First Amendment Law:

Freedom of Expression
and
Freedom of Religion

FOURTH EDITION

2021 Supplement

Arthur D. Hellman
Professor of Law Emeritus
University of Pittsburgh
School of Law

William D. Araiza
Stanley A. August Professor of Law
Brooklyn Law School

Thomas E. Baker
Professor of Law
Florida International University
College of Law

Ashutosh A. Bhagwat
Distinguished Professor of Law
University of California Davis
School of Law

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

Preface

The Supreme Court has decided several significant First Amendment cases since the authors completed work on the Fourth Edition of this Casebook before the end of the Court's 2017-2018 term. This annual supplement excerpts seven of those cases, and presents notes discussing seven others.

Freedom of Expression

- In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (Chapter 8 and Note Chapter 5), 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.
- In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (Notes 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 with state-created content regarding the availability of state-funded medical services and the license status of the clinic.
- In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) (Chapter 9 and Note Chapter 12), the Court, by a 5-4 vote, found a First Amendment violation in laws that required public sector employees who are not members of the workplace union to subsidize the union's collective bargaining activities. The Court thus overruled *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) (Casebook Chapter 9), which had allowed such exactions. 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 excerpted in Chapter 9, while a note in Chapter 12 considers the government employee speech facet.
- In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) (Chapter 10 and Note Chapter 11), the Court struck down a California law requiring charities operating in the state to disclose to the state the identities of their largest contributors. Chief Justice Roberts' opinion is notable because it clarified the meaning of the "exacting scrutiny" standard the Court had used in other compelled disclosure cases, and read that standard as requiring that "disclosure regimes . . . be narrowly tailored to the government's asserted interest." Just as significantly, the Court rejected the dissent's argument that the application of "exacting scrutiny" should be contingent upon a showing by plaintiffs of a risk of retaliation if their identity is disclosed.
- In *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021) (Chapter 12), the Court confronted the difficult question of the extent to which public schools can punish students for speech made off-campus on social media sites. While an eight-justice majority acknowledged that schools

may have some legitimate reasons to regulate even speech made off-campus, it also noted that other factors counsel against such authority. Applying those competing considerations, the Court concluded that the student speech at issue was protected, given its particular characteristics. The Court's cautious answer to the First Amendment question will likely generate further litigation about the scope of public school students' free speech rights.

- *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (Chapter 15) involved provisions of federal trademark law that prohibit the federal government from registering trademarks it deems "immoral" or "scandalous." Relying heavily on its decision invalidating the prohibition on registering "disparaging" trademarks in *Matal v. Tam* (2017) (Casebook Chapter 15), the Court in *Brunetti* unanimously held that the restriction on "immoral" trademarks was viewpoint-based and thus violated the First Amendment. However, the Justices split on whether the restriction on "scandalous" trademarks could be interpreted in a way that rendered it viewpoint-neutral and thus constitutional. Despite its resemblance to *Matal*, the Justices' varied approaches in *Brunetti* reveal interesting and important views regarding the concepts of content- and viewpoint-neutrality, the proper First Amendment category for federal trademark law, and the appropriateness of the categorical approach more generally.

Freedom of Religion

- In *American Legion v. American Humanist Assn.*, 139 S. Ct. 2067 (2019) (Chapter 17), a seven-Justice majority rejected an Establishment Clause challenge to the Bladensburg Peace Cross, a large Latin cross erected as a post-World War I war memorial, with only Justices Ginsburg and Sotomayor dissenting. Six of those seven justices took the opportunity the case presented to critique the *Lemon* test, with Justices Thomas and Gorsuch offering particularly sharp criticisms.
- In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (Note Chapter 17), a bare majority of the Justices relied on separation of powers principles to defer to Executive Branch authority over foreign affairs, and in turn to apply rational basis review to the so-called "Muslim travel ban." The Court thus rejected a claim that it violated the Establishment Clause.
- In *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020) (Note Chapter 18), the Court held that "appropriate relief" under the Religious Freedom Restoration Act included claims for money damages against government officials in their individual capacities.
- *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (Note Chapter 18), 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.
- *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (Note Chapter 18) — a case on the so-called "shadow docket" — involved a free exercise challenge to

California's COVID-19 regulations on religious gatherings. The *per curiam* opinion held that the plaintiffs were entitled to emergency injunctive relief pending their appeal. In similar previous cases, a narrow 5 to 4 majority that included Justice Ginsburg had demonstrated a deference to state health officials, but the appointment of Justice Barrett to replace Justice Ginsburg flipped those 5 to 4 votes in favor of the religious claimants in this case.

- *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (Note Chapter 18) was a much-anticipated decision that disappointed critics of *Employment Division v. Smith* (1990). A majority declined the invitation to overrule that precedent, much to the chagrin of Justice Alito who wrote a 77-page concurring opinion expressing his frustration with the majority's timidity. The majority relied on the details of the contract for placement of foster children between the City and Catholic Social Services (CSS) to hold that the provision did not satisfy strict scrutiny because it allowed an exception and therefore it was not a neutral law of general application. That ruling left *Smith* alone at least for now. CSS was allowed to continue to place foster children even though CSS had a religious belief-based policy not to place children with same-sex couples.
- *Our Lady of Guadalupe School v. Morrisey-Berru* and *St. James School v. Biel*, 140 S. Ct. 2049 (2020) (Note Chapter 19), extended the ministerial exception doctrine to apply to two lay teachers at parochial elementary schools. The Justices in the majority relied on the principal case, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), over two dissents.
- *Espinoza et al. v. Montana Department of Revenue et al.*, 140 S. Ct. 2246 (2020) (Chapter 19), revealed how the current Justices understand and apply the "play-in-the-joints" between what the Establishment Clause allows a state to do and what the Free Exercise Clause requires a state to do. The new case is so significant that it replaces two principal cases in Chapter 19: *Locke v. Davey* (2004) and *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017). The 5 to 4 decision generated six different opinions.

Beyond the problems included in previous editions of the supplement, the 2021 edition features two new problems. One, in Chapter 6, deals with a sign ordinance that implicates *Reed v. Town of Gilbert* by distinguishing between signs that advertise an activity on the premises where the sign is located and those that advertise off-premises activity. This problem is based on *Reagan National Advertising v. City of Austin*, 972 F.3d 696 (5th Cir. 2020), which the Supreme Court has agreed to review in its 2021-22 term. The second new problem, in Chapter 19, examines the First Amendment issues raised by regulations of animal slaughter that conflict with rituals of religious slaughter in Judaism (kosher) and Islam (halal). Both these new problems and the previously-included ones should provide for interesting class discussion.

The supplement also includes an updated Table of the Justices (Appendix B), reflecting two changes in the Court's membership since the Fourth edition. Justice Anthony M. Kennedy retired at the end of the 2017 Term and was replaced by

Justice Brett M. Kavanaugh. Justice Ruth Bader Ginsburg died in September 2020, after the end of the 2019 Term; she was replaced Justice Amy Coney Barrett.

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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

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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.

6. The Court reaffirmed its understanding of content discrimination in *Reed* in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020). A federal statute, the Telephone Consumer Protection Act of 1991 (TCPA) originally prohibited essentially all robocalls to cell phones. In 2015, Congress amended the TCPA to permit robocalls "made solely to collect a debt owed to or guaranteed by the United States." A group of political consultants who wished to make robocalls to discuss political issues, solicit donations, and get out the vote sued challenging the TCPA as amended.

A splintered majority of five Justices agreed that the statute, on its face, discriminated based on *content* because it permitted calls with a specific message (pay your debt to the government) but no others. These Justices therefore applied strict scrutiny, and found the statute unconstitutional. Four Justices argued that not all content-based restrictions should be subject to strict scrutiny, largely repeating the arguments made by Justices Breyer and Kagan in *Reed*; so would have applied intermediate scrutiny. Justice Sotomayor, however, concluded that the statute could

not satisfy intermediate scrutiny and concurred in the judgement. Justice Breyer, in a dissent joined by Justices Ginsburg and Kagan, would have upheld the statute.

Finally, a different seven-Justice majority found that the 2015 amendment was severable, and invalidated it, thereby restoring the TCPA's original flat ban on robocalls (and therefore giving the plaintiffs no actual relief). Is the TCPA, as amended, distinguishable from the sign ordinance in *Reed*? Is there any danger that the 2015 amendment to the TCPA had the effect of distorting the marketplace of ideas? What is to be made of the curious result that the effect of this decision, theoretically upholding First Amendment rights, resulted in banning *more* speech than Congress intended, including the plaintiffs' own speech?

Chapter 6
Regulating the "Time, Place, and Manner" of Protected Speech

B. Applications of the Doctrine

Page 368: ***insert before*** **McCullen v. Coakley*:***

Problem: On- and Off-Premise Signs

Dunham, East Carolina is a medium-sized city with a prosperous and highly-invested citizenry that prides itself on the city's All-American milieu. In the wake of the Supreme Court's decision in *Reed v. Town of Gilbert*, Dunham enacted a comprehensive new Sign Ordinance designed to limit visual blight and preserve the natural beauty and aesthetics of the town. The key distinction the Ordinance draws is between "off-premises" and "on-premises" signage. The Ordinance defines an "off-premises sign" as "a sign advertising a business, person, activity, good, products, or services not located on the site where the sign is located, or that directs persons to any location not on that site." "On-premises" signs are defined as those that are not off-premises — in other words, on-premises signs are limited to signs advertising a business, person, activity, good, products, or services located on the site where the sign is located.

Dunham's Ordinance places much stricter limits on off-premises signs than on on-premises signs. For example, going forward the Ordinance permits new on-premises signs, but not new off-premises signs. In addition, the Ordinance permits existing on-premises signs to be converted to a digital format, but not existing off-premises signs. Bush Signs is a local company that owns a number of off-premises billboards within Dunham. It sought a permit from the City of Dunham to convert two of its existing analog billboards to a digital format, but the City denied the request based on the distinctions in its sign Ordinance. Bush Signs then sued the City, seeking to invalidate the Ordinance on its face and as applied.

Should a court treat the Dunham Ordinance as a content-based, or a content-neutral restriction on speech, based on the Supreme Court's decision in *Reed v. Town of Gilbert*? If the Ordinance is deemed to be content-based, would the Ordinance survive strict scrutiny? What other facts would you need to know to answer these questions confidently?

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 if 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 bethought 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 *Abood* several times. Re-read the excerpts from *Glickman* presented in the book. Is its reasoning now in question?

Chapter 10
Freedom of Association

Page 540: ***insert after the note:***

Americans for Prosperity Foundation v. Bonta
141 S. Ct. 2373 (2021)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part II-B-1.

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

I

The California Attorney General's Office is responsible for statewide law enforcement, including the supervision and regulation of charitable fundraising. Under state law, the Attorney General is authorized to "establish and maintain a register" of charitable organizations and to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." In order to operate and raise funds in California, charities generally must register with the Attorney General and renew their registrations annually. . . .

. . . Pursuant to this regulatory authority, the Attorney General requires charities renewing their registrations to file copies of their Internal Revenue Service Form 990, along with any attachments and schedules. Form 990 contains information regarding tax-exempt organizations' mission, leadership, and finances. Schedule B to Form 990 — the document that gives rise to the present dispute — requires organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year (or, in some cases, who have given more than 2 percent of an organization's total contributions).

The petitioners are tax-exempt charities that solicit contributions in California and are subject to the Attorney General's registration and renewal requirements. . . . Since 2001, each petitioner has renewed its registration and has filed a copy of its Form 990 with the Attorney General. Out of concern for their donors' anonymity, however, the petitioners have declined to file their Schedule Bs (or have filed only redacted versions) with the State. . . . When they continued to resist disclosing their contributors' identities, the Attorney General threatened to suspend their registrations and fine their directors and officers.

The petitioners each responded by filing suit in the Central District of California. [Eventually, after a full bench trial, the district court ruled in favor of the petitioners. The Court of Appeals reversed that judgment.]

We granted certiorari.

II

A

. . . This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." *Roberts v. United States Jaycees* (1984) [*infra* this chapter]. . . .

Government infringement of this freedom "can take a number of forms." *Id.* We have held, for example, that the freedom of association may be violated where a group is required to take in members it does not want, *see id.* . . .

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

B

1 [*]

NAACP v. Alabama did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure. We have since settled on a standard referred to as "exacting scrutiny." *Buckley v. Valeo* (1976) (per curiam) [*infra* Chapter 11]. Under that standard, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe v. Reed*, 561 U.S. 186 (2010) [Note *infra* Chapter 11]. "To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* Such scrutiny, we have held, is appropriate given the "deterrent effect on the exercise of First Amendment rights" that arises as an "inevitable result of the government's conduct in requiring disclosure." *Buckley*.

The Law Center (but not the Foundation) argues that we should apply strict scrutiny, not exacting scrutiny. Under strict scrutiny, the government must adopt "the least restrictive means of achieving a compelling state interest," *McCullen v. Coakley* (2014) [*supra* Chapter 6], rather than a means substantially related to a sufficiently important interest. The Law Center contends that only strict scrutiny adequately protects the associational rights of charities. And although the Law Center acknowledges that we have applied exacting scrutiny in prior disclosure cases, it argues that those cases arose in the electoral context, where the government's important interests justify less searching review.

It is true that we first enunciated the exacting scrutiny standard in a campaign finance case. . . . But exacting scrutiny is not unique to electoral disclosure regimes. To the contrary, *Buckley* derived the test from *NAACP v. Alabama* itself, as well as

[*] [Ed. Note: This sub-part of the Chief Justice's opinion was joined only by Justices Kavanaugh and Barrett.]

other nonelection cases. As we explained in *NAACP v. Alabama*, "it is immaterial" to the level of scrutiny "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.

2

The Law Center (now joined by the Foundation) argues in the alternative that even if exacting scrutiny applies, such review incorporates a least restrictive means test similar to the one imposed by strict scrutiny. The United States and the Attorney General respond that exacting scrutiny demands no additional tailoring beyond the "substantial relation" requirement noted above. We think that the answer lies between those two positions. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.

The need for narrow tailoring was set forth early in our compelled disclosure cases. In *Shelton v. Tucker*, 364 U.S. 479 (1960), we considered an Arkansas statute that required teachers to disclose every organization to which they belonged or contributed. We acknowledged the importance of "the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools." . . . But we nevertheless held that the Arkansas statute was invalid because even a "legitimate and substantial" governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Shelton stands for the proposition that a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. This requirement makes sense. Narrow tailoring is crucial where First Amendment activity is chilled — even if indirectly — "because First Amendment freedoms need breathing space to survive."

Our more recent decisions confirm the need for tailoring. In *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014) [Note *infra* Chapter 11], for example, a plurality of the Court explained:

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective.

McCutcheon is instructive here. A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters. Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.

The dissent reads our cases differently. It focuses on the words "broadly stifle" in the quotation from *Shelton* above, and it interprets those words to mean that narrow tailoring is required only for disclosure regimes that "impose a severe burden on associational rights." Because, in the dissent's view, the petitioners have not shown such a burden here, narrow tailoring is not required.

We respectfully disagree. The "government may regulate in the [First Amendment] area only with narrow specificity," and compelled disclosure regimes are no exception. When it comes to "a person's beliefs and associations," "[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." Contrary to the dissent, we understand this Court's discussion of rules that are "broad" and "broadly stifle" First Amendment freedoms to refer to the scope of challenged restrictions — their breadth — rather than the severity of any demonstrated burden. That much seems clear to us from *Shelton*'s statement (in the sentence following the one quoted by the dissent) that "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." . . .

Nor does our decision in *Doe v. Reed* suggest that narrow tailoring is required only for laws that impose severe burdens. The dissent casts *Reed* as a case involving only "modest burdens," and therefore "a correspondingly modest level of tailoring." But it was only after we concluded that various narrower alternatives proposed by the plaintiffs were inadequate, that we held that the strength of the government's interest in disclosure reflected the burden imposed. The point is that a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.

III

The Foundation and the Law Center both argued below that the obligation to disclose Schedule Bs to the Attorney General was unconstitutional on its face and as applied to them. The petitioners renew their facial challenge in this Court, and they argue in the alternative that they are entitled to as-applied relief. For the reasons below, we conclude that California's blanket demand for Schedule Bs is facially unconstitutional.

A

As explained, exacting scrutiny requires that there be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," *Doe v. Reed*, and that the disclosure requirement be narrowly tailored to the interest it promotes, *see Shelton*. . . . It goes without saying that there is a "substantial governmental interest[ ] in protecting the public from fraud." . . . There is a dramatic mismatch, however, between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end. Recall that 60,000 charities renew their registrations each year, and nearly all are required to file a Schedule B. Each Schedule B, in turn, contains information about a charity's top donors — a small handful of individuals in some cases, but hundreds in others. This information includes donors' names and the total contributions they have made to the charity, as well as their addresses. Given the amount and sensitivity of this information harvested by the State, one would expect Schedule B collection to form an integral part of California's fraud detection efforts. It does not. To the contrary, the record amply supports the District Court's finding that there was not "a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts."

The dissent devotes much of its analysis to relitigating factual disputes that the District Court resolved against the Attorney General, notwithstanding the applicable clear error standard of review, see Fed. Rule Civ. Proc. 52(a). For

example, the dissent echoes the State's argument that, in some cases, it relies on up-front Schedule B collection to prevent and police fraud. But the record before the District Court tells a different story. And even if the State relied on up-front collection in some cases, its showing falls far short of satisfying the means-end fit that exacting scrutiny requires. California is not free to enforce any disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives.

The Attorney General and the dissent contend that alternative means of obtaining Schedule B information — such as a subpoena or audit letter — are inefficient and ineffective compared to up-front collection. It became clear at trial, however, that the Office had not even considered alternatives to the current disclosure requirement. The Attorney General and the dissent also argue that a targeted request for Schedule B information could tip a charity off, causing it to "hide or tamper with evidence." But again, the States' witnesses failed to substantiate that concern. Nor do the actions of investigators suggest a risk of tipping off charities under suspicion, as the standard practice is to send audit letters asking for a wide range of information early in the investigative process. Furthermore, even if tipoff were a concern in some cases, the State's indiscriminate collection of Schedule Bs in all cases would not be justified.

The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints. California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation. The need for up-front collection is particularly dubious given that California — one of only three States to impose such a requirement — did not rigorously enforce the disclosure obligation until 2010. Certainly, this is not a regime "whose scope is in proportion to the interest served." *McCutcheon*.

In reality, then, California's interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement. The Attorney General may well prefer to have every charity's information close at hand, just in case. But "the prime objective of the First Amendment is not efficiency." *McCullen*. Mere administrative convenience does not remotely "reflect the seriousness of the actual burden" that the demand for Schedule Bs imposes on donors' association rights.

B

The foregoing discussion also makes clear why a facial challenge is appropriate in these cases. Normally, a plaintiff bringing a facial challenge must "establish that no set of circumstances exists under which the law would be valid," or show that the law lacks "a plainly legitimate sweep." In the First Amendment context, however, we have recognized "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens* (2010) [*supra* Chapter 3]. We have no trouble concluding here that the Attorney General's disclosure requirement is overbroad. The lack of tailoring to the State's investigative goals is categorical — present in every case — as is the weakness of the State's interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny.

The Attorney General tries to downplay the burden on donors, arguing that "there is no basis on which to conclude that California's requirement results in any broad-based chill." He emphasizes that "California's Schedule B requirement is confidential," and he suggests that certain donors — like those who give to noncontroversial charities — are unlikely to be deterred from contributing. He also contends that disclosure to his office imposes no added burdens on donors because tax-exempt charities already provide their Schedule Bs to the IRS.

We are unpersuaded. Our cases have said that disclosure requirements can chill association "even if there is no disclosure to the general public." . . . Exacting scrutiny is triggered by "state action which may have the effect of curtailing the freedom to associate," and by the "*possible* deterrent effect" of disclosure. *NAACP v. Alabama* (emphasis added). While assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it.*

It is irrelevant, moreover, that some donors might not mind — or might even prefer — the disclosure of their identities to the State. The disclosure requirement "creates an unnecessary risk of chilling" in violation of the First Amendment, indiscriminately sweeping up the information of every major donor with reason to remain anonymous. The petitioners here, for example, introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence. Such risks are heightened in the 21st century and seem to grow with each passing year, as "anyone with access to a computer can compile a wealth of information about" anyone else, including such sensitive details as a person's home address or the school attended by his children.

The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America — Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California.

The dissent argues that — regardless of the defects in California's disclosure regime — a facial challenge cannot succeed unless a plaintiff shows that donors to a substantial number of organizations will be subjected to harassment and reprisals. As we have explained, plaintiffs may be required to bear this evidentiary burden where the challenged regime is narrowly tailored to an important government interest. Such a demanding showing is not required, however, where — as here — the disclosure law fails to satisfy these criteria.

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* Here the State's assurances of confidentiality are not worth much. The dissent acknowledges that the Foundation and Law Center "have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are made public," but it concludes that the petitioners have no cause for concern because the Attorney General "has implemented security measures to ensure that Schedule B information remains confidential." The District Court — whose findings, again, we review only for clear error — disagreed. After two full bench trials, the court found that the Attorney General's promise of confidentiality "rings hollow," and that "donors and potential donors would be reasonably justified in a fear of disclosure."

Finally, California's demand for Schedule Bs cannot be saved by the fact that donor information is already disclosed to the IRS as a condition of federal tax-exempt status. For one thing, each governmental demand for disclosure brings with it an additional risk of chill. For another, revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California's disclosure requirement, which can prevent charities from operating in the State altogether.

We are left to conclude that the Attorney General's disclosure requirement imposes a widespread burden on donors' associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important. We therefore hold that the up-front collection of Schedule Bs is facially unconstitutional, because it fails exacting scrutiny in "a substantial number of its applications . . . judged in relation to [its] plainly legitimate sweep." *Stevens*. . . .

* * *

The District Court correctly entered judgment in favor of the petitioners and permanently enjoined the Attorney General from collecting their Schedule Bs. The Ninth Circuit erred by vacating those injunctions and directing entry of judgment for the Attorney General. The judgment of the Ninth Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring in Parts I, II-A, II-B-2, and III-A, and concurring in the judgment.

The Court correctly holds that California's disclosure requirement violates the First Amendment. It also correctly concludes that the District Court properly enjoined California's attorney general from collecting the forms at issue, which contain sensitive donor information. But, while I agree with much of the Court's opinion, I would approach three issues differently.

First, the bulk of "our precedents . . . require application of strict scrutiny to laws that compel disclosure of protected First Amendment association." . . . The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously. . . . Laws directly burdening the right to associate anonymously, including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights.

Second, the Court holds the law "overbroad" and, thus, invalid in all circumstances. But I continue to have "doubts about the origins and application" of our "overbreadth doctrine." . . . [T]he principle that application of a law is always unlawful if "a substantial number of its applications are unconstitutional" "lacks any basis in the Constitution's text" and "contravenes traditional standing principles."

Third, and relatedly, this Court also lacks the power "to pronounce that the statute is unconstitutional in all applications," even if the Court suspects that the law will likely be unconstitutional in every future application as opposed to just a substantial number of its applications. A declaration that the law is "facially" unconstitutional "seems to me no more than an advisory opinion — which a federal court should never issue at all." Courts cannot "strike down statutory text" or resolve the legal rights of litigants not before them.

With those points of difference clarified, I join Parts I, II-A, II-B-2, and III-A of the majority's opinion and concur in the judgment.

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, concurring in Parts I, II-A, II-B-2, and III, and concurring in the judgment.

I am pleased to join most of The Chief Justice's opinion. In particular, I agree that the exacting scrutiny standard drawn from our election-law jurisprudence has real teeth. . . . The Chief Justice would hold that the particular exacting scrutiny standard in our election-law jurisprudence applies categorically "to First Amendment challenges to compelled disclosure." Justice Thomas, by contrast, would hold that strict scrutiny applies in all such cases. I am not prepared at this time to hold that a single standard applies to all disclosure requirements. And I do not read our cases to have broadly resolved the question in favor of exacting scrutiny. This Court decided its seminal compelled disclosure cases before it developed modern strict scrutiny doctrine. Accordingly, nothing in those cases can be understood as rejecting strict scrutiny. If anything, their language and reasoning — requiring a compelling interest and a minimally intrusive means of advancing that interest — anticipated and is fully in accord with contemporary strict scrutiny doctrine. . . .

Because the choice between exacting and strict scrutiny has no effect on the decision in these cases, I see no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment.

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

Although this Court is protective of First Amendment rights, it typically requires that plaintiffs demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored to the government's interests, never mind striking the law down in its entirety. Not so today. Today, the Court holds that reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no burden at all. The same scrutiny the Court applied when NAACP members in the Jim Crow South did not want to disclose their membership for fear of reprisals and violence now applies equally in the case of donors only too happy to publicize their names across the websites and walls of the organizations they support. . . .

. . . [T]he Court discards its decades-long requirement that, to establish a cognizable burden on their associational rights, plaintiffs must plead and prove that disclosure will likely expose them to objective harms, such as threats, harassment, or reprisals. It also departs from the traditional, nuanced approach to First Amendment challenges, whereby the degree of means-end tailoring required is commensurate to the actual burdens on associational rights. Finally, it recklessly holds a state regulation facially invalid despite petitioners' failure to show that a substantial proportion of those affected would prefer anonymity, much less that they are objectively burdened by the loss of it. . . .

II

Because the freedom to associate needs "breathing space to survive," this Court has recognized that associational rights must be "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Publicizing individuals' association with particular groups might expose members to harassment, threats, and reprisals by opponents of those organizations. Individuals may choose to disassociate themselves from a group altogether rather than face such backlash.

Acknowledging that risk, this Court has observed that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*. That observation places special emphasis on the risks actually resulting from disclosure. Privacy "may" be indispensable to the preservation of freedom of association, but it need not be. It depends on whether publicity will lead to reprisal. For example, privacy can be particularly important to "dissident" groups because the risk of retaliation against their supporters may be greater. For groups that promote mainstream goals and ideas, on the other hand, privacy may not be all that important. Not only might their supporters feel agnostic about disclosing their association, they might actively seek to do so.

Given the indeterminacy of how disclosure requirements will impact associational rights, this Court requires plaintiffs to demonstrate that a requirement is likely to expose their supporters to concrete repercussions in order to establish an actual burden. It then applies a level of means-end tailoring proportional to that burden. The Court abandons that approach here, instead holding that narrow tailoring applies to disclosure requirements across the board, even if there is no evidence that they burden anyone at all.

A

Before today, to demonstrate that a reporting or disclosure requirement would chill association, litigants had to show "a reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." . . . Although the Court has never imposed an "unduly strict requirement of proof," it has consistently required at least some record evidence demonstrating a risk of such objective harms. . . .

Consistent with this approach, the Court has carefully scrutinized record evidence to determine whether a disclosure requirement actually risks exposing supporters to backlash. *See NAACP v. Alabama* (compelled disclosure of NAACP members "entailed the likelihood of a substantial restraint" on association in light of "an uncontroverted showing" that past disclosures exposed members "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"); *Bates v. Little Rock*, 361 U.S. 516 (1960) (compelled disclosure of NAACP membership "would work a significant interference with the freedom of association" based on "uncontroverted evidence" that past identification "had been followed by harassment and threats of bodily harm"); *Shelton* (disclosure of teachers' organizational affiliations impaired association because record evidence substantiated a "fear of public disclosure" and a "constant and heavy" pressure on teachers "to avoid any ties which might displease those who control their professional destinies"); *Buckley* ("any serious infringement" on associational rights caused by the compelled disclosure of contributors was "highly speculative" on the record before the Court).

Hence, in *Doe v. Reed*, the Court rejected a facial challenge to the public disclosure of referenda signatories on the ground that the "typical referendum" concerned revenue, budget, and tax policies unlikely to incite threats or harassment. Any judge who has witnessed local fights over raising taxes, funding schools, building sewer systems, or rerouting roads can surely envisage signatories with reason to keep their support for such measures private. But in *Doe v. Reed*, such

subjective reasons did not suffice to establish a cognizable burden on associational rights.

Today, the Court abandons the requirement that plaintiffs demonstrate that they are chilled, much less that they are reasonably chilled. Instead, it presumes (contrary to the evidence, precedent, and common sense) that all disclosure requirements impose associational burdens. . . .

At best, then, a subjective preference for privacy . . . now subjects disclosure requirements to close scrutiny. Of course, all disclosure requires some loss of anonymity, and courts can always imagine that someone might, for some reason, prefer to keep their donations undisclosed. If such speculation is enough (and apparently it is), then all disclosure requirements *ipso facto* impose cognizable First Amendment burdens.

Indeed, the Court makes obvious its presumption that all disclosure requirements are burdensome by beginning its analysis of "burden" with an evaluation of means-end fit instead. "A reasonable assessment of the burdens imposed by disclosure," the Court explains, "should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring."

I disagree. A reasonable assessment of the burdens imposed by disclosure should begin by determining whether those burdens even exist. If a disclosure requirement imposes no burdens at all, then of course there are no "unnecessary" burdens. Likewise, if a disclosure requirement imposes no burden for the Court to remedy, there is no need for it to be closely scrutinized. By forgoing the requirement that plaintiffs adduce evidence of tangible burdens, such as increased vulnerability to harassment or reprisals, the Court gives itself license to substitute its own policy preferences for those of politically accountable actors.

B

All this would be less troubling if the Court still required means-end tailoring commensurate to the actual burden imposed. It does not. Instead, it adopts a new rule that every reporting or disclosure requirement be narrowly tailored.

1

Disclosure requirements burden associational rights only indirectly and only in certain contexts. For that reason, this Court has never necessarily demanded such requirements to be narrowly tailored. Rather, it has reserved such automatic tailoring for state action that "directly and immediately affects associational rights." *Boy Scouts of America v. Dale* (2000) [*infra* this chapter]. When it comes to reporting and disclosure requirements, the Court has instead employed a more flexible approach, which it has named "exacting scrutiny."

Exacting scrutiny requires two things: first, there must be "a substantial relation between the disclosure requirement and a sufficiently important government interest," and second, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*. Exacting scrutiny thus incorporates a degree of flexibility into the means-end analysis. The more serious the burden on First Amendment rights, the more compelling the government's interest must be, and the tighter must be the fit between that interest and the government's means of pursuing it. By contrast, a less substantial interest and looser fit will suffice where the burden on First Amendment rights is weaker (or nonexistent). In other words, to decide how closely tailored a

disclosure requirement must be, courts must ask an antecedent question: How much does the disclosure requirement actually burden the freedom to associate?

This approach reflects the longstanding principle that the requisite level of scrutiny should be commensurate to the burden a government action actually imposes on First Amendment rights.

Compare, for instance, the Court's approaches in *Shelton* and *Doe v. Reed*. At issue in *Shelton* was an Arkansas statute passed in 1958 that compelled all public school teachers, as a condition of employment, to submit annually a list of every organization to which they belonged or regularly contributed. The Court held that the disclosure requirement "comprehensively interfered with associational freedom," because record evidence demonstrated a significant risk that the information would be publicly disclosed, and such disclosure could lead to public pressure on school boards "to discharge teachers who belong to unpopular or minority organizations." . . . It is thus unsurprising that the Court found that Arkansas teachers would feel a "constant and heavy" pressure "to avoid any ties which might displease those who control their professional destinies." Because Arkansas's purpose (ensuring teachers' fitness) was "pursued by means that broadly stifle fundamental personal liberties," the Court demanded that Arkansas "more narrowly achieve" its interest.

Now consider this Court's approach in *Doe v. Reed*. *Reed* involved a facial challenge to a Washington law permitting the public disclosure of referendum petitions that included signatories' names and addresses. The Court found that Washington had a number of other mechanisms in place to pursue its stated interest in preventing fraudulent referendum signatures. . . . Publicly disclosing referendum signatories was thus a mere backstop, giving citizens the opportunity to catch the secretary's mistakes. Had Washington been required to achieve its interests narrowly, as in *Shelton*, it is unlikely the disclosure requirement would have survived.

In crucial contrast to *Shelton*, however, the *Doe v. Reed* Court found "scant evidence" that disclosure exposed signatories of typical referendums to "threats, harassment, or reprisals from either Government officials or private parties." Given the "modest burdens" imposed by the requirement, the Court required a correspondingly modest level of tailoring. Under that standard, the disclosure requirement passed muster, and the Court refused to facially strike it down.

The public disclosure regimes in both *Shelton* and *Doe v. Reed* served important government goals. Yet the Court's assessment of each differed considerably because the First Amendment burdens differed. This flexible approach is necessary because not all reporting and disclosure regimes burden associational rights in the same way.

2

The Court now departs from this nuanced approach in favor of a "one size fits all" test. Regardless of whether there is any risk of public disclosure, and no matter if the burdens on associational rights are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored.

The Court searches in vain to find a foothold for this new approach in precedent. The Court first seizes on *Shelton*'s statement that a governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." The Court could not have

cherry-picked a less helpful quote. By its own terms, *Shelton* held that an end must be "more narrowly achieved" only if the means "broadly stifle" First Amendment liberties, that is, only if the means impose a severe burden on associational rights.[5]

In any event, the Court need not read a few isolated sentences from that opinion to divine *Shelton*'s meaning. As described, see Part II-B-1, *supra*, the Court in *Shelton* concluded that a reasonable "fear of public disclosure" and an asymmetric power dynamic with hiring authorities would result in a "constant and heavy" pressure on teachers "to avoid any ties which might displease those who control their professional destinies." . . . The problem was not the breadth of the inquiry; it was the significant risk that teachers would face serious repercussions for their disclosed associations.

The Court next looks to *McCutcheon*, which addressed political contribution limits, not disclosure regimes. It is no surprise that the Court subjected the former to narrow tailoring, as *Buckley* had already held that contribution limits directly "impinge on protected associational freedoms." . . .

Neither *Shelton* nor *McCutcheon*, then, supports the idea that all disclosure requirements must be narrowly tailored. *McCutcheon* arose in the context of a direct limit on associational freedoms, while the law in *Shelton* "broadly stifled" associational rights. Ignoring these distinctions, the Court decides that it will indiscriminately require narrow tailoring for every single disclosure regime. The Court thus trades precision for blunt force, creating a significant risk that it will topple disclosure regimes that should be constitutional, and that, as in *Doe v. Reed*, promote important governmental interests.

III

A

Under a First Amendment analysis that is faithful to this Court's precedents, California's Schedule B requirement is constitutional. Begin with the burden it imposes on associational rights. Petitioners have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are made public. California's Schedule B regulation, however, is a nonpublic reporting requirement, and California has implemented security measures to ensure that Schedule B information remains confidential.[7]

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[5] The Court claims that "broadly stifle" refers "to the scope of challenged restrictions" rather than "the severity of any demonstrated burden." That reading ignores the verb "stifle" and its object, "fundamental personal liberties." The Court wishes the sentence said that a government interest "cannot be pursued by [broad] means." It does not. . . .

[7] Although in the Court's view, the actual risk of reprisals is apparently irrelevant, the Court notes that the District Court concluded that California's attorney general could not ensure the confidentiality of Schedule B information. But the Ninth Circuit held this finding to be clearly erroneous because the District Court rested its conclusion "solely on the state's past inability to ensure confidentiality." The District Court never explained why the current security measures were insufficient to protect donors' confidentiality. As the Ninth Circuit observed, "the changes the Attorney General has adopted since those breaches occurred" show that the "risk of inadvertent disclosure of any Schedule B information in the future is small, and the risk of inadvertent disclosure of the plaintiffs' Schedule B information in particular is smaller still."

Nor have petitioners shown that their donors, or any organization's donors, will face threats, harassment, or reprisals if their names remain in the hands of a few California state officials. The Court notes that, under *Shelton*, disclosure requirements can chill association even absent public disclosure. In *Shelton*, however, there was a serious concern that hiring authorities would punish teachers for their organizational affiliations. By contrast, the Court in no way suggests that California officials will use Schedule B information to retaliate against any organization's donors. If California's reporting requirement imposes any burden at all, it is at most a very slight one.

B

1

Given the modesty of the First Amendment burden, California may justify its Schedule B requirement with a correspondingly modest showing that the means achieve its ends. California easily meets this standard.

California collects Schedule Bs to facilitate supervision of charities that operate in the State. As the Court acknowledges, this is undoubtedly a significant governmental interest. . . .

The Schedule B reporting requirement is properly tailored to further California's efforts to police charitable fraud. The IRS Schedule B form requires organizations to disclose the names and addresses of their major donors, the total amount of their contributions, and whether the donation was cash or in-kind. If the gift is in-kind, Schedule B requires a description of the property and its fair market value. . . .

Schedule B and other parts of Form 990 help attorneys in the Charitable Trusts Section of the California Department of Justice . . . uncover whether an officer or director of a charity is engaged in self-dealing, or whether a charity has diverted donors' charitable contributions for improper use.

In sum, the evidence shows that California's confidential reporting requirement imposes trivial burdens on petitioners' associational rights and plays a meaningful role in Section attorneys' ability to identify and prosecute charities engaged in malfeasance. That is more than enough to satisfy the First Amendment here. . . .

IV

In a final coup de grâce, the Court concludes that California's reporting requirement is unconstitutional not just as applied to petitioners, but on its very face. "In the First Amendment context," such broad relief requires proof that the requirement is unconstitutional in "a substantial number of . . . applications . . ., judged in relation to the statute's plainly legitimate sweep." *Stevens*. "Facial challenges are disfavored for several reasons," prime among them because they "often rest on speculation." Speculation is all the Court has. The Court points to not a single piece of record evidence showing that California's reporting requirement will chill "a substantial number" of top donors from giving to their charities of choice. Yet it strikes the requirement down in every application. . . .

. . . Of course, it is always possible that an organization is inherently controversial or for an apparently innocuous organization to explode into controversy. The answer, however, is to ensure that confidentiality measures are sound or, in the case of public disclosures, to require a procedure for governments to address requests for exemptions in a timely manner. It is not to hamper all

government law enforcement efforts by forbidding confidential disclosures en masse.

Indeed, this Court has already rejected such an indiscriminate approach in the specific context of disclosure requirements. Just over a decade ago, in *Doe v. Reed*, petitioners demonstrated that their own supporters would face reprisal if their opposition to expanding domestic partnership laws became public. That evidence did not support a facial challenge to Washington's public disclosure law, however, because the "typical referendum petition concerned tax policy, revenue, budget, or other state law issues," and "there was no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case."

So too here. Many charitable organizations "concern relatively uncontroversial matters" and petitioners "have provided no reason to think that" confidential disclosure of donor information "would significantly chill the willingness of" most donors to give. Nor does the Court provide such a reason. It merely highlights threats that public disclosure would pose to these two petitioners' supporters. Those threats provide "scant evidence" of anything beyond "the specific harm" that petitioners' donors might experience were their Schedule B information publicly disclosed. . . .

How, then, can their facial challenge succeed? Only because the Court has decided, in a radical departure from precedent, that there no longer need be any evidence that a disclosure requirement is likely to cause an objective burden on First Amendment rights before it can be struck down.

* * *

Today's decision discards decades of First Amendment jurisprudence recognizing that reporting and disclosure requirements do not directly burden associational rights. There is no other explanation for the Court's conclusion that, first, plaintiffs do not need to show they are actually burdened by a disclosure requirement; second, every disclosure requirement demands narrow tailoring; and third, a facial challenge can succeed in the absence of any evidence a state law burdens the associational rights of a substantial proportion of affected individuals. . . .

With respect, I dissent.

Note: "Exacting" Scrutiny, Chill, and Americans for Prosperity

1. In *Americans for Prosperity* the Court identifies "exacting" scrutiny as the appropriate standard of review and distinguishes it from strict scrutiny. Based on this case, how does the practical application of "exacting" scrutiny differ from the application of strict scrutiny? Consider, in particular, the application of "strict" scrutiny in *Williams-Yulee v. Florida Bar* (2015) (*supra* Chapter 5).

2. Several opinions you have already encountered in this book have either applied or discussed "exacting scrutiny," including the majority opinions in *United States v. Alvarez* (2012) (*supra* Chapter 3) and *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) (*supra* Supplement Chapter 9). Chapter 11's discussion of campaign finance law will also feature prominent mentions of "exacting scrutiny." On the other hand, the majority opinions in both *Boos v. Barry* (1985) and *Texas v. Johnson* (1989) (both *supra* Chapter 7) apply "the most exacting scrutiny," a standard that is also mentioned in the *Alvarez* majority opinion and in Justice Kagan's concurrence in *Reed v. Gilbert* (2015) (*supra*

Chapter 5). Can you perceive a difference between "exacting scrutiny" and "the most exacting scrutiny"? How does "the most exacting" scrutiny standard relate to strict scrutiny?

3. In Part II-B-1 of the opinion, the plurality explicitly rejects a "least restrictive means" test. But in Part III-A (which speaks for the Court), the Court says that the government "must . . . demonstrate its need for universal production in light of *any less intrusive alternatives*." How does this differ from the test the plurality rejects?

4. Much of the difference between the majority and dissenting opinions in *Americans for Prosperity* focuses on whether challengers to disclosure laws should be required to show that compelled disclosure of their identities to the state would expose them to threats and other risks of harm before a court applies the heightened scrutiny the majority applies. Chief Justice Roberts' majority opinion states that "plaintiffs may be required to bear this evidentiary burden [of showing such exposure] where the challenged regime is narrowly tailored to an important government interest. Such a demanding showing is not required, however, where — as here — the disclosure law fails to satisfy these criteria." By contrast, Justice Sotomayor's dissent argues for more of a sliding scale:

> The more serious the burden on First Amendment rights, the more compelling the government's interest must be, and the tighter must be the fit between that interest and the government's means of pursuing it. By contrast, a less substantial interest and looser fit will suffice where the burden on First Amendment rights is weaker (or nonexistent). In other words, to decide how closely tailored a disclosure requirement must be, courts must ask an antecedent question: How much does the disclosure requirement actually burden the freedom to associate?

In essence, then, the dueling opinions disagree on the question of what should come first: applying the majority's heightened form of "exacting" scrutiny or requiring challengers to establish that the disclosure law burdens their associational rights. Who do you think has the more persuasive argument? In thinking about that question, what role is played by the idea that laws that "chill" protected expression raise serious First Amendment problems? What role does the Court's overbreadth doctrine play?

5. Chief Justice Roberts is known for favoring narrow incremental rulings that decide as little as possible. For example, two weeks before *Americans for Prosperity*, he wrote the Court opinion in *Fulton v. City of Philadelphia* [Note *infra* this Supplement Chapter 18], which Justice Alito described as so narrow that it "might as well be written on the dissolving paper sold in magic shops." But the opinion in *Americans for Prosperity* sweeps broadly — for example, striking down the regulation on its face rather than as applied. What accounts for this approach?

6. As the opinions in *Americans for Prosperity* make clear, the law governing compelled disclosure of expressive associational conduct relies heavily (though not exclusively) on the Court's election law and campaign finance jurisprudence. Chapter 11 considers the First Amendment limits on government attempts to regulate such conduct in the campaign context. Whether *Americans for Prosperity*'s more precise explanation of "exacting scrutiny" will impact campaign finance law presents an important question that will be taken up in Chapter 11.

Chapter 11
Campaign Finance

C. Disclosure Requirements

Page 610: ***insert before Part D:***

Note: Clarifying (and Strengthening?) "Exacting Scrutiny"

1. As the previous Note explained, in *Citizens United* and *Doe v. Reed*, the Court decided the constitutionality of election-related disclosure requirements by applying what it called "exacting scrutiny." In 2021, the Court considered a non-election-related disclosure requirement that added detail to what that scrutiny level requires.

2. In *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) (*supra* Chapter 10 Supplement), a six-justice majority struck down a California law that required charities soliciting funds in that state to submit to the state a copy of a federal tax form that revealed the identities of their major donors. The Court, speaking through Chief Justice Roberts, observed that the California law impacted First Amendment rights of association. Speaking only for a plurality of three justices, he concluded that it thus was subject to the same "exacting scrutiny" the Court had applied to election-related disclosure laws. (He also observed that those election-related cases, including *Citizens United*, had based their own embrace of "exacting scrutiny" on earlier non-election cases dating back to *NAACP v. Alabama* (1958) (*supra* Chapter 10).)

Speaking again for the six-justice majority, Chief Justice Roberts stated that "exacting scrutiny" requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." (quoting *Doe v. Reed*). He rejected one plaintiff's argument that the Court should engraft onto that standard a least-restrictive-means test. However, he also rejected California's argument that exacting scrutiny required nothing more than the "substantial relation" noted above. He wrote: "While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." Applying that requirement, the Court concluded that, despite the state's anti-fraud interests being substantial, the law did not satisfy the narrow tailoring requirement. For example, he noted that California had made little use of the required information to promote those interests. He concluded: "In reality, then, California's interest is less in investigating fraud and more in ease of administration."

3. The Court then proceeded to consider whether the law was the appropriate subject of a facial challenge, rather than simply a challenge to the law as applied to the plaintiffs. Speaking now for a five-justice majority, the Chief Justice concluded that a facial challenge was appropriate, because the law was overbroad. He wrote:

> The lack of tailoring to the State's investigative goals is categorical — present in every case — as is the weakness of the State's interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny.

4. Justice Thomas concurred only in part. Adhering to the view he had expressed in *Doe v. Reed*, he would have subjected the California law to strict, rather than exacting, scrutiny. He also questioned the general appropriateness of

overbreadth analysis and courts' practice of invalidating statutes on their face. He argued that such approaches exceeded the proper judicial role, even if, as a practical matter, the Court's opinion striking down California the law as applied to the plaintiffs would likely preclude the state from applying it to "a substantial number of entities." Justice Alito, joined by Justice Gorsuch, also concurred in part, to reserve the question whether strict or exacting scrutiny was appropriate since, in his view, the statute failed either standard.

5. Justice Sotomayor, joined by Justices Breyer and Kagan, dissented. She argued that "exacting scrutiny" is a "flexible approach" that allows courts to vary the scrutiny level they apply based on the extent of First Amendment injury a given disclosure requirement imposes. She argued that this approach is consistent with prior caselaw, including *Doe v. Reed*. She described that case as one in which the Court applied relatively deferential review to the plaintiffs' facial challenge to the petition signature disclosure law because it had initially determined that the law imposed only "modest burdens" on associational rights.

Justice Sotomayor also criticized the majority's decision to strike down the California law on its face, rather than as applied to the plaintiffs. She again relied on *Doe v. Reed* (a case she said the majority "barely mentioned"). She argued that in *Doe v. Reed* the Court rejected a facial challenge to the signature disclosure law, despite the associational burdens it imposed on the plaintiffs, because, in contrast to their particularized burden, most referendum signature disclosures did not impose such burdens. She argued that, similarly, the California law did not cause generally-applicable First Amendment injury, given most charitable contributors' lack of interest in anonymity.

6. Justice Sotomayor closed the introduction to her dissent with the following complaint:

> Today's analysis marks reporting and disclosure requirements with a bull's-eye. Regulated entities who wish to avoid their obligations can do so by vaguely waving toward First Amendment "privacy concerns." It does not matter if not a single individual risks experiencing a single reprisal from disclosure, or if the vast majority of those affected would happily comply. That is all irrelevant to the Court's determination that California's Schedule B requirement is facially unconstitutional.

What effect might *Americans for Prosperity* have on either campaign finance- or other election-related disclosure requirements? Do campaign-finance disclosure requirements further particularly important government interests that strengthen the argument for their constitutionality even when tested against a tougher "exacting scrutiny" standard?

7. When thinking about the previous question, consider the following descriptions of the contemporary disclosure landscape. Chief Justice Roberts' majority opinion in *Americans for Prosperity* said the following about California's charity disclosure requirements:

> The disclosure requirement "creates an unnecessary risk of chilling" in violation of the First Amendment, indiscriminately sweeping up the information of every major donor with reason to remain anonymous. The petitioners here, for example, introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence. Such risks

> are heightened in the 21st century and seem to grow with each passing year, as "anyone with access to a computer can compile a wealth of information about" anyone else, including such sensitive details as a person's home address or the school attended by his children. *Doe v. Reed* (Alito, J., concurring).

Compare that warning with Justice Kennedy's summation of the state of campaign finance law after his 2010 opinion in *Citizens United* (reprinted also at pages 609-10 of the casebook):

> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are " 'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

These two evaluations of disclosure laws have in common a focus on the way in which the Internet has made it easier to gain access to information — but not much else. Are they consistent with each other? *Americans for Prosperity* views access from the perspective of those about whom information is disclosed, while *Citizens United* adopts the perspective of those seeking information. Do those different contexts justify the different perspectives in the two passages above? Or is something else at work? Is the relevant difference that *Americans for Prosperity* was referring to individuals and *Citizens United* was referring to corporations? If so, what, if anything, would that distinction mean for the Court's decision to invalidate the California law on its face rather than only as applied to the plaintiffs?

Chapter 12
Beyond Regulation: The Government as Employer and Educator

A. First Amendment Rights of Government Employees

Page 625: ***insert before*** **Garcetti v. Ceballos*:***

Problem: A Border Patrol Facebook Group

During a period of heightened political tension over immigration enforcement policies, a journalist discovers that approximately 50 federal Border Patrol agents belong to a Facebook group that is dedicated, in the group's words, to "funny and serious discussion about work with the Border Patrol." Many postings, and comments to the postings, are troubling: they include real photos of immigrants injured or killed while trying to cross the border, coupled with captions such as "oh well" or "if he dies, he dies." Other postings include satirical doctored photos of politicians known to be critical of the Border Patrol, such as photos of congresswomen critical of the Patrol depicted as performing oral sex on persons clearly understood to be migrants. The Facebook group is private — that is, it can only be seen by members, and others can join it only if they are given a password by a member. The journalist discovered the group when a member disclosed the password to a fellow Border Patrol agent, who, appalled by the content, contacted the journalist and provided the password information.

The publicizing of this group's existence causes a furor. The Border Patrol leadership pledges to investigate. When it identifies current members of the Patrol that are members of the group, and others that both are members and have posted some of the content described above, it begins disciplinary proceedings against them.

James Heald is a Border Patrol agent who is a member of and has actively posted on the group. When he is notified that he is the subject of a disciplinary action, he sues, alleging a violation of his First Amendment rights.

Does Heald have a good First Amendment claim? Why or why not?

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?

B. The First Amendment in the Public Schools

Page 660: ***insert before the Problem:***

Mahanoy Area School Dist. v. B.L.

141 S. Ct. 2038 (2021)

JUSTICE BREYER delivered the opinion of the Court.

A public high school student used, and transmitted to her Snapchat friends, vulgar language and gestures criticizing both the school and the school's cheerleading team. The student's speech took place outside of school hours and away from the school's campus. In response, the school suspended the student for a year from the cheerleading team. We must decide whether the Court of Appeals for the Third Circuit correctly held that the school's decision violated the First Amendment. Although we do not agree with the reasoning of the Third Circuit panel's majority, we do agree with its conclusion that the school's disciplinary action violated the First Amendment.

I

A

B.L. (who, together with her parents, is a respondent in this case) was a student at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania. At the end of her freshman year, B.L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team. B.L. did not accept the coach's decision with good grace, particularly because the squad coaches had placed an entering freshman on the varsity team.

That weekend, B.L. and a friend visited the Cocoa Hut, a local convenience store. There, B.L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B.L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group (B.L. had about 250 "friends") to view the images for a 24 hour period.

The first image B.L. posted showed B.L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." The second image was blank but for a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji.

B.L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B.L.'s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (who was a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about B.L.'s posts. Questions about the posts persisted during an Algebra class taught by one of the two coaches.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B.L. from the junior varsity cheerleading squad for the upcoming year. B.L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B.L.'s suspension from the team. In response, B.L., together with her parents, filed this lawsuit in Federal District Court.

B

The District Court found in B.L.'s favor. . . . [T]he District Court found that B.L.'s Snapchats had not caused substantial disruption at the school. *Cf. Tinker v. Des Moines Independent Community School Dist.* (1969) [*supra* this chapter]. Consequently, the District Court declared that B.L.'s punishment violated the First Amendment, and it awarded B.L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record.

On appeal, a panel of the Third Circuit affirmed the District Court's conclusion. In so doing, the majority noted that this Court had previously held in *Tinker* that a public high school could not constitutionally prohibit a peaceful student

political demonstration consisting of "pure speech" on school property during the school day. [*Tinker*.] In reaching its conclusion in *Tinker*, this Court emphasized that there was no evidence the student protest would "substantially interfere with the work of the school or impinge upon the rights of other students." But the Court also said that: "[C]onduct by [a] student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."

Many courts have taken this statement as setting a standard — a standard that allows schools considerable freedom on campus to discipline students for conduct that the First Amendment might otherwise protect. But here, the panel majority held that this additional freedom did "not apply to off-campus speech," which it defined as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Because B.L.'s speech took place off campus, the panel concluded that the *Tinker* standard did not apply and the school consequently could not discipline B.L. for engaging in a form of pure speech.

A concurring member of the panel agreed with the majority's result but wrote that the school had not sufficiently justified disciplining B.L. because, whether the *Tinker* standard did or did not apply, B.L.'s speech was not substantially disruptive.

C

The school district filed a petition for certiorari in this Court, asking us to decide "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." We granted the petition.

II

We have made clear that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." *Tinker*. See also *Brown v. Entertainment Merchants Assn.* (2011) [*supra* Chapter 3] ("[M]inors are entitled to a significant measure of First Amendment protection"). But we have also made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) [Note *supra* this chapter]. One such characteristic, which we have stressed, is the fact that schools at times stand *in loco parentis*, *i.e.*, in the place of parents. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) [Note *supra* this chapter].

This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, see *id.*; (2) speech, uttered during a class trip, that promotes "illegal drug use," see *Morse v. Frederick* (2007) [*supra* this chapter]; and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper, see *Kuhlmeier*.

Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Even B.L. herself and the *amici* supporting her would redefine the Third Circuit's off-campus/on-campus distinction, treating as on campus: all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school email accounts or phones. And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B.L.'s proposed rule.

We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the Third Circuit majority's rule. That rule, basically, if not entirely, would deny the off-campus applicability of *Tinker*'s highly general statement about the nature of a school's special interests. Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

We can, however, mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.

First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.

III

Consider B.L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school — in a word or two, criticism of the rules of a community of which B.L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B.L.'s posts, while crude, did not amount to fighting words. *See Chaplinsky v. New Hampshire* (1942) [*supra* Chapter 2]. And while B.L. used vulgarity, her speech was not obscene as this Court has understood that term. *See Cohen v. California* (1971) [*supra* Chapter 3]. To the contrary, B.L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. *See id.*; *cf. Snyder v. Phelps* (2011) [*supra* Chapter 2] (First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate").

Consider too when, where, and how B.L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B.L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless (for reasons we have just explained) diminish the school's interest in punishing B.L.'s utterance.

But what about the school's interest, here primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches — at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that general interest into three parts.

First, we consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. The strength of this anti-vulgarity interest is weakened considerably by the fact that B.L. spoke outside the school on her own time. *See Morse* (clarifying that although a school can regulate a student's use of sexual innuendo in a speech given within the school, if the student "delivered the same speech in a public forum

outside the school context, it would have been protected"); *see also Fraser* (Brennan, J., concurring in judgment) (noting that if the student in *Fraser* "had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate").

B.L. spoke under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B.L.'s parents had delegated to school officials their own control of B.L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B.L.'s posts encompassed a message, an expression of B.L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B.L.'s interest in free expression.

Second, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. *Tinker*. Rather, the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B.L.'s Snapchats. But when one of B.L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking . . . about it," she responded simply, "No." As we said in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The alleged disturbance here does not meet *Tinker*'s demanding standard.

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale. One of the coaches testified that the school decided to suspend B.L., not because of any specific negative impact upon a particular member of the school community, but "based on the fact that there was negativity put out there that could impact students in the school." There is little else, however, that suggests any serious decline in team morale — to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have previously said, simple "undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression." *Tinker*.

It might be tempting to dismiss B.L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." *Cohen*.

* * *

Although we do not agree with the reasoning of the Third Circuit's panel majority, for the reasons expressed above, resembling those of the panel's concurring opinion, we nonetheless agree that the school violated B.L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, concurring.

I join the opinion of the Court but write separately to explain my understanding of the Court's decision and the framework within which I think cases like this should be analyzed. This is the first case in which we have considered the constitutionality of a public school's attempt to regulate true off-premises student speech, and therefore it is important that our opinion not be misunderstood.[2]

I

The Court holds — and I agree — that: the First Amendment permits public schools to regulate some student speech that does not occur on school premises during the regular school day; this authority is more limited than the authority that schools exercise with respect to on-premises speech; courts should be "skeptical" about the constitutionality of the regulation of off-premises speech; the doctrine of *in loco parentis* "rarely" applies to off-premises speech; public school students, like all other Americans, have the right to express "unpopular" ideas on public issues, even when those ideas are expressed in language that some find "inappropriate" or "hurtful"; public schools have the duty to teach students that freedom of speech, including unpopular speech, is essential to our form of self-government; the Mahanoy Area High School violated B.L.'s First Amendment rights when it punished her for the messages she posted on her own time while away from school premises; and the judgment of the Third Circuit must therefore be affirmed.

I also agree that it is not prudent for us to attempt at this time to "set forth a broad, highly general First Amendment rule" governing all off-premises speech. But in order to understand what the Court has held, it is helpful to consider the framework within which efforts to regulate off-premises speech should be analyzed.

II

I start with this threshold question: Why does the First Amendment ever allow the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school? As the Court recognized in *Tinker*, when a public school regulates student speech, it acts as an arm of the State in which it is located. Suppose that B.L. had been enrolled in a private school and did exactly what she did in this case — send out vulgar and derogatory messages that focused on her school's cheerleading squad. The Commonwealth of Pennsylvania would have had no legal basis to punish her and almost certainly would not have even tried. So why should her status as a public school student give the Commonwealth any greater authority to punish her speech?

Our cases involving the regulation of student speech have not directly addressed this question. . . . And in those cases, the Court appeared to take it for granted that "the special characteristics of the school environment" justified special rules. *Morse*; *Kuhlmeier*; *Tinker*.

Why the Court took this for granted is not hard to imagine. As a practical matter, it is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing

[2] All our other cases involving the free-speech rights of public school students concerned speech in school or in a school-sponsored event or publication. *See Fraser* (school assembly); *Kuhlmeier* (school newspaper); *Morse* (display of banner on street near school at school-sponsored event).

content-based restrictions in the classroom. In a math class, for example, the teacher can insist that students talk about math, not some other subject. . . . Practical necessity likewise dictates that teachers and school administrators have related authority with respect to other in-school activities like auditorium programs attended by a large audience. *See Fraser* ("A high school assembly . . . is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students").

Because no school could operate effectively if teachers and administrators lacked the authority to regulate in-school speech in these ways, the Court may have felt no need to specify the source of this authority or to explain how the special rules applicable to in-school student speech fit into our broader framework of free-speech case law. But when a public school regulates what students say or write when they are not on school grounds and are not participating in a school program, the school has the obligation to answer the question with which I began: Why should enrollment in a public school result in the diminution of a student's free-speech rights?

The only plausible answer that comes readily to mind is consent, either express or implied. The theory must be that by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights. . . .

When it comes to children, courts in this country have analyzed the issue of consent by adapting the common-law doctrine of *in loco parentis*. Under the common law, as Blackstone explained, "[a father could] delegate part of his parental authority . . . to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has *such a portion of the power of the parent* committed to his charge, [namely,] that of restraint and correction, *as may be necessary to answer the purposes for which he is employed*." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) (some emphasis added). . . .

If *in loco parentis* is transplanted from Blackstone's England to the 21st century United States, what it amounts to is simply a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform. Because public school students attend school for only part of the day and continue to live at home, the degree of authority conferred is obviously less than that delegated to the head of a late-18th century boarding school, but because public school students are taught outside the home, the authority conferred may be greater in at least some respects than that enjoyed by a tutor of Blackstone's time.

So how much authority to regulate speech do parents implicitly delegate when they enroll a child at a public school? The answer must be that parents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree — for example, by giving permission for a child to participate in an extracurricular activity or to go on a school trip.

III

I have already explained what this delegated authority means with respect to student speech during standard classroom instruction. And it is reasonable to infer that this authority extends to periods when students are in school but are not in class, for example, when they are walking in a hall, eating lunch, congregating outside before the school day starts, or waiting for a bus after school. . . . But even

when students are on school premises during regular school hours, they are not stripped of their free-speech rights. *Tinker* teaches that expression that does not interfere with a class (such as by straying from the topic, interrupting the teacher or other students, etc.) cannot be suppressed unless it "involves substantial disorder or invasion of the rights of others."

IV

A

A public school's regulation of off-premises student speech is a different matter. While the decision to enroll a student in a public school may be regarded as conferring the authority to regulate some off-premises speech (a subject I address below), enrollment cannot be treated as a complete transfer of parental authority over a student's speech. In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children. Parents do not implicitly relinquish all that authority when they send their children to a public school. As the Court notes, it would be far-fetched to suggest that enrollment implicitly confers the right to regulate what a child says or writes at all times of day and throughout the calendar year. . . . While the in-school restrictions discussed above are essential to the operation of a public school system, any argument in favor of expansive regulation of off-premises speech must contend with this fundamental free-speech principle.

B

The degree to which enrollment in a public school can be regarded as a delegation of authority over off-campus speech depends on the nature of the speech and the circumstances under which it occurs. I will not attempt to provide a complete taxonomy of off-premises speech, but relevant lower court cases tend to fall into a few basic groups. And with respect to speech in each of these groups, the question that courts must ask is whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question.

One category of off-premises student speech falls easily within the scope of the authority that parents implicitly or explicitly provide. This category includes speech that takes place during or as part of what amounts to a temporal or spatial extension of the regular school program, *e.g.*, online instruction at home, assigned essays or other homework, and transportation to and from school. Also included are statements made during other school activities in which students participate with their parents' consent, such as school trips, school sports and other extracurricular activities that may take place after regular school hours or off school premises, and after-school programs for students who would otherwise be without adult supervision during that time. Abusive speech that occurs while students are walking to and from school may also fall into this category on the theory that it is school attendance that puts students on that route and in the company of the fellow students who engage in the abuse. The imperatives that justify the regulation of student speech while in school — the need for orderly and effective instruction and student protection — apply more or less equally to these off-premises activities.

Most of the specific examples of off-premises speech that the Court mentions fall into this category.[16] The Court's broad statements about off-premises speech must be understood with this in mind.

At the other end of the spectrum, there is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection and the connection between student speech in this category and the ability of a public school to carry out its instructional program is tenuous.

If a school tried to regulate such speech, the most that it could claim is that offensive off-premises speech on important matters may cause controversy and recriminations among students and may thus disrupt instruction and good order on school premises. But it is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas that are "offensive or disagreeable." *Texas v. Johnson* (1989) [*supra* Chapter 7]. It is unreasonable to infer that parents who send a child to a public school thereby authorize the school to take away such a critical right.

To her credit, petitioner's attorney acknowledged this during oral argument. As she explained, even if such speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out; "that would be a heckler's veto."[17] . . . This is true even if the student's off-premises speech on a matter of public concern is intemperate and crude. . . .

Between these two extremes (*i.e.*, off-premises speech that is tantamount to on-campus speech and general statements made off premises on matters of public concern) lie the categories of off-premises student speech that appear to have given rise to the most litigation. A survey of lower court cases reveals several prominent categories. I will mention some of those categories, but like the Court, I do not attempt to set out the test to be used in judging the constitutionality of a public school's efforts to regulate such speech.

One group of cases involves perceived threats to school administrators, teachers, other staff members, or students. Laws that apply to everyone prohibit

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[16] Two other examples mentioned by the Court — "communications to school e-mail accounts or phones" and speech "on a school's website" — may fall into the same category if they concern school work. The Court also mentions "breaches of school security devices," but such breaches may be punishable regardless of whether the perpetrator is a student at the school. Another specific example provided by the Court is "all speech taking place over school laptops." I do not take this statement to apply under all circumstances to all student speech on such laptops. . . . In assessing the degree to which a school can regulate speech on a laptop that a school provides for student use outside school, it would be important to know the terms of the agreement under which the laptop was provided.

[17] Counsel [for the school] was asked [at oral argument] what a school could have done during the Vietnam War era if a student said, "[the] war is immoral, American soldiers are baby killers, I hope there are a lot of casualties so that people will rise up." Counsel agreed that "[e]ven if that would cause a disruption in the school," "the school couldn't do anything about it." In her words, "that would be a heckler's veto, no can do."

defined categories of threats,[18] but schools have claimed that their duties demand broader authority.[21]

Another common category involves speech that criticizes or derides school administrators, teachers, or other staff members.[22] Schools may assert that parents who send their children to a public school implicitly authorize the school to demand that the child exhibit the respect that is required for orderly and effective instruction, but parents surely do not relinquish their children's ability to complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence.

Perhaps the most difficult category involves criticism or hurtful remarks about other students.[23] Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech.

V

The present case does not fall into any of these categories. Instead, it simply involves criticism (albeit in a crude manner) of the school and an extracurricular activity. Unflattering speech about a school or one of its programs is different from speech that criticizes or derides particular individuals, and for the reasons detailed by the Court and by Judge Ambro in his separate opinion below, the school's

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[18] The First Amendment permits prohibitions of "true threats," which are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

[21] *See, e.g.*, *McNeil v. Sherwood School Dist. 88J*, 918 F.3d 700 (CA9 2019) (per curiam) (student created a "hit list" of students and drew graphic images of violence); *Wynar v. Douglas County School Dist.*, 728 F.3d 1062 (CA9 2013) (student spoke about committing a school shooting); *Wisniewski v. Board of Ed.*, 494 F.3d 34 (CA2 2007) (student sent a message depicting a pistol firing a bullet at his English teacher's head); *Porter v. Ascension Parish School Bd.*, 393 F.3d 6081 (CA5 2004) (student drew a picture showing his school under attack by a gasoline tanker, missile launcher, helicopter, and armed individuals); *Doe v. Pulaski County Special School Dist.*, 306 F.3d 616 (CA8 2002) (en banc) (student drafted letters expressing a desire to molest, rape, and murder his ex-girlfriend); *but see Conroy v. Lacey Twp. School Dist.*, 2020 WL 528896 (D NJ, Jan. 31, 2020) (two high school students posted photos on Snapchat showing them with legally purchased guns at a shooting range on a Saturday, which another student claimed made him " 'nervous to come to school' "). The cases cited in this footnote and footnotes 22–23 are listed to show types of claims addressed by the lower courts. I do not express any view about the correctness of the decisions.

[22] *See, e.g.*, *Doninger v. Niehoff*, 527 F.3d 41 (CA2 2008) (member of student council posted a message on her personal blog complaining about the administration and encouraging readers to call or e-mail the school to complain); *Evans v. Bayer*, 684 F. Supp. 2d 1365 (SD Fla. 2010) (student created a Facebook group "for students to voice their dislike" of their teacher).

[23] *See, e.g.*, *S.J.W. v. Lee's Summit R–7 School Dist.*, 696 F.3d 771 (CA8 2012) (high school juniors posted a variety of offensive, racist, sexually-explicit comments about particular female classmates); *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (CA4 2011) (student created an online discussion group accusing another student of having a sexually-transmitted disease); *Dunkley v. Board of Ed. of Greater Egg Harbor Regional High School Dist.*, 216 F. Supp. 3d 485 (NJ 2016) (student used an anonymous Twitter account to insult other students based on their appearances and athletic abilities).

justifications for punishing B.L.'s speech were weak. She sent the messages and image in question on her own time while at a local convenience store. They were transmitted via a medium that preserved the communication for only 24 hours, and she sent them to a select group of "friends." She did not send the messages to the school or to any administrator, teacher, or coach, and no member of the school staff would have even known about the messages if some of B.L.'s "friends" had not taken it upon themselves to spread the word.

The school did not claim that the messages caused any significant disruption of classes. The most it asserted along these lines was that they "upset" some students (including members of the cheerleading squad), caused students to ask some questions about the matter during an algebra class taught by a cheerleading coach, and put out "negativity . . . that could impact students in the school." The freedom of students to speak off-campus would not be worth much if it gave way in the face of such relatively minor complaints. Speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting, and the algebra teacher had the authority to quell in-class discussion of B.L.'s messages and demand that the students concentrate on the work of the class.

As for the messages' effect on the morale of the cheerleading squad, the coach of a team sport may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time, but it is self-evident that this authority has limits. (To take an obvious example, a coach could not discriminate against a student for blowing the whistle on serious misconduct.) And here, the school did not simply take B.L.'s messages into account in deciding whether her attitude would make her effective in doing what cheerleaders are primarily expected to do: encouraging vocal fan support at the events where they appear. Instead, the school imposed punishment: suspension for a year from the cheerleading squad despite B.L.'s apologies.

There is, finally, the matter of B.L.'s language. There are parents who would not have been pleased with B.L.'s language and gesture, but whatever B.L.'s parents thought about what she did, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity. And B.L.'s school does not claim that it possesses or makes any effort to exercise the authority to regulate the vocabulary and gestures of all its students 24 hours a day and 365 days a year.

There are more than 90,000 public school principals in this country and more than 13,000 separate school districts. The overwhelming majority of school administrators, teachers, and coaches are men and women who are deeply dedicated to the best interests of their students, but it is predictable that there will be occasions when some will get carried away, as did the school officials in the case at hand. If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.

JUSTICE THOMAS, dissenting.

B.L., a high school student, sent a profanity-laced message to hundreds of people, including classmates and teammates. The message included a picture of B.L. raising her middle finger and captioned "F*** school" and "f*** cheer." This message was juxtaposed with another, which explained that B.L. was frustrated that she failed to make the varsity cheerleading squad. The cheerleading coach responded by disciplining B.L.

The Court overrides that decision — without even mentioning the 150 years of history supporting the coach. Using broad brushstrokes, the majority outlines the scope of school authority. When students are on campus, the majority says, schools have authority *in loco parentis* — that is, as substitutes of parents — to discipline speech and conduct. Off campus, the authority of schools is somewhat less. At that level of generality, I agree. But the majority omits important detail. What authority does a school have when it operates *in loco parentis*? How much less authority do schools have over off-campus speech and conduct? And how does a court decide if speech is on or off campus?

Disregarding these important issues, the majority simply posits three vague considerations and reaches an outcome. A more searching review reveals that schools historically could discipline students in circumstances like those presented here. Because the majority does not attempt to explain why we should not apply this historical rule and does not attempt to tether its approach to anything stable, I respectfully dissent.

I

A

While the majority entirely ignores the relevant history, I would begin the assessment of the scope of free-speech rights incorporated against the States by looking to "what 'ordinary citizens' at the time of [the Fourteenth Amendment's] ratification would have understood" the right to encompass. *McDonald v. Chicago*, 561 U.S. 742 (2010) (Thomas, J., concurring in part and concurring in judgment). Cases and treatises from that era reveal that public schools retained substantial authority to discipline students. As I have previously explained, that authority was near plenary while students were at school. *See Morse* (concurring opinion). Authority also extended to when students were traveling to or from school. *See, e.g.*, *Lander v. Seaver*, 32 Vt. 114 (1859). And, although schools had less authority after a student returned home, it was well settled that they still could discipline students for off-campus speech or conduct that had a proximate tendency to harm the school environment.

Perhaps the most familiar example applying this rule is a case where a student, after returning home from school, used "disrespectful language" against a teacher — he called the teacher "old" — "in presence of the [teacher] and of some of his fellow pupils." [*Lander*.] The Vermont Supreme Court held that the teacher could discipline a student for this speech because the speech had "a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination." . . . Th[e *Lander*] rule was widespread. . . . A school can regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs.

B

If there is a good constitutional reason to depart from this historical rule, the majority and the parties fail to identify it. I would thus apply the rule. Assuming that B.L.'s speech occurred off campus, the purpose and effect of B.L.'s speech was "to degrade the [program and cheerleading staff]" in front of "other pupils," thus having "a direct and immediate tendency to . . . subvert the [cheerleading coach's] authority." *Id.* As a result, the coach had authority to discipline B.L.

Our modern doctrine is not to the contrary. "[T]he penalties imposed in this case were unrelated to any political viewpoint" or religious viewpoint. *Fraser*. And

although the majority sugar coats this speech as "criticism," it is well settled that schools can punish "vulgar" speech — at least when it occurs on campus, *e.g.*, *Fraser*.

The discipline here — a 1-year suspension from the team — may strike some as disproportionate. But that does not matter for our purposes. State courts have policed school disciplinary decisions for "reasonable[ness]." And disproportionate discipline "can be challenged by parents in the political process." *Morse* (THOMAS, J., concurring). But the majority and the parties provide no textual or historical evidence to suggest that federal courts generally can police the proportionality of school disciplinary decisions in the name of the First Amendment.

II

The majority declines to consider any of this history, instead favoring a few pragmatic guideposts. This is not the first time the Court has chosen intuition over history when it comes to student speech. The larger problem facing us today is that our student-speech cases are untethered from any textual or historical foundation. That failure leads the majority to miss much of the analysis relevant to these kinds of cases.

A

Consider the Court's longtime failure to grapple with the historical doctrine of *in loco parentis*. As I have previously explained, the Fourteenth Amendment was ratified against the background legal principle that publicly funded schools operated not as ordinary state actors, but as delegated substitutes of parents. This principle freed schools from the constraints the Fourteenth Amendment placed on other government actors. "[N]o one doubted the government's ability to educate and discipline children as private schools did," including "through strict discipline . . . for behavior the school considered disrespectful or wrong." "The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way." *Morse* (Thomas, J., concurring).

Plausible arguments can be raised in favor of departing from that historical doctrine. When the Fourteenth Amendment was ratified, just three jurisdictions had compulsory-education laws. One might argue that the delegation logic of *in loco parentis* applies only when delegation is voluntary. The Court, however, did not make that (or any other) argument against this historical doctrine. Instead, the Court simply abandoned the foundational rule without mentioning it. *See Tinker*. . . .

The majority does no better today. At least it acknowledges that schools act *in loco parentis* when students speak on campus. But the majority fails to address the historical contours of that doctrine, whether the doctrine applies to off-campus speech, or why the Court has abandoned it.

B

The Court's failure to explain itself in *Tinker* needlessly makes this case more difficult. Unlike *Tinker*, which involved a school's authority under a straightforward fact pattern, this case involves speech made in one location but capable of being received in countless others — an issue that has been aggravated exponentially by recent technological advances. The Court's decision not to create a solid foundation in *Tinker*, and now here not to consult the relevant history, predictably causes the majority to ignore relevant analysis.

First, the majority gives little apparent significance to B.L.'s decision to participate in an extracurricular activity. But the historical test suggests that authority of schools over off-campus speech may be greater when students

participate in extracurricular programs. The *Lander* test focuses on the effect of speech, not its location. So students like B.L. who are active in extracurricular programs have a greater potential, by virtue of their participation, to harm those programs. For example, a profanity-laced screed delivered on social media or at the mall has a much different effect on a football program when done by a regular student than when done by the captain of the football team. So, too, here.

Second, the majority fails to consider whether schools often will have more authority, not less, to discipline students who transmit speech through social media. Because off-campus speech made through social media can be received on campus (and can spread rapidly to countless people), it often will have a greater proximate tendency to harm the school environment than will an off-campus in-person conversation.

Third, and relatedly, the majority uncritically adopts the assumption that B.L.'s speech, in fact, was off campus. But, the location of her speech is a much trickier question than the majority acknowledges. Because speech travels, schools sometimes may be able to treat speech as on campus even though it originates off campus. Nobody doubts, for example, that a school has *in loco parentis* authority over a student (and can discipline him) when he passes out vulgar flyers on campus — even if he creates those flyers off campus. The same may be true in many contexts when social media speech is generated off campus but received on campus. . . . [W]here it is foreseeable and likely that speech will travel onto campus, a school has a stronger claim to treating the speech as on-campus speech.

Here, it makes sense to treat B.L.'s speech as off-campus speech. There is little evidence that B.L.'s speech was received on campus. The cheerleading coach, in fact, did not view B.L.'s speech. She viewed a copy of that speech (a screenshot) created by another student. But, the majority mentions none of this. It simply, and uncritically, assumes that B.L.'s speech was off campus. Because it creates a test untethered from history, it bypasses this relevant inquiry.

* * *

The Court transparently takes a common-law approach to today's decision. In effect, it states just one rule: Schools can regulate speech less often when that speech occurs off campus. It then identifies this case as an "example" and "leav[es] for future cases" the job of developing this new common-law doctrine. But the Court's foundation is untethered from anything stable, and courts (and schools) will almost certainly be at a loss as to what exactly the Court's opinion today means.

Perhaps there are good constitutional reasons to depart from the historical rule, and perhaps this Court and lower courts will identify and explain these reasons in the future. But because the Court does not do so today, and because it reaches the wrong result under the appropriate historical test, I respectfully dissent.

Note: Mahanoy*'s Unanswered Questions*

1. The majority and concurring opinions are remarkable for their acknowledgement that student speech questions turn heavily on fact and context. Recall the end of Justice Alito's opinion: "If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory." The majority opinion is similarly tentative in its refusal to state general rules. Are you satisfied by what those opinions say about First Amendment law?

When thinking about that last question, consider the cases Justice Alito mentions in footnotes 21-23 of his opinion. In thinking about the situations those cases present, what facts would you want to know before deciding whether the speech in each case was protected? Can you develop a more precise rule governing how those cases should be decided? What would you base that rule on?

2. If you had to explain the holding in *Mahanoy* to a meeting of school principals and superintendents, what would you say? What general advice would you give them when dealing with speech-related discipline issues?

3. The concept of *in loco parentis* — in English, "in the place of the parent" — plays a large role in the three opinions in *Mahanoy*. Justice Breyer's majority opinion characterizes it as "one" of "the special characteristics of the school environment," "which we have stressed" in determining the scope of school officials' authority to punish students for their speech. Justice Alito's concurrence seems to place even more weight on that concept. He argues that it is the way "courts in this country have analyzed the issue" of parents' consent to schools' exercise of authority over their children, with such consent serving as "the only plausible answer" to the question why schools might have authority over students' off-campus speech. His analysis turns heavily on determinations of what type of control parents would and would not likely have impliedly given schools to control their children's speech. Justice Thomas's dissent similarly relies heavily on the *in loco parentis* idea, arguing that, historically, that idea authorized significant school control over off-campus student speech.

Are you persuaded by Justice Alito's reliance on his estimations of what authority parents likely delegated, or failed to delegate, to school officials? How much weight does the majority opinion actually place on that concept, as opposed to more pragmatic concerns about the proper operation of schools? Do you agree with Justice Thomas that the *in loco parentis* idea must be applied, if it is going to be applied at all, by examining historical practice?

4. Toward the end of his opinion, Justice Alito makes the following statement when considering the schools' interests in disciplining the student:

> As for the messages' effect on the morale of the cheerleading squad, the coach of a team sport may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time, but it is self-evident that this authority has limits. (To take an obvious example, a coach could not discriminate against a student for blowing the whistle on serious misconduct.) And here, the school did not simply take B.L.'s messages into account in deciding whether her attitude would make her effective in doing what cheerleaders are primarily expected to do: encouraging vocal fan support at the events where they appear. Instead, the school imposed punishment: suspension for a year from the cheerleading squad despite B.L.'s apologies.

Does this mean that Justice Alito would have allowed the school to do the exact same thing it actually did if only it had explained its decision as based on its estimation of B.L.'s ability to "encourag[e] vocal fan support at the events where they appear"? Would he have allowed the school to warn her that such speech impaired her ability to be an effective cheerleader and that another similar outburst would cause her to be dropped or suspended from the team? Would the majority have allowed such actions by the school?

5. Both the majority and Justice Alito mention bullying speech, with Justice Alito saying the following: "Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech." Is he suggesting that a school rule prohibiting such speech would necessarily or likely be too vague to satisfy the requirements of the Court's First Amendment vagueness doctrine? How would you draft a rule that (1) would punish bullying speech that you think should be punished and that could be punished consistently with the First Amendment but (2) was sufficiently precise to avoid a vagueness challenge? In thinking about that question, consider the examples of bullying speech Justice Alito provides in Footnote 23 of his opinion.

6. Both the majority and Justice Alito also mention speech that occurs on school laptops, with the majority opinion citing B.L.'s recognition of schools' authority to punish such speech. What effects would such a rule have on students' speech rights?

7. Consider Justice Thomas's discussion of the off/on-campus distinction. He compares off-campus generated social media speech to the on-campus distribution of vulgar flyers that were created off-campus: in both cases, off-campus speech ends up being distributed on-campus. Are you persuaded by his analogy?

8. Justice Thomas's dissent relies heavily on *Lander v. Seaver*, 32 Vt. 114 (1859) as evidence of the original understanding that the First Amendment permitted school officials wide authority to punish off-campus speech. That case involved a student who, in the presence of other students, referred to his teacher as "old Jack Seaver" when he encountered him off school premises. In a footnote to his concurring opinion, Justice Alito described *Lander* as a case where "the Supreme Court of Vermont reversed the lower court's judgment for the teacher [in the student's assault and battery claim against the teacher] but opined that the teacher had the authority to punish the student's speech because of its effect on the operation of the school." Despite its seeming relevance to the original meaning question, Justice Alito continued:

> This decision is of negligible value for present purposes. It does not appear that any claim was raised under the state constitutional provision protecting freedom of speech. And even if flinty Vermont parents at the time in question could be understood to have implicitly delegated to the teacher the authority to whip their son for his off-premises speech, the same inference is wholly unrealistic today.

He also noted that "[a]t the time of the adoption of the First Amendment, public education was virtually unknown, and the Amendment did not apply to the States." This analysis led Justice Alito to argue that there was "no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech."

Are you persuaded by Justice Alito's attempt to diminish the force of *Lander* as evidence of "the original public meaning of the free-speech right protected by the First and Fourteenth Amendments"?

Problem: "Building Bridges" — Or Burning Them

Canola Valley County High School participates in a voluntary extracurricular program for American high school sophomores entitled "Building Bridges." This program involves sophomores taking the required World Cultures class selecting from a list of a participating high schools in foreign countries, and matches the American student with a student from that other school. Each participating student sends a letter to the foreign student explaining American culture and seeking information about the other student's culture. The school brochure discussing this program explains that it aims "to develop students' awareness of the interconnected world in which they will grow up." Even though the program is connected to students taking World Cultures, participation is voluntary and does not affect a student's grade in that class.

Ted Trager, a Canola Valley sophomore, selects a participating school from Guatemala. His letter to the Guatemalan student is short and to the point. He writes "Stay in your own country. We have a European culture and we don't want you to ruin it. Here's my question to you: Why is your culture so disgusting?"

When Ted reproduces the letter he wrote on his Facebook page, he is suspended from participating in athletics for one year. The school explained to his parents that "Ted has shown himself unable to comport himself in a way that brings honor and credit to Canola Valley High." The school is 25% Latino, and that when word of his letter was distributed via Ted's Facebook friends, several hallway shoving incidents occurred and two Latina students asked to be reassigned to a homeroom other than Ted's because they felt uncomfortable, before matters settled down after a few days. Ted and his parents challenge his athletics suspension on First Amendment grounds. The record shows that Ted wrote and printed the letter out on his home computer, used his own money to mail it, and used his own computer to post it to his Facebook page.

What other facts, if any, would you want to know before deciding whether Ted's lawsuit would succeed? Based on the facts provided, how do you think the case should come out?

Chapter 15
Testing the Boundaries of Doctrine

B. Government Programs and Offensive Speech

Page 772: ***insert before Part C:***

The "disparagement" provision of the federal trademark statute, struck down in *Matal*, is not the only restriction on the eligibility of a trademark for federal registration. Two years after *Matal*, the Court confronted the statute's prohibition on the registration of any "immoral" or "scandalous" trademark. The Court struck down that provision as well.

Iancu v. Brunetti
139 S. Ct. 2294 (2019)

JUSTICE KAGAN delivered the opinion of the Court.

Two Terms ago, in *Matal v. Tam* (2017) [Chapter 15] this Court invalidated the Lanham Act's bar on the registration of "disparaging" trademarks. Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of "immoral or scandalous" trademarks. We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

I

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing's brand name) is pronounced as four letters, one after the other: F-U-C-T. But you might read it differently and, if so, you would hardly be alone. That common perception caused difficulties for Brunetti when he tried to register his mark with the U.S. Patent and Trademark Office (PTO).

Under the Lanham Act, the PTO administers a federal registration system for trademarks. . . . This case involves another of the Lanham Act's prohibitions on registration — one applying to marks that "consist of or comprise immoral or scandalous matter." . . . To determine whether a mark fits in the category, the PTO asks whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation"; "disgraceful"; "offensive"; "disreputable"; or "vulgar."

Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board decided that Brunetti's mark flunked that test. Brunetti then brought a facial challenge to the "immoral or scandalous" bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. As usual when a lower court has invalidated a federal statute, we granted certiorari.

II

This Court first considered a First Amendment challenge to a trademark registration restriction in *Tam*, just two Terms ago. There, the Court declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person, living or dead." The eight-Justice Court divided evenly between two

opinions and could not agree on the overall framework for deciding the case. (In particular, no majority emerged to resolve whether a Lanham Act bar is a condition on a government benefit or a simple restriction on speech.) But all the Justices agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. And second, the disparagement bar was viewpoint-based.

The Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys. In Justice Kennedy's explanation, the disparagement bar allowed a trademark owner to register a mark if it was "positive" about a person, but not if it was "derogatory." That was the "essence of viewpoint discrimination," he continued, because "the law thus reflects the Government's disapproval of a subset of messages it finds offensive." Justice Alito emphasized that the statute "denied registration to any mark" whose disparaging message was "offensive to a substantial percentage of the members of any group." The bar thus violated the "bedrock First Amendment principle" that the government cannot discriminate against "ideas that offend." Slightly different explanations, then, but a shared conclusion: Viewpoint discrimination doomed the disparagement bar.

If the "immoral or scandalous" bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine. The Government does not argue otherwise. . . . So the key question becomes: Is the "immoral or scandalous" criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based. The meanings of "immoral" and "scandalous" are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material "immoral"? According to a standard definition, when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1246 (2d ed. 1949). Or again, when it is "opposed to or violating morality"; or "morally evil." SHORTER OXFORD ENGLISH DICTIONARY 961 (3d ed. 1947). So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material "scandalous"? Says a typical definition, when it "gives offense to the conscience or moral feelings"; "excites reprobation"; or "calls out condemnation." WEBSTER'S NEW INTERNATIONAL DICTIONARY, at 2229. Or again, when it is "shocking to the sense of truth, decency, or propriety"; "disgraceful"; "offensive"; or "disreputable." FUNK & WAGNALLS NEW STANDARD DICTIONARY 2186 (1944). So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. "Love rules"? "Always be good"? Registration follows. "Hate rules"? "Always be cruel"? Not according to the Lanham Act's "immoral or scandalous" bar.

The facial viewpoint bias in the law results in viewpoint-discriminatory application. . . . The PTO, for example, asks whether the public would view the mark as "shocking to the sense of truth, decency, or propriety"; "calling out for condemnation"; "offensive"; or "disreputable." Using those guideposts, the PTO has refused to register marks communicating "immoral" or "scandalous" views about (among other things) drug use, religion, and terrorism. But all the while, it has

approved registration of marks expressing more accepted views on the same topics. [Justice Kagan then provided several examples of PTO decisions that granted or denied trademark applications based on criteria such as offensiveness.]

How, then, can the Government claim that the "immoral or scandalous" bar is viewpoint-neutral? . . . At oral argument, the Government conceded: "If you just looked at the words like 'shocking' and 'offensive' on their face and gave them their ordinary meanings, they could easily encompass material that was shocking [or offensive] because it expressed an outrageous point of view or a point of view that most members" of society reject. But no matter, says the Government, because the statute is "susceptible of" a limiting construction that would remove this viewpoint bias. The Government's idea, abstractly phrased, is to narrow the statutory bar to "marks that are offensive or shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express." More concretely, the Government explains that this reinterpretation would mostly restrict the PTO to refusing marks that are "vulgar" — meaning "lewd," "sexually explicit or profane." Such a reconfigured bar, the Government says, would not turn on viewpoint, and so we could uphold it.

But we cannot accept the Government's proposal, because the statute says something markedly different. This Court, of course, may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." But that canon of construction applies only when ambiguity exists. "We will not rewrite a law to conform it to constitutional requirements." *United States v. Stevens* (2010) [Chapter 3]. So even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The "immoral or scandalous" bar stretches far beyond the Government's proposed construction. . . . To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one.[*]

And once the "immoral or scandalous" bar is interpreted fairly, it must be invalidated. The Government just barely argues otherwise. In the last paragraph of its brief, the Government gestures toward the idea that the provision is salvageable by virtue of its constitutionally permissible applications (in the Government's view, its applications to lewd, sexually explicit, or profane marks). In other words, the Government invokes our First Amendment overbreadth doctrine, and asks us to uphold the statute against facial attack because its unconstitutional applications are not "substantial" relative to "the statute's plainly legitimate sweep." *Stevens*. But to begin with, this Court has never applied that kind of analysis to a viewpoint-discriminatory law. In *Tam*, for example, we did not pause to consider whether the disparagement clause might admit some permissible applications (say, to certain libelous speech) before striking it down. The Court's finding of viewpoint bias ended the matter. And similarly, it seems unlikely we would compare permissible and impermissible applications if Congress outright banned "offensive" (or to use some other examples, "divisive" or "subversive") speech. Once we have found that a law "aims at the suppression of" views, why would it matter that Congress could have captured some of the same speech through a viewpoint-neutral statute? But in any event, the "immoral or scandalous" bar is substantially overbroad. There are a great many immoral and scandalous ideas in the world (even more than there are

[*] We reject the dissent's statutory surgery for the same reason. . . .

swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.

We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE ALITO, concurring.

For the reasons explained in the opinion of the Court, the provision of the Lanham Act at issue in this case violates the Free Speech Clause of the First Amendment because it discriminates on the basis of viewpoint and cannot be fixed without rewriting the statute. Viewpoint discrimination is poison to a free society. But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination. We reaffirm that principle today.

Our decision is not based on moral relativism but on the recognition that a law banning speech deemed by government officials to be "immoral" or "scandalous" can easily be exploited for illegitimate ends. Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture. But we are not legislators and cannot substitute a new statute for the one now in force.

CHIEF JUSTICE ROBERTS, concurring in part and dissenting in part.

. . . I agree with the majority that the "immoral" portion of the provision is not susceptible of a narrowing construction that would eliminate its viewpoint bias. As Justice Sotomayor explains, however, the "scandalous" portion of the provision is susceptible of such a narrowing construction. Standing alone, the term "scandalous" need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression — marks that are obscene, vulgar, or profane. That is how the PTO now understands the term, in light of our decision in *Tam*. I agree with Justice Sotomayor that such a narrowing construction is appropriate in this context.

I also agree that, regardless of how exactly the trademark registration system is best conceived under our precedents — a question we left open in *Tam* — refusing registration to obscene, vulgar, or profane marks does not offend the First Amendment. Whether such marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished. The owners of such marks are merely denied certain additional benefits associated with federal trademark registration. The Government, meanwhile, has an interest in not associating itself with trademarks whose content is obscene, vulgar, or profane. The First Amendment protects the freedom of speech; it does not require the Government to give aid and comfort to those using obscene, vulgar, and profane modes of expression. For those reasons, I concur in part and dissent in part.

JUSTICE BREYER, concurring in part and dissenting in part.

Our precedents warn us against interpreting statutes in ways that would likely render them unconstitutional. Following these precedents, I agree with Justice Sotomayor that, for the reasons she gives, we should interpret the word "scandalous" in the present statute to refer only to certain highly "vulgar" or "obscene" modes of expression.

The question, then, is whether the First Amendment permits the Government to rely on this statute, as narrowly construed, to deny the benefits of federal trademark registration to marks like the one at issue here, which involves the use of the term "FUCT" in connection with a clothing line that includes apparel for children and infants. Like Justice Sotomayor, I believe the answer is "yes," though my reasons differ slightly from hers.

I

A

In my view, a category-based approach to the First Amendment cannot adequately resolve the problem before us. I would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of "viewpoint discrimination," "content discrimination," "commercial speech," "government speech," or the like. Rather, as I have written before, I believe we would do better to treat this Court's speech-related categories not as outcome-determinative rules, but instead as rules of thumb. *Reed v. Town of Gilbert* (2015) (opinion concurring in the judgment) [Chapter 5].

After all, these rules are not absolute. The First Amendment is not the Tax Code. Indeed, even when we consider a regulation that is ostensibly "viewpoint discriminatory" or that is subject to "strict scrutiny," we sometimes find the regulation to be constitutional after weighing the competing interests involved. *See, e.g.*, *Morse v. Frederick* (2007) ("Schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use") [Chapter 12]; *Williams-Yulee v. Florida Bar* (2015) (explaining that although " 'it is the rare case' " when a statute satisfies strict scrutiny, "those cases do arise.") [Chapter 5].

Unfortunately, the Court has sometimes applied these rules — especially the category of "content discrimination" — too rigidly. In a number of cases, the Court has struck down what I believe are ordinary, valid regulations that pose little or no threat to the speech interests that the First Amendment protects. *See Janus v. State, County, and Municipal Employees* (2018) (Kagan, J., dissenting) [Supplement Chapter 9]; *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (Breyer, J., dissenting) [Chapter 3 Note]; *see generally Reed* (opinion of Breyer, J.).

Rather than deducing the answers to First Amendment questions strictly from categories, as the Court often does, I would appeal more often and more directly to the values the First Amendment seeks to protect. As I have previously written, I would ask whether the regulation at issue "works speech-related harm that is out of proportion to its justifications." *United States v. Alvarez* (2012) (opinion concurring in judgment) [Chapter 3]; *see Reed* (opinion concurring in judgment) (discussing the matter further, particularly in respect to the category of content discrimination).

B

This case illustrates the limits of relying on rigid First Amendment categories, for the statute at issue does not fit easily into any of these categories.

The Court has not decided whether the trademark statute is simply a method of regulating pure "commercial speech." *See Tam* (2017) (opinion of Alito, J.); *id.* (opinion of Kennedy, J.) (same). There may be reasons for doubt on that score. Trademarks, after all, have an expressive component in addition to a commercial one, and the statute does not bar anyone from speaking. . . .

The trademark statute cannot easily be described as a regulation of "government speech," either. *Tam*. The Government, however, may be loosely associated with the mark because it registers the mark and confers certain benefits upon the owner.

What about the concept of a "public forum"? Trademark registration has little in common with a traditional public forum, as the register of trademarks is not a public park, a street, or a similar forum for public debate. But one can find some vague resemblance between trademark registration and what this Court refers to as a "limited public forum" created by the government for private speech. The trademark registration system also bears some resemblance to cases involving government subsidies for private speech, as such programs — like trademark registration — may grant a benefit to some forms of speech without prohibiting other forms of speech.

As for the concepts of "viewpoint discrimination" and "content discrimination," I agree with Justice Sotomayor that the boundaries between them may be difficult to discern. Even so, it is hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on "viewpoint." Of course, such words often evoke powerful emotions. Standing by themselves, however, these words do not typically convey any particular viewpoint. *See FCC v. Pacifica Foundation* (1978) (noting that the Government's regulation of vulgar words was based not on "point of view," but on "the way in which [speech] is expressed") [Chapter 3]. Moreover, while a restriction on the registration of highly vulgar words arguably places a content-based limit on trademark registration, it is hard to see why that label should be outcome-determinative here, for regulations governing trademark registration "inevitably involve content discrimination."

In short, the trademark statute does not clearly fit within any of the existing outcome-determinative categories. Why, then, should we rigidly adhere to these categories? Rather than puzzling over categorization, I believe we should focus on the interests the First Amendment protects and ask a more basic proportionality question: Does "the regulation at issue work harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives"? *Reed* (opinion of Breyer, J.).

II

Based on this proportionality analysis, I would conclude that the statute at issue here, as interpreted by Justice Sotomayor, does not violate the First Amendment.

How much harm to First Amendment interests does a bar on registering highly vulgar or obscene trademarks work? Not much. The statute leaves businesses free to use highly vulgar or obscene words on their products, and even to use such words directly next to other registered marks. Indeed, a business owner might even use a vulgar word as a trademark, provided that he or she is willing to forgo the benefits of registration.

Moreover, the field at issue here, trademark law, is a highly regulated one with a specialized mission: to "help consumers identify goods and services that they wish to purchase, as well as those they want to avoid." As I have noted, that mission, by its very nature, requires the Government to impose limitations on speech. Trademark law therefore forbids the registration of certain types of words — for example, those that will likely "cause confusion," or those that are "merely descriptive." For that reason, an applicant who seeks to register a mark should not expect complete freedom to say what she wishes, but should instead expect linguistic regulation.

Now consider, by way of contrast, the Government's interests in barring the registration of highly vulgar or obscene trademarks. For one thing, when the Government registers a mark, it is necessarily "involved in promoting" that mark. The Government has at least a reasonable interest in ensuring that it is not involved in promoting highly vulgar or obscene speech, and that it will not be associated with such speech.

For another, scientific evidence suggests that certain highly vulgar words have a physiological and emotional impact that makes them different in kind from most other words. . . . These attention-grabbing words, though financially valuable to some businesses that seek to attract interest in their products, threaten to distract consumers and disrupt commerce. And they may lead to the creation of public spaces that many will find repellant, perhaps on occasion creating the risk of verbal altercations or even physical confrontations. (Just think about how you might react if you saw someone wearing a t-shirt or using a product emblazoned with an odious racial epithet.) The Government thus has an interest in seeking to disincentivize the use of such words in commerce by denying the benefit of trademark registration. *Cf. Brandenburg v. Ohio* (1969) [Chapter 1] (permitting regulation of words "directed to inciting or producing imminent law-less action" and "likely to incite or produce such action").

Finally, although some consumers may be attracted to products labeled with highly vulgar or obscene words, others may believe that such words should not be displayed in public spaces where goods are sold and where children are likely to be present. . . . To that end, the Government may have an interest in protecting the sensibilities of children by barring the registration of such words.

The upshot of this analysis is that the narrowing construction articulated by Justice Sotomayor risks some harm to First Amendment interests, but not very much. And applying that interpretation seems a reasonable way — perhaps the only way — to further legitimate government interests. . . .

I would conclude that the prohibition on registering "scandalous" marks does not "work harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *Reed*. I would therefore uphold this part of the statute. I agree with the Court, however, that the bar on registering "immoral" marks violates the First Amendment. Because Justice Sotomayor reaches the same conclusions, using roughly similar reasoning, I join her opinion insofar as it is consistent with the views set forth here.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring in part and dissenting in part.

The Court's decision today will beget unfortunate results. With the Lanham Act's scandalous-marks provision struck down as unconstitutional viewpoint discrimination, the Government will have no statutory basis to refuse (and thus no

choice but to begin) registering marks containing the most vulgar, profane, or obscene words and images imaginable.

The coming rush to register such trademarks — and the Government's immediate powerlessness to say no — is eminently avoidable. Rather than read the relevant text as the majority does, it is equally possible to read that provision's bar on the registration of "scandalous" marks to address only obscenity, vulgarity, and profanity. Such a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system. I would apply that narrowing construction to the term "scandalous" and accordingly reject petitioner Erik Brunetti's facial challenge.

I

* * *

A

As the majority notes, there are dictionary definitions for both "immoral" and "scandalous" that do suggest a viewpoint-discriminatory meaning. And as for the word "immoral," I agree with the majority that there is no tenable way to read it that would ameliorate the problem. The word clearly connotes a preference for "rectitude and morality" over its opposite.

It is with regard to the word "scandalous" that I part ways with the majority. Unquestionably, "scandalous" can mean something similar to "immoral" and thus favor some viewpoints over others. But it does not have to be read that way. To say that a word or image is "scandalous" can instead mean that it is simply indecent, shocking, or generally offensive. That offensiveness could result from the views expressed, but it could also result from the way in which those views are expressed: using a manner of expression that is "shocking to [one's] sense of . . . decency" or "extremely offensive to the sense of . . . propriety."

The word "scandalous" on its own, then, is ambiguous: It can be read broadly (to cover both offensive ideas and offensive manners of expressing ideas), or it can be read narrowly (to cover only offensive modes of expression). That alone raises the possibility that a limiting construction might be appropriate. But the broader text confirms the reasonableness of the narrower reading, because the word "scandalous" appears in the statute alongside other words that can, and should, be read to constrain its scope.

* * *

What would it mean for "scandalous" in § 1052(a) to cover only offensive modes of expression? The most obvious ways — indeed, perhaps the only conceivable ways — in which a trademark can be expressed in a shocking or offensive manner are when the speaker employs obscenity, vulgarity, or profanity. Obscenity has long been defined by this Court's decision in *Miller v. California* (1973) [Chapter 2]. As for what constitutes "scandalous" vulgarity or profanity, I do not offer a list, but I do interpret the term to allow the PTO to restrict (and potentially promulgate guidance to clarify) the small group of lewd words or "swear" words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings. . . . Of course, "scandalous" offers its own limiting principle: if a word, though not exactly polite, cannot be said to be "scandalous" — *e.g.*, "shocking" or "extremely offensive," 8 CENTURY DICTIONARY 5374 — it is clearly not the kind of vulgarity or profanity that Congress intended to target.

Everyone can think of a small number of words (including the apparent homonym of Brunetti's mark) that would, however, plainly qualify.[5]

* * *

II

Adopting a narrow construction for the word "scandalous" — interpreting it to regulate only obscenity, vulgarity, and profanity — would save it from unconstitutionality. Properly narrowed, "scandalous" is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system.

A

Content discrimination occurs whenever a government regulates "particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert* (2015) [Chapter 5]; *see also Ward v. Rock Against Racism* (1989) [Chapter 6] ("Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech' "). Viewpoint discrimination is "an egregious form of content discrimination" in which "the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) [Notes Chapters 8, 13, and 19].

While the line between viewpoint-based and viewpoint-neutral content discrimination can be "slippery," it is in any event clear that a regulation is not viewpoint discriminatory (or even content discriminatory) simply because it has an "incidental effect" on a certain subset of views. *Ward*. Some people, for example, may have the viewpoint that society should be more sexually liberated and feel that they cannot express that view sufficiently without the use of pornographic words or images. That does not automatically make a restriction on pornography into viewpoint discrimination, despite the fact that such a restriction limits communicating one's views on sexual liberation in that way.

Restrictions on particular modes of expression do not inherently qualify as viewpoint discrimination; they are not by nature examples of "the government targeting . . . particular views taken by speakers on a subject." *Rosenberger*. For example, a ban on lighting fires in the town square does not facially violate the First Amendment simply because it makes it marginally harder for would-be flag-burners to express their views in that place. *See R.A.V. v. St. Paul* (1992) [*supra* this Chapter]. By the same token, "fighting words are categorically excluded from the protection of the First Amendment" not because they have no content or express no viewpoint (often quite the opposite), but because "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.*

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[5] There is at least one particularly egregious racial epithet that would fit this description as well. While *Matal v. Tam* removed a statutory basis to deny the registration of racial epithets in general, the Government represented at oral argument that it is holding in abeyance trademark applications that use that particular epithet. As a result of today's ruling, the Government will now presumably be compelled to register marks containing that epithet as well rather than treating it as a "scandalous" form of profanity under § 1052(a).

A restriction on trademarks featuring obscenity, vulgarity, or profanity is similarly viewpoint neutral, though it is naturally content-based.[6] Indeed, the statute that the Court upheld in *Chaplinsky v. New Hampshire* (1942) [Chapter 2] itself had been construed to cover, among other kinds of "disorderly words," "profanity, obscenity and threats," despite the fact that such words had been used in that case to communicate an expressive message. To treat a restriction on vulgarity, profanity, or obscenity as viewpoint discrimination would upend decades of precedent.

Brunetti invokes *Cohen v. California* (1971) [Chapter 3], to argue that the restriction at issue here is viewpoint discriminatory. But *Cohen* — which did not employ the precise taxonomy that is more common today — does not reach as far as Brunetti wants. *Cohen* arose in the criminal context: Cohen had been arrested and imprisoned under a California criminal statute targeting disturbances of the peace because he was "wearing a jacket bearing the words 'F[***] the Draft.' " The Court held that applying that statute to Cohen because of his jacket violated the First Amendment. But the Court did not suggest that the State had targeted Cohen to suppress his view itself (i.e., his sharp distaste for the draft), such that it would have accepted an equally colorful statement of praise for the draft (or hostility toward war protesters). Rather, the Court suggested that the State had simply engaged in what later courts would more precisely call viewpoint-neutral content discrimination — it had regulated "the form or content of individual expression."

Cohen also famously recognized that "words are often chosen as much for their emotive as their cognitive force," and that "one man's vulgarity is another's lyric." That is all consistent with observing that a plain, blanket restriction on profanity (regardless of the idea to which it is attached) is a viewpoint-neutral form of content discrimination. The essence of Cohen's discussion is that profanity can serve to tweak (or amplify) the viewpoint that a message expresses, such that it can be hard to disentangle the profanity from the underlying message — without the profanity, the message is not quite the same. But those statements merely reinforce that profanity is still properly understood as protected First Amendment content. *Cohen*'s discussion does not also go further to declare, as Brunetti suggests, that a provision that treats all instances of profanity equally is nevertheless by nature an instance of "the government targeting . . . particular views taken by speakers on a subject." To be sure, such a restriction could have the incidental effect of tamping down the overall volume of debate on all sides. But differential effects alone, as explained above, do not render a restriction viewpoint (or even content) discriminatory.

Cohen therefore does not resolve this case in Brunetti's favor. Yes, Brunetti has been, as Cohen was, subject to content discrimination, but that content discrimination is properly understood as viewpoint neutral. And whereas even viewpoint-neutral content discrimination is (in all but the most compelling cases, such as threats) impermissible in the context of a criminal prosecution like the one that Cohen faced, Brunetti is subject to such regulation only in the context of the federal trademark-registration system. I discuss next why that distinction matters.

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[6] Of course, obscenity itself is subject to a longstanding exception to First Amendment protection, so it is proscribable in any event. As for vulgarity and profanity, however, they are not subject to any such exception, and a regulation like § 1052(a)'s ban on the registration of scandalous marks is not " 'justified without reference to the content of the regulated speech' " in the way that a simple regulation of time, place, or manner is. *Ward*.

B

While the Court has often subjected even viewpoint-neutral content discrimination to strict constitutional scrutiny, *see, e.g.*, *Reed*, there are contexts in which it does not. When that is the case, the difference between viewpoint-based and viewpoint-neutral content discrimination can be decisive. The federal trademark-registration system is such a context.

Rights to a trademark itself arise through use, not registration. Regardless of whether a trademark is registered, it can be used, owned, and enforced against would-be infringers. Trademark registration, meanwhile, confers several ancillary benefits on trademark-holders who meet Congress' specifications, including for example, additional protections against infringers. . . . Registration, in short, is a helpful system, but it is one that the Government is under no obligation to establish and that is collateral to the existence and use of trademarks themselves. There is no evidence that speech or commerce would be endangered if the Government were not to provide it at all.

When the Court has talked about governmental initiatives like this one before, it has usually used one of two general labels. In several cases, the Court has treated such initiatives as a limited public (or nonpublic) forum. *See, e.g.*, *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.* (1985) [Chapter 8] ("Combined Federal Campaign" literature enabling approved charitable organizations to solicit donations from federal employees). In other situations, the Court has discussed similar initiatives as government programs or subsidies. *See, e.g.*, *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) [Chapter 13 Note] (government program distributing funds to legal-services organizations). In each of these situations, a governmental body established an initiative that supported some forms of expression without restricting others. Some speakers were better off, but no speakers were worse off.

Regardless of the finer distinctions between these labels, reasonable, viewpoint-neutral content discrimination is generally permissible under either framework. Perhaps for that reason, the Court has often discussed the two frameworks as at least closely related. *See*, *e.g.*, *Velazquez* ("As this suit involves a subsidy, limited forum cases . . . may not be controlling in a strict sense, yet they do provide some instruction").

Whichever label one chooses here, the federal system of trademark registration fits: It is, in essence, an opportunity to include one's trademark on a list and thereby secure the ancillary benefits that come with registration. Just as in the limited-forum and government-program cases, some speakers benefit, but no speakers are harmed. Brunetti, for example, can use, own, and enforce his mark regardless of whether it has been registered. Whether he may register his mark can therefore turn on reasonable, viewpoint-neutral content regulations.

C

Prohibiting the registration of obscene, profane, or vulgar marks qualifies as reasonable, viewpoint-neutral, content-based regulation. Apart from any interest in regulating commerce itself, the Government has an interest in not promoting certain kinds of speech, whether because such speech could be perceived as suggesting governmental favoritism or simply because the Government does not wish to involve itself with that kind of speech. While "there is no evidence that the public associates the contents of trademarks with the Federal Government," *Tam*, registration nevertheless entails Government involvement in promoting a particular mark.

Registration requires the Government to publish the mark, as well as to take steps to combat international infringement. The Government has a reasonable interest in refraining from lending its ancillary support to marks that are obscene, vulgar, or profane. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) [Chapter 2 Note] ("Speech that is vulgar, offensive, and shocking is not entitled to absolute constitutional protection under all circumstances").

III

. . . In directing the PTO to deny the ancillary benefit of registration to trademarks featuring "scandalous" content, Congress used a word that is susceptible of different meanings. The majority's reading would render the provision unconstitutional; mine would save it. Under these circumstances, the Court ought to adopt the narrower construction, rather than permit a rush to register trademarks for even the most viscerally offensive words and images that one can imagine.[13]

That said, I emphasize that Brunetti's challenge is a facial one. That means that he must show that " 'a substantial number of [the scandalous-marks provision's] applications are unconstitutional, judged in relation to the [provision's] plainly legitimate sweep.' " With "scandalous" narrowed to reach only obscene, profane, and vulgar content, the provision would not be overly broad. Even so, hard cases would remain, and I would expect courts to take seriously as-applied challenges demonstrating a danger that the provision had been used to restrict speech based on the views expressed rather than the mode of expression.

Freedom of speech is a cornerstone of our society, and the First Amendment protects Brunetti's right to use words like the one at issue here. The Government need not, however, be forced to confer on Brunetti's trademark (and some more extreme) the ancillary benefit of trade-mark registration, when "scandalous" in § 1052(a) can reasonably be read to bar the registration of only those marks that are obscene, vulgar, or profane. Though I concur as to the unconstitutionality of the term "immoral" in § 1052(a), I respectfully dissent as to the term "scandalous" in the same statute and would instead uphold it under the narrow construction discussed here.

Note: Content-Neutrality, Viewpoint Neutrality, and "Government Programs"

1. At one level, the disagreement between the majority and Justice Sotomayor's dissent is a narrow one, centering on the susceptibility of the "scandalous" restriction to a limiting interpretation that would focus on whether the trademark's message was transmitted through a "scandalous" *mode* of communication — for example, communication via use of vulgarity. Why would such a limited interpretation of "scandalous" therefore be cured of any viewpoint discrimination? What is the constitutional difference between a "scandalous" trademark (as the majority understands that term — that is, as substantively scandalous) and a merely "vulgar" one that Chief Justice Roberts and Justices Alito, Breyer, and Sotomayor all suggest could be denied federal trademark registration? Is that suggestion by those justices consistent with *Cohen v. California* (1971) (Chapter 3)?

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[13] As noted above, I agree with the majority that § 1052(a)'s bar on the registration of "immoral" marks is unconstitutional viewpoint discrimination. I would simply sever that provision and uphold the bar on "scandalous" marks.

2. Justice Breyer argues that the federal trademark regime doesn't easily fit within traditional First Amendment concepts such as forum doctrine and commercial speech. Do you agree with him? If not, where do you think it fits? If you do, how do you think a court should analyze challenges to laws such as the ones at issue in *Matal* and *Brunetti*?

3. Justice Sotomayor recognizes that a restriction on trademarks featuring vulgarity or profanity is content-based, even though viewpoint neutral. She nevertheless argues that such content-based restriction is permissible in the trademark law, because she finds the federal trademark system analogous to "a limited public (or nonpublic) forum" (citing cases including *Rosenberger*) or a government program or subsidy (citing cases including *Cornelius*). Do you agree with her categorization?

4. Finally, consider a seemingly minor detail in Justice Sotomayor's dissent. When discussing *Cohen v. California*, she quotes the facts as the *Cohen* Court presented them (which it did by itself quoting the state court opinion). But she alters the quote. In *Cohen*, Justice Harlan wrote, quoting the state court, that the defendant was " 'wearing a jacket bearing the words "Fuck the Draft" . . . .' "

By contrast, Justice Sotomayor writes (quoting *Cohen*) that "Cohen had been arrested . . . because he was 'wearing a jacket bearing the words "F[***] the Draft." ' "

Why do you think Justice Sotomayor refrains from simply quoting *Cohen* (or, more precisely, Cohen's quotation from the state court opinion)? Is she simply being squeamish? Or is she perhaps trying to make a point about the communicative importance (or lack thereof) of the word she declines to spell out? How would making that point buttress her argument that the First Amendment permits the government to decline to register "scandalous" trademarks, if that term is understood to apply only to trademarks expressed in a scandalous *manner*? The majority refused to pass judgment on this understanding of the First Amendment, since it declined to interpret the word "scandalous" in that more limited way. Does Justice Sotomayor's treatment of the word in question influence your view about the constitutionality of this more limited understanding of "scandalous"? (For that matter, what about her reference in Footnote 5 of her opinion to "one particularly egregious racial epithet" — an epithet that she does not specify, let alone spell out?) If her treatment of those words influences your thinking on the First Amendment question, in which way does it push you?

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 or universal 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 Supreme 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 Supreme 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 885: ***omit*** **County of Allegheny v. Greater Pittsburgh ACLU.**

Page 921: ***insert new case after the case and before the Problem:***

American Legion et al. v. American Humanist Assn. et al.

588 U.S. __ (2019)

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-B, II-C, III, and IV, and an opinion with respect to Parts II-A and II-D, in which THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE KAVANAUGH join.

Since 1925, the Bladensburg Peace Cross (Cross) has stood as a tribute to 49 area soldiers who gave their lives in the First World War. Eighty-nine years after the dedication of the Cross, respondents filed this lawsuit, claiming that they are offended by the sight of the memorial on public land and that its presence there and the expenditure of public funds to maintain it violate the Establishment Clause of the First Amendment. To remedy this violation, they asked a federal court to order the relocation or demolition of the Cross or at least the removal of its arms. The Court of Appeals for the Fourth Circuit agreed that the memorial is unconstitutional and remanded for a determination of the proper remedy. We now reverse.

Although the cross has long been a preeminent Christian symbol, its use in the Bladensburg memorial has a special significance. After the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home, and the adoption of the cross as the Bladensburg

memorial must be viewed in that historical context. For nearly a century, the Bladensburg Cross has expressed the community's grief at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought. It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of "a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden v. Perry* (2005) [*supra* this chapter] (Breyer, J., concurring in judgment). And contrary to respondents' intimations, there is no evidence of discriminatory intent in the selection of the design of the memorial or the decision of a Maryland commission to maintain it. The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for so many years is fully consistent with that aim.

I

A

The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular.

A cross appears as part of many registered trademarks held by businesses and secular organizations, including Blue Cross Blue Shield, the Bayer Group, and some Johnson & Johnson products. Many of these marks relate to health care, and it is likely that the association of the cross with healing had a religious origin. But the current use of these marks is indisputably secular. The familiar symbol of the Red Cross — a red cross on a white background — shows how the meaning of a symbol that was originally religious can be transformed. The International Committee of the Red Cross (ICRC) selected that symbol in 1863 because it was thought to call to mind the flag of Switzerland, a country widely known for its neutrality. . . . Thus, the ICRC selected this symbol for an essentially secular reason, and the current secular message of the symbol is shown by its use today in nations with only tiny Christian populations. But the cross was originally chosen for the Swiss flag for religious reasons. So an image that began as an expression of faith was transformed.

The image used in the Bladensburg memorial — a plain Latin cross[6] — also took on new meaning after World War I. "During and immediately after the war, the army marked soldiers' graves with temporary wooden crosses or Stars of David" — a departure from the prior practice of marking graves in American military cemeteries with uniform rectangular slabs. G. PIEHLER, REMEMBERING WAR THE AMERICAN WAY 101 (1995). The vast majority of these grave markers consisted of crosses, and thus when Americans saw photographs of these cemeteries, what struck them were rows and rows of plain white crosses. As a result, the image of a simple white cross "developed into a 'central symbol' " of the conflict. *Id.* Contemporary literature, poetry, and art reflected this powerful imagery. *See* Brief for Veterans of

[6] The Latin form of the cross "has a longer upright than crossbar. The intersection of the two is usually such that the upper and the two horizontal arms are all of about equal length, but the lower arm is conspicuously longer." G. FERGUSON, SIGNS & SYMBOLS IN CHRISTIAN ART 294 (1954). *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1276 (1981) ("latin cross, n.": "a figure of a cross having a long upright shaft and a shorter crossbar traversing it above the middle").

Foreign Wars of the United States et al. as *Amici Curiae*. Perhaps most famously, John McCrae's poem, *In Flanders Fields*, began with these memorable lines:

> In Flanders fields the poppies blow
>
> Between the crosses, row on row.

In FLANDERS FIELDS AND OTHER POEMS 3 (G.P. Putnam's Sons ed. 1919). The poem was enormously popular. *See* P. FUSSELL, THE GREAT WAR AND MODERN MEMORY 248-49 (1975). . . . The image of "the crosses, row on row," stuck in people's minds, and even today for those who view World War I cemeteries in Europe, the image is arresting.

After the 1918 armistice, the War Department announced plans to replace the wooden crosses and Stars of David with uniform marble slabs like those previously used in American military cemeteries. But the public outcry against that proposal was swift and fierce. . . . When the American Battle Monuments Commission took over the project of designing the headstones, it responded to this public sentiment by opting to replace the wooden crosses and Stars of David with marble versions of those symbols. . . . This national debate and its outcome confirmed the cross's widespread resonance as a symbol of sacrifice in the war.

B

Recognition of the cross's symbolism extended to local communities across the country. In late 1918, residents of Prince George's County, Maryland, formed a committee for the purpose of erecting a memorial for the county's fallen soldiers. . . . Although we do not know precisely why the committee chose the cross, it is unsurprising that the committee — and many others commemorating World War I[10] — adopted a symbol so widely associated with that wrenching event. . . . The Cross was to stand at the terminus of another World War I memorial — the National Defense Highway, which connects Washington to Annapolis. The community gathered for a joint groundbreaking ceremony for both memorials on September 28, 1919. . . . By 1922, however, the committee had run out of funds, and progress on the Cross had stalled. The local post of the American Legion took over the project, and the monument was finished in 1925.

The completed monument is a 32-foot tall Latin cross that sits on a large pedestal. [A photograph of the monument is appended to the dissenting opinion.] The American Legion's emblem is displayed at its center, and the words "Valor," "Endurance," "Courage," and "Devotion" are inscribed at its base, one on each of the four faces. The pedestal also features a 9- by 2.5-foot bronze plaque explaining that the monument is "Dedicated to the heroes of Prince George's County, Maryland who lost their lives in the Great War for the liberty of the world." The plaque lists the names of 49 local men, both Black and White, who died in the war. It identifies the dates of American involvement, and quotes President Woodrow Wilson's request for a declaration of war: "The right is more precious than peace. We shall fight for

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[10] Other World War I memorials that incorporate the cross include the Argonne Cross and the Canadian Cross of Sacrifice in Arlington National Cemetery; the Wayside Cross in Towson, Maryland; the Wayside Cross in New Canaan, Connecticut; the Troop K Georgia Cavalry War Memorial Front in Augusta, Georgia; the Chestnut Hill and Mt. Airy World War Memorial in Philadelphia, Pennsylvania; and the Great War for Democracy Memorial in Waterbury, Connecticut.

the things we have always carried nearest our hearts. To such a task we dedicate our lives." . . .

Since its dedication, the Cross has served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day. Like the dedication itself, these events have typically included an invocation, a keynote speaker, and a benediction. Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park. These include a World War II Honor Scroll; a Pearl Harbor memorial; a Korea-Vietnam veterans memorial; a September 11 garden; a War of 1812 memorial; and two recently added 38-foot-tall markers depicting British and American soldiers in the Battle of Bladensburg. Because the Cross is located on a traffic island with limited space, the closest of these other monuments is about 200 feet away in a park across the road.

As the area around the Cross developed, the monument came to be at the center of a busy intersection. In 1961, the Maryland-National Capital Park and Planning Commission (Commission) acquired the Cross and the land on which it sits in order to preserve the monument and address traffic-safety concerns. The American Legion reserved the right to continue using the memorial to host a variety of ceremonies, including events in memory of departed veterans. Over the next five decades, the Commission spent approximately $117,000 to maintain and preserve the monument. In 2008, it budgeted an additional $100,000 for renovations and repairs to the Cross.[12]

C

In 2012, nearly 90 years after the Cross was dedicated and more than 50 years after the Commission acquired it, the American Humanist Association (AHA) lodged a complaint with the Commission. The complaint alleged that the Cross's presence on public land and the Commission's maintenance of the memorial violate the Establishment Clause of the First Amendment. The AHA, along with three residents of Washington, D.C., and Maryland, also sued the Commission in the District Court for the District of Maryland, making the same claim. The AHA sought declaratory and injunctive relief requiring "removal or demolition of the Cross, or removal of the arms from the Cross to form a non-religious slab or obelisk." The American Legion intervened to defend the Cross.

The District Court granted summary judgment for the Commission and the American Legion. The Cross, the District Court held, satisfies both the three-pronged test announced in *Lemon v. Kurtzman* (1971) [*supra* this chapter], and the analysis applied by Justice Breyer in upholding the Ten Commandments monument at issue in *Van Orden v. Perry* (2005). . . . A divided panel of the Court of Appeals for the Fourth Circuit reversed. The majority relied primarily on the *Lemon* test but also took cognizance of Justice Breyer's *Van Orden* concurrence. . . . The Commission and the American Legion each petitioned for *certiorari*. We granted the petitions and consolidated them for argument.

[12] Of the budgeted $100,000, the Commission had spent only $5,000 as of 2015. The Commission put off additional spending and repairs in light of this lawsuit.

II

A

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." While the concept of a formally established church is straightforward, pinning down the meaning of a "law respecting an establishment of religion" has proved to be a vexing problem. Prior to the Court's decision in *Everson v. Board of Ed. of Ewing* (1947) [*supra* this chapter], the Establishment Clause was applied only to the Federal Government, and few cases involving this provision came before the Court. After *Everson* recognized the incorporation of the Clause, however, the Court faced a steady stream of difficult and controversial Establishment Clause issues, ranging from Bible reading and prayer in the public schools, to Sunday closing laws, to state subsidies for church-related schools or the parents of students attending those schools. After grappling with such cases for more than 20 years, *Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking. That test, as noted, called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail. The Court later elaborated that the "effect[s]" of a challenged action should be assessed by asking whether a "reasonable observer" would conclude that the action constituted an "endorsement" of religion. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* [*supra* this chapter]; *id.* (O'Connor, J., concurring in part and concurring in judgment).

If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. . . . This pattern is a testament to the *Lemon* test's shortcomings. As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them. . . . The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars [omitted footnotes contain lengthy string citations for each of these groups].

For at least four reasons, the *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.

B

First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult. . . . Yet it would be inappropriate for courts to compel their removal or termination based on supposition.

Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply. . . . The existence of multiple purposes is not exclusive to longstanding monuments, symbols, or practices, but this phenomenon is more likely to occur in such cases. Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. As our society becomes more and more religiously diverse, a community

may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage.

Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, "the 'message' conveyed . . . may change over time." . . . With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity. The community may come to value them without necessarily embracing their religious roots. . . .

Fourth, when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive. . . .

These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.

C

The role of the cross in World War I memorials is illustrative of each of the four preceding considerations. Immediately following the war, "communities across America built memorials to commemorate those who had served the nation in the struggle to make the world safe for democracy." G. PIEHLER, THE AMERICAN MEMORY OF WAR. Although not all of these communities included a cross in their memorials, the cross had become a symbol closely linked to the war. "The First World War witnessed a dramatic change in . . . the symbols used to commemorate the service" of the fallen soldiers. *Id.* In the wake of the war, the United States adopted the cross as part of its military honors, establishing the Distinguished Service Cross and the Navy Cross in 1918 and 1919, respectively. And . . . the fallen soldiers' final resting places abroad were marked by white crosses or Stars of David. The solemn image of endless rows of white crosses became inextricably linked with and symbolic of the ultimate price paid by 116,000 soldiers. And this relationship between the cross and the war undoubtedly influenced the design of the many war memorials that sprang up across the Nation.

This is not to say that the cross's association with the war was the sole or dominant motivation for the inclusion of the symbol in every World War I memorial that features it. But today, it is all but impossible to tell whether that was so. The passage of time means that testimony from those actually involved in the decisionmaking process is generally unavailable, and attempting to uncover their motivations invites rampant speculation. And no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different reasons, such as the historic preservation and traffic-safety concerns the Commission has pressed here. In addition, the passage of time may have altered the area surrounding a monument in ways that change its meaning and provide new reasons for its preservation. Such changes are relevant here, since the Bladensburg Cross now sits at a busy traffic intersection, and numerous additional monuments are located nearby.

Even the AHA recognizes that there are instances in which a war memorial in the form of a cross is unobjectionable. The AHA is not offended by the sight of the Argonne Cross or the Canadian Cross of Sacrifice, both Latin crosses commemorating World War I that rest on public grounds in Arlington National Cemetery. The difference, according to the AHA, is that their location in a cemetery gives them a closer association with individual gravestones and interred soldiers. *See* Brief for Respondents; Tr. of Oral Arg. But a memorial's placement in a cemetery is not necessary to create such a connection. . . . Whether in a cemetery or a city park, a World War I cross remains a memorial to the fallen.

Similar reasoning applies to other memorials and monuments honoring important figures in our Nation's history. When faith was important to the person whose life is commemorated, it is natural to include a symbolic reference to faith in the design of the memorial. For example, many memorials for Dr. Martin Luther King, Jr., make reference to his faith. . . . National Statuary Hall in the Capitol honors a variety of religious figures . . . . These monuments honor men and women who have played an important role in the history of our country, and where religious symbols are included in the monuments, their presence acknowledges the centrality of faith to those whose lives are commemorated.

Finally, as World War I monuments have endured through the years and become a familiar part of the physical and cultural landscape, requiring their removal would not be viewed by many as a neutral act. . . . Thus, a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront. . . .

D

While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance. Our cases involving prayer before a legislative session are an example.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the Nebraska Legislature's practice of beginning each session with a prayer by an official chaplain, and in so holding, the Court conspicuously ignored *Lemon* and did not respond to Justice Brennan's argument in dissent that the legislature's practice could not satisfy the *Lemon* test. Instead, the Court found it highly persuasive that Congress for more than 200 years had opened its sessions with a prayer and that many state legislatures had followed suit. . . . In *Town of Greece v. Galloway* (2014) [*infra* this chapter], which concerned prayer before a town council meeting, there was disagreement about the inclusiveness of the town's practice. . . . But there was no disagreement that the Establishment Clause permits a nondiscriminatory practice of prayer at the beginning of a town council session. Of course, the specific practice challenged in *Town of Greece* lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment. But what mattered was that the town's practice "fit within the tradition long followed in Congress and the state legislatures." The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.

III

Applying these principles, we conclude that the Bladensburg Cross does not violate the Establishment Clause.

As we have explained, the Bladensburg Cross carries special significance in commemorating World War I. . . . Not only did the Bladensburg Cross begin with this meaning, but with the passage of time, it has acquired historical importance. . . . The Cross now stands among memorials to veterans of later wars. It has become part of the community. . . . Finally, it is surely relevant that the monument commemorates the death of particular individuals. It is natural and appropriate for those seeking to honor the deceased to invoke the symbols that signify what death meant for those who are memorialized. In some circumstances, the exclusion of any such recognition would make a memorial incomplete. This well explains why Holocaust memorials invariably include Stars of David or other symbols of Judaism. . . . And this is why the memorial for soldiers from the Bladensburg community features the cross — the same symbol that marks the graves of so many of their comrades near the battlefields where they fell.

IV

The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.

* * *

We reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the cases for further proceedings.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, concurring.

I have long maintained that there is no single formula for resolving Establishment Clause challenges. *See Van Orden v. Perry* (2005) [*supra* this chapter] (opinion concurring in judgment). The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its "separate sphere." *Id.*; *see also Zelman v. Simmons-Harris* (2002) [*supra* this chapter] (Breyer, J., dissenting).

I agree with the Court that allowing the State of Maryland to display and maintain the Peace Cross poses no threat to those ends. The Court's opinion eloquently explains why that is so . . . . The case would be different, in my view, if there were evidence that the organizers had "deliberately disrespected" members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I. But those are not the circumstances presented to us here, and I see no reason to order *this* cross torn down simply because *other* crosses would raise constitutional concerns.

Nor do I understand the Court's opinion today to adopt a "history and tradition test" that would permit any newly constructed religious memorial on public land. The Court appropriately "looks to history for guidance" (plurality opinion), but it upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place in the community (majority opinion). A newer memorial, erected under different circumstances, would not necessarily be permissible under this approach.

. . . In light of all the circumstances here, I agree with the Court that the Peace Cross poses no real threat to the values that the Establishment Clause serves.

JUSTICE KAVANAUGH, concurring.

I join the Court's eloquent and persuasive opinion in full. I write separately to emphasize two points.

I

Consistent with the Court's case law, the Court today applies a history and tradition test in examining and upholding the constitutionality of the Bladensburg Cross. *See Marsh v. Chambers* (1983); *Van Orden v. Perry* (2005) (plurality opinion); *Town of Greece v. Galloway* (2014). . . .

Today, the Court declines to apply *Lemon* in a case in the religious symbols and religious speech category, just as the Court declined to apply *Lemon* in *Town of Greece v. Galloway*, *Van Orden v. Perry*, and *Marsh v. Chambers*. The Court's decision in this case again makes clear that the *Lemon* test does not apply to Establishment Clause cases in that category. And the Court's decisions over the span of several decades demonstrate that the *Lemon* test is not good law and does not apply to [other categories of] Establishment Clause cases. . . .

On the contrary, each category of Establishment Clause cases has its own principles based on history, tradition, and precedent. And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.

The practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition. The Bladensburg Cross does not violate the Establishment Clause. *Cf. Town of Greece*.

II

. . . I agree with the Court that the Bladensburg Cross is constitutional. At the same time, I have deep respect for the plaintiffs' sincere objections to seeing the cross on public land. I have great respect for the Jewish war veterans who in an *amicus* brief say that the cross on public land sends a message of exclusion. I recognize their sense of distress and alienation. Moreover, I fully understand the deeply religious nature of the cross. It would demean both believers and nonbelievers to say that the cross is not religious, or not all that religious. A case like this is difficult because it represents a clash of genuine and important interests. Applying our precedents, we uphold the constitutionality of the cross. In doing so, it is appropriate to also restate this bedrock constitutional principle: All citizens are equally American, no matter what religion they are, or if they have no religion at all.

The conclusion that the cross does not violate the Establishment Clause does not necessarily mean that those who object to it have no other recourse. The Court's ruling *allows* the State to maintain the cross on public land. The Court's ruling does not *require* the State to maintain the cross on public land. The Maryland Legislature could enact new laws requiring removal of the cross or transfer of the land. The Maryland Governor or other state or local executive officers may have authority to do so under current Maryland law. And if not, the legislature could enact new laws to authorize such executive action. The Maryland Constitution, as interpreted by the Maryland Court of Appeals, may speak to this question. And if not, the people of Maryland can amend the State Constitution. Those alternative avenues of relief illustrate a fundamental feature of our constitutional structure: This Court is not the *only* guardian of individual rights in America. . . . Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution.

JUSTICE KAGAN, concurring in part.

I fully agree with the Court's reasons for allowing the Bladensburg Peace Cross to remain as it is, and so join Parts I, II-B, II-C, III, and IV of its opinion, as well as Justice Breyer's concurrence. Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere — as this very suit shows. I therefore do not join Part II-A. I do not join Part II-D out of perhaps an excess of caution. Although I too "look to history for guidance" (plurality opinion), I prefer at least for now to do so case-by-case, rather than to sign on to any broader statements about history's role in Establishment Clause analysis. But I find much to admire in this section of the opinion . . . . Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands.

JUSTICE THOMAS, concurring in the judgment.

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. CONST., Amdt. 1. The text and history of this Clause suggest that it should not be incorporated against the States. Even if the Clause expresses an individual right enforceable against the States, it is limited by its text to "law[s]" enacted by a legislature, so it is unclear whether the Bladensburg Cross would implicate any incorporated right. And even if it did, this religious display does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion. Therefore, the Cross is clearly constitutional.

I

[Here Justice Thomas repeated his previous critique of the precedents incorporating the Establishment Clause into the Due Process Clause of the Fourteenth Amendment and making it applicable to the states. *See* Note: The Incorporation Doctrine in Chapter 16.]

II

Even if the Clause applied to state and local governments in some fashion, "[t]he mere presence of the monument along [respondents'] path involves no coercion and thus does not violate the Establishment Clause." *Van Orden* (opinion of Thomas, J.). The *sine qua non* of an establishment of religion is " 'actual legal coercion.' " *Id.* At the founding, "[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial

support by force of law and threat of penalty." *Lee v. Weisman* (1992) [*supra* this chapter] (Scalia, J., dissenting). "In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church." *Town of Greece* (opinion of Thomas, J.). In an action claiming an unconstitutional establishment of religion, the plaintiff must demonstrate that he was actually coerced by government conduct that shares the characteristics of an establishment as understood at the founding.

Here, respondents briefly suggest that the government's spending their tax dollars on maintaining the Bladensburg Cross represents coercion, but they have not demonstrated that maintaining a religious display on public property shares any of the historical characteristics of an establishment of religion. The local commission has not attempted to control religious doctrine or personnel, compel religious observance, single out a particular religious denomination for exclusive state subsidization, or punish dissenting worship. Instead, the commission has done something that the founding generation, as well as the generation that ratified the Fourteenth Amendment, would have found commonplace: displaying a religious symbol on government property. *See* Brief for Becket Fund for Religious Liberty as *Amicus Curiae*. Lacking any characteristics of "the coercive state establishments that existed at the founding," the Bladensburg Cross is constitutional. . . .

III

As to the long-discredited test set forth in *Lemon v. Kurtzman* (1971), and reiterated in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* (1989), the plurality rightly rejects its relevance to claims, like this one, involving "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies." I agree with that aspect of its opinion. I would take the logical next step and overrule the *Lemon* test in all contexts. . . . It is our job to say what the law is, and because the *Lemon* test is not good law, we ought to say so.

* * *

Regrettably, I cannot join the Court's opinion because it does not adequately clarify the appropriate standard for Establishment Clause cases. Therefore, I concur only in the judgment.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in the judgment.

The American Humanist Association wants a federal court to order the destruction of a 94 year-old war memorial because its members are offended. Today, the Court explains that the plaintiffs are not entitled to demand the destruction of longstanding monuments, and I find much of its opinion compelling. In my judgment, however, it follows from the Court's analysis that suits like this one should be dismissed for lack of standing. Accordingly, while I concur in the judgment to reverse and remand the court of appeals' decision, I would do so with additional instructions to dismiss the case.

*

The Association claims that its members "regularly" come into "unwelcome direct contact" with a World War I memorial cross in Bladensburg, Maryland "while driving in the area." . . . This "offended observer" theory of standing has no basis in law. Federal courts may decide only those cases and controversies that the Constitution and Congress have authorized them to hear. And to establish standing

to sue consistent with the Constitution, a plaintiff must show: (1) injury-in-fact, (2) causation, and (3) redressability. The injury-in-fact test requires a plaintiff to prove "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). . . . [Here Justice Gorsuch discussed the case law of Article III standing, including some cases decided under the Religion Clauses.]

*

Offended observer standing cannot be squared with this Court's longstanding teachings about the limits of Article III. Not even today's dissent seriously attempts to defend it. So at this point you might wonder: How *did* the lower courts in this case indulge the plaintiffs' "offended observer" theory of standing? And why have other lower courts done similarly in other cases?

The truth is, the fault lies here. Lower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to this Court's decision in *Lemon v. Kurtzman* (1971). *Lemon* held that whether governmental action violates the Establishment Clause depends on its (1) purpose, (2) effect, and (3) potential to "excessively entangle" church and state, a standard this Court came to understand as prohibiting the government from doing anything that a " 'reasonable observer' " might perceive as "endorsing" religion, *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* (1989) (opinion of Blackmun, J.); *id.* (O'Connor, J., concurring in part and concurring in judgment). And lower courts reasoned that, if the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue. Here alone, lower courts concluded, though never with this Court's approval, an observer's offense must "suffice to make an Establishment Clause claim justiciable."

As today's plurality rightly indicates in Part II-A, however, *Lemon* was a misadventure. It sought a "grand unified theory" of the Establishment Clause but left us only a mess. *See ante* (plurality opinion). . . . Today, not a single Member of the Court even tries to defend *Lemon* against these criticisms — and they don't because they can't. . . .

In place of *Lemon*, Part II-D of the plurality opinion relies on a more modest, historically sensitive approach, recognizing that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Ante* (quoting *Town of Greece v. Galloway* (2014); *see also ante* (Kavanaugh, J., concurring). . . . The constitutionality of a practice doesn't depend on some artificial and indeterminate three-part test; what matters, the plurality reminds us, is whether the challenged practice fits " 'within the tradition' " of this country. *Ante*.

I agree with all this and don't doubt that the monument before us is constitutional in light of the nation's traditions. But then the plurality continues on to suggest that "longstanding monuments, symbols, and practices" are "presumptively" constitutional. *Ante*. And about that, it's hard not to wonder: How old must a monument, symbol, or practice be to qualify for this new presumption? It seems 94 years is enough, but what about the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust, or the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror? And where exactly in the Constitution does this presumption come from? The plurality does not say, nor does it even explain what work its presumption does.

To the contrary, the plurality proceeds to analyze the "presumptively" constitutional memorial in this case for its consistency with " 'historical practices and understandings' " — exactly the same approach that the plurality recognizes " 'must be' " used *whenever* we interpret the Establishment Clause. *Ante*; *see also ante* (Kavanaugh, J., concurring). Though the plurality does not say so in as many words, the message for our lower court colleagues seems unmistakable: Whether a monument, symbol, or practice is old or new, apply *Town of Greece*, not *Lemon*. Indeed, some of our colleagues recognize this implication and blanch at its prospect. *See ante* (Breyer, J., concurring); *ante* (Kagan, J., concurring in part) (declining to join Parts II-A & II-D); *post* (Ginsburg, J., dissenting). But if that's the real message of the plurality's opinion, it seems to me exactly right — because what matters when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles. The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago.

*

With *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close. Nor does this development mean colorable Establishment Clause violations will lack for proper plaintiffs. By way of example only, a public school student compelled to recite a prayer will still have standing to sue. *See School Dist. of Abington Township v. Schempp* (1963) [*supra* this chapter]. So will persons denied public office because of their religious affiliations or lack of them. And so will those who are denied government benefits because they do not practice a favored religion or any at all. On top of all that, States remain free to supply other forms of relief consistent with their own laws and constitutions.

Abandoning offended observer standing will mean only a return to the usual demands of Article III, requiring a real controversy with real impact on real persons to make a federal case out of it. Along the way, this will bring with it the welcome side effect of rescuing the federal judiciary from the sordid business of having to pass aesthetic judgment, one by one, on every public display in this country for its perceived capacity to give offense. It's a business that has consumed volumes of the federal reports, invited erratic results, frustrated generations of judges, and fomented "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry* (2005) [*supra* this chapter] (Breyer, J., concurring in judgment). Courts applying *Lemon*'s test have upheld Ten Commandment displays and demanded their removal; they have allowed memorial crosses and insisted that they be razed; they have permitted Christmas displays and pulled the plug on them; and they have pondered seemingly endlessly the inclusion of "In God We Trust" on currency or similar language in our Pledge of Allegiance. No one can predict the rulings — but one thing is certain: Between the challenged practices and the judicial decisions, just about everyone will wind up offended.

. . . In light of today's decision, we should be done with this business, and our lower court colleagues may dispose of cases like these on a motion to dismiss rather than enmeshing themselves for years in intractable disputes sure to generate more heat than light.

*

In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends *somebody*. No doubt, too, that offense can be

sincere, sometimes well taken, even wise. But recourse for disagreement and offense does not lie in federal litigation. Instead, in a society that holds among its most cherished ambitions mutual respect, tolerance, self-rule, and democratic responsibility, an "offended viewer" may "avert his eyes," or pursue a political solution. Today's decision represents a welcome step toward restoring this Court's recognition of these truths, and I respectfully concur in the judgment.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

An immense Latin cross stands on a traffic island at the center of a busy three-way intersection in Bladensburg, Maryland.[1] "Monumental, clear, and bold" by day, the cross looms even larger illuminated against the night-time sky. . . . Both the Peace Cross and the traffic island are owned and maintained by the Maryland-National Capital Park and Planning Commission (Commission), an agency of the State of Maryland.

Decades ago, this Court recognized that the Establishment Clause of the First Amendment to the Constitution demands governmental neutrality among religious faiths, and between religion and nonreligion. *See Everson v. Board of Ed. of Ewing* (1947) [*supra* this chapter]. Numerous times since, the Court has reaffirmed the Constitution's commitment to neutrality. Today the Court erodes that neutrality commitment, diminishing precedent designed to preserve individual liberty and civic harmony in favor of a "presumption of constitutionality for longstanding monuments, symbols, and practices." *Ante* (plurality opinion).[2]

The Latin cross is the foremost symbol of the Christian faith, embodying the "central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life." Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae* (Brief for Christian and Jewish Organizations). Precisely because the cross symbolizes these sectarian beliefs, it is a common marker for the graves of Christian soldiers. For the same reason, using the cross as a war memorial does not transform it into a secular symbol . . . . Just as a Star of David is not suitable to honor Christians who died serving their country, so a cross is not suitable to honor those of other faiths who died defending their nation. Soldiers of all faiths "are united by their love of country, but they are not united by the cross." Brief for Jewish War Veterans of the United States of America, Inc., as *Amicus Curiae*. By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion. . . .

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[1] A photograph of the monument [is] reproduced in the Appendix.

[2] Some of my colleagues suggest that the Court's new presumption extends to all governmental displays and practices, regardless of their age. *See ante* (Kavanaugh, J., concurring); *ante* (Thomas, J., concurring in judgment); *ante* (Gorsuch, J., concurring in judgment). *But see ante* (Breyer, J., joined by Kagan, J., concurring). I read the Court's opinion to mean what it says: "Retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones," and, consequently, only "longstanding monuments, symbols, and practices" enjoy "a presumption of constitutionality," *ante* (plurality opinion).

I

A

The First Amendment commands that the government "shall make no law" either "respecting an establishment of religion" or "prohibiting the free exercise thereof." *See Everson v. Bd. Educ.* (1947) [*supra* this chapter]. Adoption of these complementary provisions followed centuries of "turmoil, civil strife, and persecution, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Id.* Mindful of that history, the fledgling Republic ratified the Establishment Clause, in the words of Thomas Jefferson, to "buil[d] a wall of separation between church and state." . . .

The Establishment Clause essentially instructs: "The government may not favor one religion over another, or religion over irreligion." *McCreary County v. ACLU* (2005) [*supra* this chapter]. For, as James Madison observed, the government is not "a competent Judge of Religious Truth." *Memorial and Remonstrance Against Religious Assessments*. When the government places its "power, prestige [or] financial support . . . behind a particular religious belief," the government's imprimatur "makes adherence to that religion relevant . . . to a person's standing in the political community," *County of Allegheny v. Greater Pittsburgh ACLU* (1989) [*supra* this chapter]. Correspondingly, "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale* (1962) [*supra* this chapter]. And by demanding neutrality between religious faith and the absence thereof, the Establishment Clause shores up an individual's "right to select any religious faith or none at all." *Wallace v. Jaffree* (1985) [*supra* this chapter].

B

In cases challenging the government's display of a religious symbol, the Court has tested fidelity to the principle of neutrality by asking whether the display has the "effect of 'endorsing' religion." *County of Allegheny*. The display fails this requirement if it objectively "convey[s] a message that religion or a particular religious belief is favored or preferred." *Id.* . . . This inquiry has been described by some Members of the Court as the "reasonable observer" standard. *See, e.g.*, *County of Allegheny* (O'Connor, J., concurring in part and concurring in judgment).[3]

As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content. The venue is surely associated with the State; the symbol and its meaning are just as surely associated exclusively with Christianity. . . . To non-Christians — nearly 30% of the population of the United States, Pew Research Center, *America's Changing Religious Landscape* (2015) — the State's choice to display the cross on public buildings or spaces conveys a message of exclusion: It tells them they "are outsiders, not full members of the political community," *County of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in judgment).

A presumption of endorsement, of course, may be overcome. A display does not run afoul of the neutrality principle if its "setting . . . plausibly indicates" that the government has not sought "either to adopt [a] religious message or to urge its

[3] Justice Gorsuch's "no standing" opinion is startling in view of the many religious-display cases this Court has resolved on the merits. *But see* Brief for Law Professors as *Amici Curiae* (explaining why offended observer standing is necessary and proper).

acceptance by others." *Van Orden* (Souter, J., dissenting). The "typical museum setting," for example, "though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch v. Donnelly* (O'Connor, J., concurring). Similarly, when a public school history teacher discusses the Protestant Reformation, the setting makes clear that the teacher's purpose is to educate, not to proselytize. The Peace Cross, however, is not of that genre.

II

A

"For nearly two millennia," the Latin cross has been the "defining symbol" of Christianity, R. JENSEN, THE CROSS: HISTORY, ART, AND CONTROVERSY ix (2017), evoking the foundational claims of that faith. Christianity teaches that Jesus Christ was "a divine Savior" who "illuminate[d] a path toward salvation and redemption." *Lynch v. Donelly* (Brennan, J., dissenting). Central to the religion are the beliefs that "the son of God," Jesus Christ, "died on the cross," that "he rose from the dead," and that "his death and resurrection offer the possibility of eternal life." Brief for Christian and Jewish Organizations. "From its earliest times," Christianity was known as "*religio crucis* — the religion of the cross." R. VILADESAU, THE BEAUTY OF THE CROSS: THE PASSION OF CHRIST IN THEOLOGY AND THE ARTS, FROM THE CATACOMBS TO THE EVE OF THE RENAISSANCE 7 (2006). Christians wear crosses, not as an ecumenical symbol, but to proclaim their adherence to Christianity. An exclusively Christian symbol, the Latin cross is not emblematic of any other faith. The principal symbol of Christianity around the world should not loom over public thoroughfares, suggesting official recognition of that religion's paramountcy.

B

The Commission urges in defense of its monument that the Latin cross "is not merely a reaffirmation of Christian beliefs"; rather, "when used in the context of a war memorial," the cross becomes "a universal symbol of the sacrifices of those who fought and died." Brief for Petitioner Maryland-National Capital Park and Planning Commission (Brief for Planning Commission). *See also* Brief for United States as *Amicus Curiae*.

The Commission's "attempts to secularize what is unquestionably a sacred [symbol] defy credibility and disserve people of faith." *Van Orden* (Stevens, J., dissenting). *See, e.g.*, Brief for *Amici* Christian and Jewish Organizations ("For Christians who think seriously about the events and message that the cross represents, the Commission's claims are deeply offensive."). The asserted commemorative meaning of the cross rests on — and is inseparable from — its Christian meaning: "the crucifixion of Jesus Christ and the redeeming benefits of his passion and death," specifically, "the salvation of man."

Because of its sacred meaning, the Latin cross has been used to mark Christian deaths since at least the fourth century. The cross on a grave "says that a Christian is buried here," Brief for *Amici* Christian and Jewish Organizations, and "commemorates [that person's death] by evoking a conception of salvation and eternal life reserved for Christians," Brief for *Amicus* Jewish War Veterans. As a commemorative symbol, the Latin cross simply "makes no sense apart from the crucifixion, the resurrection, and Christianity's promise of eternal life." Brief for

Amici Christian and Jewish Organizations.[8] The cross affirms that, thanks to the soldier's embrace of Christianity, he will be rewarded with eternal life. "To say that the cross honors the Christian war dead does not identify a secular meaning of the cross; it merely identifies a common application of the religious meaning." *Id.* Every Court of Appeals to confront the question has held that "making a . . . Latin cross a war memorial does not make the cross secular," it "makes the war memorial sectarian." [Here Justice Ginsburg cited and quoted opinions from the Fourth Circuit, the Seventh Circuit, the Ninth Circuit, and the D.C. Circuit.]

The Peace Cross is no exception. That was evident from the start. At the dedication ceremony, the keynote speaker analogized the sacrifice of the honored soldiers to that of Jesus Christ, calling the Peace Cross "symbolic of Calvary," where Jesus was crucified. Local reporters variously described the monument as "a mammoth cross, a likeness of the Cross of Calvary, as described in the Bible"; "a monster Calvary cross"; and "a huge sacrifice cross." The character of the monument has not changed with the passage of time.

C

The Commission nonetheless urges that the Latin cross is a "well-established" secular symbol commemorating, in particular, "military valor and sacrifice in World War I." Brief for Planning Commission. Calling up images of United States cemeteries overseas showing row upon row of cross-shaped gravemarkers, *id.*; *see ante*, Brief for United States as *Amicus Curiae*, the Commission overlooks this reality: The cross was never perceived as an appropriate headstone or memorial for Jewish soldiers and others who did not adhere to Christianity.

1

A page of history is worth retelling. . . . [Here Justice Ginsburg retold the history of the graveyards of American soldiers who were killed in World War I and buried in military cemeteries in Europe. She detailed their numbers, their religious identifications, the political controversy over whether to repatriate their bodies — soldiers who were neither Christian nor Jewish could be repatriated in the U.S. and buried under a slab headstone — and the religious controversy over how to properly and permanently mark their gravesites either with a generic slab marker or with a religious symbol. She noted that Jews composed only 3% of the U.S. population but 6% of the U.S. Forces in World War I. But she pointed out that individual graves of Jewish soldiers in fact were marked with Stars of David among the "crosses row on row."]

2

Reiterating its argument that the Latin cross is a "universal symbol" of World War I sacrifice, the Commission states that "40 World War I monuments . . . built in the United States . . . bear the shape of a cross." Brief for Planning Commission. This figure includes memorials that merely "incorporate" a cross.[15] Moreover, the 40 monuments compose only 4% of the "948 outdoor sculptures commemorating the First World War." The Court lists just seven freestanding cross memorials, *ante*,

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[8] The Court sets out familiar uses of the Greek cross, including the Red Cross and the Navy Cross, and maintains that, today, they carry no religious message. But because the Latin cross has never shed its Christian character, its commemorative meaning is exclusive to Christians. . . .

[15] No other monument in Bladensburg's Veterans Memorial Park displays the Latin cross.

less than 1% of the total number of monuments to World War I in the United States. Cross memorials, in short, are outliers. The overwhelming majority of World War I memorials contain no Latin cross. . . .

Like cities and towns across the country, the United States military comprehended the importance of "paying equal respect to all members of the Armed Forces who perished in the service of our country," and therefore avoided incorporating the Latin cross into memorials. The construction of the Tomb of the Unknown Soldier is illustrative. When a proposal to place a cross on the Tomb was advanced, the Jewish Welfare Board objected; no cross appears on the Tomb. In sum, "there is simply 'no evidence . . . that the cross has been widely embraced by' — or even applied to — 'non-Christians as a secular symbol of death' or of sacrifice in military service" in World War I or otherwise. *Trunk v. San Diego*, 629 F.3d 1099 (CA9 2011).

D

Holding the Commission's display of the Peace Cross unconstitutional would not, as the Commission fears, "inevitably require the destruction of other cross-shaped memorials throughout the country." Brief of Planning Commission. When a religious symbol appears in a public cemetery — on a headstone, or as the headstone itself, or perhaps integrated into a larger memorial — the setting counters the inference that the government seeks "either to adopt the religious message or to urge its acceptance by others." *Van Orden* (Souter, J., dissenting). In a cemetery, the "privately selected religious symbols on individual graves are best understood as the private speech of each veteran." Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1242 (2011). Such displays are "linked to, and show respect for, the individual honoree's faith and beliefs." They do not suggest governmental endorsement of those faith and beliefs. [As to the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery, visitors to the cemetery "expect to view religious symbols, whether on individual headstones or as standalone monuments." Brief for *Amicus* Jewish War Veterans.]

Recognizing that a Latin cross does not belong on a public highway or building does not mean the monument must be "torn down." *Ante* (Breyer, J., concurring); *ante* (Gorsuch, J., concurring in judgment). . . . In some instances, the violation may be cured by relocating the monument to private land or by transferring ownership of the land and monument to a private party.

* * *

. . . The Establishment Clause, which preserves the integrity of both church and state, guarantees that "however . . . individuals worship, they will count as full and equal American citizens." *Town of Greece* (Kagan, J., dissenting). "If the aim of the Establishment Clause is genuinely to uncouple government from church," the Clause does "not permit . . . a display of the character" of Bladensburg's Peace Cross. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Ginsburg, J., dissenting).

APPENDIX

The Bladensburg Peace Cross

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: ***after the case insert new Note and new Problem:***

Note: "Congress shall make no law respecting an establishment of religion . . . ."

Since 1789, the House of Representatives has begun each legislative day with a prayer, a practice the Supreme Court seemingly has found compatible with the Establishment Clause by its decision in *Marsh v. Chambers*, 463 U.S. 783 (1983) to approve the Nebraska legislature's employment of a chaplain. Every member of the Court in the principal case, *Town of Greece v. Galloway* (2014), explicitly approved of that earlier decision.

House of Representatives Rule II, clause 5 provides that "the Chaplain shall offer a prayer at the commencement of each day's sitting of the House." H.R. Doc. No. 114-192, Rule II, cl. 5 (2017). The House also allows guest chaplains to deliver the opening prayer, although the chamber's rules make no provision for that practice. In the last fifteen years, guest chaplains have delivered approximately forty percent of all invocations. The House's Office of the Chaplain approves guest chaplains and coordinates their visits. Between 2000 and 2015, although the vast majority of individuals allowed to deliver opening prayers were Christian, the House also welcomed guest chaplains of the Muslim, Jewish, and Hindu faiths. However, the House has never had an openly atheist or agnostic guest chaplain.

A recent dispute arose when a member of the House asked the Chaplain, Father Patrick J. Conroy, to invite Daniel Barker — a former Christian minister turned atheist — to serve as guest chaplain and deliver a secular invocation. Conroy denied the request, and Barker sued, alleging that the Chaplain unconstitutionally excluded him from the guest chaplain program. The U.S. Court of Appeals for the

District of Columbia Circuit ruled in favor of Conroy and against Barker. *Barker v. Conroy*, 921 F.3d 1118 (D.C. Cir. 2019).

Parse the separate opinions in *Town of Greece v. Galloway* and predict how the current Justices would rule on this controversy.

Problem: "Please rise and bow your heads!"

The Erewhon 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 has been 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

B. Modern Cases

Page 970: ***insert new note #4A before note #5:***

4A. The Religious Freedom Restoration Act provides a person whose religious exercise has been unlawfully burdened the statutory right to seek "appropriate relief." In *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), the Supreme Court held that "appropriate relief" included claims for money damages against Government officials in their individual capacities. Justice Thomas wrote for a unanimous Court; Justice Barrett did not participate. Plaintiffs-Respondents were practicing Muslims who alleged that Federal Bureau of Investigation agents placed them on the No Fly List in retaliation for their refusal to act as informants against their religious communities. They sued various agents in their official capacities, seeking removal from the No Fly List. They also sued the agents in their individual capacities for money damages because the retaliation allegedly cost them substantial sums of money in wasted airline tickets and lost income from missed employment opportunities. More than a year after they sued, the Department of Homeland Security informed them that they could fly again, thus mooting the claims for injunctive relief. The District Court dismissed the individual-capacity claims for money damages, ruling that the RFRA statute did not permit monetary relief. The Second Circuit reversed and the Supreme Court affirmed the Second Circuit to allow money damages.

The Supreme Court quoted the statute to hold that injured parties can sue Government officials in their personal capacities: Persons may sue and obtain relief "against a government," § 2000bb-1(c), which is defined to include "a branch, department, agency, instrumentality, and *official (or other person acting under color of law)* of the United States." § 2000bb-2(1) (emphasis added). This language was controlling.

The Supreme Court next determined what "appropriate relief," § 2000bb-1(c), entails. The Court relied on the plain meaning of the statute and consulted dictionary definitions of "appropriate." Historically, damages against federal and state government officials have been commonly available. The Court emphasized the congressional purpose behind RFRA and appealed to principles of the separation of powers:

> Given that RFRA reinstated pre-*Employment Division v. Smith* [*supra* this chapter] protections and rights, parties suing under RFRA must have at least the same avenues for relief against officials that they would have had before *Smith*. That means RFRA provides, as one avenue for relief, a right to seek damages against Government employees. A damages remedy is not just "appropriate" relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations. For certain injuries, such as respondents' wasted plane tickets, effective relief consists of damages, not an injunction. Given the textual cues just noted, it would be odd to construe RFRA in a manner that prevents courts

> from awarding such relief. Had Congress wished to limit the remedy to that degree, it knew how to do so. . . .
>
> The Government also posits that we should be wary of damages against Government officials because these awards could raise separation-of-powers concerns. But this exact remedy has coexisted with our constitutional system since the dawn of the Republic. To be sure, there may be policy reasons why Congress may wish to shield Government employees from personal liability, and Congress is free to do so. But there are no constitutional reasons why we must do so in its stead.
>
> To the extent the Government asks us to create a new policy-based presumption against damages against individual officials, we are not at liberty to do so. Congress is best suited to create such a policy. Our task is simply to interpret the law as an ordinary person would. . . . We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted 27 years ago.
>
> We conclude that RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities. . . .

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) that 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?

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

Note: Choosing Up Sides to Cast the Shadow of Strict Scrutiny on COVID-19 Regulations of Religious Gatherings

1. Recently, the Supreme Court has issued emergency rulings with increasing frequency on significant legal issues; for example, immigration restrictions, capital punishment, access to abortion, the census, election procedures, and emergency coronavirus regulations. Court-watchers have coined the phrase "shadow docket" to describe these ostensibly procedural orders. However, some of these orders resolve important and contentious legal issues, at least temporarily in the particular case. The procedural shortcut allows a losing litigant in the lower court to ask the Supreme Court for a "stay" of the lower court's ruling to allow a petition for a writ of *certiorari* and, if granted, there follows full briefing and oral argument. If *certiorari* is denied, the stay is vacated — although in most of these emergency cases the stay is all that matters. Among other requirements, a losing litigant must show that it is likely to succeed on the merits and that it will suffer "irreparable harm" if the lower court's ruling were allowed to go into effect. There have been so many of these emergency rulings lately that Justice Sotomayor has complained that the other Justices seem

to have tacitly lowered that standard for what is supposed to be extraordinary relief. *See Wolf v. Cook County*, 589 U.S. ____ (2020) (Sotomayor, J., dissenting from the grant of the stay). But that discussion is more a matter for the Federal Courts course.

2. One of these "shadow docket" cases, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), involved a challenge to California's COVID-19 regulations on religious gatherings. An application for injunctive relief pending a petition for a writ of *certiorari* was presented to Justice Kagan, the Circuit Justice for the Ninth Circuit, and she referred it to the full Court. The *per curiam* opinion, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, held that plaintiffs were entitled to emergency injunctive relief pending their appeal challenging California's COVID-19 restrictions on private religious gatherings. Justice Kagan filed a dissenting opinion, joined by Justices Breyer and Sotomayor. Chief Justice Roberts announced only that he would deny the application. That was consistent with his previous votes in similar "shadow docket" cases challenging COVID-19 regulations on religious free exercise grounds. In those previous cases, a narrow 5 to 4 majority that included Justice Ginsburg had demonstrated a deference to state health officials, but the appointment of Justice Barrett to replace Justice Ginsburg flipped those 5 to 4 votes in favor of the religious claimants in this case.

3. The *per curiam* opinion held that the Ninth Circuit's refusal to grant an injunction pending appeal was erroneous and went on to make several points, relying on previous orders on the "shadow docket." Along the way, the opinion elaborated on the majority's understanding of the *Smith-Lukumi* standard of strict scrutiny in Free Exercise cases covered in this chapter. The majority focused on what is "a neutral and generally applicable regulation" taking into account other exemptions and exceptions in the regulation.

> First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.
>
> Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. Comparability is concerned with the risks various activities pose, not the reasons why people gather.
>
> Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow. Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise,

> precautions that suffice for other activities suffice for religious exercise too.
>
> Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions.

These four principles together provide a "most favored nation" status for religious exemption claims, i.e., if a law covers both secular and religious conduct, it will not be considered "neutral and generally applicable" if it contains *any* non-religious exemptions that are deemed "comparable" to the requested religious exemption. Exemptions in the law for non-religious "favored" activity thus trigger a presumptive right to a religious exemption unless the government can satisfy strict scrutiny. And, as the *per curiam* opinion concluded, "That standard is not watered down; it really means what it says."

4. The majority made a point to express its impatience with the Ninth Circuit, having now rejected that court's approving analysis of California's COVID-19 regulations for the fifth time:

> First, California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time. Second, the Ninth Circuit did not conclude that those activities pose a lesser risk of transmission than *applicants* proposed religious exercise at home. The Ninth Circuit erroneously rejected these comparators simply because this Court's previous decisions involved public buildings as opposed to private buildings. Third, instead of requiring the State to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities, the Ninth Circuit erroneously declared that such measures might not "translate readily" to the home. The State cannot "assume the worst when people go to worship but assume the best when people go to work." And fourth, although California officials changed the challenged policy shortly after this application was filed, the previous restrictions remain in place until April 15th, and officials with a track record of "moving the goalposts" retain authority to reinstate those heightened restrictions at any time.

5. Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. Much as the majority did, the dissenters relied on their own opinions in previous challenges to COVID-19 regulations on the "shadow docket" to side with California:

> The First Amendment requires that a State treat religious conduct as well as the State treats comparable secular conduct. Sometimes finding the right secular analogue may raise hard questions. But not today. California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the

> First Amendment. And the State does exactly that: It has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike. California need not, as the *per curiam* insists, treat at-home religious gatherings the same as hardware stores and hair salons — and thus unlike at-home secular gatherings, the obvious comparator here. As the *per curiam*'s reliance on separate opinions and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons. . . .
>
> In ordering California to weaken its restrictions on at-home gatherings, the majority yet again "insists on treating unlike cases, not like ones, equivalently." And it once more commands California "to ignore its experts' scientific findings," thus impairing "the State's effort to address a public health emergency." Because the majority continues to disregard law and facts alike, I respectfully dissent from this latest *per curiam* decision.

6. The opinions in *Tandon v. Newsom* were a "shadow docket" foreshadowing of further developments in the *Smith-Lukumi* doctrine. *See* Note: *Fulton v. City of Philadelphia* — Debating Without Deciding — What to Do with *Smith*? (*infra* this chapter).

Page 988: ***insert new problem after the problem:***

Problem: "هل لديك اي كلمات أخيره ؟" (Arabic: "Do you have any last words?")

Complete this draft opinion from the United States District Court:

Petitioner John Hakeem Smith has moved this Court for an emergency stay of his execution, scheduled to take place at 12:00 Midnight (CST) two weeks from today at the State Correctional Facility (SCF), for the 1995 rape, robbery, and brutal murder of a fifteen-year-old girl he abducted on her way home from school. He is relying on the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc, *et seq.* and the due process clause of the Fourteenth Amendment incorporating the religion clauses of the First Amendment, 42 U.S.C. § 1983.

Smith has been a committed Muslim since at least 2006. He has been meeting with his current Imam, Zaid Brown, who has provided religious ministry to Muslim prisoners in SCF since 2015. Imam Brown has stated that Smith was a devout Muslim when the Imam began his ministry at SCF and that Smith continues to be committed to Islam to this day. Moreover, the Warden of SCF and the Commissioner of the State Department of Corrections do not dispute the sincerity of Smith's religious beliefs.

Two weeks ago, Smith met with the Warden of SCF, who, apparently for the first time, explained to Smith the practices and policies that were followed by the State Department of Corrections during the administration of the death penalty following the state's official written protocol for conducting executions. Among other things, the Warden explained that the prison Chaplain, a Southern Baptist minister, would be in the execution chamber during the administration of the lethal injection along with the other prison officials. The Warden has further explained to this court that since his employment in 1997 the prison Chaplain has witnessed every execution conducted in the state as part of his official duties. During an execution, if the

prisoner requests, the Chaplain kneels at the side of the condemned prisoner on the gurney and prays aloud with him until the prisoner loses consciousness during the intravenous lethal injection procedure. If the prisoner does not want pastoral care from the Chaplain, however, the Chaplain still remains in the execution chamber standing unobtrusively by the wall praying silently to himself. The inmate's six designated witnesses, along with any spiritual advisor other than the prison Chaplain, may be seated in the adjacent witness room, separated from the execution chamber by a large glass window. Only the official prison Chaplain is permitted to be present in the execution chamber; all other religious advisors are only allowed in the adjacent witness room.

During that meeting with the Warden, Smith made two requests for the accommodation of his Muslim religious beliefs: that the institutional Christian Chaplain be excluded from the execution chamber and that instead his Imam be present in the execution chamber in order to provide spiritual guidance and comfort to him at the moment of his death. Specifically, Smith and Imam Brown would recite together the Muslim profession of faith — the *Shahāda* — at that fateful moment: "*I bear witness that (there is) no god except Allah; One is He, no partner hath He, and I bear witness that Muhammad is His Servant and Messenger*."

The Warden agreed to the first request to exclude the prison Chaplain from the execution chamber but cited the SCF execution protocol to deny the second request to admit the Imam into the execution chamber. However, the Warden explained that Smith's Imam would be permitted contact visits with him in the days leading up to and on the day of his execution. Further, Smith's Imam would be permitted to accompany him on the walk from his death row cell to the holding cell adjacent to the execution chamber and remain with him until Smith was escorted into the execution chamber to be secured onto the gurney. Then the Imam would be required to take his place in the adjacent witness room, along with Smith's relatives, invited friends, and members of the media. The Warden insisted that only employees of the SCF who were individually vetted and trained in the official execution protocol would be allowed to remain in the execution chamber in order to carry out the judicial order of execution with the necessary prison security and the proper medical procedures. Otherwise, the risk of improper interference or untoward distraction by someone untrained and unfamiliar with the execution protocol was deemed wholly unacceptable by the state prison officials.

It is hornbook law that this court may solemnly grant a stay of a state execution if — and only if — the condemned prisoner establishes that: (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the State's interests; and (4) if issued, the injunction would not be averse to the public interest. The controlling question here is the first requirement.

The first and most important question concerning his petition for a stay of execution is whether Smith is substantially likely to succeed on the merits of his claim, i.e., whether the Warden's refusal to allow Smith's Imam to remain in the execution chamber up to and including the moment of his death violates the statute and the Constitution.

Page 988: ***insert new Note after the Problem:***

Note: Fulton v. City of Philadelphia — *Debating Without Deciding — What to Do with* Smith*?*

1. In *Fulton v. City of Philadelphia*, 2021 WL 2459253 (2021), the Supreme Court granted the petition for a writ of *certiorari* presenting three questions, one of which was: "Whether *Employment Division v. Smith* [*supra* this chapter] should be revisited?" The much-anticipated decision resulted in 110 pages of opinions that revealed the current Justices' thinking and suggested the future uncertainty about the proper meaning of the Free Exercise Clause.

2. The City of Philadelphia contracts with private foster agencies to secure foster homes for children in its custody. Catholic Social Services (CSS) was one of these private agencies. The City stopped referring children to CSS because CSS would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance. The City stated that it would not enter a full foster care contract with CSS in the future unless CSS agreed to certify same-sex couples. CSS and three foster parents affiliated with the agency filed suit and sought a temporary restraining order and a preliminary injunction directing the City to continue referring children to CSS without requiring CSS to certify same-sex couples. CSS insisted that certifying a same-sex couple for adoption was tantamount to endorsing same-sex marriage, which is contrary to the teachings of the Catholic Church. The Court of Appeals for the Third Circuit, affirming the District Court, ruled that the City's new proposed contract language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal was a valid neutral and generally applicable policy under *Smith*.

CSS challenged the Third Circuit's determination that the City's actions were permissible under *Smith* and also asked the Supreme Court to reconsider that precedent. All nine Justices sided with CSS and voted to reverse the Third Circuit, but they had a heated debate among three separate concurring opinions about the proper interpretation of the Free Exercise Clause. None of the nine specifically endorsed the *Smith* interpretation of the Free Exercise Clause, although the majority opinion purported to apply that precedent. Chief Justice Roberts delivered the opinion of the Court, in which Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett joined.

3. The Court took the unusual approach of rejecting both lower courts' interpretation of the state and local law. Contrary to the District Court and Third Circuit, the majority ruled that foster services do not constitute a "public accommodation" under the City's Fair Practices Ordinance. The majority declined the *certiorari* invitation to revisit *Smith* and modestly purported to apply that precedent to the provisions of the City's foster care contract:

> *Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. CSS urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so. But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened

the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) [*supra* this chapter].

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* (2018) [Note *supra* this chapter]; *Lukumi*. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it "invites" the government to consider the particular reasons for a person's conduct by providing " 'a mechanism for individualized exemptions.' " *Smith*. . . . A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. . . .

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by *Smith*. The current version of section 3.21 specifies in pertinent part:

> Rejection of Referral. Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.

[S]ection 3.21 incorporates a system of individual exemptions, made available in this case at the "sole discretion" of the Commissioner. The City has made clear that the Commissioner "has no intention of granting an exception" to CSS. But the City "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." *Smith*.

. . . . The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. . . . CSS has demonstrated that the City's actions are subject to "the most rigorous of scrutiny" under [our] precedents. Because the City's actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.

A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents,

> protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. Rather than rely on "broadly formulated interests," courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) [Note *supra* this chapter]. The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.
>
> Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny, particularly because the authority to certify foster families is delegated to agencies by the State, not the City.
>
> That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop*. On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. *See Lukumi*. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.
>
> As [the City] acknowledges, CSS has "long been a point of light in the City's foster-care system." Brief for City Respondents. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny and violates the First Amendment.

4. Justice Barrett wrote a brief concurring opinion joined by Justices Kavanaugh and Breyer (who did not join the first paragraph below) that kicked the precedent down the road:

> In *Employment Div. v. Smith* (1990) [*supra* this chapter], this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause — no matter how severely that law burdens religious exercise. Petitioners, their

> *amici*, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause — lone among the First Amendment freedoms — offers nothing more than protection from discrimination.
>
> Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights — like speech and assembly — has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled. To name a few: Should entities like Catholic Social Services — which is an arm of the Catholic Church — be treated differently than individuals? Should there be a distinction between indirect and direct burdens on religious exercise. What forms of scrutiny should apply? And if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?
>
> We need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes. A longstanding tenet of our free exercise jurisprudence — one that both pre-dates and survives *Smith* — is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. As the Court's opinion today explains, the government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny. And all nine Justices agree that the City cannot satisfy strict scrutiny. I therefore see no reason to decide in this case whether *Smith* should be overruled, much less what should replace it. I join the Court's opinion in full.

5. "Those who count on this Court to stand up for the First Amendment have every right to be disappointed — as am I." That is the last line of Justice Alito's 77-page concurring opinion, which was so disproportionate to the Chief Justice's 15 pages — in length and in tone — that Court watchers speculated he was initially assigned to draft a majority opinion and subsequently lost the needed five votes. *See also* Note: Choosing Up Sides to Cast the Shadow of Strict Scrutiny on COVID-19 Regulations of Religious Gatherings (*supra* this chapter). Justices Thomas and Gorsuch joined his full-throated attack on *Smith*:

This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.

In *Employment Div. v. Smith* (1990) [*supra* this chapter], the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.

There is no question that *Smith*'s interpretation can have startling consequences. Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter. Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. A San Francisco ballot initiative in 2010 proposed just that. A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice. Or suppose that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy *Smith* even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added.

We may hope that legislators and others with rulemaking authority will not go as far as *Smith* allows, but the present case shows that the dangers posed by *Smith* are not hypothetical. The city of Philadelphia (City) has issued an ultimatum to an arm of the Catholic Church: Either engage in conduct that the Church views as contrary to the traditional Christian understanding of marriage or abandon a mission that dates back to the earliest days of the Church — providing for the care of orphaned and abandoned children. . . .

Whether with or without government participation, Catholic foster care agencies in Philadelphia and other cities have a long record of finding homes for children whose parents are unable or unwilling to care for them. Over the years, they have helped thousands of foster children and parents, and they take special

pride in finding homes for children who are hard to place, including older children and those with special needs.

Recently, however, the City has barred Catholic Social Services (CSS) from continuing this work. Because the Catholic Church continues to believe that marriage is a bond between one man and one woman, CSS will not vet same-sex couples. As far as the record reflects, no same-sex couple has ever approached CSS, but if that were to occur, CSS would simply refer the couple to another agency that is happy to provide that service — and there are at least 27 such agencies in Philadelphia. Thus, not only is there no evidence that CSS's policy has ever interfered in the slightest with the efforts of a same-sex couple to care for a foster child, there is no reason to fear that it would ever have that effect. None of that mattered to Philadelphia. . . .

One of the questions that we accepted for review is "whether *Employment Division v. Smith* should be revisited." We should confront that question. Regrettably, the Court declines to do so. Instead, it reverses based on what appears to be a superfluous (and likely to be short-lived) feature of the City's standard annual contract with foster care agencies. *Smith*'s holding about categorical rules does not apply if a rule permits individualized exemptions, and the majority seizes on the presence in the City's standard contract of language giving a City official the power to grant exemptions. The City tells us that it has never granted such an exemption and has no intention of handing one to CSS, Brief for City Respondents, but the majority reverses the decision below because the contract supposedly confers that never-used power.

This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power. If it does that, then, *voilà*, today's decision will vanish — and the parties will be back where they started. The City will claim that it is protected by *Smith*; CSS will argue that *Smith* should be overruled; the lower courts, bound by *Smith*, will reject that argument; and CSS will file a new petition in this Court challenging *Smith*. What is the point of going around in this circle?

Not only is the Court's decision unlikely to resolve the present dispute, it provides no guidance regarding similar controversies in other jurisdictions. . . . We should reconsider *Smith* without further delay. The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free exercise right at the time of the First Amendment's adoption. It swept aside decades of established precedent, and it has not aged well. Its interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause. Contrary to what many initially

> expected, *Smith* has not provided a clear-cut rule that is easy to apply, and experience has disproved the *Smith* majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to "anarchy." . . . . It is high time for us to take a fresh look at what the Free Exercise Clause demands.

Here Justice Alito carefully summarized the precedents preceding *Smith* and went on to criticize Justice Scalia's interpretative methodology in that case. *See* Sections A and B *supra* this chapter. Focusing on the text of the First Amendment, Justice Alito concluded:

> [The] ordinary meaning of "prohibiting the free exercise of religion" was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted. As interpreted in *Smith*, the Clause is essentially an anti-discrimination provision: It means that the Federal Government and the States cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct. *Smith* made no real attempt to square that equal-treatment interpretation with the ordinary meaning of the Free Exercise Clause's language, and it is hard to see how that could be done.
>
> The key point for present purposes is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the "exercise of religion") the right to do so without hindrance. The language of the Clause does not tie this right to the treatment of persons not in this group.
>
> The oddity of *Smith*'s interpretation can be illustrated by considering what the same sort of interpretation would mean if applied to other provisions of the Bill of Rights. Take the Sixth Amendment, which gives a specified group of people (the "accused" in criminal cases) a particular right (the right to the "Assistance of Counsel for [their] defence"). Suppose that Congress or a state legislature adopted a law banning counsel in *all litigation*, civil and criminal. Would anyone doubt that this law would violate the Sixth Amendment rights of criminal defendants? Or consider the Seventh Amendment, which gives a specified group of people (parties in most civil "Suits at common law") "the right of trial by jury." Would there be any question that a law abolishing juries in *all* civil cases would violate the rights of parties in cases that fall within the Seventh Amendment's scope? . . . . It is not necessary to belabor this point further. What [these] examples show is that *Smith*'s interpretation conflicts with the ordinary meaning of the First Amendment's terms.
>
> Not only is it difficult to square *Smith*'s interpretation with the terms of the Free Exercise Clause, the absence of any language referring to equal treatment is striking. If equal treatment was the objective, why didn't Congress say that? And since it would have

> been simple to cast the Free Exercise Clause in equal-treatment terms, why would the state legislators who voted for ratification have read the Clause that way?

Here Justice Alito's opinion took a deep dive into the early history of religious free exercise — in the colonies, at the founding, in the states, at the time of the ratification of the Bill of Rights, and in early Congresses under the Constitution. His bottom line was:

> In sum, based on the text of the Free Exercise Clause and evidence about the original understanding of the free-exercise right, the case for *Smith* fails to overcome the more natural reading of the text. Indeed, the case against *Smith* is very convincing.

Next Justice Alito's opinion considered the *force majeure* of *stare decisis*.

> In assessing whether to overrule a past decision that appears to be incorrect, we have considered a variety of factors, and four of those weigh strongly against *Smith*: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down. No relevant factor, including reliance, weighs in *Smith*'s favor.

He went on, again at great length, to discuss each of these separate factors. And he insisted that there are no apparent countervailing factors except to conclude that *Smith* was "wrongly decided" and therefore "the Court's error in *Smith* should now be corrected." That brought him to the question of the proper legal standard to apply:

> If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.
>
> Whether this test should be rephrased or supplemented with specific rules is a question that need not be resolved here because Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case. As noted, CSS's policy has not hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future.
>
> CSS's policy has only one effect: It expresses the idea that same-sex couples should not be foster parents because only a man and a woman should marry. Many people today find this idea not only objectionable but hurtful. Nevertheless, protecting against this form of harm is not an interest that can justify the abridgment of First Amendment rights.
>
> We have covered this ground repeatedly in free speech cases. In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. *See Matal v. Tam* (2017) [*supra* Chapter 15]. . . . The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle. Many core religious beliefs are

> perceived as hateful by members of other religions or nonbelievers. Proclaiming that there is only one God is offensive to polytheists, and saying that there are many gods is anathema to Jews, Christians, and Muslims. Declaring that Jesus was the Son of God is offensive to Judaism and Islam, and stating that Jesus was not the Son of God is insulting to Christian belief. Expressing a belief in God is nonsense to atheists, but denying the existence of God or proclaiming that religion has been a plague is infuriating to those for whom religion is all-important.
>
> Suppressing speech — or religious practice — simply because it expresses an idea that some find hurtful is a zero-sum game. While CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs. In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the majority made a commitment. It refused to equate traditional beliefs about marriage, which it termed "decent and honorable," with racism, which is neither. And it promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." An open society can keep that promise while still respecting the "dignity," "worth," and fundamental equality of all members of the community. *Masterpiece Cakeshop* [Note *supra* this chapter].

6. Justice Gorsuch wrote a separate concurring opinion joined by Justices Thomas and Alito. He harshly criticized the logic and reasoning of the majority opinion for "turn[ing] a big dispute of constitutional law into a small one." He took issue with the way the majority opinion interpreted the Fair Practices Ordinance and the City's foster care contract and he lamented how the majority's holding likely would prove evanescent:

> The Court granted *certiorari* to decide whether to overrule *Employment Division v. Smith*, (1990) [*supra* this chapter]. As Justice Alito's opinion demonstrates, *Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. A majority of our colleagues, however, seek to sidestep the question. They agree that the City of Philadelphia's treatment of Catholic Social Services (CSS) violates the Free Exercise Clause. But, they say, there's no "need" or "reason" to address the error of *Smith* today.
>
> On the surface it may seem a nice move, but dig an inch deep and problems emerge. *Smith* exempts "neutral" and "generally applicable" laws from First Amendment scrutiny. The City argues that its challenged rules qualify for that exemption because they require all foster-care agencies — religious and non-religious alike — to recruit and certify same-sex couples interested in serving as foster parents. For its part, the majority assumes (without deciding) that Philadelphia's rule is indeed "neutral" toward religion. So to avoid *Smith*'s exemption and subject the

City's policy to First Amendment scrutiny, the majority must carry the burden of showing that the policy isn't "generally applicable." . . . .

One way or another, the majority seems determined to declare there is no "need" or "reason" to revisit *Smith* today. *Ante* (majority opinion); *ante* (Barrett, J., concurring). But tell that to CSS. Its litigation has already lasted years — and today's (ir)resolution promises more of the same. Had we followed the path Justice Alito outlines — holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable — this case would end today. Instead, the majority's course guarantees that this litigation is only getting started. As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law. The City can revise its Fair Practice Ordinance to make even plainer still that its law does encompass foster services. Or with a flick of a pen, municipal lawyers may rewrite the City's contract to close the § 3.21 loophole.

Once any of that happens, CSS will find itself back where it started. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. To the City, it makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children. And throughout it all, the opacity of the majority's professed endorsement of CSS's arguments ensures the parties will be forced to devote resources to the unenviable task of debating what it *even means*.

Nor will CSS bear the costs of the Court's indecision alone. Individuals and groups across the country will pay the price — in dollars, in time, and in continued uncertainty about their religious liberties. . . . The costs of today's indecision fall on lower courts too. As recent cases involving COVID–19 regulations highlight, judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced. In the last nine months alone, this Court has had to intervene at least half a dozen times to clarify how *Smith* works. [*See* Note: Choosing Up Sides to Cast the Shadow of Strict Scrutiny on COVID-19 Regulations of Religious Gatherings (*supra* this chapter)].

It's not as if we don't know the right answer. *Smith* has been criticized since the day it was decided. No fewer than ten

> Justices — including six sitting Justices — have questioned its fidelity to the Constitution. *See ante* (Barrett, J., concurring); *ante* (Alito, J., concurring in the judgment). The Court granted *certiorari* in this case to resolve its fate. The parties and *amici* responded with over 80 thoughtful briefs addressing every angle of the problem. Justice Alito has offered a comprehensive opinion explaining why *Smith* should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?
>
> We hardly need to "wrestle" today with every conceivable question that might follow from recognizing *Smith* was wrong. *See ante* (Barrett, J., concurring). To be sure, any time this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise across a large field of cases and controversies. But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to *Smith* until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases until the end of time, *see American Legion v. American Humanist Assn.* (2019) (plurality opinion) [*supra* Chapter 17], the Court should overrule it now, set us back on the correct course, and address each case as it comes.
>
> What possible benefit does the majority see in its studious indecision about *Smith* when the costs are so many? The particular appeal before us arises at the intersection of public accommodations laws and the First Amendment; it involves same-sex couples and the Catholic Church. Perhaps our colleagues believe today's circuitous path will at least steer the Court around the controversial subject matter and avoid "picking a side." But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution *is* picking a side. *Smith* committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today.

7. Consider this free exercise quartet of cases from this chapter. *Smith* holds that laws that incidentally burden religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause, so long as they are neutral and generally applicable laws — those are two separate and distinct requirements to avoid the compelling interest test. *Fulton* holds that if a law allows a discretionary power to grant an exemption it is not a law of general applicability, whether or not that power is actually exercised, and therefore the compelling interest test applies. *Tandon* holds that if a law specifies secular exemptions those secular exemptions must be compared with religious activities not exempted. If the activities are comparable, then religion must be afforded a "most favored nation" status or else the law must satisfy the compelling interest test. *See supra* Note: Choosing Up Sides to Cast the Shadow of Strict Scrutiny on COVID-19 Regulations of Religious Gatherings. Thus, there is a strong anti-discrimination norm of equal regard for religious exercises operating in the constitutional background. Of course, *Lukumi* holds that laws that overtly discriminate against religion — laws enacted with an anti-religious motive

and laws that have an exclusive or dominant ant-religious effect — trigger the compelling interest test of strict scrutiny.

8. Justice Alito and Justice Gorsuch complain that the majority's many finesses to avoid overruling *Smith* would prove to be only temporary and fleeting, i.e., in the future the City and the State could revise their laws on public accommodations to include CSS and the City could revise its foster care contract to eliminate the Section 3.21 provision that the majority relied on to rule against the City. Those possible revisions would once again disqualify CSS from placing foster children. Are they right? Is the majority opinion one of those Supreme Court rulings that can be described with the old railroad metaphor of "a ticket good for one day only"? *See* Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 GREEN BAG 2d 155 (2013).

9. Go back to Justice Barrett's concurring opinion in note 4 above. This was her rookie year. She clerked for Justice Scalia, who was the author of *Employment Division v. Smith* (1990). Color her reluctant but possibly willing to overrule *Smith*. She asks the right questions. How do you answer her questions? In particular: if *Smith* is overruled, what should replace it?

10. At the end of this chapter, consider the proper interpretation of the Free Exercise Clause writ large. *Employment Division v. Smith* (1990) was decided by the narrowest of 5 to 4 votes — Justices Brennan, Marshall, Blackmun, and O'Connor strenuously dissented. Justice Souter added his name to the list in *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993). Five current Justices have called for its overruling: Justices Thomas, Breyer, Alito, Gorsuch and Kavanaugh. Justice Barrett presumably would make it six. Ditto some of the leading scholars of the Religion Clauses. *See, e.g.*, McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99 (1990). Congress almost unanimously expressed the view that *Smith*'s interpretation of the Free Exercise Clause is contrary to our society's deep-rooted commitment to religious liberty. *Religious Freedom Restoration Act of 1993*, 42 U.S.C. § 2000bb *et seq.; Religious Land Use and Institutionalized Persons Act of 2000*, 42 U.S.C. § 2000cc *et seq. See* Note: Statutory Protections of the Exercise of Religion, *supra* this chapter. What about you? Are you persuaded that *Employment Division v. Smith* (1990) should be overruled? Is Justice Alito's concurring opinion a good blueprint for an overruling?

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 state 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 state 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 state 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?

Page 1008: ***Insert new Note after the case and before the Problem:***

Note: A Deeper Dive into the Ministerial Exception and the Religion Clauses

1. The First Amendment axiomatically protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1953). *See Note: Dogma, Heresy, and Schism* (*supra* this chapter).

2. In the principal case, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), the Supreme Court interpreted the Religion Clauses together to prohibit the government from interfering with the decision of a religious entity to hire and fire its ministers: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."

3. In two companion cases, the Supreme Court considered employment discrimination claims brought by two elementary school teachers at two Catholic schools in the Archdiocese of Los Angeles. *Our Lady of Guadalupe School v. Morrissey-Berru and St. James School v. Biel*, ___ S. Ct. ____ (2020). Justice Alito wrote a majority opinion joined by Chief Justice Roberts, and Justices Thomas, Breyer, Kagan, Gorsuch, and Kavanaugh.

4. The majority determined that the two teachers qualified under the ruling in *Hosanna-Tabor*: "The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." Anyone who attended a Catholic elementary school would recognize and remember the routine religious duties of these two lay teachers. The summaries in the next two numbered entries demonstrate this reality for those who did not have that experience. Anyone who has litigated one of these employment cases will anticipate that the school administrators always claim a valid and non-discriminatory reason for these kinds of firings when a lawsuit is filed.

5. The first of the two cases involved Agnes Morrissey-Berru, who was employed at Our Lady of Guadalupe School (OLG), a Roman Catholic primary school in the Archdiocese of Los Angeles as a lay fifth-grade or sixth-grade teacher. Like most elementary school teachers, she taught all subjects, including religion. She took religious education courses at the school's request and was expected to attend faculty prayer services. Her employment contract provided that the school's mission was "to develop and promote a Catholic School Faith Community." The contract made clear that teachers were expected to "model and promote" Catholic "faith and morals." Morrissey-Berru was required to participate in "school liturgical activities, as requested." The pastor of the parish, a Catholic priest, had to approve Morrissey-Berru's hiring each year. Like all teachers in the Archdiocese of Los Angeles, Morrissey-Berru was "considered a catechist," i.e., "a teacher of religion," who was "responsible for the faith formation of the students in their charge each day."

Morrissey-Berru prepared her students for participation in the Mass and for communion and confession. And she was expected to take her students to Mass once a week and on certain feast days and to take them to confession and to pray the Stations of the Cross. Morrissey-Berru also prayed with her students. Her class began or ended every day with a Hail Mary. She led the students in prayer at other times, such as when a family member was ill. And she taught them to recite the Apostles' Creed and the Nicene Creed, as well as prayers for specific purposes, such as in connection with the sacrament of confession. The school reviewed Morrissey-Berru's performance under religious standards. In 2014, OLG asked Morrissey-Berru to move from a full-time to a part-time position, and the next year, the school declined to renew her contract. She filed a claim with the Equal Employment Opportunity Commission (EEOC), received a right-to-sue letter, and then filed suit under the Age Discrimination in Employment Act of 1967, claiming that the school had demoted her and had failed to renew her contract so that it could replace her with a younger teacher. The school maintained that it based its decisions on classroom performance.

6. The second case involved the late Kristen Biel, who worked for about a year and a half as a lay teacher at St. James School, another Catholic primary school in Los Angeles. For part of one academic year, Biel served as a long-term substitute teacher for a first-grade class, and for one full year she was a full-time fifth-grade teacher. She taught all subjects, including religion. Biel's employment contract was in pertinent part nearly identical to Morrissey-Berru's. Like Morrissey-Berru, Biel instructed her students in the tenets of Catholicism. She was required to teach religion for 200 minutes each week and administered a test on religion every week. She used a religion textbook selected by the school's principal, a Catholic nun. The religious curriculum covered "the norms and doctrines of the Catholic Faith, including . . . the sacraments of the Catholic Church, social teachings according to the Catholic Church, morality, the history of Catholic saints, and Catholic prayers." Biel worshipped with her students. At St. James, teachers are responsible for "preparing their students to be active participants at Mass, with particular emphasis on Mass responses." Teachers at St. James were "required to pray with their students every day," and Biel observed this requirement by opening and closing each school day with prayer, including the Lord's Prayer or a Hail Mary. St. James declined to renew Biel's contract after one full year at the school. She filed charges with the EEOC, and after receiving a right-to-sue letter, brought this suit, alleging that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer. The school maintained that the decision was based on poor performance — namely, a failure to observe the planned curriculum and keep an orderly classroom.

7. Justice Alito's majority opinion bore a family resemblance to his concurring opinion in *Hosanna-Tabor*. The majority opinion explained that an employee need not bear the title "minister" to qualify for the ministerial exception. Rather, "[w]hat matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." The majority recognized this understanding of religious education was not limited to the Catholic Church, but was shared by Protestant Christian denominations, Judaism, and Islam. In these major faiths, there is a "close connection that religious institutions draw between their central purpose and educating the young in the faith."

8. The majority applied a granular fact-based analysis:

> When we apply this understanding of the Religion Clauses to the cases now before us, it is apparent that Morrissey-Berru and Biel qualify for the exemption we recognized in *Hosanna-Tabor*. There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of [the teacher in *Hosanna-Tabor*]. Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.

9. Justice Thomas filed a concurring opinion, joined by Justice Gorsuch, which repeated the views he expressed in his concurring opinion in *Hosanna-Tabor*, namely that "the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.' "

10. Justice Sotomayor wrote a dissent joined by Justice Ginsburg. Here was her opening salvo:

> Two employers fired their employees allegedly because one had breast cancer and the other was elderly. Purporting to rely on this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), the majority shields those employers from disability and age-discrimination claims. In the Court's view, because the employees taught short religion modules at Catholic elementary schools, they were "ministers" of the Catholic faith and thus could be fired for any reason, whether religious or nonreligious, benign or bigoted, without legal recourse. The Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and

> were not even required to be Catholic. In foreclosing the teachers' claims, the Court skews the facts, ignores the applicable standard of review, and collapses *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role. Because that simplistic approach has no basis in law and strips thousands of schoolteachers of their legal protections, I respectfully dissent.

11. Justice Sotomayor's dissent took successive shots at the majority's decision. A pluralistic society requires religious entities to abide by generally applicable law, including statutes protecting individual rights. Congress has provided some exceptions to those statutes for religious institutions. But the ministerial exception is a judge-made doctrine for which the Supreme Court is ultimately responsible. The Court should interpret the doctrine cautiously and narrowly out of a concern for rooting out genuine discrimination. The origin of the doctrine was for "faith leaders" — "rabbis, priests, nuns, imams, ministers." A proper application of the doctrine emphasizes this leadership quality: "Lay faculty, even those who teach religion at church-affiliated schools, are not 'ministers.' " The teacher in *Hosanna-Tabor* possessed this leadership quality in ways the two teachers in these cases did not. She carried the actual title "minister," she underwent religious training, she performed important religious functions, and the church vetted her as a minister. The two lay teachers in these cases are simply not Catholic ministers. She warned that the majority's approach created an unacceptable potential for abuse by religious employers. Her ultimate concern was that religious employers would be allowed to discriminate against their employees under the cover of a pretextual justification.

> [The majority] risks allowing employers to decide for themselves whether discrimination is actionable. Indeed, today's decision reframes the ministerial exception as broadly as it can, without regard to the statutory exceptions tailored to protect religious practice. As a result, the Court absolves religious institutions of any animus completely irrelevant to their religious beliefs or practices and all but forbids courts to inquire further about whether the employee is in fact a leader of the religion. Nothing in *Hosanna-Tabor* (or at least its majority opinion) condones such judicial abdication.

Justice Sotomayor repeatedly emphasized that the plaintiffs-employees here — the two elementary teachers — had alleged employment discrimination based on age and cancer history and they deserved their day in court under federal law.

Page 1008: ***insert new Problem after the Problem:***

Problem: "By the powers vested in me by the State . . . ."

The Center for Inquiry (Center) describes itself as "a community of freethinkers, atheists, humanists, and non-believers who question and challenge the extraordinary claims of religion and fight for secularism." The Center pursues this mission through various online media, print publications, educational initiatives directed at the general public, engagement with college campus organizations and other like-minded grassroots groups, and advocacy work in the state and federal courts.

The Center filed suit in United States District Court challenging the constitutionality of State Family Code § 143, *Solemnizers of Marriage*, which provides in relevant part:

> (a) The following persons are authorized to conduct a marriage ceremony:
>
> (1) a licensed or ordained Christian minister or priest;
>
> (2) a Jewish rabbi;
>
> (3) a member or adherent of a religion who is authorized by that religion to conduct a marriage ceremony;
>
> (4) an active or retired judge of any state or federal court of record in this state.
>
> (b) A person commits an offense if the person knowingly conducts a marriage ceremony without authorization under this section. An offense under this subsection is a Class A misdemeanor.

The Center contends that § 143 violates the Establishment Clause and the Equal Protection Clause. The basis of the complaint is that the statute discriminates by excluding non-religious secular celebrants from those who are authorized to solemnize a wedding. How should the District Court rule and why?

B. Tensions between the Religion Clauses

Page 1009: ***insert additional text at the end of the section introduction:***

The Justices have conceptualized a dynamic understanding of the Religion Clauses in yet another metaphor:

> The Religion Clauses of the First Amendment, [the] Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that *"there is room for play in the joints"* between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

Locke v. Davey, 540 U.S. 712, 718-19 (2004) (emphasis added). However, the Justices have struggled over the proper application of that metaphor or principle. In *Locke*, for example, the Court approved a limitation in a state college scholarship program that prohibited a student from using the funds to obtain a degree in theology. The Establishment Clause would have allowed the state to fund such devotional training for the ministry as part of a general college scholarship program; however, the Free Exercise Clause did not require it. The majority invoked the historic practice against using state funds to support the ministry and clergy to reach this conclusion. Therefore, there was "play in the joints" and the state could choose to fund or not to fund those theology scholarships. Later, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Court invalidated a state grant program for resurfacing playgrounds that categorically disqualified churches and other religious organizations based solely on their religious status. The majority assumed that the Establishment Clause would have allowed the grants but concluded that the Free Exercise Clause compelled it. Otherwise, the state was discriminating against the church. Therefore, there was no "play in the joints" and the state was required to resurface the church school's playground. In the first case, the student was denied a scholarship based on what he proposed to do with the funds, i.e., prepare for the ministry. In the second case, the church was denied the resurfacing grant simply

because of the fact that it was a church. In each of these opposing decisions, there were ambivalent concurring opinions and strong dissenting opinions.

The play-in-the-joints metaphor was a *leitmotif* once again in the next principal case decided in 2020. There was a majority opinion joined by five Justices, but six Justices wrote six separate opinions. How much play-in-the-joints is left?

Page 1009: ***Omit*** **Locke v. Davey*****, 540 U.S. 712 (2004).***

Page 1014: ***Read the*** **Note: The Blaine Amendments*****.***

Page 1015: ***Omit*** **Trinity Lutheran Church of Columbia, Inc. v. Comer*****, 137 S. Ct. 2012 (2017).***

Page 1030***: Before the Problem substitute the following new case for the two omitted cases:***

Espinoza et al. v. Montana Department of Revenue et al.

591 U.S. ____ (2020)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the "no-aid" provision of the State Constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination." The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision.

I

A

[So] far only one scholarship organization, Big Sky Scholarships, has participated in the program. Big Sky focuses on providing scholarships to families who face financial hardship or have children with disabilities. Scholarship organizations like Big Sky must, among other requirements, maintain an application process for awarding the scholarships; use at least 90% of all donations on scholarship awards; and comply with state reporting and monitoring requirements.

A family whose child is awarded a scholarship under the program may use it at any "qualified education provider" — that is, any private school that meets certain accreditation, testing, and safety requirements. Virtually every private school in Montana qualifies. Upon receiving a scholarship, the family designates its school of choice, and the scholarship organization sends the scholarship funds directly to the school. Neither the scholarship organization nor its donors can restrict awards to particular types of schools.

The Montana Legislature also directed that the program be administered in accordance with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring government aid to sectarian schools. In full, that provision states:

> *Aid prohibited to sectarian schools.* The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or

> monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Shortly after the scholarship program was created, the Montana Department of Revenue promulgated "Rule 1." That administrative rule prohibited families from using scholarships at religious schools. The Department explained that the Rule was needed to reconcile the scholarship program with the no-aid provision of the Montana Constitution. The Montana Attorney General disagreed. In a letter to the Department, he advised that the Montana Constitution did not require excluding religious schools from the program, and if it did, it would "very likely" violate the United States Constitution by discriminating against the schools and their students. The Attorney General is not representing the Department in this case.

B

This suit was brought by three mothers whose children attend Stillwater Christian School in northwestern Montana. Stillwater is a private Christian school that meets the statutory criteria for "qualified education providers." It serves students in prekindergarten through 12th grade, and petitioners chose the school in large part because it "teaches the same Christian values that they teach at home." [Petitioners] sued the Department of Revenue in Montana state court. . . . The trial court enjoined Rule 1 [explaining] that the Rule was not required by the no-aid provision, because that provision prohibits only "appropriations" that aid religious schools, "not tax credits."

The injunctive relief freed Big Sky to award scholarships to students regardless of whether they attended a religious or secular school. For the school year beginning in fall 2017, Big Sky received 59 applications and ultimately awarded 44 scholarships of $500 each. . . . Several families, most with incomes of $30,000 or less, used the scholarships to send their children to Stillwater Christian. [In 2018, 94% of the scholarships awarded helped to pay religious-school tuition.]

[The] Montana Supreme Court reversed the trial court . . . holding that the program aided religious schools in violation of the no-aid provision of the Montana Constitution. . . . The scholarship program provided such aid by using tax credits to "subsidize tuition payments" at private schools that are "religiously affiliated" or "controlled in whole or in part by churches." In that way, the scholarship program flouted the State Constitution's "guarantee to all Montanans that their government will not use state funds to aid religious schools."

The Montana Supreme Court went on to hold that the violation of the no-aid provision required invalidating the entire scholarship program. The Court explained that the program provided "no mechanism" for preventing aid from flowing to religious schools, and therefore the scholarship program could not "under *any* circumstance" be construed as consistent with the no-aid provision. As a result, the tax credit is no longer available to support scholarships at either religious or secular private schools.

The Montana Supreme Court acknowledged that "an overly-broad" application of the no-aid provision "could implicate free exercise concerns" and that "there may be a case" where "prohibiting the aid would violate the Free Exercise Clause." But, the Court concluded, "this is not one of those cases."

II

A

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have recognized a " 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017); *Locke v. Davey* (2004). Here, the parties do not dispute that the scholarship program is permissible under the Establishment Clause. Nor could they. We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs. Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools. *See Zelman v. Simmons-Harris* (2002) [Chapter 17]. The Montana Supreme Court, however, held as a matter of state law that even such indirect government support qualified as "aid" prohibited under the Montana Constitution.

The question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program. For purposes of answering that question, we accept the Montana Supreme Court's interpretation of state law — including its determination that the scholarship program provided impermissible "aid" within the meaning of the Montana Constitution — and we assess whether excluding religious schools and affected families from that program was consistent with the Federal Constitution.

The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran*. Those "basic principles" have long guided this Court. *See, e.g.*, *Everson v. Board of Ed. of Ewing* (1947) [Chapter 17] (a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation").

Most recently, *Trinity Lutheran* distilled these and other decisions to the same effect into the "unremarkable" conclusion that disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." In *Trinity Lutheran*, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organization "owned or controlled by a church, sect, or other religious entity." Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. Missouri's policy discriminated against the Church "simply because of what it is — a church," and so the policy was subject to the "strictest scrutiny," which it failed. . . .

Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. This is apparent from the plain text. The provision bars aid to any school "controlled in

whole or in part by any church, sect, or denomination." MONT. CONST. art. X, § 6(1). The provision's title — "Aid prohibited to sectarian schools" — confirms that the provision singles out schools based on their religious character. And the Montana Supreme Court explained that the provision forbids aid to any school that is "sectarian," "religiously affiliated," or "controlled in whole or in part by churches." The provision plainly excludes schools from government aid solely because of religious status.

The Department counters that *Trinity Lutheran* does not govern here because the no-aid provision applies not because of the religious character of the recipients, but because of how the funds would be used — for "religious education." In *Trinity Lutheran*, a majority of the Court concluded that the Missouri policy violated the Free Exercise Clause because it discriminated on the basis of religious status. A plurality declined to address discrimination with respect to "religious uses of funding or other forms of discrimination." 582 U.S. at ___ n.3. The plurality saw no need to consider such concerns because Missouri had expressly discriminated "based on religious identity," which was enough to invalidate the state policy without addressing how government funds were used.

This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status. The Court repeatedly explained that the no-aid provision bars aid to "schools controlled in whole or in part by churches," "sectarian schools," and "religiously-affiliated schools." . . . The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations "owned or controlled by a church, sect, or other religious entity." . . .

Undeterred by *Trinity Lutheran*, the Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. . . . To be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran* (*quoting Sherbert v. Verner* (1963) [Chapter 18]). The Free Exercise Clause protects against even "indirect coercion," and a State "punishes the free exercise of religion" by disqualifying the religious from government aid as Montana did here. *Trinity Lutheran*. Such status-based discrimination is subject to "the strictest scrutiny."

None of this is meant to suggest that we agree with the Department that some lesser degree of scrutiny applies to discrimination against religious uses of government aid. Some Members of the Court, moreover, have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status. *See Trinity Lutheran* (Gorsuch, J., joined by Thomas, J., concurring in part). We acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

B

Seeking to avoid *Trinity Lutheran*, the Department contends that this case is instead governed by *Locke v. Davey* (2004). *See also post* (Breyer, J., dissenting); *post* (Sotomayor, J., dissenting). *Locke* also involved a scholarship program. The State of Washington provided scholarships paid out of the State's general fund to help students pursuing postsecondary education. The scholarships could be used at accredited religious and nonreligious schools alike, but Washington prohibited

students from using the scholarships to pursue devotional theology degrees, which prepared students for a calling as clergy. This prohibition prevented Davey from using his scholarship to obtain a degree that would have enabled him to become a pastor. We held that Washington had not violated the Free Exercise Clause.

Locke differs from this case in two critical ways. First, *Locke* explained that Washington had "merely chosen not to fund a distinct category of instruction": the "essentially religious endeavor" of training a minister "to lead a congregation." Thus, Davey "was denied a scholarship because of what he proposed to *do* — use the funds to prepare for the ministry." Apart from that narrow restriction, Washington's program allowed scholarships to be used at "pervasively religious schools" that incorporated religious instruction throughout their classes. By contrast, Montana's Constitution does not zero in on *any* particular "essentially religious" course of instruction at a religious school. Rather, as we have explained, the no-aid provision bars all aid to a religious school "simply because of what it is," putting the school to a choice between being religious or receiving government benefits. At the same time, the provision puts families to a choice between sending their children to a religious school or receiving such benefits.

Second, *Locke* invoked a "historic and substantial" state interest in not funding the training of clergy, explaining that "opposition to . . . funding 'to support church leaders' lay at the historic core of the Religion Clauses." As evidence of that tradition, the Court in *Locke* emphasized that the propriety of state-supported clergy was a central subject of founding-era debates, and that most state constitutions from that era prohibited the expenditure of tax dollars to support the clergy.

But no comparable "historic and substantial" tradition supports Montana's decision to disqualify religious schools from government aid. In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones. . . . Local governments provided grants to private schools, including religious ones, for the education of the poor. Even States with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia, provided various forms of aid to religious schools. Early federal aid (often land grants) went to religious schools. Congress provided support to denominational schools in the District of Columbia until 1848, and Congress paid churches to run schools for American Indians through the end of the 19th century. After the Civil War, Congress spent large sums on education for emancipated freedmen, often by supporting denominational schools in the South through the Freedmen's Bureau. Justice Breyer sees "no meaningful difference" between concerns animating bans on support for clergy and bans on support for religious schools. *Post*. But evidently early American governments did.

The Department argues that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than 30 States — including Montana — adopted no-aid provisions. Such a development, of course, cannot by itself establish an early American tradition. Justice Sotomayor questions our reliance on aid provided during the same era by the Freedmen's Bureau, *post*, but we see no inconsistency in recognizing that such evidence may reinforce an early practice but cannot create one. In addition, many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal — which Congress nearly passed — would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States

from aiding "sectarian" ["Catholic"] schools. *See Mitchell v. Helms* (2000) (plurality opinion) [Chapter 17]. . . . The Blaine Amendment was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general"; many of its state counterparts have a similarly "shameful pedigree." The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.

The Department argues that several States have rejected referendums to overturn or limit their no-aid provisions, and that Montana even re-adopted its own in the 1970s, for reasons unrelated to anti-Catholic bigotry. But, on the other side of the ledger, many States today — including those with no-aid provisions — provide support to religious schools through vouchers, scholarships, tax credits, and other measures. . . . [We] agree with the Department that the historical record is "complex." And it is true that governments over time have taken a variety of approaches to religious schools. But it is clear that there is no "historic and substantial" tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke*.

C

Two dissenters would chart new courses. Justice Sotomayor would grant the government "some room" to "single . . . out" religious entities "for exclusion," based on what she views as "the interests embodied in the Religion Clauses." *Post* (Sotomayor, J., dissenting). Justice Breyer, building on his solo opinion in *Trinity Lutheran*, would adopt a "flexible, context-specific approach" that "may well vary" from case to case. *Post*. As best we can tell, courts applying this approach would contemplate the particular benefit and restriction at issue and discern their relationship to religion and society, taking into account "context and consequences measured in light of the purposes" of the Religion Clauses. *Post* (*quoting Van Orden v. Perry* (2005) (Breyer, J., concurring in judgment) [Chapter 17]). What is clear is that Justice Breyer would afford much freer rein to judges than our current regime, arguing that "there is 'no test-related substitute for the exercise of legal judgment.' "

The simplest response is that these dissents follow from prior separate writings, not from the Court's decision in *Trinity Lutheran* or the decades of precedent on which it relied. These precedents have "repeatedly confirmed" the straightforward rule that we apply today: When otherwise eligible recipients are disqualified from a public benefit "solely because of their religious character," we must apply strict scrutiny. *Trinity Lutheran*. . . . This rule against express religious discrimination is no "doctrinal innovation." *Post* (opinion of Breyer, J.). Far from it. As *Trinity Lutheran* explained, the rule is "unremarkable in light of our prior decisions." [For] innovation, one must look to the dissents. Their "roomy" or "flexible" approaches to discrimination against religious organizations and observers would mark a significant departure from our free exercise precedents. The protections of the Free Exercise Clause do not depend on a "judgment-by-judgment analysis" regarding whether discrimination against religious adherents would somehow serve ill-defined interests.

D

Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the "strictest scrutiny" is required. That "stringent standard," is not "watered down but really means what it says." To satisfy it, government action

"must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."

The Montana Supreme Court asserted that the no-aid provision serves Montana's interest in separating church and State "more fiercely" than the Federal Constitution. But "that interest cannot qualify as compelling" in the face of the infringement of free exercise here. *Trinity Lutheran*. A State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause." *Id.*

The Department, for its part, asserts that the no-aid provision actually *promotes* religious freedom. In the Department's view, the no-aid provision protects the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations, and it safeguards the freedom of religious organizations by keeping the government out of their operations. An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. . . . Furthermore, we do not see how the no-aid provision promotes religious freedom. As noted, this Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program. But we doubt that the school's liberty is enhanced by eliminating any option to participate in the first place.

The Department's argument is especially unconvincing because the infringement of religious liberty here broadly affects both religious schools and adherents. [The] prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them. Drawing on "enduring American tradition," we have long recognized the rights of parents to direct "the religious upbringing" of their children. *Wisconsin v. Yoder* (1972) [Chapter 18]. Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution. *See Pierce v. Society of Sisters* (1925). But the no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason.

The Department also suggests that the no-aid provision advances Montana's interests in public education. According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools. . . . On the Department's view, an interest in public education is undermined by diverting government support to any private school, yet the no-aid provision bars aid only to *religious* ones. . . . Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to "bear its weight." [A] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.

III

The Department argues that, at the end of the day, there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether. According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit. [Two] dissenters agree. Justice Ginsburg

reports that the State of Montana simply chose to "put all private school parents in the same boat" by invalidating the scholarship program, *post*, and Justice Sotomayor describes the decision below as resting on state law grounds having nothing to do with the federal Free Exercise Clause, see *post*.

[Those] descriptions are not accurate. The Montana Legislature created the scholarship program; the Legislature never chose to end it, for policy or other reasons. The program was eliminated by a court, and not based on some innocuous principle of state law. Rather, the Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status. The Court applied that provision to hold that religious schools were barred from participating in the program. Then, seeing no other "mechanism" to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program.

The final step in this line of reasoning eliminated the program, to the detriment of religious and non-religious schools alike. But the Court's error of federal law occurred at the beginning. When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, "one of those cases" in which application of the no-aid provision "would violate the Free Exercise Clause," the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program. Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds. [It was the Montana Supreme Court that eliminated the program, in the decision below, which remains under review. Our reversal of that decision simply restores the status quo established by the Montana Legislature before the Court's error of federal law. We do not consider any alterations the Legislature may choose to make in the future.]

The Supremacy Clause provides that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. "This Clause creates a rule of decision" directing state courts that they "must not give effect to state laws that conflict with federal law." Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have "disregarded" the no-aid provision and decided this case "conformably to the Constitution" of the United States. *Marbury v. Madison* (1803). That "*supreme* law of the land" condemns discrimination against religious schools and the families whose children attend them. They are members of the community too," and their exclusion from the scholarship program here is "odious to our Constitution" and "cannot stand." *Trinity Lutheran*.[5]

The judgment of the Montana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[5] In light of this holding, we do not address petitioners' claims that the no-aid provision, as applied, violates the Equal Protection Clause or the Establishment Clause.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring. [Omitted. Justice Thomas repeated his understanding that the Establishment Clause ought not to have been incorporated and applied to the states as a matter of original intent. Justice Gorsuch joined this opinion, in effect substituting himself for the late Justice Scalia who had agreed with this interpretation. *See Note: The Incorporation Doctrine* (Chapter 16)].

JUSTICE ALITO, concurring. [Omitted. Justice Alito joined the opinion of the Court "in full." He went on to write a discursive concurring opinion — he described it as "a brief retelling" — that traced the history of the provision in the Montana state constitution to conclude for himself that it originated in the anti-immigrant and anti-Catholic prejudices behind the proposed Blaine Amendment to the U.S. Constitution that failed ratification in 1875. *See Note: The Blaine Amendments* (*supra* this chapter).]

JUSTICE GORSUCH, concurring.

[Today], the Court explains how the Montana Constitution, as interpreted by the State Supreme Court, violates the First Amendment by discriminating against parents and schools based on their religious status or identity. The Court explains, too, why the State Supreme Court's decision to eliminate the tax credit program fails to mask the discrimination. But for the Montana Constitution's impermissible discrimination, after all, the legislature's tax credit and scholarship program would be still operating for the benefit of Ms. Espinoza and everyone else. I agree with all the Court says on these scores and join its opinion in full. I write separately only to address an additional point.

The Court characterizes the Montana Constitution as discriminating against parents and schools based on "religious status and not religious use." *Ante*. No doubt, the Court proceeds as it does to underscore how the outcome of this case follows from *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017), where the Court struck down a similar public benefits restriction that, it held, discriminated on the basis of religious status. No doubt, too, discrimination on the basis of religious status raises grave constitutional questions for the reasons the Court describes. But I was not sure about characterizing the State's discrimination in *Trinity Lutheran* as focused only on religious status, and I am even less sure about characterizing the State's discrimination here that way. *See id.* (Gorsuch, J., concurring in part).

In the first place, discussion of religious activity, uses, and conduct — not just status — pervades this record. The Montana Constitution forbids the use of public funds "for any sectarian purpose," including to "aid" sectarian schools. Art. X, § 6(1). Tracking this directive, the State Supreme Court reasoned that the legislature's tax credit program could be used to "subsidize the sectarian school's educational program" and thereby "strengthen . . . religious education." Meanwhile, Ms. Espinoza admits that she would like to use scholarship funds to enable her daughters to be taught in school the "same Christian values" they are taught at home. Finally, in its briefing before this Court, Montana has represented that its Constitution focuses on preventing the use of tax credits to subsidize religious activity.

Not only is the record replete with discussion of activities, uses, and conduct, any jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers. Does Montana seek to prevent religious parents and schools from participating in a public benefits program (status)? Or does the State aim to bar public benefits from being employed to support religious education (use)? Maybe

it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say that the State's discrimination focused on what religious parents and schools *do* — teach religion. Nor are the line-drawing challenges here unique; they have arisen before and will again.

Most importantly, though, it is not as if the First Amendment cares. The Constitution forbids laws that prohibit the free exercise of religion. That guarantee protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly. At the time of the First Amendment's adoption, the word "exercise" meant (much as it means today) some "labour of the body," a "use," as in the "actual application of any thing," or a "practice," as in some "outward performance." 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773); *ibid.* (5th ed. 1784). By speaking of a right to "free exercise," rather than a right "of conscience," an alternative the framers considered and rejected, our Constitution "extended the broader freedom of action to all believers." So whether the Montana Constitution is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest, conditions absent here for reasons the Court thoroughly explains.

Our cases have long recognized the importance of protecting religious actions, not just religious status. . . . In fact, this Court has already recognized that parents' decisions about the education of their children — the very conduct at issue here — can constitute protected religious activity. In *Wisconsin v. Yoder* (1972) [Chapter 18], the Court held that Amish parents could not be compelled to send their children to a public high school if doing so would conflict with the dictates of their faith. [Even] cases that seemingly focus on religious status do so with equal respect for religious actions. . . .

Consistently, too, we have recognized the First Amendment's protection for religious conduct in public benefits cases. When the government chooses to offer scholarships, unemployment benefits, or other affirmative assistance to its citizens, those benefits necessarily affect the "baseline against which burdens on religion are measured." *Locke v. Davey* (2004) (Scalia, J., dissenting) (*citing Everson v. Board of Ed. of Ewing* (1947)). So, as we have long explained, the government "penalizes religious activity" whenever it denies to religious persons an "equal share of the rights, benefits, and privileges enjoyed by other citizens." What benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct.

Our cases illustrate the point. In *Sherbert v. Verner* (1963) [Chapter 18], for example, a State denied unemployment benefits to Adell Sherbert not because she was a Seventh Day Adventist but because she had put her faith into practice by refusing to labor on the day she believed God had set aside for rest. Recognizing her right to exercise her religion freely, the Court held that Ms. Sherbert was entitled to benefits. [The] First Amendment protects religious uses and actions for good reason. What point is it to tell a person that he is free to *be* Muslim but he may be subject to discrimination for *doing* what his religion commands, attending Friday prayers, living his daily life in harmony with the teaching of his faith, and educating his children in its ways? What does it mean to tell an Orthodox Jew that she may have her religion but may be targeted for observing her religious calendar? Often, governments lack effective ways to control what lies in a person's heart or mind. But

they can bring to bear enormous power over what people say and do. The right to *be* religious without the right to *do* religious things would hardly amount to a right at all.

If the government could intrude so much in matters of faith, too, winners and losers would soon emerge. Those apathetic about religion or passive in its practice would suffer little in a world where only inward belief or status is protected. But what about those with a deep faith that requires them to do things passing legislative majorities might find unseemly or uncouth — like knocking on doors to spread their beliefs, refusing to build tank turrets during wartime, or teaching their children at home? "Those who take their religion seriously, who think that their religion should affect the whole of their lives," and those whose religious beliefs and practices are least popular, would face the greatest disabilities. *Mitchell v. Helms* (2000) (plurality opinion) [Chapter 17]. A right meant to protect minorities instead could become a cudgel to ensure conformity. [It] doesn't take a long or searching look through history or around the world to see how this can go. . . . Even today, in fiefdoms small and large, people of faith are made to choose between receiving the protection of the State and living lives true to their religious convictions.

Of course, in public benefits cases like the one before us the stakes are not so dramatic. Individuals are forced only to choose between forgoing state aid or pursuing some aspect of their faith. The government does not put a gun to the head, only a thumb on the scale. But, as so many of our cases explain, the Free Exercise Clause doesn't easily tolerate either; any discrimination against religious exercise must meet the demands of strict scrutiny. In this way, the Clause seeks to ensure that religion remains "a matter of voluntary choice by individuals and their associations, where each sect ' flourishes according to the zeal of its adherents and the appeal of its dogma,' " influenced by neither where the government points its gun nor where it places its thumb.

Montana's Supreme Court disregarded these foundational principles. Effectively, the court told the state legislature and parents of Montana like Ms. Espinoza: You can have school choice, but if anyone dares to choose to send a child to an accredited religious school, the program will be shuttered. That condition on a public benefit discriminates against the free exercise of religion. Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same.

JUSTICE GINSBURG, with whom JUSTICE KAGAN joins, dissenting.

The Montana Legislature enacted a scholarship program to fund tuition for students attending private secondary schools. In the decision below, the Montana Supreme Court struck down that program in its entirety. The program, the state court ruled, conflicted with the State Constitution's no-aid provision, which forbids government appropriations to religious schools. MONT. CONST. art. X, § 6(1). Parents who sought to use the program's scholarships to fund their children's religious education challenged the state court's ruling. They argue in this Court that the Montana court's application of the no-aid provision violated the Free Exercise Clause of the Federal Constitution. Importantly, the parents, petitioners here, disclaim any challenge to the no-aid provision on its face. They instead argue — and this Court's majority accepts — that the provision is unconstitutional as applied because the First Amendment prohibits discrimination in tuition-benefit programs based on a school's religious status. Because the state court's decision does not so discriminate, I would reject petitioners' free exercise claim. . . .

[The] Montana Supreme Court's decision does not place a burden on petitioners' religious exercise. Petitioners may still send their children to a religious school. And the Montana Supreme Court's decision does not pressure them to do otherwise. Unlike the law in *Trinity Lutheran*, the decision below puts petitioners to no "choice": Neither giving up their faith, nor declining to send their children to sectarian schools, would affect their entitlement to scholarship funding. There simply are no scholarship funds to be had.

True, petitioners expected to be eligible for scholarships under the legislature's program, and to use those scholarships at a religious school. And true, the Montana court's decision disappointed those expectations along with those of parents who send their children to secular private schools. But, as Justice Sotomayor observes, *see post* (dissenting opinion), this Court has consistently refused to treat neutral government action as unconstitutional solely because it fails to benefit religious exercise. *See Sherbert* (Douglas, J., concurring) [Chapter 18] ("The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.").

These considerations should be fatal to petitioners' free exercise claim, yet the Court does not confront them. Instead, the Court decides a question that, in my view, this case does not present: "Whether excluding religious schools and affected families from [the scholarship] program was consistent with the Federal Constitution." *Ante* (majority opinion). The Court goes on to hold that the Montana Supreme Court's application of the no-aid provision violates the Free Exercise Clause because it " 'conditions the availability of benefits upon a recipient's willingness to surrender its religiously impelled status.' " *Ante* (*quoting Trinity Lutheran*). As I see it, the decision below — which maintained neutrality between sectarian and nonsectarian private schools — did no such thing. . . .

Thus, contrary to this Court's assertion, the no-aid provision did not require the Montana Supreme Court to "exclude" religious schools from the scholarship program. The provision mandated only that the state treasury not be used to fund religious schooling. As this case demonstrates, that mandate does not necessarily require *differential treatment*. The no-aid provision can be implemented in two ways. A State may distinguish within a benefit program between secular and sectarian schools, or it may decline to fund all private schools. The Court agrees that the First Amendment permits the latter course. Because that is the path the Montana Supreme Court took in this case, there was no reason for this Court to address the alternative.

By urging that it is impossible to apply the no-aid provision in harmony with the Free Exercise Clause, the Court seems to treat the no-aid provision itself as unconstitutional. Petitioners, however, disavowed a facial First Amendment challenge, and the state courts were never asked to address the constitutionality of the no-aid provision divorced from its application to a specific government benefit. The only question properly raised is whether application of the no-aid provision to bar all state-sponsored private-school funding violates the Free Exercise Clause. For the reasons stated, it does not.

Nearing the end of its opinion, the Court writes: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Ante*. Because Montana's Supreme Court did not make such a decision — its judgment put all private school parents in the

same boat — this Court had no occasion to address the matter. On that sole ground, and reaching no other issue, I dissent from the Court's judgment.

JUSTICE BREYER, with whom JUSTICE KAGAN joins as to Part I, dissenting.

The First Amendment's Free Exercise Clause guarantees the right to practice one's religion. At the same time, its Establishment Clause forbids government support for religion. Taken together, the Religion Clauses have helped our Nation avoid religiously based discord while securing liberty for those of all faiths.

This Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purpose. *See, e.g.*, *Walz v. Tax Comm'n of City of New York* (1970). And this potential conflict is nowhere more apparent than in cases involving state aid that serves religious purposes or institutions. In such cases, the Court has said, there must be constitutional room, or " 'play in the joints,' " between "what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) (*quoting Locke v. Davey* (2004)). Whether a particular state program falls within that space depends upon the nature of the aid at issue, considered in light of the Clauses' objectives. . . .

I

[We] all recognize that the First Amendment prohibits discrimination against religion. At the same time, our history and federal constitutional precedent reflect a deep concern that state funding for religious teaching, by stirring fears of preference or in other ways, might fuel religious discord and division and thereby threaten religious freedom itself. The Court has consequently made it clear that the Constitution commits the government to a "position of neutrality" in respect to religion. *School Dist. of Abington Township v. Schempp* (1963) [Chapter 17]. . . .

That, in significant part, is why the Court has held that "there is room for play in the joints" between the Clauses' express prohibitions that is "productive of a benevolent neutrality," allowing "religious exercise to exist without sponsorship and without interference." *Id.* It has held that there "are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*. And that "play in the joints" should, in my view, play a determinative role here. [It] may be that, under our precedents, the Establishment Clause does not *forbid* Montana to subsidize the education of petitioners' children. But, the question here is whether the Free Exercise Clause *requires* it to do so. The majority believes that the answer to that question is "yes." . . . I shall explain why I disagree.

As the majority acknowledges, two cases are particularly relevant: *Trinity Lutheran Church of Columbia, Inc. v. Comer* and *Locke v. Davey*. . . . The majority finds that the school-playground case, *Trinity Lutheran*, and not the religious-studies case, *Locke*, controls here. I disagree. In my view, the program at issue here is strikingly similar to the program we upheld in *Locke* and importantly different from the program we found unconstitutional in *Trinity Lutheran*. Like the State of Washington in *Locke*, Montana has chosen not to fund (at a distance) "an essentially religious endeavor" — an education designed to " 'induce religious faith.' " *Locke*. That kind of program simply cannot be likened to Missouri's decision to exclude a church school from applying for a grant to resurface its playground. . . .

What, then, is the difference between *Locke* and the present case? And what is it that leads the majority to conclude that funding the study of religion is more like paying to fix up a playground (*Trinity Lutheran*) than paying for a degree in

theology (*Locke*)? The majority's principal argument appears to be that, as in *Trinity Lutheran*, Montana has excluded religious schools from its program "solely because of the religious character of the schools." *Ante*. The majority seeks to contrast this *status-based* discrimination with the program at issue in *Locke*, which it says denied scholarships to divinity students based on the religious *use* to which they put the funds — *i.e.*, training for the ministry, as opposed to secular professions.

It is true that Montana's no-aid provision broadly bars state aid to schools based on their religious affiliation. But this case does not involve a claim of status-based discrimination. The schools do not apply or compete for scholarships, they are not parties to this litigation, and no one here purports to represent their interests. We are instead faced with a suit by *parents* who assert that *their* free exercise rights are violated by the application of the no-aid provision to prevent them from using taxpayer-supported scholarships to attend the schools of their choosing. In other words, the problem, as in *Locke*, is what petitioners " 'propose to *do* — use the funds to' " obtain a religious education. *Ante*.

Even if the schools' status were relevant, I do not see what bearing the majority's distinction could have here. There is no dispute that religious schools seek generally to inspire religious faith and values in their students. How else could petitioners claim that barring them from using state aid to attend these schools violates their free exercise rights? Thus, the question in this case — unlike in *Trinity Lutheran* — boils down to what the schools would *do* with state support. And the upshot is that here, as in *Locke*, we confront a State's decision not to fund the inculcation of religious truths.

The majority next contends that there is no " 'historic and substantial' tradition against aiding" religious schools "comparable to the tradition against state-supported clergy invoked by *Locke*." *Ante*. But the majority ignores the reasons for the founding era bans that we relied upon in *Locke*. . . . [I] see no meaningful difference between the concerns that James Madison and Thomas Jefferson raised and the concerns inevitably raised by taxpayer support for scholarships to religious schools. [State] funds are sought for those who would "instruct such citizens" in the tenets of religious faith. [That] would compel taxpayers "to support the propagation of opinions" on matters of religion with which they may disagree, by teachers whom they have not chosen. . . . For our purposes it is enough to say that, among those who gave shape to the young Republic were people, including Madison and Jefferson, who perceived a grave threat to individual liberty and communal harmony in tax support for the teaching of religious truths. These "historic and substantial" concerns have consistently guided the Court's application of the Religion Clauses since. . . .

Nor can I see how it could make a difference that the Establishment Clause might *permit* the State to subsidize religious education through a program like Montana's. The tax benefit here inures to donors, who choose to support a particular scholarship organization. That organization, in turn, awards scholarships to students for the qualifying school of their choice. The majority points to cases in which we have upheld programs where, as here, state funds make their way to religious schools by means of private choices. *Ante.* (*citing Zelman*). As the Court acknowledged in *Trinity Lutheran*, however, that does not answer the question whether providing such aid is *required*.

Neither does it address related concerns that I have previously described. Private choice cannot help the taxpayer who does not want to finance the

propagation of religious beliefs, whether his own or someone else's. It will not help religious minorities too few in number to support a school that teaches their beliefs. And it will not satisfy those whose religious beliefs preclude them from participating in a government-sponsored program. Some or many of the persons who fit these descriptions may well feel ignored — or worse — when public funds are channeled to religious schools. *See Zelman* (Breyer, J., dissenting). These feelings may, in turn, sow religiously inspired political conflict and division — a risk that is considerably greater where States are *required* to include religious schools in programs like the one before us here. And it is greater still where, as here, those programs benefit only a handful of a State's many religious denominations. . . .

If, for 250 years, we have drawn a line at forcing taxpayers to pay the salaries of those who teach their faith from the pulpit, I do not see how we can today require Montana to adopt a different view respecting those who teach it in the classroom.

II

In reaching its conclusion that the Free Exercise Clause requires Montana to allow petitioners to use taxpayer supported scholarships to pay for their children's religious education, the majority makes several doctrinal innovations that, in my view, are misguided and threaten adverse consequences.

Although the majority refers in passing to the "play in the joints" between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, its holding leaves that doctrine a shadow of its former self. Having concluded that there is no obstacle to subsidizing a religious education under our Establishment Clause precedents, the majority says little more about Montana's antiestablishment interests or the reasoning that underlies them. It does not engage with the State's concern that its funds not be used to support religious teaching. . . .

[Setting] aside the problems with the majority's characterization of this case, I think the majority is wrong to replace the flexible, context-specific approach of our precedents with a test of "strict" or "rigorous" scrutiny. And it is wrong to imply that courts should use that same heightened scrutiny whenever a government benefit is at issue. [If] the Court has found it possible to walk what we have called the " 'tight rope' " between the two Religion Clauses, it is only by "preserving doctrinal flexibility and recognizing the need for a sensible and realistic application" of those provisions. *Yoder*. [The] Court proceeded in just this way in *Locke*. It considered the same precedents the majority today cites in support of its presumption of unconstitutionality. But it found that applying the presumption set forth in those cases to Washington's decision not to fund devotional degrees would "extend" them "well beyond not only their facts but their reasoning." *Id.* In my view, that analysis applies equally to this case. . . .

Montana's law does not punish religious exercise. It does not deny anyone, because of their faith, the right to participate in political affairs of the community. And it does not require students to choose between their religious beliefs and receiving secular government aid such as unemployment benefits. The State has simply chosen not to fund programs that, in significant part, typically involve the teaching and practice of religious devotion. And "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation with Representation of Wash.* 461 U.S. 540, 549 (1983). . . .

The Court's reliance in our prior cases on the notion of "play in the joints," our hesitation to apply presumptions of unconstitutionality, and our tendency to confine

benefit-related holdings to the context in which they arose all reflect a recognition that great care is needed if we are to realize the Religion Clauses' basic purpose "to promote and assure the fullest scope of religious liberty and religious tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *See Van Orden v. Perry* (2005) (Breyer, J., concurring in judgment) [Chapter 17]. . . .

For one thing, government benefits come in many shapes and sizes. The appropriate way to approach a State's benefit-related decision may well vary depending upon the relation between the Religion Clauses and the specific benefit and restriction at issue. For another, disagreements that concern religion and its relation to a particular benefit may prove unusually difficult to resolve. They may involve small but important details of a particular benefit program. Does one detail affect one religion negatively and another positively? What about a religion that objects to the particular way in which the government seeks to enforce mandatory (say, qualification-related) provisions of a particular benefit program? Or the religious group that for religious reasons cannot accept government support? And what happens when qualification requirements mean that government money flows to one religion rather than another? Courts are ill equipped to deal with such conflicts. Yet, in a Nation with scores of different religions, many such disagreements are possible. And I have only scratched the surface. . . .

Nor does the majority's approach avoid judicial entanglement in difficult and sensitive questions. To the contrary, as I have just explained, it burdens courts with the still more complex task of untangling disputes between religious organizations and state governments, instead of giving deference to state legislators' choices to avoid such issues altogether. At the same time, it puts States in a legislative dilemma, caught between the demands of the Free Exercise and Establishment Clauses, without "breathing room" to help ameliorate the problem.

I agree with the majority that it is preferable in some areas of the law to develop generally applicable tests. The problem, as our precedents show, is that the interaction of the Establishment and Free Exercise Clauses makes it particularly difficult to design a test that vindicates the Clauses' competing interests in all — or even most — cases. That is why, far from embracing mechanical formulas, our precedents repeatedly and frankly acknowledge the need for precisely the kind of " 'judgment-by-judgment analysis' " the majority rejects. "The standards" of our prior decisions, we have said, "should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired."

The Court's occasional efforts to declare rules in spite of this experience have failed to produce either coherence or consensus in our First Amendment jurisprudence. *See Van Orden* (Breyer, J., concurring in judgment). The persistence of such disagreements bears out what I have said — namely, that rigid, bright-line rules like the one the Court adopts today too often work against the underlying purposes of the Religion Clauses. And a test that fails to advance the Clauses' purposes is, in my view, far worse than no test at all. . . .

And what are the limits of the Court's holding? The majority asserts that States "need not subsidize private education." *Ante*. But it does not explain why that is so. If making scholarships available to only secular nonpublic schools exerts "coercive" pressure on parents whose faith impels them to enroll their children in religious schools, then how is a State's decision to fund only secular *public* schools

any less coercive? Under the majority's reasoning, the parents in both cases are put to a choice between their beliefs and a taxpayer-sponsored education.

Accepting the majority's distinction between public and nonpublic schools does little to address the uncertainty that its holding introduces. What about charter schools? States vary widely in how they permit charter schools to be structured, funded, and controlled. How would the majority's rule distinguish between those States in which support for charter schools is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools? The majority's rule provides no guidance, even as it sharply limits the ability of courts and legislatures to balance the potentially competing interests that underlie the Free Exercise and Antiestablishment Clauses.

It is not easy to discern "the boundaries of the neutral area between" the two Religion Clauses "within which the legislature may legitimately act." And it is more difficult still in cases, such as this one, where the Constitution's policy in favor of free exercise, on one hand, and against state sponsorship, on the other, are in conflict. In such cases, I believe there is "no test-related substitute for the exercise of legal judgment." *Van Orden* (opinion of Breyer, J.). That judgment "must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." *Id.* Here, those purposes, along with the examples set by our decisions in *Locke* and *Trinity Lutheran*, lead me to believe that Montana's differential treatment of religious schools is constitutional. "If any room exists between the two Religion Clauses, it must be here." *Locke*. For these reasons, I respectfully dissent from the Court's contrary conclusion.

JUSTICE SOTOMAYOR, dissenting.

The majority holds that a Montana scholarship program unlawfully discriminated against religious schools by excluding them from a tax benefit. The threshold problem, however, is that such tax benefits no longer exist for anyone in the State. The Montana Supreme Court invalidated the program on state-law grounds, thereby foreclosing the as-applied challenge petitioners raise here. Indeed, nothing required the state court to uphold the program or the state legislature to maintain it. The Court nevertheless reframes the case and appears to ask whether a longstanding Montana constitutional provision is facially invalid under the Free Exercise Clause, even though petitioners disavowed bringing such a claim. . . .

Not only is the Court wrong to decide this case at all, it decides it wrongly. In *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017), this Court held, "for the first time, that the Constitution requires the government to provide public funds directly to a church." *Id.* (Sotomayor, J., dissenting). Here, the Court invokes that precedent to require a State to subsidize religious schools if it enacts an education tax credit. Because this decision further "slights both our precedents and our history" and "weakens this country's longstanding commitment to a separation of church and state beneficial to both." *Id.* I respectfully dissent.

I

A

The Montana Supreme Court invalidated a state tax-credit program because it was inconsistent with the Montana Constitution's "no-aid provision," Art. X, § 6(1), which forbids government appropriations for sectarian purposes, including funding religious schools. In so doing, the court expressly declined to resolve federal

constitutional issues [under the Establishment Clause and the Free Exercise Clause]. The court also remedied the only potential harm of discriminatory treatment by striking down the program altogether. After the state court's decision, neither secular nor sectarian schools receive the program's tax benefits.

Petitioners' free exercise claim is not cognizable. [This] Court's cases have required not only differential treatment, but also a resulting burden on religious exercise. [Neither] differential treatment nor coercion exists here because the Montana Supreme Court invalidated the tax-credit program entirely. Because no secondary school (secular or sectarian) is eligible for benefits, the state court's ruling neither treats petitioners differently based on religion nor burdens their religious exercise. *See ante* (Ginsburg, J., dissenting). Petitioners remain free to send their children to the religious school of their choosing and to exercise their faith. [To] be sure, petitioners may want to apply for scholarships and would prefer that Montana subsidize their children's religious education. But this Court had never before held unconstitutional government action that merely failed to benefit religious exercise. [Put] another way, the Constitution does not compel Montana to create or maintain a tax subsidy. [Petitioners] thus have no cognizable as-applied claim arising from the disparate treatment of religion, because there is no longer a program to which Montana's no-aid provision can apply. [Nor] is it enough that petitioners might wish that Montana's no-aid provision were no longer good law. Petitioners identify no disparate treatment traceable to the state constitutional provision that they challenge because the tax-credit program no longer operates. . . .

B

As another dissenting opinion observes, *see ante* (opinion of Ginsburg, J.), the Court sidesteps these obstacles by asking a question that this case does not raise and that the Montana Supreme Court did not answer: whether by excluding "religious schools and affected families from a scholarship program," Montana's no-aid provision was "consistent with the Federal Constitution." In so doing, the Court appears to transform petitioners' as-applied challenge into a facial one. [Indeed], it appears that the Court has declared that once Montana created a tax subsidy, it forfeited the right to eliminate it if doing so would harm religion. This is a remarkable result, all the more so because the Court strains to reach it. [In] sum, the decision below neither upheld a program that "disqualifies some private schools solely because they are religious," nor otherwise decided the case on federal grounds. The Court's opinion thus turns on a counterfactual hypothetical it is powerless (and unwise) to decide.

II

Even on its own terms, the Court's answer to its hypothetical question is incorrect. The Court relies principally on *Trinity Lutheran*, which found that disqualifying an entity from a public benefit "solely because of the entity's religious character" could impose "a penalty on the free exercise of religion." *Trinity Lutheran* held that ineligibility for a government benefit impermissibly burdened a church's religious exercise by "putting it to the choice between being a church and receiving a government benefit." Invoking that precedent, the Court concludes that Montana must subsidize religious education if it also subsidizes nonreligious education.

The Court's analysis of Montana's defunct tax program reprises the error in *Trinity Lutheran*. Contra the Court's current approach, our free exercise precedents had long granted the government "some room to recognize the unique status of

religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws." *Id.* at ___ (Sotomayor, J., dissenting). [Until] *Trinity Lutheran*, the right to exercise one's religion did not include a right to have the State pay for that religious practice. That is because a contrary rule risks reading the Establishment Clause out of the Constitution. . . . The relevant question had always been not whether a State singles out religious entities, but why it did so.

Here, a State may refuse to extend certain aid programs to religious entities when doing so avoids "historic and substantial" antiestablishment concerns. *Locke v. Davey* (2004). Properly understood, this case is no different from *Locke* because petitioners seek to procure what the plaintiffs in *Locke* could not: taxpayer funds to support religious schooling. Indeed, one of the concurrences lauds petitioners' spiritual pursuit, acknowledging that they seek state funds for manifestly religious purposes like "teaching religion" so that petitioners may "outwardly and publicly" live out their religious tenets. *Ante* (opinion of Gorsuch, J.). But those deeply religious goals confirm why Montana may properly decline to subsidize religious education. Involvement in such spiritual matters implicates both the Establishment Clause, and the free exercise rights of taxpayers, "denying them the chance to decide for themselves whether and how to fund religion," *Trinity Lutheran* (Sotomayor, J., dissenting). Previously, this Court recognized that a "prophylactic rule against the use of public funds" for "religious activities" appropriately balanced the Religion Clauses' differing but equally weighty interests. *Id.*

The Court maintains that this case differs from *Locke* because no pertinent " 'historic and substantial' " tradition supports Montana's decision. *Ante*. But the Court's historical analysis is incomplete at best. . . . [The] Court further suggests that by abstaining from funding religious activity, the State is " 'suppressing' " and "penalizing" religious activity. *Ante*. But a State's decision not to fund religious activity does not "disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns." *Trinity Lutheran* (Sotomayor, J., dissenting). That is, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). [Finally], it is no answer to say that this case involves "discrimination." *Ante*. A "decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination." *Trinity Lutheran* (Sotomayor, J., dissenting). So too here.

Today's ruling is perverse. Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place. . . . Today's Court . . . rejects the Religion Clauses' balanced values in favor of a new theory of free exercise, and it does so only by setting aside well-established judicial constraints.

I respectfully dissent.

Page 1030: ***insert new Problems after the Problem:***

Problem: The Traditions of Abraham in the Twenty-first Century

Although Jewish law permits eating meat, and even mandates eating it on certain designated Holy Days, Jews have a religious obligation to always treat animals compassionately. The *Talmud* (a collection of laws and legal opinions) elaborates on a Jew's obligation to refrain from causing undue harm to animals. *Shechita* is the method of ritual slaughter mandated by Jewish law. The procedure

consists of a *shochet*, an individual skillfully trained to perform the ritual, using a *chalaf*, a special sharp knife, to employ "a rapid and expert transverse incision . . . which severs the major structures and vessels at the neck," causing "an instant drop in blood pressure in the brain and . . . the irreversible cessation of consciousness." The religious laws of *shechita* mandate that the animal must be "healthy and uninjured" when the animal's throat is cut. Notably, this requirement forbids the animal from being stunned before being slaughtered, because pre-slaughter stunning renders an animal injured and therefore disqualified for Jewish consumption. These practices must be strictly followed for meat to be kosher, i.e., consistent with Jewish dietary laws and permissible for observant Jews to eat.

Islamic law requires somewhat similar religious slaughter procedures proscribed in the *Qur'an*, as well as in oral traditions contained in the *Sunnah*. "In the name of Allah" must be proclaimed while administering a single cut to the throat, severing the wind pipe, food pipe, and blood vessels on both sides of the throat, to produce a sudden loss of blood to the brain. This practice, known as *dhabīḥah*, is required by devout Muslims in order for their meat to be considered halāl, i.e., permissible to eat. According to religious tradition and practice, "the act of slaughtering must assure that the animals suffer minimal pain as is possible, to express respect to them and to thank Allah for providing them as food." Pre-slaughter stunning of the animal is not permitted. A majority of Muslim clerics would allow Muslims who do not have access to halāl meat to eat kosher meat instead. However, observant Jews may not eat halāl meat under any circumstances.

These religious slaughter practices have long been incorporated into many federal and state laws regulating the humane slaughtering of animals for food. More than a century ago, the State Legislature enacted *The Humane Slaughter Act* (1900). Section 1 provides:

> The Legislature finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in the State's food supply. It is therefore declared to be the policy of the State that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.

"Humane methods" are defined in Section 2 of the Act:

> No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the State unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:
>
> (a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or
>
> (b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a

> method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.

Thus, the relevant State law categorizes both commercial pre-slaughter stunning and religious ritual slaughter, as humane and legally acceptable methods of animal slaughter. The commercial meat slaughtering industry relies on stunning, i.e., subduing the animal in order to render it unconscious prior to slaughter. The primary commercial methods of stunning animals are shooting a steel bolt into the animal's skull, gassing, and electrocuting.

Animal rights groups and some commercial animal slaughtering companies have coordinated to lobby the State Legislature to repeal Section 2(b) alleging that the statutory exceptions for kosher and halāl religious slaughtering practices are a violation of the incorporated Establishment Clause. Jewish and Muslim groups have lobbied the State Legislature to preserve Section 2(b) on the basis of the incorporated Free Exercise Clause.

Apply what you have learned about the Religion Clauses. Is Section 2(b) constitutional? Is Section 2 (b) constitutionally required?

Problem: "So help me . . . no one in particular"

Simone Roseaux is a citizen of France who moved to the United States a decade ago; she became a permanent resident four years later and received her green card two years after. Last year, she submitted her application for naturalization to the U.S. Citizenship and Immigration Services (USCIS). After attending an interview with USCIS and passing her English language and civics test, her application was granted. She was notified that she should attend the next scheduled public naturalization ceremony to take the oath of allegiance to the United States, which is the last mandatory requirement for becoming an American citizen. *See* 8 U.S.C. § 1448(a). The Department of Homeland Security's nationalization regulations provide the language of the oath, which concludes: "I take this obligation freely, without any mental reservation or purpose of evasion; *so help me God*." 8 C.F.R. § 337.1(a) (emphasis added).

Roseaux responded to the USCIS notice that her "sincere religious belief system includes the denial that there exists any 'God.' " Therefore, she requested that the oath be administered without the phrase "so help me God." The USCIS informed Roseaux that she could either participate in the public oath ceremony where she herself could omit saying "so help me God," or she could schedule an individual private oath ceremony where neither the government nor she would recite that phrase. When she did not respond after several months, USCIS sent Roseaux a letter giving her "15 days in which to notify USCIS which of the options provided to her was acceptable" and warning her that if she failed to respond or "declined to specify one of the options," USCIS would reopen her case and "deny her application for naturalization for her own lack of prosecution."

Roseaux filed a complaint in United States District Court against the Director of the USCIS and the United States (the government). The complaint alleged that the inclusion of the phrase "so help me God" in the naturalization oath as set forth in the USCIS regulation violated (1) the Establishment Clause; (2) the Free Exercise Clause; and (3) the RFRA. Specifically, Roseaux described herself as "religiously [sic] a devout life-long Atheist, having grown up under the French

constitutional principle of government secularism or *Laïcité*, who specifically denies the existence of any 'God.' " She alleged that by adding "so help me God" to the end of the oath, the government "was asserting a religious belief that God exists." According to her, although the regulations do allow for the oath to be altered on her behalf as the USCIS suggested, she would still be violating her oath to "support and defend the Constitution and the laws of the United States of America" because the government cannot treat her as an "outsider" due to her religious beliefs or force her to use an alternative oath. Her complaint sought a declaration that any and all recitations of the phrase "so help me God" in the naturalization oath violated both Religion Clauses and the RFRA. She petitioned the District Court to issue a national injunction to permanently enjoin the government "from placing 'so help me God' in any and all future naturalization oath ceremonies, private and public." After briefing and argument, the District Court granted the government's motion for a summary judgment.

Suppose you are a law clerk to one of the circuit judges on the panel of the United States Court of Appeals that will decide Roseaux's appeal. Write a bench memorandum for your judge explaining the intricacies of how the Religion Clauses and the RFRA apply. Make a recommendation either to affirm or to reverse the District Court.

C. Religious Speech

Page 1052: ***insert new Problems after the Problem:***

Problem: Flying the Christian Flag on the City Hall Flagpole

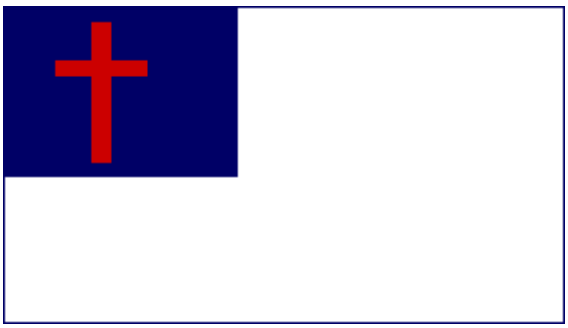
The City of Boston owns and manages three flagpoles in front of the entrance to City Hall, in a park-like area called City Hall Plaza located in the central downtown business district. The three poles are the same height, approximately eighty feet tall. One pole displays the flag of the United States. A second pole flies the flag of the Commonwealth of Massachusetts. This dispute involves the third flagpole, which displays the City of Boston flag except when replaced by another flag — usually at the request of a third party. Such a request is often made in conjunction with a proposed third-party event to take place in City Hall Plaza, such as political rallies, charitable fundraisers, fraternal gatherings, and nonviolent social protests. Examples of other flags that have been raised recently on the third flagpole are flags of some countries, *e.g.*, Brazil, Ethiopia, Portugal, Puerto Rico, the People's Republic of China, and Cuba, and the flags of some private organizations, *e.g.*, the banner of the National Juneteenth Observation Foundation, the rainbow flag of the LGBT Movement, the Transgender Pride flag, the Free Masonry flag, the Shriner's International flag, and the Bunker Hill Historical Association's flag.

To apply for a permit to raise a flag at City Hall and hold an event on a City-owned property, a third party submits an application to the City. The City has published guidelines on its website for applicants. The guidelines state that an application may be denied if the event involves illegal or dangerous activities or if it conflicts with scheduled events. In addition, an application may be denied if the applicant lacks an insurance certification, materially misrepresents anything on the application, has a history of damaging City property or failing to pay City fees, or fails to comply with other administrative requirements particular to the event. The City's Commissioner of Property Management (Commissioner) reviews applications for the City flagpole to ensure flag requests are "consistent with the City's message,

policies, and practices." The City does not otherwise have a written policy regarding the content of flags allowed to be raised.

In July, the president of Camp Constitution emailed the City on behalf of the organization, submitting an application requesting to "raise the Christian flag on the flagpole at the City Hall Plaza," in conjunction with a program for young people in the City Hall Plaza of "patriotic music and speeches by some local clergy focusing on Boston's revolutionary history" to be held on September 17th, Constitution Day.

The Christian flag is an ecumenical flag designed to represent all of Christianity and Christendom. Since its adoption by the Federal Council of Churches in 1942, it has been used by many Christian traditions, especially those of Protestant origin, including the Anglican, Baptist, Mennonite, Moravian, Lutheran, Presbyterian, Quaker, Methodist, and Calvinist Reformed, among others. The flag has a white field, with a red Latin cross inside a blue canton. The shade of red on the cross symbolizes the blood that Jesus shed on Calvary. The blue represents the waters of baptism as well as the faithfulness of Jesus Christ. The white represents the sinless purity of Jesus. Camp Constitution's email attached this illustration of the Christian flag:



Camp Constitution (http://campconstitution.net/) is an ecumenical, non-denominational Protestant organization that sponsors outdoor gatherings or rallies of young people ("camps") to instill patriotic and Christian values. Its mission statement reads in part:

> The mission of Camp Constitution is to enhance understanding of our Judeo-Christian moral heritage, our American heritage of courage and ingenuity, including the genius of our United States Constitution, and the application of free enterprise, which together gave our nation an unprecedented history of growth and prosperity, making us the envy of the world. We want to motivate, inspire and activate this generation of Patriots as well as the next generation of Patriots. We want to help find, develop, and train leaders in the freedom fight.
>
> We will have ample opportunity to enjoy our natural surroundings and celebrate our American cultural heritage, especially through our evening campfire programs which inspire our participation in melodic music, good humor and camaraderie, as well as inspiring respect for, and appreciation of, God, home, and country.

The Commissioner granted permission to hold the "camp" in the City Plaza, but denied the application to raise the Christian flag without explanation. Camp Constitution then asked for the official reason for denying the flag permit. The Commissioner responded in an email that "the City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles." The Commissioner further explained that the City's "policy and practice" was based on the First Amendment prohibition on government establishing religion and the City's authority to decide how to use its flagpoles, which are "a limited government space" and on full display to all passersby. The Commissioner concluded that "the City would be willing to consider a request to fly a non-religious flag on the City's flagpole, should Camp Constitution elect to offer one." Alternatively, the Commissioner stated the City had no objection to Camp Constitution displaying the Christian flag at ground level on stage during the event in City Plaza. In response, Camp Constitution's counsel sent a letter to the City, taking the position that the denial to fly the flag from the City's flagpole was unconstitutional and further declining to submit a "non-religious" flag.

Instead, Camp Constitution, joined by its president and several representative individual members, filed a lawsuit in United States District Court seeking to enjoin the City of Boston from denying them permission to display the Christian flag on the City Hall flagpole in conjunction with their planned "camp" on September 17th in the City Hall Plaza. What arguments are available to the Plaintiffs? How should the District Court rule?

Problem: Is Religion a Subject Matter or a Viewpoint? What Difference Does that Make?

The Metropolis Transit Authority (MTA) was established by the city of Metropolis to provide safe and reliable public transportation. Like most other local transit authorities, it sells commercial advertising space to help defray the costs of its services, and for many years it had accepted advertisements on all types of subjects. Last year, however, MTA closed its advertising space to issue-oriented advertisements, including political, religious, and advocacy advertisements. This change followed extensive complaints from riders, community groups, business interests, and its employees. MTA's policy change also was the result of several incidents of vandalism of its property and the time-intensive administrative burdens of reviewing proposed advertisements and responding to the so-called captive riders' complaints about particular advertisements. Controversial advertisements that triggered numerous complaints included, for example, advertisements that were critical of the Catholic Church's positions on birth control and abortion, advertisements by People for the Ethical Treatment of Animals that showed graphic images of animal cruelty, advertisements opposing discrimination based on sexual orientation, and advertisements that some deemed to be Islamophobic and anti-Muslim. Additionally, a MTA survey of riders revealed that 98% of them were familiar with the types of advertisements found on its buses, but that 58% of them were strongly opposed to issue-oriented advertisements and advertisements related to religion in particular.

After study and deliberation, and with the advice of the City Attorney, MTA adopted a new set of *Guidelines Governing Commercial Advertising* last year. Those Guidelines adopted broad categorical prohibitions, to avoid costly legal challenges and to minimize *ad hoc* bureaucratic determinations about which advertisements

were benign and which were not. MTA's administrative difficulties with advertisements with religious content in particular led to drafting *Guideline No. 12*, which states: "Advertisements that promote or oppose any religion, religious practice, or belief are prohibited."

The Catholic Archdiocese of Metropolis is challenging *Guideline No. 12* because MTA refused to accept the Archdiocese's proffered advertisement last November at the beginning of the liturgical season of Advent leading up to Christmas. The proffered advertisement invoked imagery from the Bible story of the gifts of the Magi or Three Wise Men. *See Matthew* 2:1-15. The advertisement that the Archdiocese sought to have MTA place on the exterior of its buses depicts a starry night and the silhouettes of the three wise men on camels traveling to Bethlehem following a bright shining star high in the sky, along with the words "*Find the Perfect Gift.*" The proffered advertisement included a link to the webpage of the Archdiocese and the Twitter hashtag "*#He* is the reason for the season." At the website, viewers would find "a simple message of hope in difficult times, parish Mass schedules, and opportunities for volunteering and charitable giving," according to the complaint. The same advertisement was placed in all the parish bulletins in the Archdiocese. But the Archdiocese believed that the bus advertisements would reach a wider audience on the streets and sidewalks throughout Metropolis. Here is a photograph of the disapproved advertisement:

The Archdiocese filed a complaint asking for declaratory and injunctive relief under the incorporated First Amendment — invoking the Free Speech Clause and the Free Exercise Clause — and added a statutory claim under the RFRA. Describe the proper constitutional and statutory analysis of *Guideline No. 12*.

Problem: COVID-19 Social Distancing Rules and Religion — a Dog's Breakfast

Soon after the outbreak of the COVID-19 pandemic, the national Centers for Disease Control and Prevention recommended that all gatherings of more than ten

(10) people should be canceled; for gatherings that did take place, the social distancing recommendation was that individuals should remain at least six feet apart at all times. The *President's Coronavirus Guidelines for America* recommended avoiding social gatherings of more than ten people — without mention or exception for religious worship services — and urged Americans to practice safe social distancing always and everywhere. Individual states issued elaborate and detailed guidelines or orders that required the social distancing standard and limited in-person gatherings during the pandemic. How these orders treated religious worship services varied from state to state.

- Ten (10) states specifically prohibited in-person religious gatherings in any form whatsoever.
- Fifteen (15) states specifically permitted religious gatherings to continue without any limit on their size.
- Twenty-two (22) states and the District of Columbia specified that religious gatherings could still take place, but only if they were limited to ten (10) or fewer people; Rhode Island set the number at five (5).
- Connecticut and Oregon limited religious gatherings to fifty (50) and twenty-five (25) people, respectively.
- Kentucky prohibited "mass gatherings" — including religious gatherings — but did not specify how many people constituted a "mass gathering."
- Several states, including Florida, South Carolina, and Tennessee, designated religious worship to be an "essential activity" — in the same category as food shopping and health care — and therefore exempted religious gatherings from their general prohibitions on social gatherings.

Source: Virginia Villa, *Most States Have Religious Exemptions to COVID-19 Social Distancing Rules*, PEW RESEARCH CENTER (Apr. 27, 2020), https://pewrsr.ch/3bHDndx.

Likewise, the responses of religious communities varied from state to state. Some religious leaders publicly defied their state's order and held unauthorized in-person religious services, sometimes with hundreds in attendance, without practicing social distancing. Consequently, some ministers and clergy were issued civil citations and fined, and a few ministers and clergy were even arrested and charged with the crime of public endangerment for holding religious services in violation of their state's order. Some religious leaders fully complied without questioning their state's order that prohibited all social gatherings without exception. Indeed, some religious leaders voluntarily canceled all in-person religious services, even in states with a religious worship exemption. News reports and blogs reported unprecedented incidents. Catholic dioceses instructed parish priests not to hold Sunday Mass and parishioners were instructed to stay home. Police arrested the attendees at a backyard religious wedding attended by family and friends and presided over by a Protestant minister. The funeral of a prominent Rabbi was broken up and dispersed by police and some mourners who refused to leave were arrested and charged with unlawful assembly.

Next came politics in the streets. Some religious protesters joined with others in mass demonstrations in state after state — replete with signs and chants about the Bill of Rights and the First Amendment — calling for state and local officials to end the restrictions and to allow a social reopening and a return to normal.

Alexis de Tocqueville's famous prediction once again proved prescient: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Lawsuits in state and federal courts followed from all sides. Some religious leaders challenged their state's order in federal and state court, under the Free Exercise Clause and the Free Speech Clause or the state constitution and the state's mini-RFRA, for failing to exempt gatherings for religious worship. Others lawsuits were brought by areligious or irreligious plaintiffs under the Establishment Clause to challenge the exemptions in their state's order that permitted gatherings for religious worship, arguing that the exogenous threat to public health and the risk to their own health and safety was so great as to be unconstitutional.

Apply what you have learned about the First Amendment and religious liberty. How should courts decide legal challenges to the social distancing restrictions brought by religious plaintiffs who seek to gather and worship in violation of their state's order? How should courts decide legal challenges brought by areligious or irreligious plaintiffs to the exemptions in their state's order that allowed in-person group religious worship?

Appendix B

The Justices of the United States Supreme Court, 1946-2020 Terms

U.S. Reports	Term*	The Court**
329-332[1]	1946	**Vinson**, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton
332[1]-335[2]	1947	"
335[2]-338[3]	1948	"
338[3]-339	1949	Vinson, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
340-341	1950	"
342-343	1951	"
344-346[4]	1952	"
346[4]-347	1953	**Warren**, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
348-349	1954	Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan[5]
350-351	1955	"
352-354	1956	Warren, Black, Reed,[6] Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker[7]
355-357	1957	Warren, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker
358-360	1958	Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart
361-364[8]	1959	"
364[8]-367	1960	"

* Rule 3 of the Supreme Court's Rules provides in part: "The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year."

** Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[1] The 1947 Term begins at 332 U.S. 371.

[2] The 1948 Term begins at 335 U.S. 281.

[3] The 1949 Term begins at 338 U.S. 217.

[4] The 1953 Term begins at 346 U.S. 325.

[5] Participation begins with 349 U.S.

[6] Participation ends with 352 U.S. 564.

[7] Participation begins with 353 U.S.

[8] The 1960 Term begins with 364 U.S. 285.

U.S. Reports	Term	The Court*
368-370	1961	Warren, Black, Frankfurter,[9] Douglas, Clark, Harlan, Brennan, Whittaker,[10] Stewart, White[11]
371-374	1962	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg
375-378	1963	"
379-381	1964	"
382-384	1965	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas
385-388	1966	"
389-392	1967	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall
393-395	1968	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas,[12] Marshall
396-399	1969	**Burger**, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, [vacancy]
400-403	1970	Burger, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, Blackmun
404-408	1971	Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell,[13] Rehnquist[18]
409-413	1972	"
414-418	1973	"
419-422	1974	"
423-428	1975	Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens[14]
429-433	1976	"
434-438	1977	"
439-443	1978	"
444-448	1979	"
449-453	1980	"
454-458	1981	Burger, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, O'Connor
459-463	1982	"
464-468	1983	"
469-473	1984	"
474-478	1985	"
479-483	1986	**Rehnquist**, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia
484-487	1987	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[9] Participation ends with 369 U.S. 422.

[10] Participation ends with 369 U.S. 120.

[11] Participation begins with 370 U.S.

[12] Participation ends with 394 U.S.

[13] Participation begins with 405 U.S.

[14] Participation begins with 424 U.S.

U.S. Reports	Term	The Court*
488-492	1988	Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy
493-497	1989	"
498-501	1990	Rehnquist, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter
502-505	1991	Rehnquist, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas
506-509	1992	"
510-512	1993	Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg
513-515	1994	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
516-518	1995	"
519-521	1996	"
522-524	1997	"
525-527	1998	"
528-530	1999	"
531-533	2000	"
534-536	2001	"
537-539	2002	"
540-542	2003	"
543-545	2004[15]	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
546-548	2005	**Roberts**, Stevens, O'Connor,[16] Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito[17]
549-551	2006	Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito
552-554	2007	"
555-557	2008	"
558-561	2009	Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor
562-564	2010	Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
565-567	2011	"
568-570	2012	"
571-573	2013	"
574-576	2014	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[15] Chief Justice Rehnquist died on Sept. 3, 2005, shortly before the 2004 Term officially concluded, but after all opinions from that Term had been delivered.

[16] Participation ends with 546 U.S. 417.

[17] Participation begins with 547 U.S.

U.S. Reports	Term	The Court*
577-579	2015	Roberts, Scalia,[18] Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
580-582	2016	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch[19]
583-585	2017	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch
586-588	2018	Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh
589-591	2019	"
592-594	2020	Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[18] Justice Scalia died on February 13, 2016, before most of the cases argued in the 2015 Term were decided. His participation ended with 136 S. Ct. 760.

[19] Justice Gorsuch joined the Court on April 10, 2017. He took no part in any of the cases from the 2016 Term discussed in this Supplement.