justify the decision to remove the monument? *See Taylor v. Northam*, 862 S.E. 2d. 458 (Va. 2021).

7. *Ban on Use of PA System*. Assume that a private Christian school in Tampa is a member of the Florida High School Athletic Association ("FHSAA"), which is "a state actor and a non-profit organization that governs high school athletics in Florida." When the school's football team was selected to play in the 2020 State Final against another private Christian school from Miami, both schools sought the FHSAA's "permission to broadcast a pre-game prayer over the PA system." The FHSAA denied this request, while noting that "the student athletes and coaches would be allowed to pray together at the middle of the field before the game started," and to pray "on the field in the minutes following the game." The schools filed suit, arguing that the FHSSA's denial of their requests violated the First Amendment. The court determined that, "The pregame speech over the PA system at the state-hosted Championship Final football game is government speech," not private speech. What reasoning could the court use to support this conclusion? *See Cambridge Christian Schools, Inc. v. Florida High School Athletic Association Inc.*, 2022 WL 971778 (M.D. Fla., March 31, 2022).

On p. 660, insert the following new notes ## 1 & 2, and renumber the following notes:

1. *Post-Decision Developments*. Following the holding in the prior case, the Court was confronted by follow-up litigation in *Agency for International Development v. Alliance for Open Society International, Inc.*, 140 S.Ct. 2082 (2020). That case dealt with the issue of whether participating foreign organizations were also exemption from the "policy explicitly opposing prostitution and sex trafficking." § 7631(f). Foreign organizations, that were linked to U.S. organizations, sought to claim an exemption as well. The Court held that foreign organizations could be subjected to the requirement:

> Plaintiffs' position runs headlong into two bedrock principles of American law. *First*, it is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution. See, *e.g.*, *Boumediene* v. *Bush*, 553 U. S. 723, 770 (2008); *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 265 (1990); U. S. Const., Preamble. If the rule were otherwise, actions by American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries would be constrained by the foreign citizens' purported rights under the U. S. Constitution. That has never been the law. See *Verdugo-Urquidez*, 494 U. S., at 2734. *Second*, it is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations. See *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 474 (2003). Plaintiffs' foreign affiliates were incorporated in other countries and are legally separate from plaintiffs' American organizations. Even though the foreign organizations have affiliated with the American organizations, the foreign organizations remain legally distinct from the American organizations.
>
> That conclusion corresponds to historical practice regarding American foreign aid. The United States supplies more foreign aid than any other nation in the world. Acting with the President in the legislative process, Congress sometimes imposes conditions on foreign aid. Congress may condition funding on a foreign organization's ideological

> commitments—for example, pro-democracy, pro-women's rights, anti-terrorism, pro-religious freedom, anti-sex trafficking, or the like. Doing so helps ensure that U. S. foreign aid serves U. S. interests. By contrast, plaintiffs' approach would throw a constitutional wrench into American foreign policy. In particular, plaintiffs' approach would put Congress in the untenable position of either cutting off certain funding programs altogether, or instead funding foreign organizations that may not align with U. S. values. We see no constitutional justification for the Federal Judiciary to interfere in that fashion with American foreign policy and American aid to foreign organizations. In short, plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad have no First Amendment rights.

The Court also rejected the argument that "the foreign affiliates' required statement of policy against prostitution and sex trafficking might be incorrectly attributed to the American organizations," and that "the American organizations themselves possess a First Amendment right against imposition of the Policy Requirement on their foreign affiliates." The Court concluded:

> Here the United States is not forcing plaintiffs to affiliate with foreign organizations. Plaintiffs are free to choose whether to affiliate with foreign organizations and are free to disclaim agreement with the foreign affiliates' required statement of policy. Any alleged misattribution in this case and any effect on the American organizations' message of neutrality toward prostitution stems from their choice to affiliate with foreign organizations, not from U. S. Government compulsion. We appreciate that plaintiffs would prefer to affiliate with foreign organizations that do not oppose prostitution. But Congress required foreign organizations to oppose prostitution in return for American funding. And plaintiffs cannot export their own First Amendment rights to shield foreign organizations from Congress's funding conditions.

Justice Breyer, with whom Justice Ginsburg and Justice Sotomayor join, dissented, arguing that.

> This case is not about the First Amendment rights of foreign organizations. It is about—and has always been about—the First Amendment rights of American organizations. The question is whether the American organizations enjoy that same constitutional protection against government-compelled distortion when they speak through clearly identified affiliates that have been incorporated overseas. The answer to that question is yes. The First Amendment protects speakers from government compulsion that is likely to cause an audience to mistake someone else's message for the speaker's own views. We have never before held that an American speaker forfeits First Amendment protection when it speaks though foreign affiliates to reach audiences overseas. As I have said, this case does not concern the constitutional rights of foreign organizations. This case concerns the constitutional rights of *American* organizations. Every respondent here is—and has always been—American. No foreign entities are party to this case, and respondents have never claimed that the Policy Requirement violates anyone's First Amendment rights apart from their own. The question before us is clear: whether the First Amendment protects *Americans* when they speak through clearly identified foreign affiliates to reach audiences overseas. I fear the Court's decision will seriously impede the countless American speakers who communicate overseas in a similar way. That weakens

the marketplace of ideas at a time when the value of that marketplace for Americans, and for others, reaches well beyond our shores. With respect, I dissent.

2. *The Trump Gag Rule*. The Trump Administration prohibited taxpayer-funded family planning clinics from performing, promoting or referring someone for abortion. In other words, organizations like Planned Parenthood were required to physically and financially separate their abortion services from other reproductive care. The validity of the rule is currently being litigated. *See California v. Azar*, 950 F.3d 1067 (9th Cir. 2020).

On p. 663, replace the citation at the end of problem # 1 with the following new citation:

See California v. Azar, 950 F.3d 1067 (9th Cir. 2020).

On p. 665, at the end of problem # 8, insert the following new paragraph:

In 2019, President Trump translated his threats into an executive order which directed 12 federal agencies, including the Departments of Education and Defense and the National Science Foundation, that fund college and university research and education grants to add the following language to the agreements institutions sign to receive the money: "The heads of covered agencies shall, in coordination with the Director of the Office of Management and Budget, take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies." While the order refers to "education grants," that would not include federal student aid that goes directly to students to pay college expenses. The types of "education grants" seemingly referred to in the order might, however, include institutional capacity-building grants, such as those made to minority-serving institutions. Is this EO constitutionally valid?

On p. 665, after the problems, add the following new problem:

9. *Anti-BDS Law*. A Texas law provides that, "A governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract." When the City of Houston's contract with an engineering firm is up for renewal, the firm wants to continue to work for the City, but does not want to certify, as required by the contract, that it wants to preserve the option to boycott Israel. When the firm files suit to challenge the Texas law on First Amendment grounds, the court notes that the question raised in the suit is "surprisingly perplexing though not uncommon." The court observes that many similar suits have been "filed nationwide seeking to set aside pieces of legislation passed in various states known as 'Anti-BDS laws,' which preclude a person or entity receiving government funds from boycotting Israel." The court also acknowledges that, "More than a few courts have addressed this

issue, and their decisions have not been necessarily uniform." What arguments can be made on both sides? *See A & R Engineering & Testing, Inc. v. City of Houston*, 2-22 WL 267880 (S.D. Tex., January 28, 2022).

Chapter 9

The Press

On p. 694, change the title "C. Access to Judicial Proceedings" to "C. Access to Governmental Proceedings and Information."

C. Access to Judicial Proceedings

On p. 696, before the problems, add the following:

Notes

1. *Data Coverups*. Press requests for data about covid-19 cases have been rejected and lawsuits have been filed to obtain the data. In Arizona, for example, when news and other media sought nursing home data, the Arizona Department of Human Services denied the request based on its "overarching legal and public health responsibilities, including a responsibility to protect the privacy of Arizonans' health-related data." Media plaintiffs filed suit to obtain "public records that show the number of nursing home residents that have tested positive for coronavirus and the number of individuals who have been taken to and from the hospital as a result." The plaintiffs argue that these public records "are integral to the public's ability to monitor the safety" of Arizona's nursing home residents. See 12 News, 12 News and other Arizona media file suit for records of nursing homes with coronavirus outbreaks, May 5, 2020, https://www.12news.com/article/news/health/coronavirus/12-news-and-other-arizona-news-outlets-file-suit-for-names-of-nursing-homes-with-coronavirus-outbreaks/75-c886147f-f2e6-4385-ba0e-41cedf1cf60f.

2. *Speech Restrictions for CDC Employees.*. On March 19, 2020, the Knight Institute filed a FOIA request "seeking records" from the CDC "concerning White House and CDC policies restricting the ability of CDC employees to speak to the press and the public, including about the coronavirus pandemic. Having received no response by on April 2, 2020, the Knight Institute filed a suit to "expedite and enforce" the FOIA request. The genesis of the request was described as follows:

> According to press reports, the White House began requiring CDC experts to coordinate with the Office of Vice President Mike Pence before speaking with members of the press or public about the pandemic. This policy was put into place after public health officials publicly contradicted the administration's messaging, which has included inaccurate and misleading information. In addition, the CDC has imposed its own restrictions on the ability of its employees to speak publicly in the past. To the extent that these policies prevent CDC employees from speaking out as private citizens, they raise serious First Amendment concerns.

Knight First Amendment Institute, *Knight Institute v. CDC*, April 2, 2020, https://knightcolumbia.org/cases/knight-institute-v-cdc

On p. 697, in problem # 2, following the Milligan article, start a new paragraph, and insert the following at the beginning of the paragraph:

3. *Other Ground for Denying Access*.

On p. 697, new problem # 3, add the following to the end of the problem:

See John K. MacIver Institute for Public Policy, Inc. v. Evers, 994 F.3d 602 (7th Cir. 2021). May a White House press pass be revoked because a journalist is involved in a dispute with another person at a social media summit at the White House? *See Karem v. Trump*, 960 F.3d 656 (D.C. Cir. 2020).

On p. 697, at the end of the problems, add the following new problems:

3. *Access to Legislative Chambers*. The Texas Legislature has erected a brass railing between to separate the legislators from the general public. However, Texas admits duly accredited media members inside the railing. Empower Texans creates an annual scorecard for Texas Legislators, and it has routinely given one legislator (the head of the Committee on House Administration) an "F." Thereafter, Empower Texas reporters were denied legislative press credentials. Empower Texans believes that the denial was based on its rating of the committee head. If so, is the denial actionable? *See Empower Texans Inc. v. Geren*, 977 F.3d 367 (5th Cir. 2020).

4. *Police Recording Bans*. A state statute makes it a crime to secretly record another person without his/her consent? Consistently with the First Amendment, can the statute be applied to the actions of a citizen or a journalist who records police conduct that occurs in a public setting? In the Derek Chauvin trial relating to the murder of George Floyd, a citizen recording provided a pivotal piece of evidence. Should citizens have the to record police actions, especially when they see what they regard as police misconduct? *See Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020).

5. *Sealed Records*. Many jurisdictions have judicial rules that permit the "sealing" of judicial records. Under these rules, the public does not have access to the records. For example, when child sexual abuse allegations were swirling against the Catholic Church, the Church often asked courts to seal the records of suits against the Church. Are these seals consistent with the press access rules articulated in the *Globe Newspaper* case?

On p. 703, at the end of problem # 6, add the following new text and new citation:

Would the arguments change if instead of seeking to obtain the jurors' names, a reporter sought only to obtain the juror questionnaires used during *voir dire*? *See People v. Conley*, 165 A.D. 3d 1602 (N.Y. 2018).

On p. 703, at the end of the problems, add the following new problem:

8. *Foreign Intelligence Surveillance Court*. Citizens and the media have struggled unsuccessfully to gain access to decisions of the Foreign Intelligence Surveillance Court (FISC). Congress created the court in 1978 and gave it the authority to approve surveillance conducted for foreign intelligence purposes. In addition, its decisions are rarely published even though they can involve emails, phone records and online browsing data. Should FISC records be subject to public disclosure just like other court records? Or is there a compelling governmental interest in maintaining secrecy?

D. Access to Prisons

On p. 703, at the end of problem # 6, add the following new text and new citation:

Would the arguments change if instead of seeking to obtain the jurors' names, a reporter sought only to obtain the juror questionnaires used during *voir dire*? *See People v. Conley*, 165 A.D. 3d 1602 (N.Y. 2018).

E. The Press and Due Process

[3] Electronic Media in the Courtroom

On p. 730, delete the heading and insert the Notes heading, then renumber the existing note as note # 1, then insert the following new note # 2:

Notes

1. *Courtroom Cameras*.

2. *Remote Oral Arguments at the Supreme Court*. After the closure of the Supreme Court's building to the public during the covid19 pandemic, the Court heard oral arguments "via telephone hookup" and allowed livestreaming of its audio online and on C-Span. The rules for questioning the advocates call for each Justice to ask questions "for two to three minutes each" in order of seniority. Nina Totenberg, *Supreme Court Arguments Resume, But with a Twist*, NPR, May 4, 2020, https://www.npr.org/2020/05/04/847785015/supreme-court-arguments-resume-but-with-a-twist

This strategy was made necessary because of the closure of the Court's building to the public during the covid19 pandemic. According to one opinion poll, 72% of those surveyed "say they support the Court's decision to convene online during the pandemic to hear oral arguments with only 13% opposed." Notably, 61% favored the option of allowing television coverage of the oral arguments with 22% opposed, but the Court did not adopt that solution. *See Americans Want the Supreme Court to Function Remotely, and That Includes Hearing Arguments*, FIX THE COURT, April 8, 2020, https://fixthecourt.com/2020/04/americans-want-supreme-court-function-remotely-includes-hearing-arguments/

Chapter 10

Electronic Media and the First Amendment

B. Post-Broadcasting Technology

On p. 776, in note # 1, following the period in the 10th line, add the following:

The repeal was partially upheld against a court challenge. *See Mozilla v. Federal Communications Commission*, 940 F.3d 1 (D.C. Cir. 2020).

On p. 776, change the heading "Notes" to "Notes and Questions"

On p. 778, insert new note# 5, and renumber the remaining notes:

5. *The Section 230 Shield*. Section 230 of the Communications Decency Act draws a distinction between "publishers" (who are aware of the content that they are distributing and therefore potentially liable for that content) and "platforms" (which distribute information created by others). Section 230 was designed to insulate platforms from liability for defamatory content posted by others even if they engage in some content moderation on their websites. After Twitter flagged some of President Trump's tweets for fact-checking, he issued an executive order questioning whether they were engaged in good faith moderation of content. As a result, he took the position that social media platforms should be denied Section 230 protection if they censor content. *See* Donald Trump, Executive Order on Preventing Online Censorship (May 28, 2020). If platforms are going to aggressively censor content, is it appropriate to give them an exemption from liability?

On p. 783, insert the following new problem # 5and renumber the remaining problems:

5. *The Pandemic and the EU.* Article 10, paragraph 2, of the European Convention on Human Rights allows governments to restrict speech when necessary for "public safety" and the "protection of health." Suppose that a European government concludes that individuals are circulating false information over the internet regarding Covid-19. In particular, they are alleging that governmental warnings regarding Covid-19 are all a "hoax," and that Covid-19 vaccines are both unnecessary and dangerous. Would it be consistent with the right to free speech to allow the U.S. government to ban false information relating to the pandemic and to prohibit such statements regarding vaccines?

On p. 783, at the end of problem # 6, add the following new paragraph:

Would private plaintiffs fare better? In 2012, children were murdered at school in Newton, Connecticut. Afterwards, Alex Jones used his Infowars website speculated that the attack had been staged, and that crisis actors had been used to make it appear real. Plaintiff, a father of one of the murdered children, was alleged to have lied about the death of his son in order to promote stronger gun laws. Can plaintiff recover for defamation against Jones and Infowars? *See Jones v. Heslin*, 587 S.W.3d 134 (Tex.App. 2019).

On p. 784, in problem # 7, at the end of the second full sentence, insert the following:

A suit claiming that Twitter is biased against conservative viewpoints was dismissed in reliance on Section 230 of the CDA. *See Brittain v. Twitter, Inc.*, 2019 WL 2423375 (N.D. Az.).

On p. 784, at the end of problem # 7, delete the cite.

On p. 784, insert new problem ## 8 & 9, and renumber the remaining problems:

8. *Texas' Social Media Law*. In 2021, Texas passed HB20 which purported to regulate "social media platforms" that are "open to the public," that "enable users to communicate with other users for the primary purpose of posting information, comments, messages, or images," and that have at least "50 million active users in the United States in a calendar month." Section 7 of HB20 prohibits these platforms from "censoring" users based on viewpoint, and § 2 requires covered platforms to disclose certain information about their business practices, including an "acceptable use policy" and "a biannual transparency report." The platforms must also establish procedures by which users can appeal a platform's decision to "remove content posted by the user." The law was challenged by trade associations that represent major social media platforms who claimed, among other things, that the law is facially unconstitutional under the First Amendment because it limits their editorial discretion. Texas responds that the law does not require social media platforms to host any particular message but only to refrain from discrimination against a user's speech on the basis of "viewpoint," and in this respect the statute is a permissible attempt to prevent "repression of freedom of speech by private interests." Texas also argues that HB20 applies only to platforms that hold themselves out as "open to the public," and as neutral forums for the speech of others. Texas further contends that the covered social media platforms do not generally "convey ideas or messages that they have endorsed." Finally, Texas argues that the law only applies to companies with "50 million active users in the United States," and that possess some measure of common carrier-like market power which gives them the "opportunity to shut out disfavored speakers." Is the law constitutional? *See Netchoice, LLC v. Paxton*,142 S.Ct. 1715 (2022).

9. *More on Social Media*. Twitter announced in 2019 that it would ban all political advertisements. How can it determine what constitutes a political advertisement?

On p. 791, before the problems, add the following new note:

Note

In *United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2021), the court struck down courts orders barring a convicted sex offender, on supervised release, from possessing legal pornography as well as from accessing the internet. The court concluded that the prohibitions were "overly restrictive" and not reasonably related to his past wrongdoing or his rehabilitation. Likewise, in *United States v. Abbate*, 970 F.3d 601 (5th Cir. 2020), the court dealt with restrictions on an individual convicted of possession of child pornography. The court upheld a ban on possession of pornography, legal or illegal, but struck down a ban on possession of all game consoles, including those not connected to the internet.

On p. 792, at the end of the problems, insert the following new problem:

4. *Lifetime Internet Ban?* Suppose that a teacher is convicted of possession of child pornography, including sadistic images of prepubescent children. The trial court imposes a sentence that includes a 121 month period of supervised release, as well as a lifetime ban from holding a social media account or any device that is capable of accessing the internet. After *Packingham*, can such a ban be imposed if it is consistent with the "statutory goals of deterrence, protection of the public, and rehabilitation?" If so, what must be shown to impose such a ban? *See United States v. McMiller*, 954 F. 3d 670 (4th Cir. 2020).

Chapter 11

Overview of the Religion Clauses

B. Defining the Subject Matter of the Religion Clauses

On p. 815, at the end of note # 3, add the following:

See 45 C.F.R. Part 88. The rule was vacated on non-constitutional grounds. *See City & County of San Francisco v. Azar*, 911 F.3d 558 (N.D. Ca. 2019).

Chapter 12

The Establishment Clause

A. Financial Aid to Religion

On p. 828, at the end of the first paragraph, insert the following:

In *Shurtleff v. City of Boston*, 142 S.Ct. 1583 (2022), a concurring Justice Gorsuch leveled his own criticisms of the *Lemon* test:

> *Lemon* held out the promise that any Establishment Clause dispute could be resolved by following a neat checklist focused on three questions. The only sure thing *Lemon* yielded was new business for lawyers and judges. Faced with such a malleable test, risk-averse local officials found themselves in an ironic bind. To avoid Establishment Clause liability, they sometimes felt they had to discriminate against religious speech and suppress religious exercises. But those actions only invited liability under other provisions of the First Amendment. *Lemon*'s abstract and ahistoric test put "policymakers in a vise between the Establishment Clause and the Free Speech and Free Exercise Clauses." *Pinette*, 515 U. S., at 767 (plurality opinion). It is less clear is why this state of affairs still persists. *Lemon* has long since been exposed as an anomaly and a mistake.
>
> From the birth of modern Establishment Clause litigation in *Everson* v. *Board of Ed. of Ewing*, this Court looked primarily to historical practices and analogues to guide its analysis. 330 U. S. 1 (1947). *Lemon* interrupted this long line of precedent. It offered no plausible reason. And the ahistoric alternative it offered quickly proved both unworkable in practice and unsound in its results. Several early decisions applying *Lemon* were rapidly overruled. All of which led Justice after Justice to conclude that *Lemon* was "flawed in its fundamentals," "unworkable in practice," and "inconsistent with our history and precedents." *County of Allegheny*, 492 U. S., at 655, 669 (Kennedy, J., concurring and dissenting). Recognizing *Lemon*'s flaws, this Court has not applied its test for nearly two decades.
>
> It's hard not to wonder whether some simply prefer the policy outcomes *Lemon* can be manipulated to produce. The test is guaranteed to spit out results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could sustain. *Lemon* may promote an unserious, results-oriented approach to constitutional interpretation. But for some, that may be more a virtue than a vice. If your policy goal is to lump in religious speech with fighting words and obscenity, if it is to celebrate only a "particular" type of diversity consistent with popular ideology, the First Amendment is not exactly your friend. Dragging *Lemon* from its grave may be your only chance.

Finally, in *Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (2022), the Court overruled *Lemon*. The case involved a high school football coach who prayed at the 50 yard line after every game. After repeated demands to stop, the school district took disciplinary action against him, arguing that it could not permit the prayers without running afoul of the Establishment Clause. In concluding that the coach's prayer was protected under the Free Exercise Clause, and rejecting the District's Establishment Clause claim, the Court overruled the *Lemon* decision:

> The District [Court] relied on *Lemon* and its progeny. In *Lemon* this Court attempted a "grand unified theory" for assessing Establishment Clause claims. That approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. See, *e.g.*, *County of Allegheny* v. *American Civil Liberties Union*, *Greater Pittsburgh Chapter*, 492 U. S. 573 (1989); *id.*, at 630 (O'Connor, J., concurring). The "shortcomings" associated with this "ambitious," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion*, 588 U. S., at ___ (plurality opinion) (slip op., at 12). These tests "invited chaos," led to "differing results" in materially identical cases, and created a "minefield" for legislators. The Establishment Clause does not include anything like a "modified heckler's veto, in which religious activity can be proscribed" based on "perceptions" or "discomfort." *Good News Club* v. *Milford Central School*, 533 U. S. 98, 119 (2001). An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fails to censor" private religious speech. *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990) (plurality opinion). Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden* v. *Perry*, 545 U. S. 677, 699 (2005) (Breyer, J., concurring). Just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test. See *Shurtleff*, 596 U. S., at ___ (slip op., at 1–2).[6]

The Court held that the Lemon test should be replaced a new test that would be focused on history:

---

[6] Nor was that decision an outlier. In the last two decades, this Court has often criticized or ignored *Lemon* and its endorsement test variation. See, *e.g.*, *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. ___ (2020); *American Legion* v. *American Humanist Assn.*, 588 U. S. ___ (2019); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___ (2017); *Town of Greece* v. *Galloway*, 572 U. S. 565 (2014); *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012); *Arizona Christian School Tuition Organization* v. *Winn*, 563 U. S. 125 (2011); *Van Orden* v. *Perry*, 545 U. S. 677 (2005). A vast number of Justices have criticized those tests over an even longer period.

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings." *Town of Greece*, 572 U. S., at 576. "The line" that courts and governments "must draw between the permissible and the impermissible" has to "accord with history and faithfully reflect the understanding of the Founding Fathers." *Town of Greece*, 572 U. S., at 577. An analysis focused on original meaning and history has long represented the rule rather than some 'exception' within the "Court's Establishment Clause jurisprudence." 572 U. S., at 575; see *American Legion*, 588 U. S., at ___ (plurality opinion) (slip op., at 25). The District and the Ninth Circuit erred by failing to heed this guidance.

Justice Sotomayor, joined by Justice Breyer and Justice Kagan join, dissented:

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the practice, would perceive it as a state endorsement of prayer in public schools." *Santa Fe*, 530 U. S., at 308. The Court now says that endorsement does not matter and repudiates *Lemon*. The Court reserves particular criticism for the longstanding understanding that government action that appears to endorse religion violates the Establishment Clause, which it paints as a "modified heckler's veto, in which religious activity can be proscribed" based on "perceptions" or "discomfort." Endorsement concerns under the Establishment Clause bear no relation to a "heckler's veto." The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of "the reasonable observer" who is "aware of the history and context of the community and forum in which the religious speech takes place." "The endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from discomfort" but concern "with the political community writ large." The Court has long prioritized endorsement concerns in the context of public education. "There will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." These are "often questions of accommodating" religious practices to the degree possible while respecting the Establishment Clause.

The Court claims that it "long ago abandoned" the "endorsement test." The Court cites the plurality opinion in *American Legion* v. *American Humanist Assn.*, 588 U. S. ___ (2019) to support this contention. The only categorical rejection of *Lemon* in *American Legion* appeared in separate writings. The Court now goes much further, overruling *Lemon* entirely. It is wrong to do so. *Lemon* summarized "the cumulative criteria developed by the Court over many years" of experience "drawing lines" as to when government engagement with religion violated the Establishment Clause. *Lemon* properly concluded that precedent generally directed consideration of whether the government action had a "secular legislative purpose," whether its "principal or primary effect must be

> one that neither advances nor inhibits religion," and whether in practice it "fosters 'an excessive government entanglement with religion.' " It is true "that the *Lemon* test does not solve every Establishment Clause problem," but that does not mean that the test has no value. The purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents instruct in the context of public schools.

The dissenting justices also questioned the workability of the Court's new Establishment Clause test:

> Upon overruling one "grand unified theory," the Court holds that courts must interpret whether an Establishment Clause violation has occurred mainly "by 'reference to historical practices and understandings.' " While the Court has long referred to historical practice as one element of the analysis in Establishment Clause cases, the Court has never announced this as a general test or exclusive focus. The Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court elevates individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers.

***[3]* Agostini v. Felton**

On p. 840, at the end of problem # 5 after the case, insert the following:

Would it be permissible for a religious group to require those who take advantage of its services to adhere to its religious beliefs? *See Maddonna v. U.S. Department of Health & Human Services*, 567 F. Supp. 3d 688 (D.S.C. 2020).

[4] School Vouchers

On p. 852, at the end of the note, insert the following new material:

3. *Scholarship Program*. In *Espinoza v. Montana Department of Revenue,* 140 S.Ct. 2246 (2020), the Court broke new ground. *Espinoza* involved a Montana which sought to create parental and student choice through the creation of a scholarship program for students attending private schools. The program created a tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship organization" which, in turn, passed the money on as scholarships to students who attended private schools. However, the legislature directed that the aid program be administered consistently with Article X, section 6, of the Montana Constitution,

which contains a "no-aid" provision that bars direct or indirect governmental aid to sectarian schools. In order to comply with the no aid provision, the Montana Supreme Court terminated the aid program for all students whether is sectarian or secular schools. The Court held that Montana acted improperly in terminating the program and in denying aid to sectarian schools:

> The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran*, 137 S. Ct. 2012, 2019 (2017). Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. The provision plainly excludes schools from government aid solely because of religious status.
>
> The Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. So applied, the provision "imposes special disabilities on the basis of religious status" and "conditions the availability of benefits upon a recipient's willingness to surrender its religiously impelled status." *Trinity Lutheran*,137 S. Ct. at 2022 (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993), and *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978) (plurality opinion)). To be eligible for government aid, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 137 S. Ct. at 2022. The Free Exercise Clause protects against even "indirect coercion," and a State "punishes the free exercise of religion" by disqualifying the religious from government aid as Montana did here. Such status-based discrimination is subject to "the strictest scrutiny." *Id.* It is enough to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

As a result, the Court reversed the Montana Supreme Court's decision to terminate the program for all recipients.

Espinoza was extended by the holding in *Carson v. Makin*, 142 S.Ct. 1987 (2022). Carson involved a Maine law which required local towns to provide every child with the benefits of a free public education. For cities that were too rural or too small to maintain their own schools, Maine created a tuition assistance program which provided for the payment of "the tuition at the public school or the approved private school of the parent's choice at which the student is accepted." "Approved" schools included those that were "currently accredited by a New England association of schools and colleges" or separately "approved for attendance purposes" by the Department, and which met certain curricular requirements (e.g., using English as the language of instruction, offering a course in "Maine history, including the Constitution of Maine and Maine's cultural and ethnic heritage," and maintaining a student-teacher ratio of not more than 30 to 1). Parents could send their children to schools inside or outside the State, or even in foreign countries. However,

Maine precluded religious schools from participating in the program if they infused religion into their classes.

The Court struck down the Maine prohibition on the inclusion of religious schools:

> The principles applied in *Trinity Lutheran* and *Espinoza* resolve this case. Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. A wide range of private schools are eligible to receive tuition assistance payments. BCS and Temple Academy are disqualified from this generally available benefit "solely because of their religious character." By "conditioning the availability of benefits" in that manner, Maine's tuition assistance program—like the program in *Trinity Lutheran*—"effectively penalizes the free exercise" of religion. *Espinoza* applied these basic principles in the context of religious education. As here, we considered a state benefit program under which public funds flowed to support tuition payments at private schools. That program specifically carved out private religious schools from those eligible to receive such funds. While the wording of the Montana and Maine provisions is different, their effect is the same: to "disqualify some private schools" from funding "solely because they are religious." A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny." A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.

Justice Breyer dissented:

> [The Religion] Clauses should be interpreted to advance their goal of avoiding religious strife. We are a Nation with over 100 different religious groups. People adhere to a vast array of beliefs, ideals, and philosophies. With greater religious diversity comes greater risk of religiously based strife, conflict, and social division. The Religion Clauses were written in part to help avoid that disunion.
>
> Here, Maine chooses not to fund only those schools that "promote the faith or belief system with which the schools are associated and/or present the academic material taught through the lens of this faith"—*i.e.*, schools that will use public money for religious purposes. Maine excludes schools not because of the schools' religious character but because the schools will use the funds to teach and promote religious ideals. Maine legislators thought that government payment for this kind of religious education would be antithetical to the religiously neutral education that the Establishment Clause requires in public schools. In the majority's view, the fact that private individuals choose to spend the State's money on religious education saves Maine's program from Establishment Clause condemnation. But that fact simply *permits* Maine to route funds to religious schools. Nothing in our Free Exercise Clause cases *compels* Maine to give tuition aid to private schools that will use the funds to provide a religious education. *Trinity Lutheran* and *Espinoza* prohibit States from denying aid to religious schools solely because of religious *status*. But the Free Exercise Clause does not require Maine to fund schools that will use

public money to promote religion. Maine's decision not to fund such schools falls squarely within the play in the joints between those two Clauses.

B. School Prayer

On p. 856, insert a new note # 2 which reads as follows, and renumber the remaining notes:

In *Kennedy* v. *Bremerton School District*, 142 S.Ct. 2407 (2022), the Court was confronted by the case of a football coach who prayed following football games on the 50 yard line of the playing field. The school district instructed the coach that the Establishment Clause precluded it from allowing the coach to engage in such prayers, and the lower courts agreed. The Supreme Court reversed:

> The District argues that its suspension of Kennedy was essential to avoid a violation of the Establishment Clause. The Ninth Circuit [held] that the District's interest in avoiding an Establishment Clause violation "trumped" Kennedy's rights to religious exercise and free speech. The District [believes] that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorsed" religion. The District took the view that a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." On the District's account, it did not matter whether the Free Exercise Clause protected Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never endorsed Kennedy's prayer, and a strong public reaction only followed after the District sought to ban Kennedy's prayer. Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause and the Free Speech and Free Exercise Clauses," placed itself in the middle, and then chose its preferred way out of its self-imposed trap.
>
> The District relied on *Lemon* and its progeny. In *Lemon* this Court attempted a "grand unified theory" for assessing Establishment Clause claims. The approach came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. See, *e.g.*, *County of Allegheny* v. *American Civil Liberties Union*, *Greater Pittsburgh Chapter*, 492 U. S. 573 (1989); *id.*, at 630 (O'Connor, J., concurring). The "shortcomings" associated with this "ambitious," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion*, 588 U. S., at ___ (plurality opinion) (slip op., at 12). The Establishment Clause does not include anything like a "modified heckler's veto, in which religious activity can be proscribed" based on "perceptions" or "discomfort." An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fails to censor" private religious speech. Nor does the Clause "compel

the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden* v. *Perry*, 545 U. S. 677, 699 (2005) (Breyer, J., concurring). In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings." *Town of Greece*, 572 U. S., at 576. An analysis focused on original meaning and history has long represented the rule rather than some "exception" within the "Court's Establishment Clause jurisprudence." 572 U. S., at 575. The District and the Ninth Circuit erred by failing to heed this guidance.

The District still contends that it was justified in suppressing Kennedy's religious activity because otherwise it would have been guilty of coercing students to pray. Government "may not coerce anyone to attend church," nor may it force citizens to engage in "a formal religious exercise," *Lee* v. *Weisman*, 505 U. S. 577, 589 (1992). In its correspondence, the District never raised coercion concerns. The District conceded in a public 2015 document that there was "no evidence that students were directly coerced to pray with Kennedy." Kennedy has repeatedly stated that he "never coerced, required, or asked any student to pray," and that he never "told any student that it was important that they participate in any religious activity." The District did not discipline Kennedy for engaging in prayer while presenting locker-room speeches to students. That tradition predated Kennedy and he willingly ended it. He also willingly ended his practice of postgame religious talks with his team. The only prayer Kennedy sought to continue was the prayer he gave alone. He made clear that he could pray "while the kids were doing the fight song" and "take a knee by himself and give thanks and continue on." Kennedy even considered it "acceptable" to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. In short, Kennedy did not seek to direct any prayers to students or require anyone else to participate. His plan was to wait to pray until athletes were occupied. It was for three prayers of this sort in October 2015 that the District suspended him. Some people would have seen his religious exercise. Those close at hand might have heard him too. This Court has long recognized that "secondary school students are mature enough to understand that a school does not endorse," let alone coerce them to participate in, "speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U. S., at 250 (plurality opinion).

The District responds that, as a coach, Kennedy "wielded enormous authority and influence over the students," and students might have felt compelled to pray alongside him. There is no indication that anyone expressed any coercion concerns about the quiet, postgame prayers that Kennedy asked to continue and that led to his suspension. Nor is there any evidence that students felt pressured to participate in these prayers. Not a single Bremerton student joined Kennedy's quiet prayers following the three October 2015 games for which he was disciplined. On October 16, those students who joined Kennedy were "from the opposing team," and could not have "reasonably feared" that he would decrease their "playing time" or destroy their "opportunities" if they did not "participate." As for the other two games, "no one joined" Kennedy on October 23. And only a few members of the public participated on October 26.

> The District suggests that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression. In the name of protecting religious liberty, the District would have us suppress it. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. See *Town of Greece*, 572 U. S., at 589 (plurality opinion). We are aware of no historically sound understanding of the Establishment Clause that begins to "make it necessary for government to be hostile to religion" in this way. *Zorach*, 343 U. S., at 314. The prayers for which Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And none of Kennedy's students did participate in any of the October 2015 prayers that resulted in Kennedy's discipline.
>
> In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses should "trump" the other two. The project falters. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot show that they are at odds. In truth, there is no conflict. In no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights. See, *e.g.*, *Rosenberger*, 515 U. S., at 845; *Good News Club*, 533 U. S., at 112.

Justice Sotomayor, joined by justices Breyer and Kagan, dissented:

.

> Since *Engel* v. *Vitale*, 370 U. S. 421 (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. The Court now charts a different path paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the District stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. This would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him.
>
> For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective

observer, acquainted with the text, legislative history, and implementation of the practice, would perceive it as a state endorsement of prayer in public schools." *Santa Fe*, 530 U. S., at 308. The Court now says that endorsement does not matter and repudiates *Lemon*. The Court reserves particular criticism for the longstanding understanding that government action that appears to endorse religion violates the Establishment Clause, which it paints as a "modified heckler's veto, in which religious activity can be proscribed" based on "perceptions" or "discomfort." The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of "the reasonable observer" who is "aware of the history and context of the community and forum in which the religious speech takes place." "The endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from discomfort" but concern "with the political community writ large." The Court has long prioritized endorsement concerns in the context of public education. "There will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." These are "often questions of accommodating" religious practices to the degree possible while respecting the Establishment Clause. The Court claims that it "long ago abandoned" the "endorsement test." The Court now goes much further, overruling *Lemon* entirely. It is wrong to do so. *Lemon* summarized "the cumulative criteria developed by the Court over many years" "drawing lines" as to when government engagement with religion violated the Establishment Clause. It is true "that the *Lemon* test does not solve every Establishment Clause problem," but that does not mean that the test has no value. The purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents instruct in the context of public schools.

On p. 859, at the end of the problems, add the following new problem:

6. *"So Help Me God."* A woman wishes to become a naturalized U.S. citizen, but she is an atheist, and does not want to say the concluding words: "so help me God." She is offered the option of a private oath that does not include the concluding phrase, and she is also offered the option of remaining silent during the concluding phrase, but she declines both options. Does the oath run afoul of the Establishment Clause because of the addition of the concluding phrase? Would it matter whether the concluding phrase is evaluated under *Lemon* or under the endorsement test? *See Perrier-Bilbo v. United States*, 954 F.3d 413 (1st Cir. 2020).

D. OFFICIAL ACKNOWLEDGEMENT

On p. 937, at the end of the case, insert the following new problem:

Problem: The Courthouse Nativity Scene

An Indiana county has a Christmas tradition of allowing private groups to place a nativity scene on its courthouse lawn along with Santa Claus in his sleigh, a reindeer, carolers, and large candy-striped poles..In light of *Allegheny County*, is the scene constitutional? How does *American Legion* affect the analysis? Does it matter that there is a "long national tradition of using the nativity scene in broader holiday displays to celebrate the origins of Christmas – a public holiday?" *See Woodring v. Jackson County*, 986 F.3d 979 (7th Cir. 2021).

Chapter 13

Free Exercise

A. BURDENS ON RELIGION

[3] Modern Cases

On p, 952, replace the heading with the Problems heading, followed by the existing notes # 1 and # 2:

Problems

1. *The Amish and Social Security.*
2. *Fluorescent Triangles*.

On p. 960, in note # 6, delete the final paragraph and replace it with the following:

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020), relying on RFRA, the Court held that the Government had created lawful exemptions from a regulatory requirement implementing the Patient Protection and Affordable Care Act of 2010 (ACA). The requirement at issue obligated employers to provide contraceptive coverage to their employees through their group health plans. Though contraceptive coverage was not required by (or even mentioned in) the ACA, the Government mandated such coverage by promulgating interim final rules (IFRs) shortly after the ACA's passage. After six years of protracted litigation, the Departments of Health and Human Services, Labor, and the Treasury (Departments)—which jointly administer the relevant ACA provision—exempted certain employers who have religious and conscientious objections from this agency-created mandate. The Court held that the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections.

On p. 958, change the heading "Notes" to "Notes and Questions" and move problem # 2 here as note & question # 2, and then renumber the remaining notes.

On p. 958, note # 1, on the 4th line, following the period, add the following:

Trump also provided broad exemptions for exemptions from the Obamacare birth control coverage rule requiring employees to provide health plans that pay in full for employees' birth control.

On p. 958, at the end of note # 1, add the following:

Do the exemptions transgress the Establishment Clause? *See Massachusetts v. U.S. Department of Health & Human Services*, 513 F. Supp. 3d 215 (D. Mass. 2021); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020).

On p. 958, insert the following new note # 2, and renumber the remaining notes:

2. *Covid-19 Vaccines and Religious Objections*. During the Covid-19 pandemic, there was considerable litigation about whether the government could require individuals to be vaccinated against the virus despite their religious objections. These issues arose in the employment context, as well as the education context. Although many jurisdictions created religious opt-outs, some did not. By and large, the U.S. Supreme Court refused to intervene on behalf of religious objectors. *See, e.g., Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021), *cert. denied*, 142 S.Ct. 1112 (2022); *F.F. v. States*, 194 A.D. 30 (App. Div. 2021), *appeal denied*, 37 N.Y.3d 1040 (N.Y. 2021), *cert. denied*, *F.F. v. New York*, 2022 WL 1611804. Lower courts routinely upheld denial of an exemption to health care workers. *See We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2nd Cir. 2021).

On p. 960, at the end of note # 2, add the following:

In *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), the Supreme Court vacated the judgment of a Minnesota appellate court that required the Amish to install septic tanks on their property. The Amish argued that the use of septic tanks would violate their religious commitment to a "traditional and simple way of life," and contended that they had a right to continue using "mulch basins" instead. The Minnesota court reasoned that the State had a compelling governmental interest (related to public health) for requiring the installation of septic tanks. The Supreme Court remanded the case for the reexamination of the question whether an exception was required for the Amish under the RLUIPA in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

On p. 961, at the end of note # 7, add the following:

In *Bear Creek Bible Church v. EEOC*, --- F.Supp.3d ----2021 WL 5449038 (N.D. Tex. 2021), applying statutory principles, the court held that a religious employer could require employees to

dress in clothes appropriate to their assigned sex, and could require them to use the bathroom that corresponds to their assigned sex. However, the employer could not prohibit employees from having genital surgery or from using hormone replacement therapy.

On p. 962, at the end of existing problem # 3, add the following cite:

See C.F. v. New York State Department of Health and Mental Hygiene, 191 A.D.3d 52139 N.Y.S.3d 273 (2021).

On p. 962, problem # 4, delete the Elaine Photography citation.

On p. 962, problem # 4, delete the cite at the end of the problem and replace it with:

Compare Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government, 479 F. Supp. 3d 543 (W.D. Ky. 2020), *with State v. Arlene's Flowers, Inc.,* 193 Wash. 2d 469, 441 P.3d 1203 (2020), and *Elaine Photography LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

On p. 962, problem # 5, delete "5. More on the Collision" and place the remainder of the paragraph at the end of the prior problem.

On p. 974, replace the heading with the Notes heading, renumber the existing note as new note # 1, and add the following new note # 2:

Notes

1. *More on the Ministerial Exception.*

2. *The Ministerial Exception and Lay Teachers*. In *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S.Ct. 2049 (2020), the Court extended the ministerial exception to lay teachers entrusted with responsibility for instructing their students in the faith: "Morrissey-Berru and Biel both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." Justice Thomas concurred: "To avoid disadvantaging these minority faiths and interfering in 'a religious group's

right to shape its own faith and mission,' courts should defer to a religious organization's sincere determination that a position is 'ministerial.' " Justice Sotomayor dissented: "Neither school publicly represented that either teacher was a Catholic spiritual leader or "minister." Rather, the schools referred to both as "lay" teachers. Neither teacher had a "significant degree of religious training" or underwent a "formal process of commissioning." Nor did either school require such training or commissioning as a prerequisite to gaining (or keeping) employment. Neither held herself out as having a leadership role in the faith community. Neither claimed any benefits (tax, governmental, ceremonial, or administrative) available only to spiritual leaders. Both Biel and Morrissey-Berru had almost exclusively secular duties, making it especially improper to deprive them of all legal protection when their employers have not offered any religious reason for the alleged discrimination. Morrissey-Berru did lead classroom prayers, bring her students to a cathedral once a year, direct the school Easter play, and sign a contract directing her to 'assist with Liturgy Planning.' But these occasional tasks should not trigger as a matter of law the ministerial exception. Morrissey-Berru did not lead mass, deliver sermons, or select hymns. And there is no evidence that Morrissey-Berru led devotional exercises."

On p. 975, at the end of the problems, add the following new problems:

3. *Scope of the Ministerial Exception*. Would/should the ministerial exception apply to a gay staff attorney who works for an evangelical organization that serves the homeless? What about a professor at a Christian college who was outspoken about LGBTQ issues in contravention of church teachings? What if the professor was not involved in chapel or religious services, did not lead students in prayer or deliver sermons or select liturgy, but was asked to integrate "Christian faith into her teaching and scholarship as a professor of social work?" *See Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021); *DeWeese-Boyd v. Gordon College*, 487 Mass. 311, 163 N.E.3d 1000 (2021).

3. *The Prisoner's Meals*. A Muslim prisoner has religious objections to eating pork. By and large, the prison serves porkless meals to the prisoner, but occasionally serves pork. Does it violate the prisoner's free exercise rights to occasionally serve him pork? Would you view the situation differently if pork was a staple of the prison menu and the prison made no accommodations for a Muslim prisoner? *See Mbonyunkiza v. Beasley*, 956 F.3d 1048 (8th Cir. 2020).

On p. 979, insert the following new problems, and renumber the remaining problems:

2. *Church Services During the Coronavirus Pandemic*. In early 2020, as the Covid-19 pandemic settled in, the Commonwealth of Kentucky imposed a "Healthy at Home" order which required most businesses to close, and also prohibited mass gatherings. The objective of these restrictions was to limit transmission of the virus, and to "flatten the curve" of infections so that hospitals could handle the demand for their services. The order also sought to prohibit in-person church services for fear that they would bring people together and therefore could result in

additional infections. Suppose that the On Fire church wishes to continue having services, and commits to maintaining "social distancing" by keeping all worshipers at least six feet apart from each other, and requiring everyone to wear a face mask. Must the prohibition against mass gatherings give way to the religious right of free exercise in this context? Should it matter that Kentucky allows other businesses to operate provided that they maintain adequate social distancing? Does the fact that church goers sing and talk during the services enhance the risk that droplets will infect others? Should that matter? *See Roman Catholic Archbishop of Washington v. Bowser*, 531 F. Supp. 3d 22 (D.D.C. 2021) (D.D.C. 2021) (Striking down a 250 person limit for church services, including at Washington's National Basilica); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020).

2. *Executive Order with Exemption for Religious Organizations*. The Illinois governor issued executive orders that attempted to limit the transmission of COVID19 by "stay-at-home directives; flat prohibitions of public gatherings; caps on the number of people who may congregate; masking requirements; and strict limitations on bars, restaurants, cultural venues, and the like." However, the governor also issued an executive order (EO43) with an exemption for the "free exercise of religion," which eschewed mandatory limitations and stated instead that "religious organizations are *encouraged* to take steps to ensure social distancing, the use of face coverings, and implementation of other public health measures," and also "*encouraged* to provide services online, in a drive-in format, or outdoors, and to limit indoor services to 10 people." Under EO43, religious organizations also were exempt from the 50-person cap on gatherings that was mandated for other groups. Plaintiff sought injunctive relief against the exemption, arguing that it violated the Free Speech Clause of the First Amendment, arguing that "preferential treatment for religious exercise" requires strict scrutiny because it is content-based discrimination against non-religious speech. Is plaintiff correct? *See Illinois Republican Party v, Pritzker*, 973 F.3d 760 (7th Cir. 2020).

B. DISCRIMINATION AGAINST RELIGION

On p. 990, change the heading "Note: The Buddhist Execution" to "Notes" then insert the following new note # 1, and place the following heading at the beginning of the existing paragraph :

1. *Covid-19 Orders and Religious Services*. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), the Court granted an application for injunctive relief against New York Governor Mario Cuomo's order limiting attendance at religious services held in "red" zones to 10 people, and in "orange" zones to 25 people. Under the order, in red zones, so-called "essential" businesses (which included things such as acupuncture facilities, camp grounds, garages, as well as all plants manufacturing chemicals and microelectronics and all transportation facilities) were not subject to occupancy limits. In orange zones, while attendance at houses of worship was limited to 25 persons, even non-essential businesses could decide for themselves how many persons to admit. The Court concluded that the Governor's order was not neutral towards religion because it targeted the "ultra-Orthodox Jewish community" and in any event

discriminated against houses of worship. The Court noted that a nearby store could "literally have hundreds of people shopping there on any given day" whereas attendance at church or synagogue services were dramatically limited. And, although "factories and schools have contributed to the spread of COVID–19, they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records." The Court found irreparable harm because "remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance." *See also Tandon v. Newsom*, — S.Ct. —, 2021 WL 1328507 (2021) (striking down an executive order limiting attendance at in-home religious services while permitting secular activities under similar circumstances); *Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021); *but see See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346–47 (7th Cir. 2020); *Calvary Chapel v. Sisolak*, 140 S.Ct. 2603 (2020).

2. *The Buddhist Execution*.

On p. 990, at the end of the prior note, insert the following:

In *Ramirez v. Collier*, 142 S.Ct. 1264 (2022), the Court held that a prisoner who was about to be executed was entitled under RFRA to have a minister pray aloud over him and lay on hands.

On p. 990, insert the following new problems and renumber the remaining problems:

3. *More on Church Services During the Coronavirus Pandemic*. A prior problem examined whether a ban on mass gatherings must give way to the religious rights of worshipers. Suppose that, instead of holding in-person services, On Fire wishes to hold "drive-up" services in which all worshipers must remain in their cars, and all cars must be at least six feet apart. Louisville's Mayor makes a public announcement to the effect that drive-up church services are also prohibited. Is there discrimination against religion? Would it matter that Louisville permits drive-up liquor purchases, but not drive-up church services?

4. *"Essential Services" During the Coronavirus Pandemic.* In imposing their lock down orders, most states distinguished between "essential" and "non-essential" services with essential services being allowed to continue. Does a state discriminate against religion by labeling such activities as liquor stores as "essential" services, but labeling religious services as "non-essential?"

On p. 1001, in the Masterpiece Cakeshop, Ltd. case, in the sixth line, replace the citation for Matal v. Tam with the following citation:

137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring).

On p. 1002, before the problems, add the following new case and note:

Fulton v. City of Philadelphia

141 S.Ct. 1868 (2021).

Chief Justice Roberts delivered the opinion of the Court.

The Catholic Church has served the needy children of Philadelphia for over two centuries. During the 19th century, nuns ran asylums for orphaned and destitute youth. Petitioner CSS (Catholic Social Services) continues that mission today.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families. The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "existing family relationships," and ability "to work in partnership" with a foster agency. The agency must decide whether to "approve, disapprove or provisionally approve the foster family." When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work. CSS believes that "marriage is a sacred bond between a man and a woman." Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs. But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not consider prospective foster parents in same-sex marriages. Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the Fair Practices Ordinance. The City stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples. CSS and three foster parents filed suit. The District Court denied preliminary relief. It concluded that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division, Department of Human*

Resources of Oregon v. *Smith*, 494 U. S. 872 (1990). The Court of Appeals for the Third Circuit affirmed. We granted certiorari.

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise" of religion. It is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 714 (1981). Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. CSS urges us to overrule *Smith*. But this case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable. Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___(2018). A law is not generally applicable if it "invites" the government to consider the particular reasons for a person's conduct by providing "a mechanism for individualized exemptions." *Smith*, 494 U. S., at 884. A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. In *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. The City claimed that the ordinances were necessary to protect public health, which was "threatened by the disposal of animal carcasses in open public places." But the ordinances did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard.

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. This provision is not generally applicable as required by *Smith*. Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available at the "sole discretion" of the Commissioner. The Commissioner "has no intention of granting an exception" to CSS. But the City "may not refuse to extend that exemption system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U. S., at 884. The City and intervenor-respondents argue that governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public. When individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal. We have never suggested that the government may discriminate against religion when acting in its managerial role. *Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs. The inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.

The City and intervenor-respondents add that, notwithstanding the system of exceptions in section 3.21, a separate provision in the contract independently prohibits discrimination in the certification of foster parents. That provision, section 15.1, bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions. But state law makes clear that "one part of a contract cannot be so interpreted as to annul another part." Applying that "fundamental" rule, an exception from section 3.21 also must govern the prohibition in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity. As a result, the contract as a whole contains no generally applicable non-discrimination requirement.

Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it "invites" the government to decide which reasons for not complying with the policy are worthy of solicitude at the Commissioner's "sole discretion."

In addition to relying on the contract, the City argues that CSS's refusal to certify same-sex couples constitutes an "Unlawful Public Accommodations Practice" in violation of the Fair Practices Ordinance. That ordinance forbids "denying or interfering with the public accommodations opportunities of an individual or otherwise discriminating based on his or her race, ethnicity, color, sex, sexual orientation, disability, marital status, familial status," or several other protected categories. Phila. Code § 9–1106(1) (2016). The City contends that foster care agencies are public accommodations and therefore forbidden from discriminating on the basis of sexual orientation when certifying foster parents. A public accommodation must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire." *Blizzard* v. *Floyd*, 613 A. 2d 619, 621 (1992). Certification as a foster parent is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. We therefore have no need to assess whether the ordinance is generally applicable.

The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. Because the City's actions are examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision. A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U. S., at 546. So long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. Rather than rely on "broadly formulated interests," courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U. S., at 431. The question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation

that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny because the authority to certify foster families is delegated to agencies by the State, not the City.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop*, 584 U. S., at ___ (slip op., at 9). However, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others. CSS has "long been a point of light in the City's foster-care system." CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment. The actions of the City violate the Free Exercise Clause.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Barrett, with whom Justice Kavanaugh joins, and with whom Justice Breyer joins as to all but the first paragraph, concurring.

A longstanding tenet of our free exercise jurisprudence is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. I therefore see no reason to decide whether *Smith* should be overruled.

Justice Alito, with whom Justice Thomas and Justice Gorsuch join, concurring in the judgment.

In *Smith*, the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution provides no protection. It is high time for us to take a fresh look at what the Free Exercise Clause demands. RFRA and RLUIPA have restored part of the protection that *Smith* withdrew, but they are limited in scope and can be weakened or repealed by Congress at any time. They are no substitute for a proper interpretation of the Free Exercise Clause.

The text of the Free Exercise Clause gives those who wish to engage in the "exercise of religion" the right to do so without hindrance. The language of the Clause does not tie this right to the treatment of persons not in this group. One of *Smith*'s supposed virtues was ease of application, but things have not turned out that way. Problems continue to plague courts when called upon to apply *Smith*. Laws involving rules designed to slow the spread of COVID–19 have driven that point home. State and local rules adopted for this purpose have typically imposed different restrictions for different categories of activities. Sometimes religious services have been

placed in a category with certain secular activities, and sometimes religious services have been given a separate category of their own. To determine whether COVID–19 rules provided neutral treatment for religious and secular conduct, it has been necessary to compare the restrictions on religious services with the restrictions on secular activities that present a comparable risk of spreading the virus, and identifying the secular activities that should be used for comparison has been hotly contested. *Smith* seemed to offer a relatively simple and clear-cut rule that would be easy to apply. Experience has shown otherwise. The *Smith* majority thought that adherence to *Sherbert* would invite "anarchy," but experience has shown that this fear was not well founded. Both RFRA and RLUIPA impose essentially the same requirements as *Sherbert*, and courts are well "up to the task" of applying that test.

Smith was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom. And while precedent should not lightly be cast aside, the Court's error in *Smith* should now be corrected. A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest. In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle.

Justice Gorsuch, with whom Justice Thomas and Justice Alito join, concurring in the judgment.

The Court granted certiorari to decide whether to overrule *Smith* which failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. CSS' litigation has already lasted years—and today's (ir)resolution promises more of the same. The Pennsylvania Supreme Court can effectively overrule the majority's reading of the public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or municipal lawyers may rewrite the City's contract to close the § 3.21 loophole. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. It makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children.

Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties. Consider Jack Phillips, the baker whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings. After being forced to litigate all the way to the Supreme Court, we ruled for him on narrow grounds similar to those the majority invokes today. All that victory assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives. A nine-year odyssey thus barrels on. No doubt those who cannot afford such endless litigation under *Smith*'s regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects. The costs of today's indecision fall on lower courts too. As recent cases involving COVID–19 regulations highlight, judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced. In the last nine months

alone, this Court has had to intervene at least half a dozen times. Rather than adhere to *Smith* until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases, the Court should overrule it now, set us back on the correct course, and address each case as it comes. *Smith* committed a constitutional error. Dodging the question today guarantees it will recur tomorrow.

Note: *The Boston Flag Pole*

The Court also applied the non-discrimination principle in *Shurtleff v. City of Boston*, 142 S.Ct. 1583 (2022). That case involved a flagpole outside the Boston City Hall where the city allowed individuals to hold flag-raising ceremonies, at which they raised a flag of their choice, and let it fly for a couple of hours. Although the city allowed individuals and groups to raise flags commemorating a numerous and diverse things (e.g., marking the national holidays of Bostonians' many countries of origin, recognizing Pride Week, honoring emergency medical service workers), the Court denied a request to raise a Christian flag, fearing a violation of the Establishment Clause. After concluding that the flag raisings did not constitute "government speech," the Court held that the city's action constituted discrimination against religion:

> Boston acknowledges that it denied Shurtleff's request because it believed flying a religious flag at City Hall could violate the Establishment Clause. When a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination." *Good News Club* v. *Milford Central School*, 533 U. S. 98, 112 (2001). Applying that rule, we have held, for example, that a public university may not bar student-activity funds from reimbursing only religious groups. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). Here, Boston concedes that it denied Shurtleff's request solely because the Christian flag he asked to raise "promoted a specific religion." That refusal discriminated based on religious viewpoint and violated the Free Speech Clause. We conclude that Boston's flag-raising program does not express government speech. As a result, the city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment.

Justice Kavanaugh concurred:

> A government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like. A government *violates* the Constitution when (as here) it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like. See, *e.g., Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. ___ (2020). Under the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second-class.

Justice Alito, joined by justices Thomas and Gorsuch, concurred:

> The flag displays were plainly private speech within a forum created by the City, not government speech. The City never rejected any request to raise a flag submitted by any private party. Even if the City *had* reserved the flagpoles for nationality commemorations and official holidays, that would only mean that the City had reserved the flagpoles "for certain groups or for the discussion of certain topics" and created a nonpublic forum, not that it had engaged in government speech. Having created a forum with those characteristics, the City could not reject Shurtleff's application on account of the religious viewpoint he intended to express.

On p. 1002, at the end of problem # 2, add the following:

Could the anti-bias ordinance be invoked to prevent a pastor from making an LGBT person feel "unwelcome?" Could the ordinance be applied to a pastor's sermon? Could it also be applied to the church's other activities? *See Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776 (S.D. Iowa 2016).

On p. 1002, delete problem # 3, and replace it with the following:

3. *The Christian Student Group*. The University of Iowa adopts a Human Rights Policy which prohibits student organizations from discriminating based on various grounds, including religious beliefs. Under that policy, the university deregistered the group InterVarsity because it imposed a membership requirement involving affirmation of "the basic biblical truths of Christianity. However, it did not deregister Love Works which required a gay-affirming statement of Christian faith." Did the University run afoul of the First Amendment? *See Intervarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021).

On p. 1005, at the end of problem # 11, keep the case name, but change the citation so that it reads as follows:

, *aff'd.*, 897 F.3d 314 (D.C. Cir. 2018), *cert. denied*, 140 S.Ct. 1198 (2020).

Chapter 14

Establishment versus Free Exercise and Free Speech Concerns

On p. 1007, before the case, insert the following new case:

Kennedy v.Bremerton School District
142 S.Ct. 2407 (2022)

Justice Gorsuch delivered the opinion of the Court.

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades in the Marine Corps. Like many football players and coaches, Kennedy made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. Kennedy sought to express gratitude for "what the players had accomplished and for the opportunity to be part of their lives." Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quietly" for "approximately 30 seconds." Initially, Kennedy prayed on his own. Over time, some players asked whether they could pray alongside him. Kennedy responded by saying, "This is a free country. You can do what you want." The number of players who joined eventually grew to include most of the team after some games. Sometimes team members invited opposing players to join. Other times Kennedy prayed alone. Eventually, Kennedy began incorporating short motivational speeches with his prayer when others were present. Separately, the team at times engaged in pregame or postgame prayers in the locker room. This practice was a "school tradition" that predated Kennedy's tenure [and he] "never pressured or encouraged any student to join."

For seven years, no one complained. The District's superintendent first learned of them in September 2015, after an employee from another school commented positively. The superintendent sent Kennedy a letter [that] identified "two problematic practices." First, Kennedy had provided "inspirational talks" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of games." Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated his involvement with the program." The District instructed Kennedy to avoid motivational "talks with students" that "included religious expression, including prayer," and to avoid "suggesting, encouraging (or discouraging), or supervising" any prayers of students, which students remained free to "engage in." The District explained that religious activity must be "nondemonstrative (*i.e.*, not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement." The District appealed to what it called a "direct tension between" the "Establishment Clause" and "a school employee's right to

freely exercise" his religion. To resolve that "tension," an employee's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities."

After receiving the letter, Kennedy ended the tradition, predating him, of offering locker-room prayers. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team. Kennedy felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. However, Kennedy felt upset that he had "broken his commitment to God" by not offering his prayer, so he turned his car around and returned to the field. By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks. On October 14, Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. He asked the District to allow him to continue that "private religious expression" alone. Kennedy explained that he "neither requests, encourages, nor discourages students from participating in" these prayers. He sought only the opportunity to "wait until the game is over and the players have left the field and then walk to mid-field to say a short, private, personal prayer." He was willing to say his "prayer while the players were walking to the locker room" or "bus," and then catch up. However, Kennedy objected to the the letter which he understood as banning him "from bowing his head" in the vicinity of students, and as requiring him to "flee the scene if students voluntarily came to the same area" where he was praying. After all, District policy prohibited him from "discouraging" independent student decisions to pray.

On October 16, shortly before the game, the District acknowledged that Kennedy "had complied" with the "directives" in its September 17 letter. Yet instead of accommodating Kennedy's request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District forbade Kennedy from engaging in "any overt actions" that could "appear to a reasonable observer to endorse prayer while he is on duty as a District-paid coach." The District judged that anything less would violate the Establishment Clause. After receiving this letter, Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield, "most Bremerton players were singing the school fight song to the audience." Though Kennedy was alone when he began, players from the other team and members of the community joined him before he finished his prayer. This event spurred media coverage of Kennedy's dilemma and a public response from the District. The District placed robocalls to parents to inform them that public access to the field is forbidden; it posted signs and made announcements at games saying the same thing; and it had the police secure the field in future games. Subsequently, the District explained in an email to the leader of a state association of school administrators that "the coach moved on from leading prayer with kids, to taking a silent prayer at the 50 yard line." On October 21, the superintendent observed to a state official that "the issue is quickly changing as it has shifted from leading prayer with student athletes, to a coaches [*sic*] right to conduct" his own prayer "on the 50 yard line."

On October 23, shortly before that evening's game, the District expressed "appreciation" for his "efforts to comply" with the District's directives, including avoiding "on-the-job prayer with players in the football program, both in the locker room prior to games as well as on the field immediately following games." The letter admitted that, during Kennedy's recent October 16 postgame prayer, his students were otherwise engaged and not praying with him, and that his

prayer was "fleeting." Still, the District explained that a "reasonable observer" could think government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." The only option it would offer Kennedy was to allow him to pray after a game in a "private location" behind closed doors "not observable to students or the public." After the October 23 game, Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." The superintendent informed the board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional."

After the football game on October 26, Kennedy knelt alone to offer a brief prayer as the players engaged in postgame traditions. Other adults gathered around him on the field. Later, Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song. Shortly after the game, the District placed Kennedy on paid administrative leave and prohibited him from "participating in football activities." In a letter explaining this disciplinary action, the superintendent criticized Kennedy for engaging in "public and demonstrative religious conduct while on duty as an assistant coach" by offering a prayer following the games on October 16, 23, and 26. The letter did not allege that Kennedy performed these prayers with students, and it acknowledged that his prayers took place while students were engaged in unrelated postgame activities. The letter faulted Kennedy for not being willing to pray behind closed doors.

In an October 28 Q&A document provided to the public, the District admitted that it possessed "no evidence that students have been directly coerced to pray with Kennedy." The Q&A acknowledged that Kennedy "had complied" with the District's instruction to refrain from his "prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games." But the Q&A asserted that the District could not allow Kennedy to "engage in a public religious display." Otherwise, the District would "violate the Establishment Clause" because "reasonable students and attendees" might perceive the "district as endorsing religion."

While Kennedy received "uniformly positive evaluations" every other year, the District gave him a poor performance evaluation. The evaluation advised against rehiring Kennedy on the grounds that he "failed to follow district policy" regarding religious expression and "failed to supervise student-athletes after games.'" Kennedy did not return for the next season. Kennedy sued, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. [The trial court rejected Kennedy's claims, and the Ninth Circuit affirmed]. The Ninth Circuit denied a petition to rehear the case en banc. The panel's analysis rested on *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). We granted certiorari.

The Free Exercise and Free Speech Clauses of the First Amendment work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. See, *e.g.*, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, IN SELECTED WRITINGS OF JAMES MADISON 21, 25 ®. Ketcham ed. 2006). "In Anglo–American history, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and*

Advisory Bd. v. *Pinette*, 515 U. S. 753, 760 (1995). Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. See, *e.g.*, *Fulton* v. *Philadelphia*, 593 U. S. _____ (2021) (slip op., at 4, 13).

The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise" of religion. Amdt. 1. This Court has held the Clause applicable to the States under the Fourteenth Amendment. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Employment Div.*, *Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877 (1990). A plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." Should plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Lukumi*, 508 U. S., at 546.

Kennedy has discharged his burdens. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise involves, as Kennedy put it, giving "thanks through prayer" briefly and by himself "on the playing field" at the conclusion of each game he coaches. Kennedy is willing to "wait until the game is over and the players have left the field" to "walk to mid-field to say his short, private, personal prayer." The contested exercise does not involve leading prayers with the team or before any captive audience. Kennedy's "religious beliefs do not require him to lead prayer involving students." At the District's request, he voluntarily discontinued the school tradition of locker-room prayers and his postgame religious talks to students. The District disciplined him *only* for his decision to persist in praying quietly without his players after three games in October 2015.

In forbidding Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is "specifically directed at religious practice." *Smith*, 494 U. S., at 878. A policy can fail this test if it "discriminates on its face," or if a religious exercise is otherwise its "object." *Lukumi*, 508 U. S., at 533. A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." *Fulton*, 593 U. S., at ___ (slip op., at 6). Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. See *Lukumi*, 508 U. S., at 546. In this case, the District's challenged policies were neither neutral nor generally applicable. The District sought to restrict Kennedy's actions at least in part because of their religious character. In its September 17 letter, the District prohibited "any overt actions on Kennedy's part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer." The District explained that it could not allow "an employee, while still on duty, to engage in *religious* conduct." Prohibiting a religious practice was thus the District's unquestioned "object." The District candidly acknowledged that its policies

were "not neutral" toward religion. The District's challenged policies also fail the general applicability test. The District's performance evaluation after the 2015 football season advised against rehiring Kennedy on the ground that he "failed to supervise student athletes after games." In fact, this was a requirement specifically addressed to Kennedy's religious exercise. The District permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls. Thus, any postgame supervisory requirement was not applied in an evenhanded way. The District conceded that its challenged directives were not "generally applicable."

The First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969). None of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages. To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in *Pickering* v. *Board of Ed. of Township High School Dist. 205*, *Will Cty.*, 391 U. S. 563 (1968), *Garcetti*, 547 U. S. 410, and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech. If a public employee speaks "pursuant to his or her official duties," the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes—the government's own speech. When an employee "speaks as a citizen addressing a matter of public concern," the First Amendment may be implicated and courts should proceed to a second step. At this step, courts engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." Courts have sometimes considered whether an employee's speech interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*, at 417.

Both sides ask us to employ this *Pickering–Garcetti* framework to resolve Kennedy's free speech claim. They agree that Kennedy's speech implicates a matter of public concern. They also accept that Kennedy's speech does not raise questions of academic freedom that may involve "additional" First Amendment "interests" beyond those captured by this framework. *Garcetti*, 547 U. S., at 425. At the first step of the inquiry, the parties' disagreement centers on one question: Did Kennedy offer his prayers as a private citizen, or did they amount to government speech attributable to the District? Kennedy has demonstrated that his speech was private speech, not government speech. When Kennedy uttered the prayers that resulted in his suspension, he was not engaged in speech "within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any speech the District paid him to produce as a coach. During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. We find it unlikely that Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the coaching staff was free to engage in all manner of private speech.

That Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Kennedy's prayers took place "within the office" environment—on the field of play. What matters is whether Kennedy offered his prayers while acting within the scope of his duties as a coach. Both the substance of Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

The Ninth Circuit stressed that, as a coach, Kennedy served as a role model "clothed with the mantle of one who imparts knowledge and wisdom." The court emphasized that Kennedy remained on duty after games. They have a point. Teachers and coaches often serve as role models. But this argument posits an "excessively broad job description" by treating everything teachers and coaches say in the workplace as government speech subject to government control. On this understanding, a school could fire a Muslim teacher for wearing a head scarf in the classroom or prohibit a Christian aide from praying quietly over lunch in the cafeteria. Kennedy's job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. That Kennedy chose to use the time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech and eviscerate the promise that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U. S., at 506.

Of course, acknowledging that Kennedy's prayers represented his own private speech does not end the matter. Under the *Pickering–Garcetti* framework, the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern. See *Lane*, 573 U. S., at 236, 242.[7] Whether one views the case through the lens of the Free Exercise or Free Speech Clause, the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy "strict scrutiny," showing that its restrictions on the plaintiff 's protected rights serve a compelling interest and are narrowly tailored to that end. See *Lukumi*, 508 U. S., at 533. A similar standard obtains under the Free Speech Clause. See *Reed*, 576 U. S., at 171. The District asks us to apply the more lenient second-step *Pickering–Garcetti* test, or intermediate scrutiny. It does not matter which standard we apply. The District cannot sustain its burden under [either].

The District argues that its suspension of Kennedy was essential to avoid a violation of the Establishment Clause. On its account, Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in "direct tension" with the competing demands of the Establishment Clause. To resolve that clash, the District reasoned, Kennedy's rights had to "yield." The Ninth Circuit [insisted] that the District's interest in avoiding an Establishment Clause violation "trumped" Kennedy's rights to religious exercise and free speech. It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment: "Congress shall make no law respecting an establishment of

---

[7] We do not decide whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering–Garcetti* framework.

religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." Amdt. 1. A natural reading would suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others. See *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 13 (1947).

The District [believes] that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorsed" religion. The District took the view that a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." On the District's account, it did not matter whether the Free Exercise Clause protected Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never endorsed Kennedy's prayer, and a strong public reaction only followed after the District sought to ban Kennedy's prayer. Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause and the Free Speech and Free Exercise Clauses," placed itself in the middle, and then chose its preferred way out of its self-imposed trap.

The District relied on *Lemon* and its progeny. In *Lemon* this Court attempted a "grand unified theory" for assessing Establishment Clause claims. That approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. *Lemon*, 403 U. S., at 612. In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. See, *e.g.*, *County of Allegheny* v. *American Civil Liberties Union*, *Greater Pittsburgh Chapter*, 492 U. S. 573 (1989); *id.*, at 630 (O'Connor, J., concurring). The "shortcomings" associated with this "ambitious," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion*, 588 U. S., at ___ (plurality opinion) (slip op., at 12). These tests "invited chaos," led to "differing results" in materially identical cases, and created a "minefield" for legislators. *Pinette*, 515 U. S., at 768 (plurality opinion). The Establishment Clause does not include anything like a "modified heckler's veto, in which religious activity can be proscribed" based on "perceptions" or "discomfort." *Good News Club* v. *Milford Central School*, 533 U. S. 98, 119 (2001). An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fails to censor" private religious speech. *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990) (plurality opinion). Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden* v. *Perry*, 545 U. S. 677, 699 (2005) (Breyer, J., concurring). Just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test. See *Shurtleff*, 596 U. S., at ___

(slip op., at 1–2).[8] In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings." *Town of Greece*, 572 U. S., at 576. "The line" "between the permissible and the impermissible" has to "accord with history and faithfully reflect the understanding of the Founding Fathers." *Town of Greece*, 572 U. S., at 577. An analysis focused on original meaning and history has long represented the rule rather than some "exception" within the "Court's Establishment Clause jurisprudence." 572 U. S., at 575; see *American Legion*, 588 U. S., at ___ (plurality opinion) (slip op., at 25). The District and the Ninth Circuit erred by failing to heed this guidance.

The District still contends that its Establishment Clause concerns trump Kennedy's free exercise and free speech rights. It says it was justified in suppressing Kennedy's religious activity because otherwise it would have been guilty of coercing students to pray. The District says, coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning. This Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." *Zorach* v. *Clauson*, 343 U. S. 306, 314 (1952). Government "may not coerce anyone to attend church," nor may it force citizens to engage in "a formal religious exercise," *Lee* v. *Weisman*, 505 U. S. 577, 589 (1992). Coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment. Kennedy's private religious exercise did not come close to crossing any line separating protected private expression from impermissible government coercion.

In its correspondence, the District never raised coercion concerns. The District conceded in a public 2015 document that there was "no evidence that students were directly coerced to pray with Kennedy." Kennedy has repeatedly stated that he "never coerced, required, or asked any student to pray," and that he never "told any student that it was important that they participate in any religious activity." The District did not discipline Kennedy for engaging in prayer while presenting locker-room speeches to students. That tradition predated Kennedy and he willingly ended it. He also willingly ended his practice of postgame religious talks with his team. The only prayer Kennedy sought to continue was the prayer he gave alone. He made clear that he could pray "while the kids were doing the fight song" and "take a knee by himself and give thanks and continue on." Kennedy even considered it "acceptable" to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. In short, Kennedy did not seek to direct any prayers to students or require anyone else to participate. His plan was to wait to pray until athletes were occupied. It was for three prayers of this sort in October 2015 that the District suspended him. Some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is "part of

---

[8] This Court has often criticized or ignored *Lemon* and its endorsement test variation. See, *e.g.*, *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. ___ (2020); *American Legion* v. *American Humanist Assn.*, 588 U. S. ___ (2019); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___ (2017); *Town of Greece* v. *Galloway*, 572 U. S. 565 (2014); *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012); *Van Orden* v. *Perry*, 545 U. S. 677 (2005). Justices have criticized those tests over an even longer period.

learning how to live in a pluralistic society," a trait of character essential to "a tolerant citizenry." *Lee*, 505 U. S., at 590. This Court has long recognized that "secondary school students are mature enough to understand that a school does not endorse," let alone coerce them to participate in, "speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U. S., at 250 (plurality opinion). Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But "offense does not equate to coercion." *Town of Greece*, 572 U. S., at 589 (plurality opinion).

The District responds that, as a coach, Kennedy "wielded enormous authority and influence over the students," and students might have felt compelled to pray alongside him. The District submits that, after Kennedy's suspension, a few parents told District employees that their sons had "participated in the team prayers only because they did not wish to separate themselves from the team." Not only does the District rely on hearsay. For all we can tell, the concerns the District says it heard from parents were occasioned by the locker-room prayers that predated Kennedy's tenure or his postgame religious talks, all of which he discontinued at the District's request. There is no indication that anyone expressed any coercion concerns about the quiet, postgame prayers that Kennedy asked to continue and that led to his suspension. Nor is there any evidence that students felt pressured to participate in these prayers. Not a single Bremerton student joined Kennedy's quiet prayers following the three October 2015 games for which he was disciplined. On October 16, those students who joined Kennedy were "from the opposing team," and could not have "reasonably feared" that he would decrease their "playing time" or destroy their "opportunities" if they did not "participate." As for the other two games, "no one joined" Kennedy on October 23. And only a few members of the public participated on October 26.[9]

The District suggests that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. See *Town of Greece*, 572 U. S., at 589 (plurality opinion). It is a rule that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." *Lee*, 505 U. S., at 590. We are aware of no historically sound understanding of the Establishment Clause that begins to "make it necessary for government to be hostile to religion" in this way. *Zorach*, 343 U. S., at 314. The prayers for which Kennedy was disciplined were not publicly broadcast or recited to a captive

---

[9] The dissent expresses concern that looking to "history and tradition" to guide Establishment Clause inquiries will not afford "school administrators" sufficient guidance. The District's problem isn't a failure to identify coercion as a crucial legal consideration; it is a lack of evidence that coercion actually occurred.

audience. Students were not required or expected to participate. And none of Kennedy's students did participate in any of the October 2015 prayers that resulted in Kennedy's discipline.[10]

In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses should "trump" the other two. The project falters. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot show that they are at odds. In truth, there is no conflict. In no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights. See, *e.g.*, *Rosenberger*, 515 U. S., at 845; *Good News Club*, 533 U. S., at 112.

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. The only meaningful justification offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is

Reversed.

Justice Thomas, concurring.

In the free-speech context, we have held that "the First Amendment protects public employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern." It remains an open question if a similar analysis can or should apply to free-exercise claims in light of the "history" and "tradition" of the Free Exercise Clause. The Court also does not decide what burden a government employer must shoulder to justify restricting an employee's religious expression because the District had no constitutional basis for reprimanding Kennedy under any possibly applicable standard of scrutiny.

Justice Alito, concurring.

Petitioner's expression occurred while at work but during a time when a brief lull in his duties gave him a few free moments to engage in private activities. He acted in a purely private

---

[10] The dissent suggests that [Kennedy's prayers] bear an indelible taint of coercion by association with the school's past prayer practices—some of which predated Kennedy, and all of which he ended on request. But none of those practices formed the basis for Kennedy's suspension, and he has not sought to claim First Amendment protection for them. Nor does the possibility that students might choose, unprompted, to participate in Kennedy's prayers necessarily prove them coercive. The District conceded that no coach may "discourage" voluntary student prayer. Kennedy has repeatedly explained that he is willing to conduct his prayer without students—as he did after each of the games that formed the basis of his suspension—and after students head to the locker room or bus.

capacity. The Court does not decide what standard applies to such expression under the Free Speech Clause but holds only that retaliation for this expression cannot be justified based on any of the standards discussed.

Justice Sotomayor, with whom Justice Breyer and Justice Kagan join, dissenting.

Since *Engel* v. *Vitale*, 370 U. S. 421 (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. The Court now charts a different path paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the District stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. This would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him.

Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line, leading to an article in the Seattle News and a local television broadcast about the upcoming homecoming game. In the wake of this media coverage, the District began receiving emails, letters, and calls, many of them threatening. On October 16, Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most BHS players were singing the school's fight song. He quickly was joined by coaches and players from the opposing team. Television news cameras surrounded the group. Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who "intended to conduct ceremonies on the field after football games if others were allowed to." To secure the field and enable subsequent games to continue safely, the District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public. The District emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement. It invited Kennedy to reach out to discuss accommodations that might be mutually satisfactory, offering proposed accommodations and inviting Kennedy to raise others

Several parents [said] that their children participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team. No BHS students [prayed] on the field after Kennedy's suspension. In Kennedy's annual review, the head coach of the varsity team recommended Kennedy not be rehired because he "failed to follow district policy," "demonstrated a lack of cooperation," "contributed to negative relations between parents, students, community members, coaches, and the school district," and "failed to supervise student-athletes after games due to his interactions with media and community" members. The head coach resigned after 11 years, expressing fears that he or his staff would be shot or otherwise attacked because of the turmoil created by Kennedy's media appearances. Three of five assistant coaches did not reapply. This case is not about an individual's ability to engage in private prayer at work. This case is

about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; the Establishment Clause prohibits it from doing so.

The Establishment Clause protects freedom by "commanding a separation of church and state." *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005). In public schools, a State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." *Illinois ex rel. McCollum* v. *Board of Ed.*, 333 U. S. 203, 211 (1948). Indeed, "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards* v. *Aguillard*, 482 U. S. 578 (1987). The reasons motivating this vigilance inhere in the nature of schools themselves and the young people they serve. Government neutrality toward religion is particularly important in the public school given [that] families "entrust public schools with the education of their children on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." Schools face a higher risk of unconstitutionally "coercing support or participation] in religion or its exercise" than other government entities. Children are particularly vulnerable to coercion because of their "emulation of teachers as role models" and "susceptibility to peer pressure." *Edwards*, 482 U. S., at 584. Accordingly, "the State may not, consistent with the Establishment Clause, place primary and secondary school children" in the dilemma of choosing between "participating or protesting" a religious exercise in a public school. *Lee*, 505 U. S., at 593. Kennedy was a school official "on government property" when he incorporated a public, demonstrative prayer into "government-sponsored school-related events" as a regularly scheduled feature of those events. Kennedy's prayer thus strikes at the heart of the Establishment Clause's concerns about endorsement. For students and community members, Kennedy was the face and the voice of the District during football games. Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game had ended, the football game events had not; Kennedy acknowledged that his responsibilities continued until the players went home. Kennedy's postgame responsibilities placed Kennedy on the 50-yard line in the first place; that was where he met the opposing team to shake hands after the game. Permitting a coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring "with the approval of the school administration."

Kennedy's prayer practice implicated the coercion concerns at the center of Establishment Clause jurisprudence. This Court has recognized a heightened potential for coercion where school officials are involved, as their "efforts to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject." *Lee*, 505 U. S., at 590. Students look to their teachers and coaches as role models and seek their approval. Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. The District Court found that some students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates. Kennedy responds that his highly visible and demonstrative

prayer at the last three games before his suspension did not violate the Establishment Clause because these prayers were quiet and thus private. Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved. "The government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Santa Fe*, 530 U. S., at 312. To uphold a coach's integration of prayer into the ceremony of a football game, in the context of an established history of the coach inviting student involvement in prayer, is to exact precisely this price from students.

Kennedy did not "shed his constitutional rights at the schoolhouse gate" while on duty as a coach. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969). Constitutional rights, however, are not absolutes. Rights often conflict and balancing of interests is often required to protect the separate rights at issue. Kennedy "accepted certain limitations" on his freedom of speech when he accepted government employment. *Garcetti* v. *Ceballos*, 547 U. S. 410 (2006). "Government employers, like private employers, need a significant degree of control over their employees' words and actions" to ensure "the efficient provision of public services." *Ibid*. Balancing "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" to determine whose interests should prevail. *Pickering* v. *Board of Ed. of Township High School*, 391 U. S. 563, 568 (1968). Even assuming that Kennedy's speech was in his capacity as a private citizen, the District's responsibilities under the Establishment Clause provided "adequate justification" for restricting it.

Kennedy's free exercise claim must be considered in light of the fact that he is a school official and his participation in religious exercise can create Establishment Clause conflicts. Accordingly, his right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute. The burden is on the District to establish that its policy prohibiting Kennedy's public prayers was the least restrictive means of furthering a compelling state interest. The District's directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation. The last three games proved that Kennedy did not intend to pray silently, but to thrust the District into incorporating a religious ceremony into its events, as he invited others to join his prayer and anticipated in his communications that students would want to join as well. The District repeatedly sought to work with Kennedy to develop an accommodation to permit him to engage in religious exercise during or after his game-related responsibilities. Kennedy, however, refused to respond to the District's suggestions except through media appearances. Because the District's valid Establishment Clause concerns satisfy strict scrutiny, Kennedy's free exercise claim fails as well.

The Court inaccurately implies that the courts below relied upon a rule that the Establishment Clause must always "prevail" over the Free Exercise Clause. In focusing almost exclusively on Kennedy's free exercise claim, and declining to recognize the conflicting rights at issue, the Court substitutes one supposed blanket rule for another. The proper response is to identify the tension and balance the interests based on a careful analysis of "whether the particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*, 397 U. S., at 669. That inquiry leads to the conclusion that permitting Kennedy's desired religious practice at the time and place of his choosing, without

regard to the legitimate needs of his employer, violates the Establishment Clause in the context at issue here.

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the practice, would perceive it as a state endorsement of prayer in public schools." *Santa Fe*, 530 U. S., at 308. The Court now says that endorsement does not matter and repudiates *Lemon*. The Court reserves particular criticism for the longstanding understanding that government action that appears to endorse religion violates the Establishment Clause, which it paints as a "modified heckler's veto, in which religious activity can be proscribed" based on "perceptions" or "discomfort." The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of "the reasonable observer" who is "aware of the history and context of the community and forum in which the religious speech takes place." "The endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from discomfort" but concern "with the political community writ large." The Court has long prioritized endorsement concerns in the context of public education. "There will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." These are "often questions of accommodating" religious practices to the degree possible while respecting the Establishment Clause. The Court claims that it "long ago abandoned" the "endorsement test." The Court now goes much further, overruling *Lemon* entirely. It is wrong to do so. *Lemon* summarized "the cumulative criteria developed by the Court over many years" "drawing lines" as to when government engagement with religion violated the Establishment Clause. It is true "that the *Lemon* test does not solve every Establishment Clause problem," but that does not mean that the test has no value. The purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents instruct in the context of public schools.

Upon overruling one "grand unified theory," the Court holds that courts must interpret whether an Establishment Clause violation has occurred "by 'reference to historical practices and understandings.' " While the Court has long referred to historical practice as one element of the analysis in Establishment Clause cases, the Court has never announced this as a general test or exclusive focus. The Court's history-and-tradition test offers no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court elevate[s] individuals' rights to religious exercise above all else? The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society.

On p. 1025, insert the following new case before the note:

Carson v. Makin

142 S.Ct. 1987 (2022).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Maine's Constitution provides that the State's legislature shall "require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." Me. Const., Art. VIII, pt. 1, § 1. In accordance with that command, the legislature has required that every school-age child in Maine "shall be provided an opportunity to receive the benefits of a free public education," Me. Rev. Stat. Ann., Tit. 20–A, § 2(1) (2008), and that the required schools be operated by "the legislative and governing bodies of local school administrative units." But Maine is the most rural State in the Union, and for many school districts the realities of remote geography and low population density make those commands difficult to heed. Of Maine's 260 school administrative units (SAUs), fewer than half operate a public secondary school. Maine sought to deal with this problem in part by creating a program of tuition assistance for families. If an SAU neither operates its own public secondary school nor contracts with a public or private school for the education of its children, the SAU must "pay the tuition at the public school or the approved private school of the parent's choice at which the student is accepted." Parents who wish to take advantage of this benefit select the school they wish their child to attend. If they select a private school that has been "approved" by the Maine Department of Education, the SAU "shall pay the tuition" at the chosen school up to a specified maximum rate. To be "approved," a private school must meet certain requirements under Maine's compulsory education law. The school must be "currently accredited by a New England association of schools and colleges" or separately "approved for attendance purposes" by the Department. Schools seeking approval must meet curricular requirements, such as using English as the language of instruction, offering a course in "Maine history, including the Constitution of Maine and Maine's cultural and ethnic heritage," and maintaining a student-teacher ratio of not more than 30 to 1. Parents may direct tuition payments to schools inside or outside the State, or even in foreign countries. In schools that qualify, teachers need not be certified by the State, and Maine's curricular requirements do not apply. Single-sex schools are eligible.

Prior to 1981, parents could also direct the tuition assistance payments to religious schools. In 1979–1980, over 200 Maine students opted to attend such schools. However, Maine imposed a new requirement that any school receiving tuition assistance payments must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." That provision was enacted in response to an opinion by the Maine attorney general that public funding of private religious schools violated the Establishment Clause of the First Amendment. We subsequently held, however, that a benefit program under which private citizens "direct government aid to religious schools wholly as a result of their own genuine and independent private choice" does not offend the Establishment Clause. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Following *Zelman*, the Maine Legislature considered a bill to repeal the "nonsectarian" requirement, but rejected it. The "nonsectarian" requirement for participation remains in effect. The Department has stated that, in administering this requirement, it "considers

a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." "The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented." "Affiliation or association with a church or religious institution is one indicator of a sectarian school," but "it is not dispositive."

This case concerns two families that live in SAUs that neither maintain their own secondary schools nor contract with any nearby secondary school. When this litigation commenced, the Carsons' daughter attended Bangor Christian Schools (BCS), which was founded in 1970 as a ministry of Bangor Baptist Church. The Carsons sent their daughter to BCS because of the school's high academic standards and because the school's Christian world view aligns with their sincerely held religious beliefs. Given that BCS is a "sectarian" school that cannot qualify for tuition assistance payments under Maine's program, the Carsons paid the tuition themselves. Petitioners Troy and Angela Nelson live in Palermo, Maine. When this litigation commenced, their son attended Temple Academy, a "sectarian" school affiliated with Centerpoint Community Church. The Nelsons sent their son to Temple Academy because they believed it offered a high-quality education that aligned with their sincerely held religious beliefs. While they wished to send their daughter to Temple Academy too, they could not afford to pay the tuition for both of their children. BCS and Temple Academy are both accredited by the New England Association of Schools and Colleges (NEASC), and the Department considers each school a "private school approved for attendance purposes" under the State's compulsory attendance requirement. Because neither school qualifies as "nonsectarian," neither is eligible to receive tuition payments under Maine's tuition assistance program. Absent the "nonsectarian" requirement, the Carsons and the Nelsons would have asked their respective SAUs to pay the tuition to send their children to BCS and Temple Academy, respectively.

Petitioners brought suit against the Maine Department of Education. They alleged that the "nonsectarian" requirement of Maine's tuition assistance program violated the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. Their complaint sought declaratory and injunctive relief. The District Court rejected petitioners' constitutional claims. While petitioners' appeal was pending, this Court decided *Espinoza* v. *Montana Department of Revenue*, 591 U. S. —— (2020). *Espinoza* held that a provision of the Montana Constitution barring government aid to any school "controlled in whole or in part by any church, sect, or denomination," Art. X, § 6(1), violated the Free Exercise Clause by prohibiting families from using otherwise available scholarship funds at the religious schools of their choosing. The First Circuit affirmed. We granted certiorari.

The Free Exercise Clause of the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988). A State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits. A State may not withhold unemployment benefits on the ground that an individual lost his job for refusing to abandon the dictates of his faith. See *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S.Ct. 2012 (2017), we considered a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground

surfaces made from recycled rubber tires. The Missouri Department of Natural Resources maintained an express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. The Trinity Lutheran Church Child Learning Center applied for a grant to resurface its gravel playground, but the Department denied funding on the ground that the Center was operated by the Church. We deemed it "unremarkable" that the Free Exercise Clause did not permit Missouri to "expressly discriminate against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." While Trinity Lutheran remained "free to continue operating as a church," it could enjoy that freedom only "at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center was otherwise fully qualified." Such discrimination was "odious to our Constitution." In *Espinoza*, we reached the same conclusion as to a Montana program that provided tax credits to donors who sponsored scholarships for private school tuition. The Montana Supreme Court held that the program violated a provision of the Montana Constitution that barred government aid to any school controlled in whole or in part by a church, sect, or denomination. As a result, the State terminated the scholarship program, preventing the petitioners from accessing scholarship funds they would have used to fund their children's educations at religious schools. We held that the Free Exercise Clause forbade the State's action. Application of the no-aid provision required strict scrutiny because it "barred religious schools from public benefits solely because of the religious character of the schools." *Espinoza*, 140 S.Ct., at 2255. "A State need not subsidize private education," "but once a State decides to do so, it cannot disqualify some private schools solely because they are religious."

The principles applied in *Trinity Lutheran* and *Espinoza* resolve this case. Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. A wide range of private schools are eligible to receive tuition assistance payments. BCS and Temple Academy are disqualified from this generally available benefit "solely because of their religious character." By "conditioning the availability of benefits" in that manner, Maine's tuition assistance program—like the program in *Trinity Lutheran*—"effectively penalizes the free exercise" of religion. *Espinoza* applied these basic principles in the context of religious education. As here, we considered a state benefit program under which public funds flowed to support tuition payments at private schools. That program specifically carved out private religious schools from those eligible to receive such funds. While the wording of the Montana and Maine provisions is different, their effect is the same: to "disqualify some private schools" from funding "solely because they are religious." A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny."

To satisfy strict scrutiny, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). "A law that targets religious conduct for distinctive treatment will survive strict scrutiny only in rare cases." 508 U.S. at 546. This is not one of them. A neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* promotes stricter separation of church and state than the Federal Constitution requires. An "interest in separating church and state 'more fiercely' than the Federal Constitution 'cannot qualify as

compelling' in the face of the infringement of free exercise." *Espinoza*, 140 S.Ct., at 2260. Justice BREYER stresses the importance of "government neutrality" when it comes to religious matters, but there is nothing neutral about Maine's program. The State pays tuition for students at private schools so long as the schools are not religious. That is discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.

The First Circuit held that the "nonsectarian" requirement was constitutional because the benefit was viewed as funding the "rough equivalent of the public school education that Maine may permissibly require to be secular." The statute says that an SAU without a secondary school "shall pay the tuition at the public school or the approved private school of the parent's choice at which the student is accepted." The benefit is *tuition* at a public *or* private school, selected by the parent, with no suggestion that the "private school" must provide a "public" education. The differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school are numerous and important. Private schools do not have to accept all students. Public schools generally do. The free public education that Maine insists it is providing through the tuition assistance program is often *not* free. That "assistance" is available at private schools that charge several times the maximum benefit that Maine is willing to provide. Moreover, the curriculum at participating private schools need not resemble that taught in the public schools. For example, Maine public schools must abide by "parameters for essential instruction in English language arts; mathematics; science and technology; social studies; career and education development; visual and performing arts; health, physical education and wellness; and world languages." But NEASC-accredited private schools are exempt from these requirements, and subject only to general "standards and indicators" governing the implementation of their own chosen curriculum. Private schools approved by the Department (rather than by NEASC) are likewise exempt from many of the State's curricular requirements, so long as fewer than 60% of their students receive tuition assistance from the State. Such schools need not abide by Maine's "comprehensive, statewide system of learning results," including the "parameters for essential instruction," and they need not administer the annual state assessments in English language arts, mathematics, and science. Participating schools need not hire state-certified teachers. And the schools can be single-sex. In short, it is simply not the case that these schools, to be eligible for state funds, must offer an education that is equivalent—roughly or otherwise—to that available in the Maine public schools.

The key manner in which the two educational experiences *are* required to be "equivalent" is that they must both be secular. Saying that Maine offers a benefit limited to private secular education is another way of saying that Maine does not extend tuition assistance payments to parents who educate their children at religious schools. "The definition of a program can always be manipulated to subsume the challenged condition," and to allow States to "recast a condition on funding" in this manner would be to see "the First Amendment reduced to a simple semantic exercise." *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 215 (2013). Were we to accept Maine's argument, our decision in *Espinoza* would be rendered meaningless. By Maine's logic, Montana could have obtained the same result simply by redefining its tax credit for sponsors of generally available scholarships as limited to "tuition

payments for the rough equivalent of a Montana public education"—meaning a secular education. But *Espinoza* turned on the substance of free exercise protections, not on magic words. That holding applies whether the prohibited discrimination is in an express provision like § 2951(2) or in a reconceptualization of the public benefit. Maine may provide a strictly secular education in its public schools. But BCS and Temple Academy—like numerous other recipients of Maine tuition assistance payments—are not public schools. In order to provide an education to children who live in parts of its far-flung State, Maine has decided *not* to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of *their* choice. Maine's administration of that benefit is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient's religious exercise.

The dissents are wrong to say that under our decision, Maine "*must*" fund religious education. Maine chose to allow some parents to direct state tuition payments to private schools; that decision was not "forced upon" it. The State could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own. A "State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."

The Court of Appeals [distinguished] *Trinity Lutheran* and *Espinoza* on the ground that the funding restrictions in those cases were "solely status-based religious discrimination," while the challenged provision here "imposes a use-based restriction." Justice BREYER makes the same argument. In *Trinity Lutheran*, the Missouri Constitution banned the use of public funds in aid of "any church, sect or denomination of religion." The case involved "express discrimination based on religious identity," and our opinion did "not address religious uses of funding." In *Espinoza*, the discrimination was a prohibition on aiding "schools controlled by churches," and we analyzed the issue in terms of "religious status and not religious use." Montana argued that its case was different from Trinity Lutheran's because it involved general funds that "could be used for religious ends by some recipients, particularly schools that believe faith should '*permeate*' everything they do." However, the strict scrutiny triggered by status-based discrimination could not be avoided by arguing that "one of its goals or effects was preventing religious organizations from putting aid to religious *uses*." Nothing in our analysis was "meant to suggest that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." Maine's argument—and Justice BREYER's dissent—is premised on precisely such a distinction. *Trinity Lutheran* and *Espinoza* held that the Free Exercise Clause forbids discrimination on the basis of religious status. Those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. "Educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 140 S.Ct. 2049, 2064. Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would raise serious concerns about state entanglement with religion and denominational favoritism. See *Our Lady*, 140 S.Ct., at 2068; *Larson v. Valente*, 456 U.S. 228 (1982). Maine concedes that the Department barely engages in any such scrutiny when enforcing the "nonsectarian" requirement. That suggests that any status-

use distinction lacks a meaningful application not only in theory, but in practice. The prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.

Maine and the dissents invoke *Locke v. Davey*, 540 U.S. 712 (2004), in support of the argument that the State may preclude parents from designating a religious school to receive tuition assistance payments. In that case, Washington established a scholarship fund to assist academically gifted students with postsecondary education expenses. But the program excluded one particular use of the scholarship funds: the "essentially religious endeavor" of pursuing a degree designed to "train a minister to lead a congregation." We upheld that restriction against a free exercise challenge, reasoning that the State had "merely chosen not to fund a distinct category of instruction." *Trinity Lutheran* and *Espinoza* emphasized, as did *Locke*, that the funding was intended to be used "to prepare for the ministry." Funds could be used for theology courses; only pursuing a "vocational religious" *degree* was excluded. *Locke*'s reasoning expressly turned on the "historic and substantial state interest" against using "taxpayer funds to support church leaders." But as we explained in *Espinoza*, "there is no 'historic and substantial' tradition against aiding [private religious] schools comparable to the tradition against state-supported clergy." *Locke* cannot be read beyond its narrow focus on vocational religious degrees to authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.

Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. The program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice KAGAN joins, and with whom Justice SOTOMAYOR joins except as to Part I–B, dissenting.

The First Amendment begins by forbidding the government from "mak[ing] [any] law respecting an establishment of religion." It next forbids them to make any law "prohibiting the free exercise thereof." The Court today pays almost no attention to the first Clause while giving almost exclusive attention to the second. The majority fails to recognize the "play in the joints" between the two Clauses. That "play" gives States some degree of legislative leeway. It sometimes allows a State to further antiestablishment interests by withholding aid from religious institutions without violating the Constitution's protections for the free exercise of religion. Maine's nonsectarian requirement falls squarely within the scope of that constitutional leeway.

I

A

The two Clauses "are frequently in tension," and "often exert conflicting pressures" on government action, *Cutter v. Wilkinson*, 544 U.S. 709 (2005). The Free Exercise Clause "protects religious observers against unequal treatment." *Trinity Lutheran*, 137 S.Ct., at 2019). In the education context, this means that States generally cannot "bar religious schools from public

benefits solely because of the religious character of the schools." *Espinoza* v. *Montana Dept. of Revenue*, 140 S.Ct. 2246. On the other hand, the Establishment Clause "commands a separation of church and state." *Cutter*, 544 U.S. at 719. A State cannot "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15 (1947). A State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." *Illinois ex rel. McCollum v. Board of Ed.*, 333 U.S. 203, 211 (1948). Nor may a State "adopt programs or practices in its public schools which 'aid or oppose' any religion." *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968). Although the Religion Clauses are often in tension, they "express complementary values." *Cutter*, 544 U.S. at 719. They attempt to chart a "course of constitutional neutrality" with respect to government and religion. *Walz*, 397 U.S. at 669. They were written to help create an American Nation free of the religious conflict that had long plagued European nations with "governmentally established religions." *Engel*, 370 U.S. at 431. The Framers sought to avoid the "anguish, hardship and bitter strife" that resulted from the "union of Church and State" in those countries. The Religion Clauses thus aspired to create a "benevolent neutrality" one which would "permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. "The purpose" was "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Ibid.* People "were entitled to worship God in their own way and to teach their children" in that way.

In applying these Clauses, "there is room for play in the joints." *Walz*, 397 U.S. at 669. It may be difficult to determine in any particular case whether the Free Exercise Clause *requires* a State to fund the activities of a religious institution, or whether the Establishment Clause *prohibits* the State from doing so. Rather than attempting to draw a highly complex free-exercise/establishment line that varies based on the circumstances of each program, we have provided general interpretive principles that apply uniformly in all Religion Clause cases. States enjoy a degree of freedom to navigate the Clauses' competing prohibitions. This includes choosing not to fund religious activity where States have strong, establishment-related reasons for not doing so. States have freedom to make this choice even when the Establishment Clause does not itself prohibit the State from funding that activity. The Court today nowhere mentions, and I fear effectively abandons, this longstanding doctrine.

B

[The Religion] Clauses should be interpreted to advance their goal of avoiding religious strife. We are a Nation with over 100 different religious groups. People adhere to a vast array of beliefs, ideals, and philosophies. With greater religious diversity comes greater risk of religiously based strife, conflict, and social division. The Religion Clauses were written in part to help avoid that disunion. As James Madison, a drafter and proponent, said, compelled taxpayer sponsorship of religion "is itself a signal of persecution," which "will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." *Id.*, at 68. A "rigid, bright-line" approach to the Religion Clauses approach without any leeway or "play in the joints" will often work against the Clauses' underlying purposes. Not all state-funded programs that have religious restrictions carry the same risk of creating social division and conflict. States enjoy a degree of constitutional leeway allows States to enact laws

sensitive to local circumstances while also allowing this Court to consider those circumstances in light of the basic values underlying the Religion Clauses.

II

A State *may*, consistent with the Establishment Clause, provide funding to religious schools through a general public funding program if the "government aid reaches religious institutions only by way of the deliberate choices of individual aid recipients." We have never previously held that a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education. Does that mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education? What other social benefits are there that the State must pay parents for the religious equivalent of the secular benefit provided? "Play in the joints" means that courts need not, and should not, answer with "must" these questions that can more appropriately be answered with "may."

Cities and States normally pay for police forces, fire protection, paved streets, municipal transport, and hosts of other services that benefit churches as well as secular organizations. But paying the salary of a religious teacher as part of a public school tuition program is a different matter. Here, Maine chooses not to fund only those schools that "promote the faith or belief system with which the schools are associated and/or present the academic material taught through the lens of this faith"—*i.e.*, schools that will use public money for religious purposes. Maine excludes schools not because of the schools' religious character but because the schools will use the funds to teach and promote religious ideals. The very point of the Establishment Clause is to prevent the government from sponsoring religious activity, favoring one religion over another or favoring religion over nonreligion. State funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent. It is religious activity, not religious labels, that lies at the heart of this case.

III

Under Maine law, an "approved" private school must be "nonsectarian." A school fails to meet that requirement only if it is *both* (1) "associated with a particular faith or belief system" *and also* (2) "promotes the faith or belief system with which it is associated and/or presents the [academic] material taught through the lens of this faith." The differences between this kind of education and a purely civic, public education are important. Public schools comprise "a most vital civic institution for the preservation of a democratic system of government, and the primary vehicle for transmitting the values on which our society rests." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Public schools are religiously neutral, neither disparaging nor promoting any one particular system of religious beliefs. We have consistently required public school education to be free from religious affiliation or indoctrination.

Maine legislators thought that government payment for this kind of religious education would be antithetical to the religiously neutral education that the Establishment Clause requires in public schools. In the majority's view, the fact that private individuals choose to spend the State's

money on religious education saves Maine's program from Establishment Clause condemnation. But that fact simply *permits* Maine to route funds to religious schools. Nothing in our Free Exercise Clause cases *compels* Maine to give tuition aid to private schools that will use the funds to provide a religious education. *Trinity Lutheran* and *Espinoza* prohibit States from denying aid to religious schools solely because of religious *status*. But the Free Exercise Clause does not require Maine to fund schools that will use public money to promote religion. Maine's decision not to fund such schools falls squarely within the play in the joints between those two Clauses.

Maine's nonsectarian requirement supports the Religion Clauses' goal of avoiding religious strife. Forcing Maine to fund schools that provide the sort of religiously integrated education creates a similar potential for religious strife as that raised by promoting religion in public schools. It may that the State favors a particular religion over others, or favors religion over nonreligion. Members of minority religions, with too few adherents to establish schools, may see injustice in the fact that only those belonging to more popular religions can use state money for religious education. Taxpayers may be upset at having to finance the propagation of religious beliefs that they do not share and with which they disagree. Parents in school districts that have a public secondary school may feel indignant that only *some* families in the State—families in more rural districts without public schools—have the opportunity [for] a Maine-funded religious education. Maine legislators who endorsed the State's nonsectarian requirement understood this potential for social conflict. Legislators also recognized that these private schools make religiously based enrollment and hiring decisions. Bangor Christian and Temple Academy have admissions policies that deny enrollment to students based on gender, gender-identity, sexual orientation, and religion, and both schools require their teachers to be Born Again Christians. Legislators did not want Maine taxpayers to pay for these religiously based practices. There is almost no area "as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits." *Zelman*, 536 U.S. at 725 (BREYER, J., dissenting). The Establishment Clause was intended to keep the State out of this area.

Justice SOTOMAYOR, dissenting.

This Court continues to dismantle the wall of separation between church and state that the Framers fought to build. [This] Court recognized " 'room for play in the joints' between" the Religion Clauses, with "some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.,* at 718 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). Using this flexibility, and consistent with a rich historical tradition, States and the Federal Government could decline to fund religious institutions. Moreover, the Court for many decades understood the Establishment Clause to prohibit government from funding religious exercise. The space between the Clauses continued to afford governments "some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws." *Trinity Lutheran* veered sharply from that understanding. The Court revolutionized Free Exercise doctrine by equating a State's decision not to fund a religious organization with presumptively unconstitutional discrimination on the basis of religious status. A plurality limited the Court's decision to "express discrimination based on religious identity" (*i.e.,* status), not "religious uses of funding." The Court

reprised and extended *Trinity Lutheran*'s error to hold that a State could not limit a private-school voucher program to secular schools. *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. —— (2020). The Court, however, refrained from extending *Trinity Lutheran* from funding restrictions based on religious status to those based on religious uses.

In just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars. The Court's expansive view of the Free Exercise Clause risks swallowing the space between the Religion Clauses that once "permitted religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. Maine must choose between giving subsidies to its residents or refraining from financing religious teaching and practices. The Establishment Clause requires that public education be secular and neutral as to religion. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens.

On p. 1013, at the end of the problems, add the following new problem:

3. *The "Winged Goat" Monument*. The Satanic Temple, which is recognized by the IRS as an "aethiest church," wants to erect a monument to a mystical winged goat named Baphomet at the Arkansas State Capitol. The only other display at the Capitol is a Ten Commandments monument. The Temple believes that the context surrounding the Ten Commandments display suggests that its existence constitutes an establishment of religion. When the Temple's display is rejected, it sues claiming discrimination against religion. Should the Temple prevail?