

First Amendment Law:

Freedom of Expression

and

Freedom of Religion

FOURTH EDITION

2018 Supplement

Arthur D. Hellman

Professor of Law Emeritus
University of Pittsburgh
School of Law

William D. Araiza

Professor of Law
Brooklyn Law School

Thomas E. Baker

Professor of Law
Florida International University
College of Law

Ashutosh A. Bhagwat

Martin Luther King, Jr. Professor of Law
University of California Davis
School of Law

Preface

The authors completed work on the Fourth Edition of this Casebook well before the end of the Supreme Court's 2017-2018 term, which meant that important cases handed down late in that term had to be included in this Supplement. There were several such cases. In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (“*NIFLA*”) (Chapters 5 and 9), the Court introduced the concept of content-neutrality into an analysis of compelled speech, in the course of striking down a California law requiring particular types of health clinics to post messages concerning the availability of state-funded birth control and abortions. In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (Chapters 5 and 8), the Court struck down a Minnesota law restricting the wearing of apparel containing political statements while in a polling place. The Court continued to recognize that polling places are special locations where otherwise-unconstitutional speech regulations might be allowed. However, it found the Minnesota law to be too vague to be constitutional, given its broad definitions of the prohibited messages.

One very important speech issue the Court resolved in the 2017-2018 term concerned compelled exactions from public sector employees who disagreed with the workplace union's position on collective bargaining issues. Two terms earlier the Court had been primed to issue a decision on the question whether such compelled exactions violated the dissenting employee's First Amendment rights, but the death of Justice Scalia in February 2016 resulted in a 4-4 split on that question. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) (Chapters 9 and 12), the Court, by a 5-4 vote, found such exactions to violate the First Amendment, and thus overruled *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) (Casebook Chapter 9), which had allowed them. In addition to sparring over the merits of *Abood*, Justice Alito's majority opinion and Justice Kagan's dissent debated at length the applicability to this issue of the government employee speech doctrine. The compelled speech portions of the opinions are presented in Chapter 9, while a note in Chapter 12 considers the government employee speech facet.

A notable feature of many of the cases presented in this Supplement is their mingling of different lines of First Amendment doctrine. Of particular interest, *NIFLA* mixes the content-neutrality rule and the compelled speech doctrine, while, as noted immediately above, *Janus* discusses the applicability of the government employee speech doctrine to the question of compelled financial support for unions' collective bargaining. Whether the cross-cutting in these cases is a coincidence or hearkens more generally to a less rigid categorization of free speech law presents an interesting question about which it is far too early to draw confident conclusions.

In Part II, on the Religion Clauses, the Supplement chronicles the apparent minimalism and incrementalism that has characterized the Roberts Court. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), relied on separation of powers principles to defer to Executive Branch authority over foreign affairs to apply rational basis review to the travel ban, thus assuring its validity. A bare majority of the Justices thus rejected the Establishment Clause challenge. The four dissenters insisted the travel ban was essentially a Muslim ban and therefore unconstitutional. Two of those dissenters (Breyer, joined by Kagan) called for more fact development on one aspect of the order but concluded that, in the absence of such proceedings, they would agree with Justice Sotomayor (joined by Justice Ginsburg) that the order was in fact motivated by anti-Muslim animus. Justice Kennedy, interestingly, wrote a concurring opinion

sans citations that seemingly admonished the President to show respect and tolerance for religious differences, as required by the First Amendment. The next day, he drove over to the White House to deliver his resignation letter to President Trump who would pick his successor. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 139 S. Ct. 1719 (2018), presented the Court with a stark choice between the free exercise and free speech rights of a baker versus the state's interest in protecting a same-sex couple from sexual orientation discrimination — a choice the majority avoided. By a 7 to 2 vote, the Justices based their (narrow) decision on the *Smith-Lukumi* principle against religious discrimination. The Court found sufficient indicators of animus on the part of the state's civil rights commission to persuade the majority that the commission had violated that principle. That was the majorities' tale of the two cases: no official animus in the first case and enough official animus in the second case to turn the litmus unconstitutional. For teachers looking to freshen up their course, there are three new problems about the Religion Clause which promise some interesting class discussion.

* * *

From a First Amendment perspective, the most important development of the Term was not a decision of the Court but the decision of Justice Anthony M. Kennedy to retire from active service. For most of his 30-year tenure on the Court, Justice Kennedy was the most ardent defender of free speech among the Justices, perhaps the most ardent in the Court's history (though some would award that palm to Justice Brennan).

* * *

As always, the authors express their appreciation to the staff of the University of Pittsburgh School of Law Document Technology Center for their dedicated efforts that made it possible to produce this Supplement under a pressing deadline. As with the Casebook, we welcome comments and suggestions from users and readers.

Arthur D. Hellman: hellman@pitt.edu

William D. Araiza: bill.araiza@brooklaw.edu

Thomas E. Baker: thomas.baker@fiu.edu

Ashutosh A. Bhagwat: aabhagwat@ucdavis.edu

Table of Contents

Chapter 5: Content-Based Regulation	1
A. The Principle	1
B. Defining Content Discrimination	1
Chapter 8: Speech on Government Property and the Public Forum Doctrine	3
C. Access to Nontraditional Forums and Facilities	3
<i>Minnesota Voters Alliance v. Mansky</i>	3
Note: The “Reasonableness” Requirement.....	9
Chapter 9: Compelled Expression	11
A. Compelled Speech.....	11
Note: <i>NIFLA</i> , Compelled Speech, and Content (and Viewpoint) Neutrality.....	11
B. Compelled Subsidy	12
Note: The Overruling of <i>Abood</i>	12
<i>Janus v. American Federation of State, County, and Municipal Employees, Council 31</i>	12
Note: Questions about <i>Janus</i>	19
Chapter 12: Beyond Regulation: The Government as Employer and Educator	21
A. First Amendment Rights of Government Employees	21
Note: Union Agency Fees and Government Employee Speech	21
Chapter 17: The Establishment Clause	25
A. Financial Aid to Religion.....	25
[1] Basic Principles	25
Note: President Trump’s Travel Ban Does Not Violate the Establishment Clause.....	25
D. Displays in Public Places.....	33
Problem: Is it a Sign from God?.....	33
E. Legislative Prayer	35
Problem: “Please rise and bow your heads!”	35
Chapter 18: The Free Exercise Clause	37
C. Discrimination against Religion	37
Note: State Administrative Agencies Must Remain Neutral, Fair, and Impartial Towards Religious Claims	37
Chapter 19: Interrelationships among the Clauses	45
A. Definition of Religion.....	45
Problem: Honor thy Father or thy Mother?	45

Chapter 5

Content-Based Regulation

A. The Principle

Page 312: *insert before Section B:*

In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) [Supplement Chapter 8], the Court may have limited the holding in *Burson* to some extent. In striking down a statute that barred political messages *within* the polling place, the Court reaffirmed *Burson's* reasoning that the state can permissibly limit campaign speech near or in polling places in order to prevent voter intimidation and fraud. However, it found the specific law at issue to be so vague regarding what sorts of political signs and apparel it prohibited that it was unconstitutional.

B. Defining Content Discrimination

Page 323: *insert before the Problems:*

5. In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) the Court, in an opinion by Justice Thomas (the author of *Reed*), struck down a California statute regulating “crisis pregnancy centers.” These centers, typically operated by opponents of abortion, provide an assortment of services to pregnant women, but do not generally offer abortion services or referrals. The California statute required centers which are licensed as medical clinics by the state to prominently post a notice, dictated by the statute, which informed patients that California has public programs which provide an assortment of services, including abortions, at low or no cost to indigent women. The Court held that this notice requirement constituted a content-based regulation of the speech of the regulated clinics, because it “alters the content” of their speech by interfering with their ability to disseminate their anti-abortion message.

Is this analysis consistent with, or compelled by, *Reed*? In what sense does a disclosure requirement “alter the content” of the centers’ speech, if they remain free (as they did) to speak out against abortion? Chapter 9 takes up the issue of compelled speech. When you read those materials, consider whether the analysis in this case comports with the approach taken in other cases involving laws that require speakers to communicate a message of the government’s choosing.

Chapter 8

Speech on Government Property and the Public Forum Doctrine

C. Access to Nontraditional Forums and Facilities

Page 503: *insert before the Problem:*

Minnesota Voters Alliance v. Mansky

138 S. Ct. 1876 (2018)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under Minnesota law, voters may not wear a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The question presented is whether this ban violates the Free Speech Clause of the First Amendment.

I

A

Today, Americans going to their polling places on Election Day expect to wait in a line, briefly interact with an election official, enter a private voting booth, and cast an anonymous ballot. Little about this ritual would have been familiar to a voter in the mid-to-late nineteenth century. [The Court summarized the nature of early voting systems, in which voting was largely conducted openly in public, and voters were susceptible to pressure or coercion.]

By the late nineteenth century, States began implementing reforms to address these vulnerabilities and improve the reliability of elections. Between 1888 and 1896, nearly every State adopted the secret ballot. Because voters now needed to mark their state-printed ballots on-site and in secret, voting moved into a sequestered space where the voters could “deliberate and make a decision in . . . privacy.” In addition, States enacted “viewpoint-neutral restrictions on election-day speech” in the immediate vicinity of the polls. *Burson v. Freeman* (Scalia, J., concurring in judgment) [Chapter 5 Note]. Today, all 50 States and the District of Columbia have laws curbing various forms of speech in and around polling places on Election Day.

Minnesota’s such law contains three prohibitions, only one of which is challenged here. See MINN. STAT. § 211B.11(1). The first sentence of § 211B.11(1) forbids any person to “display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated” to “vote for or refrain from voting for a candidate or ballot question.” The second sentence prohibits the distribution of “political badges, political buttons, or other political insignia to be worn at or about the polling place.” The third sentence — the “political apparel ban” — states that a “political badge, political button, or other political insignia may not be worn at or about the polling place.” Versions of all three prohibitions have been on the books in Minnesota for over a century.

There is no dispute that the political apparel ban applies only *within* the polling place, and covers articles of clothing and accessories with “political insignia” upon them. Minnesota election judges — temporary government employees working the polls on Election Day — have the authority to decide whether a particular item falls within the ban. . . .

B

Petitioner Minnesota Voters Alliance (MVA) is a non-profit organization that “seeks better government through election reforms.” Petitioner Andrew Cilek is a registered voter in Hennepin County and the executive director of MVA; petitioner Susan Jeffers served in 2010 as a Ramsey County election judge. Five days before the November 2010 election, MVA, Jeffers, and other likeminded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds. The groups — calling themselves “Election Integrity Watch” (EIW) — planned to have supporters wear buttons to the polls printed with the words “Please I. D. Me,” a picture of an eye, and a telephone number and web address for EIW. (Minnesota law does not require individuals to show identification to vote.) One of the individual plaintiffs also planned to wear a “Tea Party Patriots” shirt. The District Court denied the plaintiffs’ request for a temporary restraining order and preliminary injunction and allowed the apparel ban to remain in effect for the upcoming election.

In response to the lawsuit, officials for Hennepin and Ramsey Counties distributed to election judges an “Election Day Policy,” providing guidance on the enforcement of the political apparel ban. The Minnesota Secretary of State also distributed the Policy to election officials throughout the State. The Policy specified that examples of apparel falling within the ban “include, but are not limited to”:

- Any item including the name of a political party in Minnesota, such as the Republican, [Democratic-Farmer-Labor], Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.
- Issue oriented material designed to influence or impact voting (including specifically the “Please I. D. Me” buttons).
- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

As alleged in the plaintiffs’ amended complaint and supporting declarations, some voters associated with EIW ran into trouble with the ban on Election Day. One individual was asked to cover up his Tea Party shirt. Another refused to conceal his “Please I. D. Me” button, and an election judge recorded his name and address for possible referral. And petitioner Cilek — who was wearing the same button and a T-shirt with the words “Don’t Tread on Me” and the Tea Party Patriots logo — was twice turned away from the polls altogether, then finally permitted to vote after an election judge recorded his information.

Back in court, MVA and the other plaintiffs (now joined by Cilek) argued that the ban was unconstitutional both on its face and as applied to their apparel. The District Court granted the State’s motions to dismiss, and the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. In evaluating MVA’s facial challenge, the Court of Appeals observed that this Court had previously upheld a state law restricting speech “related to a political campaign” in a 100-foot zone outside a polling place; the Court of Appeals determined that Minnesota’s law likewise passed constitutional muster (quoting *Burson*). The Court of Appeals reversed the dismissal of the plaintiffs’ as-applied challenge, however. . . .

II

The First Amendment prohibits laws “abridging the freedom of speech.” Minnesota’s ban on wearing any “political badge, political button, or other political insignia” plainly restricts a form of expression within the protection of the First Amendment.

But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our “‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property.” *International Soc. for Krishna Consciousness, Inc. v. Lee (ISKCON)* [*supra* this Chapter]. Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum — parks, streets, sidewalks, and the like — the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. See *Pleasant Grove City v. Summum* [Chapter 13 Note]. The same standards apply in designated public forums — spaces that have “not traditionally been regarded as a public forum” but which the government has “intentionally opened up for that purpose.” In a nonpublic forum, on the other hand — a space that “is not by tradition or designation a forum for public communication” — the government has much more flexibility to craft rules limiting speech. *Perry Ed. Assn. v. Perry Local Educators’ Assn.* [*supra* this Chapter Note]. The government may reserve such a forum “for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view” . . .

A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is “a special enclave, subject to greater restriction.” *ISKCON*. Rules strictly govern who may be present, for what purpose, and for how long. And while the four-Justice plurality in *Burson* and Justice Scalia’s concurrence in the judgment parted ways over whether the public sidewalks and streets *surrounding* a polling place qualify as a nonpublic forum, neither opinion suggested that the interior of the building was anything but.

We therefore evaluate MVA’s First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker’s political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota’s ban on political apparel is “reasonable in light of the purpose served by the forum”: voting. *Cornelius v. NAACP Legal Defense and Education Fund* [*supra* this Chapter].

III

A

We first consider whether Minnesota is pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place. The natural starting point for evaluating a First Amendment challenge to such a restriction is this Court’s decision in *Burson*, which upheld a Tennessee law imposing a 100-foot campaign-free zone around polling place entrances. Under the Tennessee law — much like Minnesota’s buffer-zone provision — no person could solicit votes for or against a candidate, party, or ballot measure, distribute campaign materials, or “display . . . campaign posters,

signs or other campaign materials” within the restricted zone. The plurality found that the law withstood even the strict scrutiny applicable to speech restrictions in traditional public forums. In his opinion concurring in the judgment, Justice Scalia argued that the less rigorous “reasonableness” standard of review should apply, and found the law “at least reasonable” in light of the plurality’s analysis.

That analysis emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. Against that historical backdrop, the plurality and Justice Scalia upheld Tennessee’s determination, supported by overwhelming consensus among the States and “common sense,” that a campaign-free zone outside the polls was “necessary” to secure the advantages of the secret ballot and protect the right to vote. . . .

In any event, we see no basis for rejecting Minnesota’s determination that some forms of advocacy should be excluded from the polling place, to set it aside as “an island of calm in which voters can peacefully contemplate their choices.” Casting a vote is a weighty civic act, akin to a jury’s return of a verdict, or a representative’s vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.

To be sure, our decisions have noted the “nondisruptive” nature of expressive apparel in more mundane settings. *Tinker v. Des Moines Independent Community School Dist.* [Chapter 12] (students wearing black armbands to protest the Vietnam War engaged in “silent, passive expression of opinion, unaccompanied by any disorder or disturbance”). But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations. . . .

Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand.

B

But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. See *Cornelius*. Here, the unmoored use of the term “political” in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota’s restriction to fail even this forgiving test.

Again, the statute prohibits wearing a “political badge, political button, or other political insignia.” It does not define the term “political.” And the word can be expansive. It can encompass anything “of or relating to government, a government, or the conduct of governmental affairs,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1755 (2002), or anything “[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state,” AMERICAN HERITAGE DICTIONARY 1401 (3d ed. 1996). Under a literal reading of those definitions, a button or T-shirt merely imploring others to “Vote!” could qualify.

The State argues that the apparel ban should not be read so broadly. According to the State, the statute does not prohibit “any conceivably ‘political’ message” or cover “all ‘political’ speech, broadly construed.” Instead, the State interprets the ban to proscribe “only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place.”

At the same time, the State argues that the category of “political” apparel is *not* limited to campaign apparel. After all, the reference to “campaign material” in the first sentence of the statute — describing what one may not “display” in the buffer zone as well as inside the polling place — implies that the distinct term “political” should be understood to cover a broader class of items. As the State’s counsel explained to the Court, Minnesota’s law “expand[s] the scope of what is prohibited from campaign speech to additional political speech.”

We consider a State’s “authoritative constructions” in interpreting a state law. *Forsyth County v. Nationalist Movement* [*supra* this Chapter]. But far from clarifying the indeterminate scope of the political apparel provision, the State’s “electoral choices” construction introduces confusing line-drawing problems.

For specific examples of what is banned under its standard, the State points to the 2010 Election Day Policy — which it continues to hold out as authoritative guidance regarding implementation of the statute. The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating “support of or opposition to a ballot question.”

But the next example — “[i]ssue oriented material designed to influence or impact voting” — raises more questions than it answers. What qualifies as an “issue”? The answer, as far as we can tell from the State’s briefing and argument, is any subject on which a political candidate or party has taken a stance. For instance, the Election Day Policy specifically notes that the “Please I. D. Me” buttons are prohibited. But a voter identification requirement was not on the ballot in 2010, so a Minnesotan would have had no explicit “electoral choice” to make in that respect. The buttons were nonetheless covered, the State tells us, because the Republican candidates for Governor and Secretary of State had staked out positions on whether photo identification should be required.

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. Would a “Support Our Troops” shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a “#MeToo” shirt, referencing the movement to increase awareness of sexual harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had “brought up” the topic.

The next broad category in the Election Day Policy — any item “promoting a group with recognizable political views” — makes matters worse. The State construes the category as limited to groups with “views” about “the issues confronting voters in a given election.” The State does not, however, confine that category to groups that have endorsed a candidate or taken a position on a ballot question.

Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an “issue confronting voters in a given election.” For instance, the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry’s all have stated positions on matters of public concern. If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned? Take another example: In the run-up to the 2012 election, Presidential candidates of both major parties issued public statements regarding the then-existing policy of the Boy Scouts of America to exclude members on the basis of sexual orientation. Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?

The State emphasizes that the ban covers only apparel promoting groups whose political positions are sufficiently “well-known.” But that requirement, if anything, only increases the potential for erratic application. Well known by whom? The State tells us the lodestar is the “typical observer” of the item. But that measure may turn in significant part on the background knowledge and media consumption of the particular election judge applying it. . . .

“[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Ward v. Rock Against Racism* [Chapter 6]. But the State’s difficulties with its restriction go beyond close calls on borderline or fanciful cases. And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views.

It is “self-evident” that an indeterminate prohibition carries with it “[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.” Election judges “have the authority to decide what is political” when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge’s own politics may shape his views on what counts as “political.” And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State’s interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it. . . .

* * *

Cases like this “present us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote.” *Burson*. Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering. While that choice is generally worthy of our respect, Minnesota has not supported its good intentions with a law capable of reasoned application.

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

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, dissenting.

I agree with the Court that “[c]asting a vote is a weighty civic act” and that “State[s] may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth,” including by “prohibit[ing] certain apparel [in polling places] because of the message it conveys.” I disagree, however, with the Court’s

decision to declare Minnesota’s political apparel ban unconstitutional on its face because, in its view, the ban is not “capable of reasoned application,” when the Court has not first afforded the Minnesota state courts “ ‘a reasonable opportunity to pass upon’ ” and construe the statute. I would certify this case to the Minnesota Supreme Court for a definitive interpretation of the political apparel ban under Minn. Stat. § 211B.11(1), which likely would obviate the hypothetical line-drawing problems that form the basis of the Court’s decision today. . . .

Note: The “Reasonableness” Requirement

1. As a preliminary matter, notice that in its summary of the public forum doctrine the Court identifies three types of forums: traditional, designated, and nonpublic. The category of “limited” forums has disappeared. Has the Court now clarified the doctrine and made clear that there are only three categories of forums? Note that the distinction between “nonpublic” and “limited” forums has always been a bit obscure since in both types of forums the doctrine requires only that regulations be viewpoint neutral, and “reasonable.” Subject matter and speaker-based restrictions are allowed.

2. The Court first asks whether Minnesota’s restriction on campaign apparel advances a “permissible objective.” Since the parties do not dispute that the law at issue is viewpoint neutral, where does this come from? Is it an aspect of the “reasonableness analysis”? Or is it a different, and new requirement?

3. The key issue turns out to be whether the ban on political apparel is reasonable. The Court itself describes this as a “forgiving” standard, and in past cases the Court has tended to be highly deferential to regulators in applying this rule — Justice O’Connor’s separate opinion in *ISKCON* finding the distribution ban unreasonable was highly unusual. What made the Minnesota law unreasonable? Was it because it restricted too much speech? Apparently not — the Court clearly holds that the problem was the law’s failure to draw clear lines, and suggests that a more carefully drawn statute might survive. What is it about the lack of clarity of the law that made it “unreasonable?”

4. Aspects of the Court’s analysis clearly overlap with the Overbreadth and Void for Vagueness doctrines covered in Chapter 4. Why did the majority choose to apply forum analysis rather than one of those doctrines in this case?

Chapter 9

Compelled Expression

A. Compelled Speech

Page 526: *insert before Part B:*

Note: NIFLA, Compelled Speech, and Content (and Viewpoint) Neutrality

1. Recall from a note in Chapter 5 a case called *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___ (2018) (“*NIFLA*”). In that case the Court struck down a California law mandating that certain pregnancy-health centers post placards advising readers of State programs providing several free and lost-cost pregnancy-related services, including abortions. The centers that were subject to this posting rule were typically run by anti-abortion groups.

One might expect that a decision striking down such a law would be based squarely on the principle disfavoring government compulsion of speech — that is, the *Barnette* principle. Perhaps surprisingly, though, the five-justice *NIFLA* majority focused heavily on the fact that the law in question was content-based — that is, it required the pregnancy centers in question to speak certain messages. To be sure, the Court did not apply the strict scrutiny that it normally applies to content-based speech restrictions, and it acknowledged the possibility that a lesser standard might apply to the California law given its regulation of speech made by professionals (here, health care professionals). The Court did not have to decide that question, however, because it concluded that the law failed even more lenient review.

2. Leave aside the question of whether the California law regulated professional speech and thus merited lesser scrutiny, and focus instead on the Court’s emphasis on the content-neutrality question. Isn’t it *always* the case that government compulsion of speech would be content-based? Is it even possible realistically to imagine a law that compelled people to speak, but expressed no view on what the person had to say or what topic the person had to address? Writing for the four dissenters, Justice Breyer stated: “Virtually every disclosure law could be considered ‘content based,’ for virtually every disclosure law requires individuals ‘to speak a particular message.’” Isn’t he correct?

Writing for the majority, Justice Thomas wrote that “By compelling individuals to speak a particular message, such notices “alter the content of their speech.” (internal brackets omitted). Does this comment suggest that the content-based problem with the California law arose because the speakers were already speaking, with the result that the government’s compelled speech distorted what they were already saying? Indeed, Justice Thomas observed that the government-mandated message in *NIFLA* included information about the availability of abortion, which he described as “the very practice that petitioners are devoted to opposing.” Moreover, Justice Kennedy, concurring for himself and the three other justices in the majority other than Justice Thomas, went even further, concluding that “[it] does appear that *viewpoint* discrimination is inherent in the design and structure of the Act.” (emphasis added). As such, he concluded, “the State requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs”

3. Think about these concerns. Wouldn't they also arise in a "pure" compelled speech context, such as *Barnette* or *Wooley*, where the individual would prefer to remain silent but instead is forced to mouth the government's message? If so, then what analytical work is being done by the analysis of whether the California law is content-based (or even viewpoint-based)? Is it possible that the majority is simply using the content-neutrality rule to formally import the strict scrutiny requirement into the compelled speech context? Reconsider *Barnette* and *Wooley*: did they prescribe a standard governing the constitutionality of government-compelled speech? Did any such standard flow from a conclusion that the government compulsion in those cases was content-based?

B. Compelled Subsidy

Page 535: *insert before the Problem:*

Note: The Overruling of Abood

1. For several years before 2018 the Court expressed its doubts about *Abood* in increasingly forceful terms. As set forth in a previous note, in 2012 a five-justice majority expressed doubts about *Abood*, although it stopped short of overruling the case outright. *Knox v. Service Employees International*, 567 U.S. 298 (2012).

Two years later, in *Harris v. Quinn*, 573 U.S. ___ (2014), the same five-justice majority declined to engage in what it described as "a very significant expansion" of *Abood* to a class of employees whose status as government employees was not as clear-cut as the public-school teacher in *Abood* itself. *Harris* also criticized *Abood* as "questionable on several grounds," including (but not limited to) *Abood*'s alleged failure "to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector" and failure "to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Harris* also concluded that "a critical pillar of *Abood*'s analysis rest[ed] on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." Despite these criticisms, the Court again declined to overrule *Abood*, characterizing its decision against the union as simply a refusal to extend that case.

2. In 2016 it appeared that the Court was poised to overrule *Abood* in *Friedrichs v. California Teachers Association*, 578 U.S. ___ (2016). However, the death of Justice Scalia in February 2016 resulted in the lower court's decision (which applied *Abood*) being affirmed by an equally divided Court. When Justice Gorsuch ascended to the Court in 2017, the Court again granted *certiorari* in a case in which the challenger requested that *Abood* be overruled.

Janus v. American Federation of State, County, and Municipal Employees, Council 31

585 U.S. ___ (2018)

JUSTICE ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement

violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood v. Detroit Bd. of Ed.* (1977) [*supra* this Chapter], and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

[The plaintiff, Janus, was an employee of the state of Illinois in a closed-shop workplace represented by a union to which Janus did not belong. Janus objected to the agency fees he was required to pay to offset the union’s representation expenses, alleging that he objected to the positions the union was taking on matters on which the union was bargaining with the state. He claimed that, in his view, the union’s positions did not adequately account for the state’s financial difficulties, and alleged that it violated his First Amendment rights to be forced to subsidize the union’s expression of those positions.] . . .

III

In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, but in more recent cases we have recognized that this holding is “something of an anomaly,” *Knox v. Service Employees*, 567 U.S. 298 (2012) [Note *supra* this Chapter], and that *Abood*’s “analysis is questionable on several grounds.” We have therefore refused to extend *Abood* to situations where it does not squarely control, while leaving for another day the question whether *Abood* should be overruled, see *Knox*.

We now address that question. We first consider whether *Abood*’s holding is consistent with standard First Amendment principles.

A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard* (1977) [*supra* this Chapter]. The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (“Freedom of association . . . plainly presupposes a freedom not to associate”). As Justice Jackson memorably put it: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*” *West Virginia Bd. of Ed. v. Barnette* (1943) (emphasis added) [*supra* this Chapter].

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues — say, the platform of one of the major

political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth, see, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940) [Note Chapter 4]. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence. *Barnette*.

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox*; *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) [Note *supra* this Chapter]; *Abood*. As Jefferson famously put it, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted). We have therefore recognized that a “‘significant impingement on First Amendment rights’” occurs when public employees are required to provide financial support for a union that “takes many positions during collective bargaining that have powerful political and civic consequences.” *Knox*.

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified “levels of scrutiny” to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox*; *Harris v. Quinn*, 573 U.S. ____ (2014) [Note *supra* this Chapter]; *Friedrichs v. California Teachers Assn.*, 578 U.S. ____ (2016) (*per curiam*) (affirming decision below by equally divided Court) [Note *supra* this Chapter].

In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, *e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.* (1980) [Chapter 3], prior precedent in that area, specifically *United Foods*, had applied what we characterized as “exacting” scrutiny, *Knox*, a less demanding test than the “strict” scrutiny that might be thought to apply outside the commercial sphere. Under “exacting” scrutiny, we noted, a compelled subsidy must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” *Ibid*.

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed “exacting scrutiny.” But we questioned whether that test

provides sufficient protection for free speech rights, since “it is apparent that the speech compelled” in agency-fee cases “is not commercial speech.” *Id.*

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to “strict scrutiny.” . . . [We] again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*. . . .

B

In *Abood*, the main defense of the agency-fee arrangement was that it served the State’s interest in “labor peace.” By “labor peace,” the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, “inter-union rivalries” would foster “dissension within the work force,” and the employer could face “conflicting demands from different unions.” *Id.* Confusion would ensue if the employer entered into and attempted to “enforce two or more agreements specifying different terms and conditions of employment.” *Id.* And a settlement with one union would be “subject to attack from [a] rival labor organizatio[n].” *Id.*

We assume that “labor peace,” in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*’s fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. . . .

C

In addition to the promotion of “labor peace,” *Abood* cited “the risk of ‘free riders’” as justification for agency fees. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Petitioner strenuously objects to this free-rider label. . . .

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, “free-rider arguments . . . are generally insufficient to overcome First Amendment objections.” *Knox*. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. . . .

Those supporting agency fees contend that the situation here is different because unions are statutorily required to “represen[t] the interests of all public employees in the unit,” whether or not they are union members. Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions

would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought. . . .

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. . . .

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox*. We therefore hold that agency fees cannot be upheld on free-rider grounds.

IV

Implicitly acknowledging the weakness of *Abood's* own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.

[Justice Alito then addressed, and rejected, the argument that the agency fee scheme satisfied the First Amendment because it constituted legitimate government regulation of government employee speech. He then considered whether *stare decisis* nevertheless prevented the Court from overruling *Abood*. The employee speech part of his opinion for the Court is set forth in a note in Chapter 12.] . . .

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. §315/6(e). No form of employee consent is required. This procedure violates the First Amendment and cannot continue. . . .

* * *

Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE SOTOMAYOR, dissenting.

I join Justice Kagan's dissent in full. Although I joined the majority in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) [Note Chapter 3], I disagree with the way that this Court has since interpreted and applied that opinion. Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with Justice Kagan that *Sorrell*— in the way it has been read by this Court— has allowed courts to “wiel[d] the First Amendment in . . . an aggressive way” just as the majority does today. *Post*.

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

For over 40 years, *Abood* struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. . . . Far from an "anomaly," *ante*, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer. . . .

I

I begin with *Abood*, the 41-year-old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit's public school teachers. The union's collective-bargaining agreement with the city included an "agency shop" clause, which required teachers who had not joined the union to pay it "a service charge equal to the regular dues required of [u]nion members." A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation" — a "central element" in "industrial relations" since the New Deal. *Id.* Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: "avoid[] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"; "prevent[] inter-union rivalries from creating dissension within the work force"; "free[] the employer from the possibility of facing conflicting demands from different unions"; and "permit[] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.* . . .

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. . . .

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees "counteract[] the incentive that employees might otherwise have to become 'free riders.'" *Ibid.* . . .

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." *Ibid.* And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context — as when they "contribute to political candidates." *Id.* Employees might well object to the use of their money to support such "ideological causes." *Id.*

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." *Id.* There, the Court held, the "important government interests" in having a stably funded

bargaining partner justify “the impingement upon” public employees’ expression. *Id.* But on the other hand, employees could not be compelled to fund the union’s political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee’s First Amendment rights defeated any conflicting government interest. See *id.*

II

Unlike the majority, I see nothing “questionable” about *Abood’s* analysis. The decision’s account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers’ interests and public employees’ expression is right at home in First Amendment doctrine.

A

Abood’s reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. . . . Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. . . . And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others.

The majority does not take issue with the first point. The majority claims that the second point never appears in *Abood*, but is willing to assume it for the sake of argument. So the majority stakes everything on the third point — the conclusion that maintaining an effective system of exclusive representation often entails agency fees.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. . . .

The majority’s initial response to this reasoning is simply to dismiss it. “[F]ree rider arguments,” the majority pronounces, “are generally insufficient to overcome First Amendment objections.” *Ante* (quoting *Knox*). “To hold otherwise,” it continues, “would have startling consequences” because “[m]any private groups speak out” in ways that will “benefit[] nonmembers.” *Ante*. But that disregards the defining characteristic of *this* free-rider argument — that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for “senior citizens or veterans” (to use the majority’s examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are — by law — in a different position, as this Court has long recognized. Justice Scalia, responding to the same argument as the majority’s, may have put the point best. In a way that is true of no other private group, the “law *requires* the union to carry” non-members — “indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests.” *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991) (opinion concurring in part and dissenting in part). That special

feature was what justified *Abood*: “Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them.” . . .

[Justice Kagan’s dissent then addressed the majority arguments on both the employee speech and *stare decisis* issues. The employee speech part of her opinion is explained in a note in Chapter 12.] . . .

IV

There is no sugarcoating today’s opinion. The majority overthrows a decision entrenched in this Nation’s law — and in its economic life — for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Departures from *stare decisis* are supposed to be “exceptional action[s]” demanding “special justification” — but the majority offers nothing like that here. . . . The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be — and until now, has been — an energetic policy debate. . . . And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, e.g., *National Institute of Family and Life Advocates v. Becerra*, ___ U.S. ___ (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users) [Notes *supra* Chapter 5 and this Chapter]; *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (striking down a law that restricted pharmacies from selling various data) [Note Chapter 3]. And it threatens not to be the last. Speech is everywhere — a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority’s road runs long. And at every stop are black-robed rulers overriding citizens’ choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance — including over the role of public-sector unions.

Note: Questions about Janus

1. Much of the debate between Justice Alito and Justice Kagan in *Janus* concerns the strength of the government’s interest in adopting agency-fees requirements for any employee who declines to join the public-sector union representing that employee’s workplace. That question is a complex one, that turns on the empirical realities of union representation and the severity of the free-rider problem that Justice Kagan stresses (calling it “nightmarish”) but that Justice Alito discounts. Leave that empirical question aside, and consider the broader First Amendment issues at stake in the case. Should the government enjoy any deference when it argues that it has legitimate interests in requiring such agency fees? Perhaps relatedly, how serious is the First Amendment harm suffered by these dissenting employees?

2. One way to think about the previous question is as presenting a framing question: is *Janus* “really” a case about labor-management relations (in which perhaps the government merits some deference in its decisions about what structures will lead to such relations being harmonious), or is it “really” a case about

the dissenting employee's right not to subsidize speech with which he disagrees (in which case such deference might be less appropriate)? Is there a way to answer this question in a principled way? You'll see this framing question return when you encounter, in Chapter 12, the doctrine dealing with the free speech rights of government employees. That chapter will include a note that recounts a further aspect of *Janus*, in which the majority and dissent debate whether the agency fees structure in question reflects government regulation of employees' speech. In staking out their positions on that question, Justices Alito and Kagan again offer competing frames for understanding agency fees requirements.

3. Consider one additional question: is compelled *subsidization* of speech the same thing as compelled *speech* itself? All the justices in *Janus* assumed that compelled subsidization implicated the First Amendment, but note that this assumption was not compelled (no pun intended) by *Barnette* or *Wooley*. Is it justifiable? In thinking about this question, recall *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), where the Court unanimously upheld the Solomon Amendment (requiring universities receiving federal funds to provide equal access to military recruiters) and rejected a claim that that law compelled speech in a way that violated the First Amendment. In that case, Chief Justice Roberts dismissed that claim as "trivializing *Barnette*." Do you think *Janus*'s claim does the same? Why or why not?

4. Speaking of precedent, what effect might *Janus* have on the agricultural marketing subsidy cases presented in the casebook? In particular, does it undermine the first of those cases, *Glickman v. Wileman Brothers and Elliott*, 521 U.S. 457 (1997)? *Glickman* cited *Abouod* several times. Re-read the excerpts from *Glickman* presented in the book. Is its reasoning now in question?

Chapter 12

Beyond Regulation: The Government as Employer and Educator

A. First Amendment Rights of Government Employees

Page 640: *insert before the Note:*

Note: Union Agency Fees and Government Employee Speech

1. Recall from Chapter 9 that in 2018 the Supreme Court struck down legal requirements that non-union members working in unionized government workplaces contribute so-called “agency fees” to the union to defray the union’s cost of representing the workers in collective bargaining. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. ___ (2018). Chapter 9’s presentation of *Janus* focused on the justices’ disagreements about the relevant precedent, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had upheld such compelled contributions. As set forth in Chapter 9, the five-justice majority in *Janus* overruled *Abood*.

2. In *Janus*, Justice Alito, writing for the Court, and Justice Kagan, writing the main dissent, debated, among other issues, the applicability to the agency fees issue of the government employee speech doctrine, as reflected in cases presented in this Chapter, beginning with *Pickering*. Justice Alito questioned the applicability of the *Pickering* line of cases, describing it as a “painful fit” with the agency fees issue, for three reasons.

First, he argued that “the *Pickering* framework was developed for use in a very different context — in cases that involve ‘one employee’s speech and its impact on that employee’s public responsibilities.’ *United States v. Treasury Employees*, 513 U.S. 454 (1995) [Note *supra* this chapter]. This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation.”

He then continued:

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti v. Ceballos* (2006) [*supra* this chapter]. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

Justice Alito then provided a final argument for *Pickering*’s inapplicability:

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases' categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood*, a public employer is flatly prohibited from permitting nonmembers to be charged for this speech, but under *Pickering*, the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. . . . Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

3. Justice Kagan, dissenting in *Janus*, took issue with these arguments and argued that *Abood* "coheres with [the] framework" established in *Pickering*. She began by engaging Justice Alito's final point above, stating that "Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression." She argued that, just as *Pickering* would have required, in *Abood* the Court concluded that the government had no workplace managerial interest in compelling non-union members' subsidization of the union's political expression, and thus found a First Amendment right to be free of such compelled subsidization.

Justice Kagan then turned to Justice Alito's first two arguments recounted above. First, she noted that, in the very case he cited — *Treasury Employees* — the Court did in fact apply *Pickering* to a broad government policy restricting employee speech. With regard to his second argument, about the increased First Amendment harm of compelling, rather than restricting, speech, Justice Kagan cited cases in which the Court found the distinction irrelevant as a First Amendment matter. She acknowledged the Court's opinion in *Barnette* condemning compelled speech as particularly problematic, but sought to limit the force of that precedent by describing it as "(thankfully) the most exceptional in our First Amendment annals."

4. After setting forth reasons not to apply *Pickering* at all, Justice Alito then argued that an agency fees scheme would fail *Pickering* balancing even if it was appropriate to apply that approach. His analysis turned heavily on the argument that public employee union speech on matters such as pay and working conditions can be of significant public concern. For example, he noted the public's interest in states' fiscal stability, an issue that would be implicated by the union's collective bargaining speech on matters such as wages, and the public's interest in teacher tenure protections, which would be implicated by a teachers' union's insistence that such tenure be part of any union agreement with the state. Given the public's interest in the union's speech, the dissenting employee was held to have a significant interest in not being compelled to subsidize such speech. In turn, Justice Alito referred to the opinion's earlier analysis of the reasons for agency fee schemes when he concluded that the state lacked a sufficiently strong interest to outweigh the employee's interest against the compelled speech subsidization.

5. Justice Kagan disagreed on these points as well. She argued that the majority opinion misunderstood the first prong of *Pickering's* test: “The question [asked by that first prong] is not, as the majority seems to think, whether the public is, or should be, interested in a government employee’s speech. Instead, the question is whether that speech is about and directed to the workplace — as contrasted with the broader public square.” She then continued that “Consistent with that focus, speech about the terms and conditions of employment — the essential stuff of collective bargaining — has never survived *Pickering's* first step.” In support of this conclusion, she observed that “even the Justices who originally objected to *Abood* conceded that the use of agency fees for bargaining on ‘economic issues’ like ‘salaries and pension benefits’ would not raise significant First Amendment questions.” She then argued that, even if the speech in question in *Janus* satisfied *Pickering's* first test, the government had shown adequate justification for compelling the non-members’ subsidization of the union speech given the government’s interest in ensuring “a stable and productive relationship with an exclusive bargaining agent.” She concluded this part of her opinion with the following paragraph:

The key point about *Abood* is that it fit naturally with this Court’s consistent teaching about the permissibility of regulating public employees’ speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today’s decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech — and will almost surely remain so.

6. How close a fit was *Abood* with *Pickering*? Justice Kagan conceded that *Abood* was not an “overt, one-to-one application of *Pickering*,” but she nevertheless insisted that both cases “raised variants of the same basic issue: the extent of the government’s authority to make employment decisions affecting expression.” She continued that “in both, the Court struck the same basic balance . . .” By contrast, Justice Alito insisted that “[s]uperimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.” Re-read *Connick v. Myers*, which explains and applies *Pickering*. After doing so, consider which side has the better of this issue.

7. Consider in particular whether public sector union’s collective bargaining speech satisfies *Pickering's* requirement that, in order to enjoy constitutional protection, government employee speech must implicate matters of public concern. The majority insists that, by definition, expression about the terms and conditions of government employment satisfies this requirement, given the effect those terms and conditions have on the public fisc. Justice Kagan countered by hypothesizing a government entity disciplining a group of government employees for “agitating for a better health plan at various inopportune times and places.” According to Justice Kagan, the *Janus* majority’s answer to the “public concern” question would necessarily mean either that such agitation would satisfy *Pickering's* first step and would thus require courts to perform the balancing *Pickering* requires at step two, or, alternatively, that the *Janus* rule applies only (and, she implied, arbitrarily) to unions.

To be sure, even Justice Kagan presumably concedes that the “agitation” she hypothesizes might still end up punishable by the employer, depending on how that

step two balancing comes out. If you were a government employer, would the prospect of such judicial balancing comfort you? Or would it make you more uncertain? If it's the latter, is there a principled way to exclude such agitation from *Pickering* balancing consistent with what the majority says in *Janus* about how the union speech in question would satisfy *Pickering's* first step and thus require such balancing?

Chapter 17

The Establishment Clause

A. Financial Aid to Religion

[1] Basic Principles

Page 818: *insert new Note after the Note:*

***Note: President Trump’s Travel Ban Does Not Violate the
Establishment Clause***

1. Justice Black’s landmark opinion in *Everson v. Board of Education* (1947), excerpted above, declared several basic principles about the separation of church and state, including:

The “establishment of religion” clause of the First Amendment means at least this: neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . .

These basic principles were invoked in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), which involved a challenge to a Presidential Proclamation to the extent that it indefinitely barred entry into the United States by nationals from six predominantly Muslim countries (Iran, Libya, Syria, Yemen, Somalia, and Chad). The State of Hawaii (as operator of a state university system), individual citizens or lawful permanent residents with relatives applying for immigrant or nonimmigrant visas, and a nonprofit organization that operated a mosque in Hawaii brought a pre-enforcement action to prohibit implementation and enforcement of the Presidential Proclamation. The U.S. District Court granted the plaintiffs’ motion for a temporary restraining order (TRO) and later granted a nationwide preliminary injunction, which was stayed in part by the U.S. Court of Appeals for the Ninth Circuit and also by the Supreme Court. Defendants appealed. The Ninth Circuit affirmed in part and vacated in part. The Supreme Court reversed and remanded by a vote of 5 to 4. Chief Justice Roberts delivered the opinion of the Court, in which Justices Kennedy, Thomas, Alito, and Gorsuch joined. Justices Kennedy and Thomas filed concurring opinions. Justice Breyer filed a dissenting opinion joined by Justice Kagan. Justice Sotomayor filed a dissenting opinion joined by Justice Ginsburg.

2. In September 2017, President Trump issued Proclamation No. 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, the third in a series of travel bans which were all challenged in the lower federal courts on multiple grounds and with varying success. According to the Trump Administration, the Proclamation before the Supreme Court sought to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present a security threat. The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about

their nationals the President deemed inadequate. Foreign states were selected for inclusion based on a review pursuant to one of the President's earlier Executive Orders, undertaken by the Department of Homeland Security (DHS) in consultation with the State Department and U.S. intelligence agencies.

3. As a preliminary matter, the Court held that the President had lawfully exercised the broad discretion granted to him to suspend the entry of aliens into the United States under 8 U.S.C. § 1182(f):

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

4. The Court ultimately went on to hold that the plaintiffs had not demonstrated a likelihood of success on the merits of their claim that the Proclamation violated the Establishment Clause. The individual plaintiffs had Article III standing to challenge the exclusion of their relatives under the Establishment Clause because a person's interest in being united with family and relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact.

5. On the merits, Plaintiffs alleged that the primary purpose of the Proclamation was religious *animus* against Muslims:

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were "foreordained." Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious *animus* and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." That statement remained on his campaign website until May 2017. Then-candidate

Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.” Shortly after being elected, when asked whether violence in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.”

One week after his inauguration, the President issued EO–1. In a television interview, one of the President’s campaign advisers explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” The adviser said he assembled a group of Members of Congress and lawyers that “focused on, instead of religion, danger. . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country.”

Plaintiffs also note that after issuing EO–2 to replace EO–1, the President expressed regret that his prior order had been “watered down” and called for a “much tougher version” of his “Travel Ban.” Shortly before the release of the Proclamation, he stated that the “travel ban . . . should be far larger, tougher, and more specific,” but “stupidly that would not be politically correct.” More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President’s deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that “the President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.” . . .

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements — many of which were made before the President took the oath of office. These various aspects of plaintiffs’ challenge inform our standard of review.

6. Deferring to the President's constitutional and statutory authority over foreign affairs, the Court decided to apply a rational basis standard of review, *i.e.*, whether the entry policy was plausibly related to the Government's stated objective to protect the country and improve the vetting processes:

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group." *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). . . . The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but *animus*." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. . . .

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. . . . It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of *animus* toward Muslims. . . .

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight,

particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.” *Holder v. Humanitarian Law Project* (2010) [Note Chapter 13].

Three additional features of the entry policy support the Government’s claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries — Iraq, Sudan, and Chad — have been removed from the list of covered countries. The [text of the] Proclamation emphasizes that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified “inadequacies and risks,” and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated. In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya’s ongoing engagement with the State Department and the steps Libya is taking “to improve its practices.”

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas, for example, permitting student and exchange visitors from Iran, while restricting only business and tourist nonimmigrant entry for nationals of Libya and Yemen, and imposing no restrictions on nonimmigrant entry for Somali nationals. These carveouts for nonimmigrant visas are substantial: Over the last three fiscal years — before the Proclamation was in effect — the majority of visas issued to nationals from the covered countries were nonimmigrant visas. The Proclamation also exempts permanent residents and individuals who have been granted asylum.

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. . . . The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver. . . .

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. The case now

returns to the lower courts for such further proceedings as may be appropriate. . . .

7. Justice Kennedy’s concurring opinion added this admonition:

[There] are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

This was his last Supreme Court opinion; the next day he hand-delivered his letter of resignation to President Trump.

8. Justice Thomas wrote a separate concurring opinion emphasizing his skepticism whether District Courts have the constitutional authority to enter universal or nationwide injunctions, *i.e.*, an order prohibiting the Executive Branch from applying a law or policy against anyone. The majority opinion did not reach this issue.

9. Justice Breyer wrote a dissenting opinion, joined by Justice Kagan, that called into question whether the Government was fairly applying the elaborate system of exemptions and waivers in the Presidential Proclamation, which would suggest it did have the effect of a “Muslim ban.” Furthermore, he determined there was sufficient evidence of antireligious bias set forth in Justice Sotomayor’s dissent to set aside the Proclamation.

10. Justice Sotomayor wrote the principal dissent, joined by Justice Ginsburg, which moved straight away to the Establishment Clause:

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court’s decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created. Based on the evidence in the

record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim *animus*. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent. . . .

The Establishment Clause forbids government policies “respecting an establishment of religion.” The “clearest command” of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. . . . Consistent with that clear command, this Court has long acknowledged that governmental actions that favor one religion “inevitably” foster “the hatred, disrespect, and even contempt of those who hold contrary beliefs.” *Engel v. Vitale* (1962) [*infra* this chapter]. That is so, this Court has held, because such acts send messages to members of minority faiths “that they are outsiders, not full members of the political community.” To guard against this serious harm the Framers mandated a strict “principle of denomination neutrality.” . . . “When the government acts with the ostensible and predominant purpose” of disfavoring a particular religion, “it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *McCreary County v. American Civil Liberties Union of Ky.* (2005) [*infra* this chapter]. To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. *See id.*; *Town of Greece v. Galloway* (2014) [*infra* this chapter].

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by” the decisionmaker. *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) [Chapter 18]; *McCreary County*. At the same time, however, courts must take care not to engage in “any judicial psychoanalysis of a drafter’s heart of hearts.” *Id.*

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs’ constitutional challenge, that highly abridged account does not tell even half of the story. *See* Brief for The Roderick & Solange MacArthur Justice Center as *Amicus Curiae* 5–31 (outlining President Trump’s public statements expressing *animus* toward Islam). The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the

Proclamation was motivated by hostility and *animus* toward the Muslim faith. [Here Justice Sotomayor detailed seven pages of candidate Trump’s campaign statements promising a “Muslim ban” and President Trump’s statements, speeches, interviews, and official tweets defending his Executive Orders and criticizing the multiple lawsuits challenging them.]

As the majority correctly notes, “the issue before us is not whether to denounce” these offensive statements. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all “openly available data,” the text and “historical context” of the Proclamation, and the “specific sequence of events” leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim *animus*, rather than by the Government’s asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that “Islam hates us,” warned that “we’re having problems with the Muslims, and we’re having problems with Muslims coming into the country,” promised to enact a “total and complete shutdown of Muslims entering the United States,” and instructed one of his advisers to find a “legal” way to enact a Muslim ban. The President continued to make similar statements well after his inauguration. . . .

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump’s failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President’s lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. Cf. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n* (2018) [Supplement Chapter 18] (“The official expressions of hostility to religion in some of the commissioners’ comments — comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmance of the order — were inconsistent with what the Free Exercise Clause requires”). It should find the same here.

Ultimately, what began as a policy explicitly “calling for a total and complete shutdown of Muslims entering the United States” has since morphed into a “Proclamation” putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by

impermissible discriminatory *animus* against Islam and its followers. . . .

[None] of the features of the Proclamation highlighted by the majority supports the Government’s claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country. . . .

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation’s deep commitment to religious plurality and tolerance. That constitutional promise is why, “for centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom.” *Town of Greece v. Galloway* (Kagan, J., dissenting). Instead of vindicating those principles, today’s decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by *animus* against Muslims, the majority opinion upends this Court’s precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty. . . .

D. Displays in Public Places

Page 921: *insert new Problem after the Problem:*

Problem: Is it a Sign from God?

Your law firm represents the city of Hondo, Texas. Mayor Joe Quimby has asked you to draft a formal letter on behalf of the city to respond to a demand letter from the Freedom From Religion Foundation (FFRF) that the city take down its two welcome signs which appear at the city limits alongside U.S. Highway 90 that runs through town. The signs say: “Welcome. This is God’s country. Please don’t drive through it like hell. Hondo, Texas.”

The signs were originally erected in the 1930s by a local Lion’s Club. They have appeared on postcards and are a popular place for taking selfies with locals and tourists alike. They were temporarily removed to allow for the widening of the highway in 2012. New signs were erected that year on the city-owned right-of-way, using city funds, and adding the word “please.” The local garden society planted and maintains the landscaping surrounding the new signs. A picture of the new sign also appears on the homepage of the city’s website and the sign’s motto appears on the masthead of the city’s monthly newsletter. Mayor Quimby has publicly and repeatedly pledged in interviews in the local newspaper and media, “There’s no way in hell we are taking down those signs!” Large numbers of local supporters have registered their approval of his announcement on various social media, including the town’s Facebook page. Here is the gist of the FFRF demand letter, which was addressed to the Mayor, to which you are expected to draft a formal legal response:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) to object to two divisive religious displays on government property in the City of Hondo. We have been contacted

about this issue by multiple concerned Texans. FFRF is a national nonprofit organization with nearly 24,000 members nationwide, including almost 1,000 in Texas. Our purpose is to protect the constitutional separation between state and church.

It is our understanding that signs proclaiming: “WELCOME — THIS IS GOD’S COUNTRY — PLEASE DON’T DRIVE THROUGH IT LIKE HELL — HONDO, TEXAS” are displayed prominently along U.S. 90, at the Hondo city borders. See the enclosed photo. A picture of one of the signs is also featured on the city’s website.

We write to encourage the city to find an alternative way to promote safe driving that doesn’t also endorse a religious message.

It is inappropriate for the City of Hondo to display religious signs that convey government preference for religion over nonreligion. The display of the religious message “THIS IS GOD’S COUNTRY” on public property violates the Establishment Clause of the First Amendment, which prohibits public grounds from being used to advance, support, or promote religion. It is also needlessly divisive.

A prominent declaration to visitors and Hondo residents that “THIS IS GOD’S COUNTRY” sends the message that non-believers are not welcome in the city. By endorsing such a statement, the sign sends the message to non-adherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). The message assumes a common god, yet imagine the public outrage had the city posted a sign saying “THIS IS VISHNU’S COUNTRY” or “THIS IS NO GOD’S COUNTRY.” It is equally inflammatory and inappropriate to post a sign dedicating a city to the god of the bible.

Like the Ten Commandments posting in the county buildings in *McCreary County v. ACLU*, 545 U.S. 844 (2005), and the crèche display on county land in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), these displays are unconstitutional under the precedent of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). A reasonable observer would view the signs as an endorsement of religion by the City of Hondo.

Because the signs are currently on public land, and because city funds have recently been expended to make and install the new signs, they are not protected as private speech, even if private groups have contributed to restoring and maintaining the signs in the past. As a legal matter, it is settled that permanent displays on public land are government speech. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). And all “government speech must comport with the Establishment Clause.” *Id.* at 468.

We ask that the City of Hondo immediately remove these signs from public property and refrain from displaying any messages

that endorse religion in the future. Please inform us in writing of the actions you are taking to remedy this First Amendment violation. We look forward to a reply at your earliest convenience.



E. Legislative Prayer

Page 938: *insert new Problem after the case:*

Problem: "Please rise and bow your heads!"

The Erewon County Board of Commissioners has nine elected members. The Board holds a monthly public meeting. Each meeting begins with a “call to order,” when the Chair directs those in attendance to “rise” and “assume a reverent posture.” Then one of the Commissioners delivers a prayer, after which the Chair invites a resident being honored or a group of residents — sometimes a social group from the community or a class of students from one of the local schools — to come forward and lead the assembly in the Pledge of Allegiance. The Chair then announces that “everyone should be seated” and proceeds through the published agenda for the meeting.

The Commissioners take turns reciting the opening prayer. They adopted this practice to avoid having to select prayer-givers and then having to monitor the content of the prayers of those selected. They were worried that some clergy and some self-ordained ministers might possibly deliver inappropriate prayers or awkwardly sectarian prayers that would be controversial. The Commissioners agreed upon this internal guideline for themselves:

The prayer-giver should be mindful that citizens of our County are members of many different faith traditions. Each prayer should not exceed 150 words and should avoid excessive sectarian references and personal or partisan political beliefs. Appropriate themes include: citizenship, community, tolerance, respect, values, and the importance of responsible and wise government for the common good.

The denominational make-up of the current Commission includes five Catholics, three Jews, and one Episcopalian and their individual prayers somewhat reflect their individual faiths. Thus, the Commissioners claim to be adhering to the Judeo-Christian tradition. Here is an example of a prayer, composed by one of the Catholic commissioners, which she has delivered each time it is her turn to pray:

Please stand and bow your heads. Our heavenly Father we thank you for allowing us to gather here in your presence tonight. We ask that you watch over us and keep your guiding hand on our shoulder as we deliberate tonight. Please protect and watch over the men and women serving this great nation in our military, whether at home or abroad, as well as our police officers and firefighters. In this we pray, in Jesus's name, Amen.

When the president of the local chapter of Americans United for the Separation of Church and State (“AUSCS”) appeared at a recent Commission meeting to object to this prayer practice, one of the Commissioners responded: “With all due respect, I will continue to pray in the Lord’s name. I am human. I need inspiration and grace. I am asking for guidance to make good decisions for the best of the whole community — for all our citizens whatever they believe.” It was moved and seconded to continue the policy and practice; the motion passed unanimously. Now, AUSCS has brought suit on behalf of its organization and some individual members, alleging that the Commissioners’ prayer practice is unconstitutionally sectarian and exclusionary, as well as unduly coercive, and therefore violates the First and Fourteenth Amendments. How should the district court rule and why?

Chapter 18

The Free Exercise Clause

C. Discrimination against Religion

Page 988: *insert new Note after the case and before Problem:*

Note: State Administrative Agencies Must Remain Neutral, Fair, and Impartial Towards Religious Claims

1. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court relied on *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (Casebook p. 978) to conclude that there was unconstitutional discrimination against religion during the administrative proceedings of the state’s Civil Rights Commission.

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012, he told a same-sex couple that he would not make a cake for their wedding celebration because of his religious opposition to same-sex marriages — marriages that Colorado did not then recognize — but that he would sell them any other baked goods (e.g., birthday cakes) which did not have anything to do with a same-sex wedding. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, *inter alia*, discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services . . . to the public.” Under the CADA’s administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple’s favor. In so doing, the ALJ rejected both of Phillips’ First Amendment claims: (1) that requiring him to “create” a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed, and (2) that such a requirement also would violate his right to the free exercise of religion because his sincere religious belief was that marriage was limited to a man and a woman. Both the Commission and the Colorado Court of Appeals affirmed.

The Supreme Court reversed by a vote of 7 to 2. Justice Kennedy wrote the majority opinion. Justice Kagan, joined by Justice Breyer, wrote a concurring opinion. Justice Gorsuch, joined by Justice Alito, wrote a concurring opinion. Justice Thomas, joined by Justice Gorsuch, wrote an opinion concurring in part and concurring in the judgment. Justice Ginsburg, joined by Justice Sotomayor, wrote a dissenting opinion disagreeing with the majority’s analysis.

2. The Court framed the facts as a contest of oppositional rights but went on to decide the case on the basis of a discriminatory animus on the part of the Commission against the religious beliefs of Jack Phillips:

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the

First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. . . . Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

The Court did not reach the free speech claim of the baker; the Court did not attempt to balance the free exercise rights of the baker against the state's interest to protect the same-sex couple from sexual orientation discrimination.

3. The *ratio decidendi* for the reversal was in the details of the state administrative proceedings. The majority opinion parsed the record on appeal and set out the particulars of how the Commission violated this First and Fourteenth Amendment norm of religious neutrality:

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the — the law's impacting his personal belief system, he needs to look at being able to compromise." Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and

dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be — I mean, we — we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical — something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law — a law that protects discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. In this case, however, the remarks were made in a very different context — by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

[On] at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious

text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Civil Rights Division, the requested cake included “wording and images the baker deemed derogatory,” *Jack v. Gateaux, Ltd.*; featured “language and images the baker deemed hateful,” *Jack v. Le Bakery Sensual, Inc.*; or displayed a message the baker “deemed as discriminatory, *Jack v. Azucar Bakery*.”

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission’s treatment of Phillips’ objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips’ willingness to sell “birthday cakes, shower cakes, and cookies and brownies,” to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers’ conscience-based objections as legitimate, but treated his as illegitimate — thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that “this case is distinguishable from the Commission’s recent findings that the other bakeries in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the requested cakes. In those cases, the court continued, there was no impermissible discrimination because “the Division found that the bakeries . . . refused the patron’s request . . . because of the offensive nature of the requested message.”

A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *West Virginia Bd. of Ed. v. Barnette* (1943) [Chapter 9], it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal v. Tam* (2017) (Alito, J.) [Chapter 15]. The Colorado court’s

attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye* [*supra* this chapter], the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.* Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance," of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. *Id.* It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments — comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order — were inconsistent with what the

Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

4. The majority was careful to explain that a religious person's sincere religious objections would not always outweigh the state's interest to prohibit discrimination based on sexual orientation in places of public accommodation. Justice Kennedy thus narrowed the holding:

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

5. A thought experiment: Remove the particularized religious bias in this case, which tainted the Colorado Commission's proceedings and triggered the reversal of the Commission's order. Reboot the facts. Rehearse the legal arguments of the parties. Answer the question the Supreme Court did not answer. Who should prevail — the religious baker invoking his free speech and free exercise rights or the state enforcing its civil rights statute to protect the same sex couple from discrimination based on sexual orientation?

6. Reconsider *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), excerpted in Chapter 17 of this Supplement, which considered an Establishment Clause challenge to President Trump's travel ban. Chief Justice Roberts' majority opinion did not refer to *Masterpiece Cakeshop*, which had been decided under the Free Exercise Clause. Justice Sotomayor dissented in both cases. In her dissent in the travel ban case, she nonetheless invoked *Masterpiece Cakeshop* as a precedent:

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop* [Supplement Chapter 17] which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece Cakeshop*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," the government actors in

this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance [under the Establishment Clause]. Unlike in *Masterpiece Cakeshop*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country "that they are outsiders, not full members of the political community."

Is Justice Sotomayor right? Or are there valid ways to distinguish the two cases?

Chapter 19

Interrelationships among the Clauses

A. Definition of Religion

Page 999: *insert new Problem after the Note:*

Problem: Honor thy Father or thy Mother?

Melissa and Matthew Solomon divorced seven years ago. They both agreed to — and they were both awarded — joint legal and physical custody of their daughter, four-year-old R.A. Regarding their daughter’s education, the original divorce decree provided: “Subject to both parties mutually agreeing to send their daughter to private school, the parties agree to be equally responsible for the cost of private school tuition.” The parents initially agreed to enroll their daughter at Bayside Montessori School (Bayside), a small, private, secular school. Three years ago, they agreed in a stipulated order that she would continue to attend Bayside, but Matthew would be responsible for all future tuition costs. Last year, when 11-year-old R.A. was about to finish her elementary education, the parents agreed that, although Bayside did offer middle school education, she should attend a larger middle school with more varied educational resources. They could not agree, however, on which middle school.

Matthew moved the district court for an order directing that R.A. attend a religious private middle school and high school, Faith Lutheran School, which was administered by the Lutheran parish he attended. He argued that it was in R.A.’s best interest to attend Faith Lutheran School because she was used to private schooling, she wanted to enroll there, she would benefit from the educational continuity of attending the same school for middle school and high school, the high school had a high college placement rate, and as a member of the congregation he would qualify for a tuition discount.

Melissa objected to her child receiving a religious education at Faith Lutheran School because she was not a Lutheran and she did not want her daughter raised a Lutheran. Furthermore, she opposed any religious schooling because she was non-religious and she insisted that it was in her daughter’s best interest to be raised non-religious. She argued that R.A. should attend the local public magnet school, J.P. Wynne Middle School — which is highly ranked for academics and has strong extra-curriculars and is even a few blocks closer to R.A.’s primary residence than Faith Lutheran School.

Without holding an evidentiary hearing, on the sole basis of Melissa’s vehement objection to any religious schooling of her daughter, the district court ordered that R.A. would attend J.P. Wynne Middle School. The district court’s order is notably devoid of any findings of fact. After briefly summarizing the factual background, procedural history, and both parents’ arguments, the order found that attending *both* schools would, in the abstract, satisfy the relevant controlling standard of “the child’s best interest,” given the overall quality of the two middle schools. Recognizing, however, that it was “not feasible” for R.A. to attend two schools at the same time, the court chose J. P Wynne Middle School as the preferable school placement. The district court’s stated logic was that “the irreconcilable religious preferences of the parents could not both be implemented and, therefore, the mother’s strong objection to any religious schooling must be dispositive.”

Matthew appeals the portion of the order directing R.A. to attend J.P. Wynne Middle School. How should the appellate court rule and why?