2018 SUPPLEMENT

TO

The First Amendment

Cases, Problems, and Materials

Fifth Edition

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Chapter 1
Historical Intentions and Underlying Values

On p. 14, change the Note heading to Notes, then number the existing note as new note #1 with the title "Persecution of the Press", and then insert the following new note # 2:

Notes

1. *Persecution of the Press*.

2. *Campus Unrest and Repression*. On college campuses, there have been increasing protests against ideas that some on campus find offensive. In recent years, conservative speakers have been shouted down or confronted with riots or attempts to prevent their speeches. In response, bills have been proposed in at least ten state legislatures to require public colleges and universities to impose sanctions on students who interfere with the expressive activities of others. North Carolina was the first state to enact a version of the model Campus Free Speech Bill drafted by the Goldwater Institute, which applies sanctions to any student who "substantially disrupts the functioning of the constituent institution or substantially interferes with the protected free expression rights of others, including protests and demonstrations that infringe upon the rights of others to engage in and listen to expressive activity." A similar bill was enacted in Georgia and both bills originally included the requirement that campus administrators must either expel or impose a one-year suspension on any student "responsible for infringing on the expressive rights of others" on two occasions. This requirement was amended before each enactment to require schools only to develop their own range of sanctions applying to "protests and demonstrations that infringe upon the rights of others to engage in ord listen to expressive activity." These new statutes also provide that schools will insure they are open to any invited speaker who is invited by student groups or faculty members. A bill resembling the Georgia and North Carolina law was vetoed by the Louisiana Governor. *See* International Center for Not-For-Profit-Law (ICNL), U.S. Protest Law Tracker, Feb. 4 and May 30, 2018, www.icnl.org/protestlawtracker/

3. *Retaliation Claims.* In *Lozman v. City of Riviera Beach*, 138 S.Ct. 1945 (2018), the Court held that a First Amendment retaliation claim for false arrest (in which governmental officials arrested an individual in retaliation for exercising Free Speech rights) can proceed even though the police had probable cause to arrest the individual.

On p. 15, after problem # 5, insert the following new problem # 6, and then renumber the remaining problems:

6. *Artificial Intelligence, Robotic Speech, and the First Amendment*. With the rise of so-called "bots," which are controlled by artificial intelligence rather than by humans, questions have arisen regarding whether robotic speech should be protected under the First Amendment. Some suggest that there are now 100 million online bots which can produce messages that recipients perceive as human generated. Can bots be viewed as simply a free speech outlet for their human creators? Should it matter whether the speech is a direct reflection of the human's thoughts or has been altered by the bot? Should a bot be required to disclose that it is not human?

Chapter 2
Advocacy of Illegal Action

E. Modern Standards

On p. 49, after problem # 3, insert the following new problem # 4, and then renumber the remaining problems:

4. *Terror Plot or Idle Talk?* Members of a white supremacist group (the Crusaders) sit around discussing burning down churches which help refugees settle in their area, as well as killing landlords who rent property to Muslims. They also talk about bombing an apartment complex inhabited by immigrants. Their conversations are recorded by a governmental informant. In addition, they were written down in a "manifesto" that they authored. When they are charged with plotting attacks, the men claimed that their discussions amounted to nothing more than "idle talk." May they be convicted based solely on their discussions? Would the case be more compelling if they actually purchased supplies, began making homemade explosives, and holding meetings to plan the attack on the apartment?

On p. 57, after the problems, insert the following new problems # 9 and # 10:

9. Get 'Em Outta Here. A Kentucky statute provides that a plaintiff may recover for injuries suffered as a result of a defendant's violation of a criminal statute. The crime of incitement to riot occurs when a person "incites or urges five or more persons to create or engage in a public disturbance which by tumultuous or violent conduct creates grave danger of damage or injury to persons or property." Assume that the term "incites" may include an act of "provoking, urging on, or stirring up." During a Trump campaign rally in Louisville on March 1, 2016, the presence of anti-Trump protesters was noticed by then candidate Donald Trump. Videos of the rally captured the conduct of Trump who stopped his speech and stated repeatedly, "Get 'em outta here." Several anti-Trump protesters were shoved, pushed, struck and punched by members of the crowd as they were driven out of the forum. Trump also stated, "Don't hurt 'em. If I say 'go get 'em,' I get in trouble with the press." Three injured protesters file a civil action against Donald Trump and the Trump Campaign for damages based on the cause of action of incitement to riot. Counsel for defendant argues that Trump did not commit incitement to riot because he was not addressing the crowd and did not intend for violence to occur. Counsel also argues that his speech was protected under the First Amendment. What pro and con arguments can be made regarding the First Amendment issues? *See Nwanguma v. Trump*, 273 F. Supp. 3d 719 (W.D. Ky. 2017); *granting motion to certify interlocutory appeal*, 2017 WL 3430514 (W.D. Ky. Aug. 9, 2017), *granting leave to appeal*, 874 F.3d 948 (6th Cir. 2017).

10. *Reckless Expression of Support for Terrorist Group.* Anti-terrorism proposals in the U.K. are meant "to make it easier to target people support proscribed groups" like the Islamic State. The justification for these proposals is "that radicalisation, be it deliberate or reckless, should be illegal, in order to stop support for these groups and to protect the public." The proposals are described as including these potential offenses: 1) "displaying an associated flag or item of clothing," such as the Isis flag; 2) viewing "terrorist material online three or more times"; and 3) communicating "banned material to someone who does not understand they are being incited, such as a child or a vulnerable person." Also proposed is the potential offense of making statements supporting a terrorist group while "being reckless as to whether others will be encouraged to support the organisation. " Are these proposals consistent with the First Amendment definitions of protected speech expressed in *Brandenburg* and *Hess*? Do the proposals resemble any of the Court's definitions of unprotected speech in the clear and present danger precedents of the pre-*Brandenburg* era? *See* Peter Walker, *Anti-terrorism plans 'will make thoughtcrime a reality,'* THE GUARDIAN, June 6, 2018, https://www.theguardian.com/uk-news/2018/jun/06/anti-terrorism-plans-criticised-make-thoughtcrime-reality

On p. 67, after problem # 2, insert the following new problem # 3, and then renumber the remaining problem:

3. *Online Radicalization*. Governmental officials have become concerned about "online radicalization" of young people. Although this type of radicalization is often associated with Muslim organizations like ISIS, and other violent jihadists, it is also associated with white supremacist groups. Prior to the Internet, groups like the KKK grew through personal connections and word of mouth encouragement. Now, they do so though messaging, recruitment and organization online. Does the government have the power to prohibit all speech by such groups? Can it prohibit, in particular, all white supremacist speech even speech that does not advocate illegal action or violence? Can it prohibit such speech when it makes vague and indefinite calls for future violence?

Chapter 3

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

A. Fighting Words

On p. 73, after problem # 3, insert the following new problem # 4, and then renumber the remaining problems:

4. *The Abusive Tirade*. In the course of a customer service dispute, defendant (a woman) calls the manager of the store a "fat ugly bitch," a "cunt," and also says "fuck you, you're not a manger." After she leaves the store, defendant is arrested and charged with a breach of the peace. Can defendant's words be regarded as "fighting words?" Was there a likelihood of violent retaliation by the store manager? Should it matter that the manager remained calm and polite? *See State v. Baccala*, 326 Conn. 232, 163 A.3d 1 (S.C. 2017).

B. Hostile Audiences

On p. 83, after the title of problem # 6, insert the following three new sentences, followed by the words "Suppose that" to begin the existing first sentence, and change the capital M in the existing word "Members" to lower-case in the same sentence:

In 2017, there were a number of incidents between marchers and hostile audiences. Perhaps the most dramatic example occurred in Charlottesville, Virginia, where a group of white supremacists decided to hold a rally. Some of the protesters openly carried weapons and the march resulted in a melee where one counter-protester was killed, and a number of others were injured. Suppose that

On p. 83, at the end of problem # 6, insert the following new citation:

See Final Report: Independent Review of the 2017 Protest Events in Charlottesville Virginia, Hunton & Williams, LLP, December 1, 2017.

C. Defamation

[1] The Constitutionalization of Defamation

On p. 95, at the end of the problems, add the following new problem:

8. *More on the International Treaty on the Internet*. Suppose that the delegates to the convention wish to discuss the standards that apply to defamation actions. As we have seen, the standards vary dramatically from nation-to-nation. What treaty provisions can you agree to?

On p. 106, insert the following new problem # 2, and renumber the remaining problems:

2. *The Porn Star*. In 2018, "Stormy Daniels," a porn star who allegedly had a sexual affair with President Donald Trump, burst onto the public scene after she challenged an agreement for silence that she made with Trump. Later, she filed a defamation action against Trump after he made statements on Twitter questioning her credibility. Daniels had released a sketch of a man who allegedly threatened her in order to encourage her to remain silent about the affair. Trump's tweet referred to Daniels' allegations as a "total con job." We know

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

On p. 106, at the end of the notes, add the following new notes # 6, # 7, and # 8:

6. *A Cosby Accuser.* In *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017), a defamation suit involved the plaintiff Katherine McKee's allegation in the media that the actor Bill Cosby had sexually assaulted her. McKee filed her suit after the publication of a letter from Cosby's lawyer, attacking her credibility and suggesting that she was not believable. Since McKee had voluntarily chosen to make her public allegation against Cosby, the court concluded that she was a "limited purpose public figure" and therefore required McKee to satisfy the actual malice standard in order to prevail. Ultimately, she failed to meet that burden of proof and her suit was dismissed in 2017. Later, after a mistrial on the charge of sexually assaulting Andrea Costand, Cosby was convicted at a second trial in 2018 at which five other women testified that he had sexually assaulted them also. Roughly 60 women have accused Cosby of sexual assault. *See* Jen Kirby, *Bill Cosby convicted of sexual assault*, VOX, April 26, 2018, https://www.vox.com/2018/4/26/17272470/bill-cosby-trial-verdict-guilty-sexual-assault-Andrea-Costand

7. *The Section 230 Shield.* Under Section 230 of the Communications Decency Act, online publishers are generally shielded from liability against defamation liability: "No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230©. However, the shield applies only if the computer service provider is not also an "information content provider," which the law defines as someone who is "responsible, in whole or in part, for the creation or development of" the offending content. Recently, Congress overwhelmingly supported an amendment to Section 230 and President Trump signed the new legislation known as the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). The statute creates an exception to Section 230 so that its shield "does not apply to criminal or civil charges of sex trafficking or to conduct that 'promotes or facilitates prostitution.'" Adi Robertson, *Trump signs anti-trafficking law that weakens online free speech protections*, THE VERGE, April 11, 2018, https://www.the verge.com/2018/4/11/17223720/trump-signs-fosta-sex-trafficking-section-230-law

8. *Food-Libel Suits.* Even though the *Sullivan* decision effectively terminated the overwhelming majority of defamation suits by public officials, one type of libel action has survived: food-libel cases. In 2017, ABC News reached an out-of-court settlement with Beef Products, Inc. (BPI) for referring to its product as "pink slime." BPI claimed that the report caused its sales to plummet and that a number of processors cancelled pending orders. In addition to suing for defamation, BPI asserted claims under South Dakota's Agricultural Food Products Disparagement Act which permitted triple damages. *See* Christine Hauser, *ABC's 'Pink Slime' Report Tied to $177 Million in Settlement Costs*, THE NEW YORK TIMES, August 10, 2017, https://www.nytimes.com/2017/08/10/business/pink-slime-disney-abc.html

On p. 108, after problem # 8, insert the following new problem # 9, and then renumber the remaining problems:

9. *The False Rolling Stone Article.* Rolling Stone magazine published an article entitled "A Rape on Campus: A Brutal Assault and a Struggle for Justice" which described a brutal gang rape of a first-year female student at a on-campus fraternity house. The story was later found to have been fabricated and the magazine withdrew the story. Can members of the fraternity, recover for defamation, even if they were not named in the story, as long as they appear to have been described in the story? First, assuming that it is necessary under state defamation law for a plaintiff to show that false statements were "of and concerning" the plaintiff as an individual, what standard should be used by the court to determine whether each of the unnamed fraternity members can satisfy that requirement? Second, in the alternative, assume that it may be possible for all the members of the fraternity – both

named and unnamed – to recover under a different theory. Ordinarily, a statement about an organization is not understood to refer to any of its individual members. But state defamation law allows a "small group defamation claim" to be brought in a suit for individual injuries by each plaintiff that result from a defamatory comment about the group to which all the plaintiffs belong. Under this theory, what requirements should the court use to determine whether the fraternity members should qualify for a small group defamation claim as a policy matter? *See Elias v. Rolling Stone*, LLC, 872 F.3d 97 (2d Cir. 2017).

10. *Ag-Gag Law*s. Activists have attempted to enter agricultural facilities to document the alleged mistreatment of animals. Since truth is a complete defense to a defamation action, the owners of those facilities cannot sue the activists for defamation or disparagement for truthful allegations. As a result, some states have enacted laws limiting the ability of individuals to enter and report on what happens in non-public areas. For example, North Carolina's so-called "Ag-Gag Law" prohibits individuals from entering private property ("non-public areas") to investigate the alleged mistreatment of animals. Of course, one of the concerns is that activists will apply for jobs at the facilities in order to gain entry and to do "economic or other injury to an agricultural production facility." An Idaho law makes it a crime to make misrepresentations to gain entry to an agricultural production facility, and also to make recordings of the operations. Are such laws valid? *See People for the Ethical Treatment of Animals v. Stein*, — Fed. Appx. —, 2018 WL 2714684 (2018); Animal Legal Defense Fund v. Wasden, — F.3d—, 2018 WL 2123374 (2018).

11. *Planned Parenthood Videos*. Suppose that defendants, activists who are opposed to abortion, create fake corporations and fake identifications in order to gain access to a Planned Parenthood convention. Once inside the convention, they produce videos which Planned Parenthood regards as "false" and "misleading." In particular, although the videos purport to show Planned Parenthood employees discussing violations of federal law related to fetal tissue donations, Planned Parenthood claims that the videos were altered to distort the actual conversations. Can the activists be held liable consistently with the First Amendment? On what grounds? *See Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018).

[4] Fact versus Opinion

On p. 123, at the end of the problems, add the following new problem # 10:

10. *The Lawyer's Letter.* While a custody case was pending before a judge, a law professor sent a letter to the judge criticizing one of the parties and some of the judge's custody rulings. The professor described his letter as "amicus curiae letter brief." Later, the lawyer for the party sent a letter to the dean of the law school in which she suggested that the lawyer had engaged in an improper attempt to influence the court, thereby committed a breach of professional ethics, and involved an effort to induce the judge to violate the Code of Judicial Conduct. Assuming that the lawyer correctly summarized the facts of what the law professor did, do the lawyer's suggestions constitute assertions of fact or as statements of opinion? *See Paulsen v. Yarrell*, 537 S.W.3d 224 (Tex. App. 2017).

D. Emotional Distress

On p. 138, before the problems, insert the Notes heading, and then add the following new notes # 1, # 2, and # 3:

Notes

1. *The Constitutionality of Revenge Porn Laws*. In *Ex Parte Jones*, 2018 WL 1835925 (Tex. Ct. App. April 18, 2018),the court struck down a Texas revenge porn law. That law made it a crime to intentionally disclose, without consent, pictures of another person with their "intimate parts exposed." The court held that the law was a content-based restriction on speech. Although the court held that the state has a compelling interest in protecting privacy, it struck down the statute because it was not narrowly drawn. Under the law, a third party, who had no knowledge regarding the circumstances under which a picture was created, could be subject to prosecution for disclosing it.

2. *Narrower Revenge Porn Law*. Missouri was the 39th state to enact a revenge porn statute, which includes two crimes. Both use narrow definitions of "private sexual images" and their *mens rea* requirements are

more demanding than the that of the invalidated Texas law described in the prior note. The first crime of "nonconsensual dissemination" occurs when a person intentionally disseminates a private sexual image of the victim, having obtained the image under circumstances "in which a reasonable person would know or understand" that the person in the image has not consented to the dissemination. The second crime of "threatening nonconsensual dissemination" occurs when a person gains or attempts to gain anything of value, or coerces or attempts to coerce another person to act or refrain from acting, by threatening to disseminate a private sexual image of the other person. The Missouri Governor signed the revenge porn legislation only hours before he resigned after "scandals grew" around him, including the allegation that he took "a nonconsensual photo of a partially nude woman with whom he had an affair" and warned her "that he would distribute it if she ever spoke of their encounter." *See* David A. Lieb, *Missouri governor quits in scandal, signs 'revenge porn' law*, THE WASHINGTON POST, June 1, 2018, https.//www.washingtonpost.com/national/missouri-to-get-new-leader-as-scandal-plagued-governor-quits/2018/06/01/e0abee48-6551-11e8-81ca-bb14593acaab_story.html?noredirect=on&utmm_term=.479fc9f2f989

3. *Indecent Exposure Statutes*. In *State v. Lopez*, 907 N.W.2d 112 (Iowa 2018), the defendant engaged in a course of stalking conduct, including the act of texting a previously taken photograph of his erect penis to the victim. He was convicted of the crime of indecent exposure but his conviction was reversed because the indecent exposure statute predated the digital revolution and required either proof of physical contact or proof of the victim's fear of immediate physical contact. The court noted that, although the legislature had "expressly criminalized the transmission of some images in some contexts," it had not "signaled that the general indecent-exposure provision should be interpreted as criminalizing the transmission of a picture of one's genitals to an unwilling adult." Two concurring justices agreed that since the transmission of videos or photos involves the exposure of an image rather than the exposure of a person's body, it was evident that the defendant's transmission of a photograph was not covered because of the indecent exposure statute's explicit reference to "the exposure of genitals." But these justices urged the court to recognize that in a future case, conviction would be allowed under the statute when a person intentionally exposes his or her genitals to another "via a real-time electronic connection, such as a security camera, Face Time, or Skype."

E. Invasion of Privacy

On p. 147, in note # 6, after the end of the fourth sentence and before the words, "In Snyder", insert the following new text:

For example, when sportscaster Erin Andrews was staying at a Marriott in Nashville, a Marriott employee altered the peephole and secretly recorded pictures of Andrews in the nude. He released the video. Andrews sued and won a $55 million judgment against Marriott for invasion of privacy. The case was later settled out of court. Note that increasing concerns regarding the development of weaponized suits for similar judgments may be attributed to the suit for invasion of privacy brought by Terry Gene Bollea (a/k/a Hulk Hogan) against Gawker Media, based on Gawker's internet posting of a secretly-recorded videotape of Bollea having sex with the wife of Bubba Clem (aka Bubba the Love Sponge). The jury awarded Bollea $140 million dollars and billionaire Paul Thiel later admitted that he funded the litigation to the tune of $10 million dollars, purportedly because Gawker had outed him and several of his friends as gay. The suit ultimately resulted in a $31 million settlement and the demise of Gawker, which filed for bankruptcy in 2016. Later Thiel sought to bid on Gawker's assets in a bankruptcy auction but abandoned his bid to avoid the potential threat of litigation regarding his secret funding of the suit against Gawker. *See* Jonathan Randles, *Peter Thiel Agrees Not to Buy Gawker*, THE WALL STREET JOURNAL, April 25, 2018, https://www.wsj.com/articles/peter-thiel-agrees-not-to-buy-gawker-1524666697

On p. 147, in note # 6, delete the last five sentences that begin with the words "In Snyder", then use those sentences as the text for new note # 7 with the following new title, and then renumber the remaining notes:

7. *More on Intrusion Upon Seclusion.*

F. Obscenity

On p. 157, renumber the existing problem # 5 as new problem # 1 and move it to p. 162 as a substitute for the existing problem # 1 on that page, and then renumber that existing problem #1 as new problem #5 and move it to p. 157 to follow existing problem #4 there.

***On p. 157, in the newly numbered problem # 5, delete the last sentence and substitute the following new text*:**

Assume that the novel is found to be obscene under the three-part definition used in *Memoirs*. What arguments can be made on appeal by defense counsel to reverse this result?

On p. 157, after the newly numbered problem # 5, insert the following new problem #6:

6. *Conflicts Regarding Expert Evidence and "Social Importance."*. Justice Brennan's plurality opinion in *Memoirs* did not address the question whether *Fanny Hill* was obscene, but simply held that the Massachusetts Supreme Court erroneously interpreted the "social importance" criterion. He emphatically rejected the state court's understanding that "minimal literary value" as established by expert evidence is not sufficient to prove that a novel has "redeeming social importance." On the contrary, he emphasized, such proof of minimal value necessarily would make it impossible for a jury or a court to find that the novel was "*utterly* without redeeming social importance." By contrast, Justice Clark's dissent argued equally emphatically that *Fanny Hill* was obscene under the *Memoirs* plurality's three requirements for obscenity. After characterizing the work as "nothing more than a series of minutely and vividly described sexual episodes," Clark argued that since "the whole purpose of the book is to arouse the prurient interest," and since the candid "repetition of sexual episode after episode" "renders the book 'patently offensive,'" these determinations should "weigh heavily in any appraisal of the book's claims to "redeeming social importance." Moreover, Clark chose to disregard the unanimous testimony of the five defense experts concerning the positive literary value of *Fanny Hill*. They included professors of English literature at Williams College, Harvard College, Boston University, M.I.T., and Brandeis University. In Clark's view, "a careful reading of [their] testimony" revealed "that it has no substance." What are the implications of the dispute between Brennan and Clark regarding the meaning of the "social importance" criterion and the appropriate role of appellate court judges in assessing expert evidence in the record of an obscenity trial?

On p. 167, at the end of the notes, add the following new notes # 3 and # 4:

3. *Federal Obscenity Enforcement Efforts*. The devotion of federal prosecutorial resources to obscenity prosecutions has varied depending on the attitude of the Attorney General and influential party leaders in Congress. For example, when George W. Bush was President, Attorney General Alberto Gonzales presided over the creation of the Obscenity Prosecution Task Force at the Department of Justice in 2005. During the Obama administration, Attorney General Eric Holder eliminated that task force in 2011. When over 40 Senators wrote him a letter to advocate for more obscenity prosecutions, he indicated that the DOJ was using its limited investigative resources to focus on cases involving child abuse, presumably with prosecutions supported by the Child Exploitation and Obscenity Section (CEOS) within the DOJ's Criminal Division. That Section was created in 1987, five years after the Supreme Court recognized "child pornography" images as unprotected speech in *Ferber*. The primary mission of the CEOS is the investigation and prosecution of child pornography laws. As for the enforcement of obscenity laws, the CEOS notes that, "Given the importance of community standards under the *Miller* test, the full commitment and support of local U.S. Attorneys Offices, who best know local community standards, are absolutely essential to the federal obscenity enforcement efforts." *See* https://www.justice/gov/criminal-ceos/obscenity

4. *The Politics of Obscenity*. The enforcement of obscenity laws remains popular as a political cause, as evidenced by President Trump's willingness, as a candidate, to sign the "first-ever internet anti-porn presidential

pledge, promising to enforce long-ignored obscenity laws to stop the explosion of hard core sex videos." *See* Paul Bedard, *Trump signs first ever internet anti-porn pledge, Clinton refuses*, WASHINGTON EXAMINER, Aug. 1, 2016, https://www.washingtonexaminer.com/trump-signs-first-ever-internet-anti-porn-pledge Moreover, at the 2017 confirmation hearing for Attorney General Sessions, when asked whether he would prosecute obscenity laws and also consider reestablishing the DOJ's Obscenity Task Force, Sessions stated that obscenity laws "should be vigorously prosecuted in cases that are appropriate," and that he would consider reviving the task force. However, that task force has not been reestablished yet. *See* Matt Hadro, *Attorney General nominee would consider cracking down on porn*, CATHOLIC NEWS AGENCY, Jan. 16, 2017, https://www.catholicnewsagency.com/news/attorney-general-nominee-says-hed-consider-cracking-down-on-porn-81358

On p. 168, at the end of the problems, add new problems # 3 and # 4:

3. *Not Playing Entire Film for Jury.* At the defendant's obscenity trial for distributing a film on the internet, *Pirates II: Stagnetti's Revenge* (138 minutes), the prosecutor sought permission from the judge to play only five three-minute scenes from the film for the jury instead of the entire film, in order to prove all the elements of obscenity under *Miller*. The judge overruled the defense counsel's objection and agreed with all of the prosecutor's reasoning to support his request: 1) it would be difficult for the jurors to watch the entire film if they were offended by it and they would blame the prosecutor for playing it; 2) the defense counsel was free to play the entire film for the jury; and 3) the *Miller* opinion does not require that the film "as a whole" depicts or describes sexual conduct in a patently offensive way, only that the film "as a whole" must satisfy the other two elements of obscenity. So it was the defense counsel who played the entire film to establish the defense that the film did not lack serious artistic value. The defense counsel also relied on the expert witness testimony of Mary, an academic scholar of modern pornography, who identified *Pirates II* as a form of homage to Disney's *Pirates of the Caribbean* trilogy. She noted that the film's serious artistic value was displayed in the novelistic quality of its story, its art direction, and its special effects. Even so, the defendant was convicted. What arguments can be made by defense counsel to persuade the appellate court to reject the trial judge's three justifications for granting the prosecutor's request? Why do the Court's obscenity precedents require a new trial at which the prosecutor will be required to play the entire film for the jury? *See United States v. Adams*, 337 Fed. Appx. 336 (4th Cir. 2009).

4. *Robotic Strippers.* At the 50th Consumer Electronics Show in Las Vegas, one manufacturer unveiled robotic strippers. The robots, which appeared to be very life-like, gyrated on stage next to a stripper pole. Is the use of robotic strippers protected speech under the First Amendment? May a municipality ban the use of nude robotic strippers? *See Robot strippers are going to be pole dancing in Las Vegas*, NEW YORK POST, January 9, 2018, https://nypost.com/2018/01/09/robot-strippers-are-going-to-be-pole-dancing-in-las-vegas/

Chapter 4

Content-Based Speech Restrictions: Post-Chaplinsky Categorical Exclusions

A. "Offensive" Speech

On p. 186, before problem # 6, insert the following new Note heading and new note:

Note: Disparaging Trademarks

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), in a trademark case in which petitioner tried to trademark his band's name, "The Slants." The Patent and Trademark Office (PTO) declined to register the name, relying on a provision of federal law that allowed the PTO to reject a trademark that might "disparage or bring into contempt or disrepute" any "persons living or dead." The Court struck down the law on the basis that it violated the Free Speech Clause because it offended "a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." The Court explained:

> We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U. S. 576, 592 (1969). See also *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46 (1988); *Coates* v. *Cincinnati*, 402 U. S. 611 (1971); *Bachellar* v. *Maryland*, 397 U. S. 564 (1970); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937).

Justice Kennedy's concurring opinion in *Matal* was joined by three other justices and offered these views:

> §1052(a) constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny. The Court is correct in its judgment, and I join Parts I, II, and III–A of its opinion. This separate writing explains why the First Amendment's protections against viewpoint discrimination apply to the trademark here. The viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.
>
> Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition. *See United States* v. *Stevens*, 559 U. S. 460 (2010). Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. *See Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995).
>
> The First Amendment guards against laws "targeted at specific subject matter," a form of speech suppression known as content based discrimination. *Reed* v. *Town of Gilbert,* 135 S. Ct. 2218, 2230 (2015). This category includes a subtype of laws that go further, aimed at the suppression of "particular views on a subject." *Rosenberger*, 515 U. S., at 829. A law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional." *Id.* at 829–830.
>
> At its most basic, the test for viewpoint discrimination is whether—within the relevant subject

category—the government has singled out a subset of messages for disfavor based on the views expressed. *See Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788 (1985). In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as "persons, living or dead, institutions, beliefs, or national symbols." 15 U. S. C. §1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.

The Government argues that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The Government next suggests that the statute is viewpoint neutral because the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark. Instead, registration is denied based on the expected reaction of the applicant's audience. In this way, the argument goes, it cannot be said that Government is acting with hostility toward a particular point of view. For example, the Government does not dispute that respondent seeks to use his mark in a positive way. Indeed, respondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride. Respondent's application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian-Americans.

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience. The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.

Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed.

The Government's argument assumes that respondent's mark is a negative comment. From respondent's submissions, it is evident he would disagree that his mark means what the Government says it does. The trademark will have the effect, respondent urges, of reclaiming an offensive term for the positive purpose of celebrating all that Asian-Americans can and do contribute to our diverse Nation. While thoughtful persons can agree or disagree, the dissonance between the trademark's potential to teach and the Government's insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute.

The parties dispute whether trademarks are commercial speech and whether trademark registration should be considered a federal subsidy. The former issue may turn on whether certain commercial concerns for the protection of trademarks might, as a general matter, be the basis for regulation. However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny. "Commercial speech is no exception," the Court has explained, to the principle that the First Amendment "requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 566 (2011). Unlike

content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context. *See Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60 (1983).

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality. Justice Holmes' reference to the "free trade in ideas" and the "power of thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion), was a metaphor. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. To permit viewpoint discrimination in this context is to permit Government censorship.

This case does not present the question of how other provisions of the Lanham Act should be analyzed under the First Amendment. It is well settled that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners. This case also does not involve laws related to product labeling or otherwise designed to protect consumers. These considerations, however, do not alter the speech principles that bar the viewpoint discrimination embodied in the statutory provision at issue here.

It is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. *See Legal Services Corporation* v. *Velazquez*, 531 U. S. 533 (2001). The exception is necessary to allow the government to stake out positions and pursue policies. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment. These cases have identified a number of factors that, if present, suggest the government is speaking on its own behalf; but none are present here.

There may be situations where private speakers are selected for a government program to assist the government in advancing a particular message. That is not this case either. The central purpose of trademark registration is to facilitate source identification. To serve that broad purpose, the Government has provided the benefits of federal registration to millions of marks identifying every type of product and cause. Registered trademarks do so by means of a wide diversity of words, symbols, and messages. Whether a mark is disparaging bears no plausible relation to that goal. While defining the purpose and scope of a federal program for these purposes can be complex, our cases are clear that viewpoint discrimination is not permitted where, as here, the Government "expends funds to encourage a diversity of views from private speakers," *Velazquez*, *supra*, at 542.

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society. For these reasons, I join the Court's opinion in part and concur in the judgment.

On p. 186, following the new note on Matal, insert a new Problems heading before the existing problem #6, renumber that problem as new problem # 1, and then renumber the remaining problems.

B. "Hate" Speech

On p. 201, after the Notes heading, insert the following new note # 1, and then renumber the remaining notes:

1. *Defining "Hate Speech."* Of course, one of the problems with "hate speech" is how to define it. Does the definition depend on who is doing the defining? In the 1830s, a number of Southern states enacted law suppressing abolitionist speech. Senator John C. Calhoun denounced abolitionists on the basis that those who criticized slavery "libeled the South and inflicted emotional injury." Of course, the right to free expression was of essential importance of the modern civil rights movement. As Congressman John Lewis stated, "Without freedom of speech and the right to dissent, the Civil Rights movement would have been a bird without wings." But should government have the right to choose which speech should be allowed and which speech should be prohibited? In modern times, is there a risk that the definition of "hate speech" may reflect nothing more than the decisionmaker's own perspective on what constitutes "hate?" For example, some would condemn as "hate speech" those who advocate that marriage should involve only relationships involving a man and a woman, and should not include same-sex relationships. In a free society, should those who hold this more restrictive view of marriage be prohibited from expressing it?

On p. 201, at the end of the notes, add the following new note # 4:

4. *The Amy Wax and Larry Alexander Controversy.* Amy Wax, a law professor at the University of Pennsylvania and Larry Alexander, a law professor at the University of San Diego, jointly published an op-ed article which called for a renewal of the "cultural script" that prevailed in the 1950s and (as they claimed) still prevails among affluent Americans." In particular, they suggested that people should get married before they have children and "strive to stay married for the children's sake." They also advocated that people should get the education they need for gainful employment, and that people should work hard, avoid idleness, and avoid substance abuse and crime. The Dean of the Penn Law School denounced the op-ed as "divisive, even noxious," and a number of Wax's Penn colleagues issued a letter denouncing her views. The Dean of the USD Law School also condemned the op-ed and announced new efforts to compensate "vulnerable, marginalized" students for the "racial discrimination and subordination they experience." *See* Amy Wax and Larry Alexander, *Paying the Price for Breakdown of Country's Bourgeois Culture*, THE INQUIRER, Aug. 9, 2017, http://www.philly.com/philly/opinion/commentary/paying-the-price-for-breakdown-of-country's-bourgeois-culture-20170809.html; *see generally* Prof. Wax op-ed on "bourgeois culture" stirs intense debate, strong reactions, Sept. 5, 2017, https://www.law.upenn.edu/live/news/7319-prof-wax-oped-on-bourgeois-culture-spurs-intense-debate-strong-reactions

On p. 203, after problem # 7, insert the following new problems ## 8 - 10, and then renumber the remaining problems:

8. *Tenure and Collegiality*. Historically, universities have only been able to fire tenured professors for such things as the commission of crimes. Suppose that a university wishes to amend its tenure policy to state that tenured faculty can be dismissed for a "pattern of disruptive conduct or an unwillingness to work productively with other colleagues." Under such a policy, could a faculty member be fired (as one commentator suggested) for voting for President Trump, displaying an NRA bumper sticker, or failing to stand during the Diversity Pledge?

9. *"All Lives Matter."* Suppose that, in response to a "Black Lives Matter" protest, some students at the University of Louisville hold up "All Lives Matter" signs. Others hold up "White Lives Matter, Too" signs. Or, suppose that conservative students display signs promoting heterosexual values, and suggesting that homosexual sex is immoral. Assume that the University's Vice President for Diversity is outraged by the "All Lives Matter" and "White Lives Matter, Too" signs, and the signs regarding homosexual sex. Can she impose discipline on the students who held up those signs? Can she require those students to go through "extensive training for racial and cultural competency?"

10. *Loss of Federal Funds.* When Milo Yiannopoulos, an editor for Breitbart News, was scheduled to speak at U.C. Berkeley in 2017, a crowd of 1,500 protesters gathered and engaged in violent acts that included throwing smoke bombs and setting fires. Police locked down the campus and the speech was cancelled. In response, President Trump tweeted as follows: "If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view – NO FEDERAL FUNDS? Would Congress violate the First Amendment by

enacting a federal statute that would provide for the withdrawal of federal funds from universities based on the circumstances that occurred at Berkeley? Or for the withdrawal of funds under other circumstances involving the denial of the right of faculty members and students to invite speakers to their campuses?

On p. 209, at the end of problem # 7, insert the following new sentence:

If you believe that the Gayssot law is constitutional, could Congress also pass a law making it a crime to deny that the Turks committed genocide in Armenia?

On p. 210, after problem #7, insert the following new problem # 8, and then renumber problem # 8 as # 9 and problem # 9 as # 10:

8. *More on Sexual Harassment*. Some civil rights groups (e.g., FIRE, the Foundation for Individual Rights in Education), complained about what they regarded as Obama administration "overreaching" in areas involving free expression. In particular, concerns have been raised regarding an expansion of "sexual harassment" to include "cruel jokes" rather than focusing on the more limited definition articulated by the Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (in order to qualify as "harassment," conduct must be "so severe, pervasive and objectively offensive, that the victim-students are effectively denied access to an institution's resources and opportunities"). Should it be permissible under the First Amendment to define sexual harassment broadly enough to include a joke?

On p. 210, after the renumbered problem # 10, insert the following new problems ## 11 & 12, and renumber the remaining problems:

11. *Facebook Posts and Criminal Convictions.* Defendant is charged with illegal firearm possession as well as possession of crack cocaine with intent to distribute. At his trial, the prosecution seeks to introduce a Facebook video that defendant posted which contained the following lyrics: Real thugz 'bout dat, get at me. Bang, bang!!!!!!!!!!" The gun that was found in defendant's vehicle (on which the firearms charge was based) had a fingerprint which corresponded to the way defendant held the gun in the video, and the prosecution felt that it helped show "knowing possession." Would it violate defendant's First Amendment rights to admit the video against him? *See United States v. Rembert*, 851 F.3d 836 (8th Cir. 2017).

12. *More on Hostile Environments*. Suppose that a male student is upset about the fact that his girlfriend has decided to break up with him. As a result, he physically restrains the girlfriend in his car, takes her phone from her, threatens to commit suicide if she breaks up with him, threatens to spread rumors about her, and threatens to make the University of Kansas's "campus environment so hostile, that she would be able to attend any university in the state of Kansas." Based on a criminal complaint, the university issues a no contact order against the man. Following the order, the man does not make contact with the woman, but does make the following posts on his social media account: "Oh right, negative boob job. I remember her"; "If I could say one thing to you it would probably be 'Go fuck yourself you piece of shit' "; "Lol, she goes up to my friends and hugs them and then unfriends them on Facebook." Does the University have sufficient grounds to expel the student for creating a hostile environment for his former girlfriend? *See Yeasin v. Durham*, 719 Fed. Appx. 844 (10th Cir. 2018).

On p. 209, at the end of existing problem # 7, insert the following:

If you believe that the Gayssot law is constitutional, could Congress also pass a law making it a crime to deny that the Turks committed genocide in Armenia?

On p. 210, insert a new problem # 8 that reads as follows, and then renumber the remaining problems:

8. *More on Sexual Harassment*. Some civil rights groups (e.g., FIRE (Foundation for Individual Rights in Education)), complained about what they regarded as Obama administration "overreaching" in areas involving free expression. In particular, concerns have been raised regarding an expansion of "sexual harassment" to include "cruel jokes" rather than focusing on the more limited definition articulated by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (in order to qualify as "harassment," conduct must be "so severe, pervasive and objectively offensive, that the victim-students are effectively denied access to an institution's resources and opportunities"). Is it/should it be permissible under the First Amendment to define sexual harassment broadly enough to include a joke?

On p. 210, at the end of the problems, insert a new problem # 11 and renumber the remaining problem:

11. *Facebook Posts and Criminal Convictions.* Defendant is charged with illegal firearm possession as well as possession of crack cocaine with intent to distribute. At his trial, the prosecution seeks to introduce a Facebook video that defendant posted which contained the following lyrics: Real thugz 'bout dat, get at me. Bang, bang!!!!!!!!!!" The gun that was found in defendant's vehicle (on which the firearms charge was based) had a fingerprint which corresponded to the way defendant held the gun in the video, and the prosecution felt that it helped show "knowing possession." Would it violate defendant's First Amendment rights to admit the video against him? *See United States v. Rembert*, (8th Cir. 2017).

C. True Threats

On p. 220, at the end of note # 2, add the following new paragraph:

On remand, Elonis' conviction was reinstated. *See United States v. Elonis*, 841 F.3d 589 (3d Cir. 2016). The court held that, if "If a defendant transmits a communication for the purpose of issuing a threat or with *knowledge* that the recipient will view it as a threat, and a jury determines that communication is objectively threatening, then the defendant has violated Section 875© whether or not he agrees the communication was objectively threatening." Given the overwhelming evidence that this standard was satisfied, the Third Circuit concluded that the error in the original jury instruction was "harmless." The Supreme Court refused to hear the case a second time.

On p. 225, after problem # 10, insert the following new problem # 11, and then renumber the remaining problems:

11. *More Online (and Other) Threats Against President Obama*. When President Obama is going to give a speech in his city, a man posts on Facebook that he intends to kill the President and he makes similar statements to a number of people. When charged, he claims that his threat could not have been taken as a "true threat" because he did not have a ticket to the Obama event, had no weapon other than a slingshot, and freely discussed his plan with others who had the power to stop him. Is there a "true threat" against the President so that conviction is appropriate? *See United States v. Dutcher*, 851 F.3d 757 (7th Cir. 2017).

On p. 226, at the end of renumbered problem # 16, add the following new text:

Following the police killing of a black man in Tulsa, Oklahoma, and an intense national debate regarding police killings of minorities, a man made numerous online anonymous Facebook postings stating that police officer Betty Shelby would be executed for shooting and killing the Tulsa man. Does the man's posting constitute a "true threat"

against the officer? *See United States v. Stevens*, 881 F.3d 1249 (10th Cir. 2018).

E. Possible Additional Categories for Exclusion From Speech Protection

On p. 286, at the end of problem # 3, after the word "See" in the citation, insert the following new citation:

United States v. Swisher, 811 F.3d 299 (9th Cir. 2016) (en banc);

On p. 287, at the end of problem # 7, add the following cite:

See Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

F. Near Obscene

On p. 297, after the Problems heading, insert the following new problem # 1, and then renumber the remaining problems:

1. *Is Renton Still Good Law?* In section B of Chapter 5 on the Public Forum Doctrine, you will read the Supreme Court's decision in *Reed v. Town of Gilbert*. Please read the *Reed* decision now and think about whether the *Renton* decision is still valid in light of *Reed*. Here is one scholar's view: "The secondary effects cases [like *Renton*] are the clearest example of the rare situation in which the Court has done precisely what the Ninth Circuit [erroneously] thought was proper [in *Reed*]: treated a facially content-based restriction as content-neutral because the government was supposedly motivated by reasons other than hostility to the content of the speech (for instance, a concern that the presence of the stores or theaters would decrease property values or attract crime). Yet [the *Reed* Court] never mentions "secondary effects or cites *Renton* or any of the other secondary effects cases. Presumably it isn't trying to silently overrule those cases[.] Yet it's hard to see how those cases could be logically reconciled, on their own terms, with the [*Reed* Court's] firm condemnation of facially content-based laws." Eugene Volokh, *Supreme Court reaffirms broad prohibition on content-based speech restrictions, in today's Reed v. Town of Gilbert decision*, THE VOLOKH CONSPIRACY, June 18, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/18/supreme-court-reaffirms-broad-prohibition-on-content-based-speech-restrictions-in-todays-reed-v-town-of-gilbert-decision/?utm_term=.fbb58b110491

On p. 310, after note # 3, insert the following new note # 4, and then renumber the remaining notes:

4. *Disparaging Trademarks and Commercial Speech*. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), in a trademark case in which petitioner tried to trademark his band's name, "The Slants." The Patent and Trademark Office (PTO) declined to register the name, relying on a provision of federal law that allowed the PTO to reject a trademark that might "disparage or bring into contempt or disrepute" any "persons living or dead." The Court struck down the law on the basis that it violated the Free Speech Clause of the First Amendment. The Court rejected the idea that the law could be upheld as a legitimate restriction on commercial speech:

> We confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). The Government and *amici* supporting its position argue that all trademarks are commercial speech. They note that the central purposes of trademarks are commercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his *amici* contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either

about the product or service or some broader issue. The trademark in this case illustrates this point. The name "The Slants" not only identifies the band but expresses a view about social issues.

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." This means, among other things, that "the regulatory technique may extend only as far as the interest it serves." The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing "underrepresented groups" from being "bombarded with demeaning messages in commercial advertising." An *amicus* supporting the Government refers to "encouraging racial tolerance and protecting the privacy and welfare of individuals." But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. As we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States* v. *Schwimmer*, 279 U. S. 644 (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. Commerce, we are told, is disrupted by trademarks that "involve disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification." Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce. A simple answer to this argument is that the disparagement clause is not "narrowly drawn" to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*. It applies to trademarks like the following: "Down with racists," "Down with sexists," "Down with homophobes." It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted. The clause is far too broad in other ways as well. The clause protects every person living or dead as well as every institution. Is it conceivable that commerce would be disrupted by a trademark saying: "James Buchanan was a disastrous president" or "Slavery is an evil institution"?

There is a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear. If affixing the commercial label permits the suppression of any speech that may lead to political or social "volatility," free speech would be endangered.

On p. 313, at the end of the notes, add the following new note # 14:

13. *Credit Card Charges and Free Expression.* In *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), the merchants wanted to implement a "single sticker regime" in which they post a cash price with an additional credit card surcharge. The Court held that the New York statute that prohibited this regime was a regulation of "speech" because it regulated the communication of prices, although not the prices themselves. The Court also held that the statute was not void for vagueness and remanded the case for a determination whether the statute violates the First Amendment.

On p. 313, at the end of the notes, add the following new case:

National Institute of Family and Life Advocates v. Becerra

138 S.Ct. 2361 (2018).

Justice Thomas delivered the opinion of the Court.

The California State Legislature enacted the California Reproductive Freedom, Accountability,

Comprehensive Care and Transparency Act (FACT Act) to regulate crisis pregnancy centers. Crisis pregnancy centers are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." "Unfortunately," the author of the FACT Act stated, "there are nearly 200 licensed and unlicensed" crisis pregnancy centers in California. These centers "aim to discourage and prevent women from seeking abortions." The author of the FACT Act observed that crisis pregnancy centers "are commonly affiliated with, or run by organizations whose stated goal" is to oppose abortion—including the petitioners. To address this problem, the FACT Act imposes notice requirements on facilities that provide pregnancy-related services—one for licensed facilities and one for unlicensed facilities.

The first notice requirement applies to "licensed covered facilities." To fall under the definition of "licensed covered facility," a clinic must be a licensed primary care or specialty clinic or qualify as an intermittent clinic under California law. A licensed covered facility must have the "primary purpose" of "providing family planning or pregnancy-related services." And it must satisfy at least two of the following six requirements: "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients." The FACT Act exempts several categories of clinics that would otherwise qualify as licensed covered facilities. Clinics operated by the United States or a federal agency are excluded, as are clinics that are "enrolled as a Medi-Cal provider" and participate in "the Family Planning, Access, Care, and Treatment Program" (Family PACT program). To participate in the Family PACT program, a clinic must provide "the full scope of family planning services specified for the program,"

If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site. Cal. Health & Safety Code Ann. §123472(a)(1). The notice states that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in. The notice must be in English and any additional languages identified by state law. In some counties, that means the notice must be spelled out in 13 different languages. The stated purpose of the FACT Act, including its licensed notice requirement, is to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." The Legislature posited that "thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." Citing the "time sensitive" nature of pregnancy-related decisions, the Legislature concluded that requiring licensed facilities to inform patients themselves would be "the most effective" way to convey this information.

The second notice requirement in the FACT Act applies to "unlicensed covered facilities." To fall under the definition of "unlicensed covered facility," a facility must not be licensed by the State, not have a licensed medical provider on staff or under contract, and have the "primary purpose" of "providing pregnancy-related services." An unlicensed covered facility also must satisfy at least two of the following four requirements: "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients." Clinics operated by the United States and licensed primary care clinics enrolled in Medi-Cal and Family PACT are excluded. Unlicensed covered facilities must provide a government-drafted notice stating that "this facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." This notice must be provided on site and in all advertising materials. The notice must be posted "conspicuously" at the entrance of the facility and in at least one waiting area. It must be "at least 8.5 inches by 11 inches and written in no less than 48-point type." In advertisements, the notice must be in the same size or larger font than the surrounding text, or otherwise set off in a way that draws attention to it. Like the licensed notice, the unlicensed notice must be in English and any additional languages specified by state law. Its stated purpose is to ensure "that pregnant women in California know when they are getting medical care from licensed professionals."

Petitioners—a licensed pregnancy center, an unlicensed pregnancy center, and an organization of crisis pregnancy centers—filed suit. Petitioners alleged that the licensed and unlicensed notices abridge the freedom of speech protected by the First Amendment. The District Court denied their motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed. We granted certiorari. We reverse.

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed* v. *Town of Gilbert*, 576 U. S. ___, ___ (2015) (slip op., at 6). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.* This stringent standard reflects the fundamental principle that governments have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ibid.*

The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices "alter the content of their speech." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988). Here, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing. By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly "alters the content" of petitioners' speech. *Riley, supra*, at 795.

The Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates "professional speech." Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules. These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime." "Professional speech" is defined as any speech by these individuals that is based on "their expert knowledge and judgment," or that is "within the confines of the professional relationship," These courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny.

This Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection." *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 804 (1996) (Kennedy, J., concurring, and dissenting). It has been especially reluctant to "exempt a category of speech from the normal prohibition on content-based restrictions." *United States* v. *Alvarez*, 567 U. S. 709, 722 (2012) (plurality). This Court's precedents do not permit governments to impose content-based restrictions on speech without "persuasive evidence of a long (if heretofore unrecognized) tradition" to that effect. *Ibid.* (quoting *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792 (2011). This Court's precedents do not recognize such a tradition for a category called "professional speech." This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." See, *e.g., Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985). Second, States may regulate professional conduct, even though that conduct incidentally involves speech. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). Neither line of precedents is implicated here.

This Court's precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts. In *Zauderer*, this Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. Noting that the disclosure requirement governed only "commercial advertising" and required the disclosure of "purely factual and uncontroversial information about the terms under which services will be available," the Court explained that such requirements should be upheld unless they are "unjustified or unduly burdensome." *Zauderer* does not apply here. The licensed notice is not limited to "purely factual and uncontroversial information about the terms under which services will be available." The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an "uncontroversial" topic.

This Court has upheld regulations of professional conduct that incidentally burden speech. "The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 567 (2011), and professionals are no exception to this rule.

Longstanding torts for professional malpractice "fall within the traditional purview of state regulation of professional conduct." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). In *Planned Parenthood of Southeastern Pa.* v. *Casey*, this Court upheld a law requiring physicians to obtain informed consent before they could perform an abortion. 505 U. S., at 884 (opinion of O'Connor, Kennedy, and Souter, JJ.). Pennsylvania law required physicians to inform their patients of "the nature of the procedure, the health risks of the abortion and childbirth, and the 'probable gestational age of the unborn child.' " The law also required physicians to inform patients of the availability of printed materials from the State, which provided information about the child and various forms of assistance. The joint opinion rejected a free-speech challenge to this requirement. It described the Pennsylvania law as "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion," which "for constitutional purposes, was no different from a requirement that a doctor give certain specific information about any medical procedure." The law regulated speech only "as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State." Indeed, the requirement that a doctor obtain informed consent to perform an operation is "firmly entrenched in American tort law." *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 269 (1990).

The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is sought, offered, or performed. Tellingly, many facilities that provide the exact same services as covered facilities—such as general practice clinics, are not required to provide the licensed notice. The licensed notice regulates speech as speech.

Outside of the two contexts discussed, this Court's precedents have long protected the First Amendment rights of professionals. This Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, see *Reed*, 576 U. S., at ___ (slip op., at 10); *In re Primus*, 436 U. S. 412, 432 (1978); professional fundraisers, see *Riley*, 487 U. S., at 798; and organizations that provided specialized advice about international law, see *Holder* v. *Humanitarian Law Project*, 561 U. S. 1 (2010). And the Court emphasized that the lawyer's statements in *Zauderer* would have been "fully protected" if they were made in a context other than advertising. Moreover, this Court has stressed the danger of content-based regulations "in the fields of medicine and public health, where information can save lives." *Sorrell*, *supra*, at 566.

The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech "poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting,* 512 U. S., at 641. Take medicine, for example. Throughout history, governments have "manipulated the content of doctor-patient discourse" to increase state power and suppress minorities: "During the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients.

When the government polices the content of professional speech, it can fail to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen* v. *Coakley*, 573 U. S. ___, ___ (2014) (slip op., at 8–9). Professionals might have a host of good-faith disagreements, with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "The best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

"Professional speech" is also a difficult category to define with precision. See *Entertainment Merchants Assn.*, 564 U. S., at 791. As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others. One court of appeals has even applied it to fortune tellers. All that is required to make something a "profession," according to these courts, is that it involves personalized services and requires a professional license

from the State. But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose "invidious discrimination of disfavored subjects." *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 423 (1993).

California has [not] identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest: providing low-income women with information about state-sponsored services. Assuming that this is a substantial interest, the licensed notice is not sufficiently drawn to achieve it. If California's goal is to educate low-income women about the services it provides, the licensed notice is "wildly underinclusive." The notice applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services" and that provide two of six categories of specific services. Other clinics that have another primary purpose, or that provide only one of those services, also serve low-income women and could educate them about the State's services. California has "nearly 1,000 community clinics"—including "federally designated community health centers, migrant health centers, rural health centers, and frontier health centers"—that "serve more than 5.6 million patients annually through over 17 million patient encounters." But most of those clinics are excluded from the licensed notice requirement without explanation. Such "underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entertainment Merchants Assn.*, 564 U. S., at 802. The FACT Act also excludes federal clinics and Family PACT providers from the licensed-notice requirement. California notes that those clinics can enroll women in California's programs themselves, but California's stated interest is informing women that these services exist in the first place. California has identified no evidence that the exempted clinics are more likely to provide this information than the covered clinics. In fact, the exempted clinics have long been able to enroll women in California's programs, but the FACT Act was premised on the notion that "thousands of women remain unaware of them." If the goal is to maximize women's awareness of these programs, then it would seem that California would ensure that the places that can immediately enroll women also provide this information. The FACT Act's exemption for these clinics, which serve many women who are pregnant or could become pregnant, demonstrates the disconnect between its stated purpose and its actual scope. "Precision must be the touchstone" when it comes to regulations of speech, which "so closely touch our most precious freedoms." *Button*, 371 U. S., at 438.

Further, California could inform low-income women about its services "without burdening a speaker with unwanted speech." Most obviously, it could inform the women itself with a public-information campaign. California could even post the information on public property near crisis pregnancy centers. California argues that it has already tried an advertising campaign, and that many women who are eligible for publicly-funded healthcare have not enrolled. But California has no evidence to that effect. Regardless, a "tepid response" does not prove that an advertising campaign is not a sufficient alternative. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803 (2000). Individuals might not have enrolled in California's services because they do not want them, or because California spent insufficient resources on the advertising campaign. Either way, California cannot co-opt the licensed facilities to deliver its message for it. "The First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, *supra*, at 795.

In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice. Contrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.

We next address the unlicensed notice. The parties dispute whether the unlicensed notice is subject to deferential review. We need not decide whether the *Zauderer* standard applies to the unlicensed notice. Even under *Zauderer*, a disclosure requirement cannot be "unjustified or unduly burdensome." Our precedents require disclosures to remedy a harm that is "potentially real not purely hypothetical," *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136 (1994), and to extend "no broader than reasonably necessary," *In re R. M. J.*, 455 U. S. 191, 203 (1982). California has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome. See *Ibanez*, 512 U. S., at 146. It has not met its burden.

We need not decide what type of state interest is sufficient to sustain a disclosure requirement like the unlicensed notice. California has not demonstrated any justification for the unlicensed notice that is more than "purely hypothetical." The only justification that the California Legislature put forward was ensuring that "pregnant

women in California know when they are getting medical care from licensed professionals." California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals. The services that trigger the unlicensed notice—such as having "volunteers who collect health information from clients," "advertising pregnancy options counseling," and offering over-the-counter "pregnancy testing,"—do not require a medical license. And California already makes it a crime for individuals without a medical license to practice medicine. At this preliminary stage of the litigation, we agree that petitioners are likely to prevail on the question whether California has proved a justification for the unlicensed notice.

The FACT Act unduly burdens protected speech. The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers. While the licensed notice applies to facilities that provide "family planning" services and "contraception or contraceptive methods," the California Legislature dropped these triggering conditions for the unlicensed notice. The notice applies only to facilities that primarily provide "pregnancy-related" services. Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed. This Court's precedents are deeply skeptical of laws that "distinguish among different speakers, allowing speech by some but not others." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 340 (2010). Speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell*, 564 U. S., at 580.

The application of the unlicensed notice to advertisements demonstrates just how burdensome it is. The notice applies to all "print and digital advertising materials" by an unlicensed covered facility. These materials must include a government-drafted statement that "this facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." An unlicensed facility must call attention to the notice, instead of its own message, by some method such as larger text or contrasting type or color. This scripted language must be posted in English and as many other languages as California chooses to require. A billboard for an unlicensed facility that says "Choose Life" would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility's own message. The "detail required" by the unlicensed notice "effectively rules out" the possibility of having such a billboard. *Ibanez*, *supra*, at 146.

For all these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies. California has offered no justification that the notice plausibly furthers. It targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech. We conclude that the unlicensed notice is unjustified and unduly burdensome under *Zauderer*. We express no view on the legality of a similar disclosure requirement that is better supported or less burdensome.

We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Kennedy, with whom The Chief Justice, Justice Alito, and Justice Gorsuch join, concurring.

Here the State requires primarily pro-life pregnancy centers to promote the State's preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts. The history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs. The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking." But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view they find unacceptable." *Wooley* v. *Maynard*, 430 U. S. 705, 715 (1977). It is forward thinking to read the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders knew it; to confirm that history shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.

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

Because most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered "content based," for virtually every disclosure law requires individuals "to speak a particular message." Many ordinary disclosure laws would fall outside the majority's exceptions for disclosures related to the professional's own services or conduct. These include numerous disclosure requirements relating to the medical profession. The majority says that it does not "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." But this disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification. The majority does not explain why the Act does not fall within its "health" category. [The Court's] test invites courts around the Nation to strike down disclosure laws that judges may disfavor. "Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint." *Reed,* 576 U. S., at ___ (Alito, J., concurring) (slip op., at 1). "Limiting speech based on its 'topic' or 'subject' " can favor "those who do not want to disturb the status quo." *Ibid.* But the mine run of disclosure requirements do nothing of that sort. They simply alert the public about child seat belt laws, [and] the location of stairways, among other things.

Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Since this Court departed from the approach set forth in *Lochner* v. *New York*, 198 U. S. 45 (1905), ordinary economic and social legislation has been thought to raise little constitutional concern. The Court has taken this same respectful approach to economic and social legislation when a First Amendment claim like the claim here. Even during the *Lochner* era, when this Court struck down numerous economic regulations, this Court was careful to defer to state legislative judgments concerning the medical profession. The Court took the view that a State may condition the practice of medicine on any number of requirements. Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions. In the name of the First Amendment, the majority treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.

The Court refers to widely accepted First Amendment goals, such as the need to protect the Nation from laws that "suppress unpopular ideas or information" or inhibit the "marketplace of ideas in which truth will ultimately prevail." I value this role that the First Amendment plays. But the majority enunciates a general test that reaches far beyond the area where this Court has examined laws closely in the service of those goals. Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will obscure, not clarify, the true value of protecting freedom of speech.

The disclosure here concerns speech related to abortion. It involves health, differing moral values, and differing points of view. Rather than set forth broad, new, First Amendment principles, we should focus upon precedent more closely related to the case at hand. This Court has more than once considered disclosure laws relating to reproductive health. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), the Court considered a state law that required doctors to provide information to a woman deciding whether to proceed with an abortion. That law required the doctor to tell the woman about the nature of the abortion procedure, the health risks of abortion and of childbirth, the "probable gestational age of the unborn child," and the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion). A joint opinion, in judging whether the State could impose these informational requirements, asked whether doing so imposed an "undue burden" upon women seeking an abortion. The joint opinion stated that the statutory requirements amounted to "reasonable measures to ensure an informed choice, one which might cause the woman to choose childbirth over abortion." The joint opinion specifically discussed the First Amendment. It concluded that the statute did not violate the First Amendment physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Casey*, 505 U. S., at 884.

If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? There is no convincing reason to distinguish between information about adoption and information about abortion in this context. The majority tries to distinguish *Casey* as concerning

a regulation of professional conduct that only incidentally burdened speech. *Casey*, in its view, applies only when obtaining "informed consent" to a medical procedure is directly at issue. This distinction lacks moral, practical, and legal force. The individuals here are all medical personnel engaging in activities that directly affect a woman's health —not significantly different from the doctors in *Casey*. The statute here applies only to "primary care clinics," which provide "services for the care and treatment of patients for whom the clinic accepts responsibility." And the persons responsible for patients at those clinics are all persons "licensed, certified or registered to provide" pregnancy-related medical services. Petitioners have not provided any example of a covered clinic that is not operated by licensed doctors or equivalent professionals. The Act requires these medical professionals to disclose information about the possibility of abortion (including potential financial help) that is as likely helpful to granting "informed consent" as is information about the possibility of adoption and childbirth. I find it impossible to drive any meaningful legal wedge between the law, as interpreted in *Casey*, and the law as it should be applied in this case. If the law in *Casey* regulated speech "only 'as part of the *practice* of medicine,' " so too here.

The majority contends that the disclosure here is unrelated to a "medical procedure," and so the State has no reason to inform a woman about alternatives to childbirth (or, presumably, the health risks of childbirth). No one doubts that choosing an abortion is a medical procedure that involves certain health risks. But the same is true of carrying a child to term and giving birth. That is why prenatal care often involves testing for [a host] of medical conditions. Childbirth itself risks harms of various kinds, some connected with caesarean or surgery-related deliveries, some related to more ordinary methods of delivery. In any case, informed consent principles apply more broadly than only to discrete "medical procedures." Prescription drug labels warn patients of risks even though taking prescription drugs may not be considered a "medical procedure." In California, clinics that screen for breast cancer must post a sign in their offices notifying patients that, if they are diagnosed with breast cancer, their doctor must provide "a written summary of alternative efficacious methods of treatment." If even these disclosures fall outside the majority's cramped view of *Casey* and informed consent, it undoubtedly would invalidate the many other disclosures that are routine in the medical context. The majority finds it "telling" that general practice clinics—*i.e.,* paid clinics—are not required to provide the licensed notice. But the lack-of-information problem that the statute seeks to ameliorate is commonly found among low-income women. There is "nothing inherently suspect" about this distinction, which is not "based on the content of the advocacy each group offers," but upon the patients the group generally serves and the needs of that population.

Finding no First Amendment infirmity in the licensed notice is consistent with earlier rulings. In *Zauderer* we upheld a requirement that attorneys disclose in their advertisements that clients might be liable for significant litigation costs if their lawsuits were unsuccessful. We refused to apply heightened scrutiny, instead asking whether the disclosure requirements were "reasonably related to the State's interest in preventing deception of consumers." The majority concludes that *Zauderer* does not apply because the disclosure "in no way relates to the services that licensed clinics provide." But information about state resources for family planning, prenatal care, and abortion *is* related to the services that licensed clinics provide. These clinics provide counseling about contraception (a family-planning service), ultrasounds or pregnancy testing (prenatal care), or abortion. The required disclosure is related because it provides information about state resources for the very same services. A patient who knows that she can receive free prenatal care from the State may prefer to forgo the prenatal care offered at the clinics here.

Regardless, *Zauderer* turned on "material differences between disclosure requirements and outright prohibitions on speech." A disclosure requirement does not prevent speakers "from conveying information to the public," but "only requires them to provide more information than they might otherwise be inclined to present." Where a State's requirement to speak "purely factual and uncontroversial information" does not attempt "to '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,' " it does not warrant heightened scrutiny. *Id.,* at 651 (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943)). In *Zauderer*, the Court emphasized the reason that the First Amendment protects commercial speech: "the value to consumers of the information such speech provides." For that reason, a professional's "constitutionally protected interest in *not* providing particular factual information in his advertising is minimal." But this rationale is not in tied to advertisements about a professional's own services. Whether the context is advertising the professional's own services or other commercial speech, a doctor's First Amendment interest in not providing factual information to patients is the same: minimal, because his professional speech is protected because of its informational value to patients. There is no reason to subject such laws to heightened scrutiny.

The majority's reliance on cases that prohibit rather than require speech is misplaced. "In the fields of medicine and public heath, information can save lives," but the licensed disclosure *serves* that informational interest by requiring clinics to notify patients of the availability of state resources for family planning services, prenatal care, and abortion, which is truthful and nonmisleading. Abortion is a controversial topic and a source of debate, but the availability of state resources is not a debatable truth. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other. Similarly, the majority highlights an interest that often underlies our decisions in respect to speech prohibitions—the marketplace of ideas. But that marketplace is fostered, not hindered, by providing information to patients to enable them to make fully informed medical decisions in respect to their pregnancies.

One might take the majority's decision to mean that speech about abortion is special, that it involves not only professional medical matters, but also views based on deeply held religious and moral beliefs about the nature of the practice. To that extent, arguably, the speech here is different from that at issue in *Zauderer*. But the law's insistence upon treating like cases alike should lead us to reject petitioners' arguments. The the need for evenhandedness should prove particularly weighty in a case involving abortion rights. Americans hold strong, and differing, views about the matter. Some Americans believe that abortion involves the death of a live and innocent human being. Others believe that the ability to choose an abortion is "central to personal dignity and autonomy," and note that the failure to allow women to choose an abortion involves the deaths of innocent women. We cannot try to adjudicate who is right and who is wrong in this moral debate. But we can do our best to interpret constitutional law so that it applies fairly within a Nation whose citizens strongly hold these different points of view. It is particularly important to interpret the First Amendment so that it applies evenhandedly between those who disagree so strongly. A Constitution that allows States to insist that medical providers tell women about the possibility of adoption should also allow States to insist that medical providers tell women about the possibility of abortion.

The second statutory provision covers pregnancy-related facilities that provide women with certain medical-type services (such as obstetric ultrasounds or sonograms, pregnancy diagnosis, counseling about pregnancy options, or prenatal care), are not licensed as medical facilities by the State, and do not have a licensed medical provider on site. The statute says that such a facility must disclose that it is not "licensed as a medical facility" and it must make this disclosure in a posted notice and in advertising. The majority does not question that the State's interest (ensuring that "pregnant women in California know when they are getting medical care from licensed professionals") is the type of informational interest that *Zauderer* encompasses. Nor could it. Nevertheless, the majority concludes that the State's interest is "purely hypothetical" because unlicensed clinics provide innocuous services that do not require a medical license. The legislature heard that information-related delays in qualified healthcare negatively affect women seeking to terminate their pregnancies as well as women carrying their pregnancies to term, with delays in qualified prenatal care causing life-long health problems for infants. Even without such testimony, patients might think they are receiving qualified medical care when they enter facilities that collect health information, perform obstetric ultrasounds or sonograms, diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care. The State's conclusion to that effect is certainly reasonable.

The majority suggests that the Act is suspect because it covers some speakers but not others. "An exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.' " *McCullen*, 573 U. S., at ___ (slip op., at 15) (quoting *City of Ladue* v. *Gilleo*, 512 U. S. 43, 51 (1994)). Such speaker-based laws warrant heightened scrutiny "when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broadcasting System, Inc.*, 512 U. S., at 658. Where a law's exemptions "facilitate speech on only one side of the abortion debate," there is a "clear form of viewpoint discrimination." *McCullen, supra,* at ___ (slip op., at 18). The Act does not, on its face, distinguish between facilities that favor pro-life and those that favor pro-choice points of view. Nor is there any convincing evidence that discrimination was the purpose or effect of the statute. Notably, California does not single out pregnancy-related facilities for this type of disclosure requirement. And it is unremarkable that the State excluded the provision of family planning and contraceptive services. After all, the State was seeking to ensure that "pregnant women in California know when they are getting medical care from licensed professionals," and pregnant women generally do not need contraceptive services.

"Unduly burdensome disclosure requirements might offend the First Amendment." *Zauderer*, 471 U. S., at 651. But these are claims that the statute could be applied unconstitutionally, not that it is unconstitutional on its

face. The majority highlights that the statute requires facilities to write their "medical license" disclaimers in 13 languages. The Act would require disclosure in no more than two languages in the vast majority of California's 58 counties. Whether the requirement of 13 different languages goes too far and is unnecessarily burdensome in light of the need to secure the statutory objectives is a matter that concerns Los Angeles County alone, and it is a proper subject for a Los Angeles-based as applied challenge.

On p. 314, at the end of problem # 4, after the word "See" in the citation, insert the following new citation:

Gresham v. Swanson, 866 F.3d 853 (8th Cir. 2017);

On pp. 317-18, delete problem # 15.

On p. 318, renumber problem # 16 as # 15, then delete the citation at the end of newly numbered problem #15, and then insert the following new citation:

704 Fed. Appx. 665 (9th Cir. 2017).

On p. 318, at the end of the problems, add the following new problems:

17. *The Judicial Advertisement*. Suppose that a sitting judge runs an advertisement that touts a newspaper endorsement of her candidacy. However, the endorsement is nearly twenty years old. Can the judge be reprimanded for a "knowing misrepresentation" for not disclosing the age of the endorsement? *See Shepard v. Florida Judicial Qualifications Commission*, 217 So.3d 71 (Fla. 2017).

18. *Greeters Outside Stores*. Many of the retail stores and restaurants in the historic district of Miami Beach rely on solicitation of customers by "greeters" who stand outside the storefronts and offer friendly comments and free samples in order to attract potential customers inside. Even though the greeters do not engage in direct sales pitches of the products in their stores, there are so many of them that their activities provoke a tide of complaints from visitors and residents alike. In response, the City Council debated these three options for a potential ordinance to regulate the use of the greeters in all public areas of the historic district: 1) prohibit greeters from approaching within five feet of any person outside their store; 2) establish one or more zones on each block in which greeters would be confined; and 3) a more comprehensive ban on greeters. The City Council decided that each of the first two options would be difficult to enforce and therefore enacted this broad ordinance: "It shall be unlawful to solicit any person for the purpose of inducing them to purchase any property, real or personal, or any food, beverage, or service, or to solicit such person to enter any place of business for the purpose of attempting to induce such person to purchase any such goods or services." The Council declared that the goals of the ordinance were to protect the aesthetic character of the historic district and minimize the harassment of visitors and residents. Under the *Central Hudson* test, does the ordinance violate the First Amendment? *See FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290 (11th Cir. 2017).

19. *Promoting Responsible Consumption*. The following ordinance is challenged by two plaintiffs, including a winery and a restaurant that is licensed to sell alcohol, on First Amendment grounds:

> No advertisement by beer or wine retailers shall contain any statement offering any coupon, premium, prize, rebate, sales price below cost, or discount as an inducement to purchase the advertised beer or wine. Nor shall any advertisement of beer or wine contain a price that is below the retailer's actual cost.
>
> a) However, this section does not prohibit the advertising of sales, promotions, and discounts for beer or wine available within a retail establishment itself.
>
> b) Furthermore, such advertisements for beer or wine within retail establishments are not prohibited from containing a price below the retailer's actual cost.
>
> c) Also, this section does not prohibit the manufacturers of intoxicating liquor other than beer or wine from

offering and advertising consumer cash rebate coupons.

The plaintiffs are a winery and a food and drink establishment that is licensed to sell alcohol. As the attorneys for the plaintiffs point out, the effect of the statute is to prohibit beer and wine retailers from advertising discounted prices for these products that are available *outside* their establishments, such as "a two-for-one special on beer at the local grocery store, a going-out-of-business sale at a specialty wine shop, or an offer for one free glass of beer or wine with the purchase of a meal at a neighborhood bar and grill." The Attorney General argues that the goal of the statute is to "promote the responsible consumption of alcohol" and cites the "common sense link" between the existence of advertising and an increase in the public demand for a product. The Attorney General argues further that the statute should be upheld because there must be a similar "common sense link" between the advertisement restrictions in the statute and the achievement of the government's goal to promote the responsible consumption of alcohol. What arguments will the plaintiffs make to persuade the court that the statute violates *Central Hudson*? *See Missouri Broadcasting Association v. Lacy*, 846 F.3d 295 (8th Cir. 2017).

Chapter 5

Content-Neutral Speech Restrictions: Symbolic Speech and Public Fora

A. Symbolic Speech

On p. 344, at the end of the problems, add the following new problem # 7:

6. *Go Topless Day*. GoTopless is a nonprofit organization that advocates for a woman's right to bare her breasts in public, and the organization sponsors an annual "Go Topless Day." Dawn participated in this event by walking around Chicago unclothed from the waist up, with body paint applied to her bare breasts. The paint was not opaque enough for her to avoid getting a ticket for violating the Chicago public nudity ordinance, which applies to "any person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any school facility, or any municipal building, or any public way within the City in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or public hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering." The penalty for the citation ranges from $100 to $500.Dawn challenged the citation on First Amendment grounds. Was Dawn's conduct inherently expressive? If so, is the *O'Brien* test applicable? What result will follow if the *O'Brien* test is applied? *See Tagami v. City of Chicago*, 875 F.3d 375 (7th Cir. 2017).

B. Public Forum Doctrine

[1] Foundational Principles

On p. 347, at the end of problem # 3, insert the following new citation:

See Frisby v. Shultz, 487 U.S. 474 (1988).

On p. 346, insert a new problem # 2 that reads as follows, and then renumber the remaining problems:

2. *The President's Twitter Account*. President Donald Trump used a personal Twitter account extensively in his bid for the presidency, and has continued to use it after he became President. However, he has chosen to block individuals who have been critical of him or his policies. Should the President's personal Twitter account be regarded as a "public forum" so that viewpoint discrimination is impermissible? Is it sufficiently like streets and parks, which have been regarded as public fora, or should it be treated like private property? Does it matter whether Trump uses that account to make official announcements? President Trump has argued that critics have plenty of other avenues for responding to his Tweets. Would your analysis be different if the President created an "official" Twitter account (the "POTUS Account") and then tried to discriminate on the basis of viewpoint? *See Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp.3d 541 (S.D.N.Y. 2018).

On p. 347, after problem # 3, insert the following new problems # 4 and # 5:

4. *The Anti-Videotaping Ordinance.* Defendant sought to videotape a police station from across the street when police officers approached him and demanded identification. Does an individual have the right to videotape what goes on in the street outside of a police station? If this right exists, can it be subjected to reasonable time, place and manner restrictions? *See Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017).

5. *The Anti-Panhandling Ordinance.* In Kentucky, the Lexington-Fayette Urban County Government adopted Ordinance 14-5 prohibiting all begging and soliciting from public streets or intersections within the urban-county area. The penalty is a fine of up to $100 and between 10 to 30 days in jail. Does panhandling involve communicative activity that should be protected under the First Amendment? If so, what standard of review should apply? Is the ordinance content-based? *See Champion v. Commonwealth*, 520 S.W.3d 331 (Ky. 2017).

On p. 356, at the end of note # 1, add the following new text:

The Court's current description of a designated public forum implicitly refers to Justice Kennedy's perspective in ISKCON by using this language: "[In] order to ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public forum, this Court has looked to the policy and practice of the government and to the nature of the property and its compatibility with expressive activity." *Walker v. Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239, 2250 (2015) (quoting *Cornelius*).

On p. 357, after note # 2, insert the following new notes # 3, # 4, and # 5:

3. *"Selective Access" as Evidence of Nonpublic Forum Status.* The Court observed famously in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1998), that aside from traditional public fora and designated public fora, "other government properties are either nonpublic fora or not fora at all." Since the traditional public forum category is limited to its "historic confines" of the streets, parks and sidewalks, many cases pose the question whether a forum falls into the "designated public forum" or the "nonpublic forum" category. Starting in the 1980s, the Court adopted the position that in order to qualify as a "designated public forum," the government must intend to make the property "generally available" with "general access" provided for a class of speakers. In *Widmar v. Vincent*, 454 U.S. 263 (1982), a state university policy allowed all registered student groups to use the university's meeting facilities, and the Court characterized those facilities as a designated public forum because they had been made generally available to the class of speakers comprising the registered student groups. As a result, when a student religious group was later denied access to the university's facilities, that exclusion was invalidated as an impermissibly content-based regulation of a designated public forum. But *Widmar* was the rare case in which the Court recognized that the excluded speakers could point to evidence of a right of "general access" for the class to which they belonged. More often, the Court decided that the government did not intend to create a designated public forum because the government allowed only "selective access" to a forum by "reserving eligibility" for forum use to "a particular class of speakers, whose members must then, as individuals, obtain permission" from government officials to use it. The "selective access" type of forum is a nonpublic forum.

4. *The Limits of a "Limited" Public Forum*. Also beginning in the 1980s, the Court began to examine the claims of speakers who argued that even when a forum was not "generally available" to a broad class of speakers, the government had established a "limited" public forum by granting access to particular speakers in a class to which the plaintiff belonged. But in most of the Court's precedents in which the plaintiffs have made this argument, it has not been successful. An early example is *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), where the forum at issue was the interschool mail system that could be used to deliver messages to teacher mailboxes in roughly a dozen public schools. Initially, the mail system was open to school employees and to the two unions that represented the district's teachers. But when one union became the exclusive representative for the teachers, it obtained exclusive access to the interschool mail system from the school district. In challenging its own loss of access, the rival union relied on evidence that some speakers in "outside groups" had been granted access to the mail system, including YMCA and Cub Scout groups, as well as other civic and religious organizations. Since the government had opened a "limited" public forum for these "non-school-connected groups," the plaintiff union urged the Court to invalidate the exclusion of the union, given its identity as another such group.

However, the *Perry* Court rejected this argument and its analysis reflected two key limitations on the potential use of the "limited" public forum concept. First, the Court concluded that the outside organizations only had "selective access" and not "general access" to the mail system forum, since "permission to use the system to communicate with teachers must be secured from the individual building principal." Such "selective access" is the sign of a nonpublic forum. Second, the Court held that even assuming that the government had created a "limited public forum" with "general access" allowed for some outside groups, the "resulting constitutional right of access" would extend "only to other entities of similar character." Then the Court chose to define the "character" of the outside groups in *Perry* as "organizations that engage in activities of interest and educational relevance to students." This narrow definition meant that the plaintiff union could not qualify as an entity of similar character, as in the Court's eyes, the union's interest was limited to "the terms and conditions of teacher employment." Thus, the plaintiff union could claim no right of "general access" to the hypothetical "limited public forum" in *Perry*.

5. *Forum Analysis Does Not Apply to Government Speech.* Since forum analysis is designed to evaluate "government restrictions on purely private speech that occurs on government property," such analysis does not govern "government speech" cases in which "the State is speaking on its own behalf." In these cases, the government "is not barred by the Free Speech Clause from determining the content of what it says." In *Walker v. Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239, 2250 (2015), the Court held that specialty license plates should be characterized as government speech, given the history of license plate designs in communicating messages from the States, the close identification of those designs with the States in the public mind, and the existence of State control over the messages conveyed in license plate designs. Since the plate designs are government speech and not purely private speech, the *Walker* Court found that they license plates did not constitute a forum of any kind. The topic of government speech will be studied in Part C of Chapter 8.

On p. 357, after note # 2, delete the heading and the problem, and then insert the Problems heading and the following new problems # 1, # 2, # 3, # 4, # 5, and # 6:

Problems

1. *No-Demonstration Zones*. The U.S. Capitol Grounds include 60 acres area of grass, trees, sidewalks, and a few paved plazas, as well as the Capitol building and the Senate and House office buildings. There are no barriers that impede pedestrian access to the sidewalks in the Grounds, and members of the public use the sidewalks for purposes such as walking to work, sightseeing, taking selfies, picnicking, jogging, and walking dogs. The sidewalks are continuously open and not crowded. A local ordinance establishes "no-demonstration zones" at particular sites in D.C. where "demonstration activity" is prohibited, including "parading, picketing, leafleting, or other expressive conduct or speechmaking that conveys a message and has the intent, effect or propensity to attract a crowd of onlookers." Al is an artist who wants to distribute leaflets that advocate the right of artists to sell their works on the public sidewalks. But when he distributes leaflets to passing pedestrians on sidewalk next to the East Front of the Capitol, a police officer informs him that he is leafleting in a "no-demonstration zone." In order to avoid arrest, Al must move 250 feet away from the Capitol building to distribute his leaflets in a lawn area where few pedestrians can be seen. Al gives up his quest and files suit to challenge the ban on "demonstration activity" in the "no-demonstration" zone of the East Front sidewalk. Counsel for the government defends this ban as justified by the interest in controlling traffic and promoting security around the Capitol. What arguments will Al's counsel make to win the First Amendment challenge? *See Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002).

2. *The President's Twitter Account*. President Donald Trump used a personal Twitter account, @realDonaldTrump, extensively in his bid for the Presidency, and he has continued to use the account since his election. The account is "generally accessible to the public at large" and the White House Social Media Director assists in the operation of the account. However, President Trump has chosen to block individuals whose replies to his tweets have been critical of him or his policies. Assume that several blocked individuals file suit and argue that one aspect of the Twitter account is subject to public forum analysis – specifically, the interactive space for replies and retweets created by each tweet that is sent from the account by the President. Should a court find that this space is a designated public forum or a non-public forum? Does the President's blocking of the plaintiffs violate the First Amendment in either case? Does it matter whether President Trump uses the account occasionally "to communicate about other issued not directly related to official government business"? President Trump has argued that critics have

plenty of other avenues for responding to his Tweets. What impact should this fact have on the court's analysis of the public forum issue? Should it matter whether the Twitter account is a "personal" account as opposed to an "official" Twitter account (the "POTUS Account") in which the President is blocking people whose replies are critical of his policies? *See Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp.3d 541 (S.D.N.Y. 2018).

3. *Supreme Court Sidewalk and Plaza.* A statute in the federal criminal code prohibits "the display of any flag, banner, or device designed or adapted to bring into public notice any party, organization or movement on the grounds of the U. S. Supreme Court." These "grounds" are defined to include the large elevated marble plaza in front of the Court, as well as the concrete perimeter sidewalk that surrounds the four sides of the plot that is occupied by the Court building. The plaza is surrounded by a low marble wall and contains two fountains and six marble benches. The constitutionality of statute is challenged by two plaintiffs, each of whom was warned that they would be arrested under the statute if they continued to engage in their activities. One plaintiff was distributing free religious pamphlets while standing on the concrete sidewalk in front of the Supreme Court building. The other plaintiff was standing on the same sidewalk next to the first plaintiff, while holding up a sign that was two feet square and inscribed with the text of the First Amendment. After they were warned, both plaintiffs went across the city street in front of the Supreme Court and continued their activities while standing on the city sidewalk, to which the statute does not apply. In defending the constitutionality of the statute, the government counsel concedes that "almost any sign or leaflet carrying a communication" would be covered by the statute. Is the perimeter sidewalk around the Supreme Court, where the plaintiffs were standing when warned about arrest, a public forum? Is the elevated marble plaza a public forum? *See United States v. Grace*, 461 U.S. 37 (1983); *Hodge v. Talkin*, 799 F.3d 1145 (D.C. Cir. 2015); *Bonowitz v. United States*, 741 A.2d 18 (D.C. Ct. App. 1999).

4. *Enclave on Campus*. The Quad at the University of Alabama in Tuscaloosa is a well-traveled, wide-open grassy field surrounded by UA buildings. The city's street grid runs around the Quad and the campus is not fenced off or gated to prevent public access. But anyone standing on the Quad would notice that flower beds line the sidewalks in the street grid, that the UA logo appears on all the street signs on the grid, and that UA signs hang from the street lamps near the Quad. A variety of UA landmarks are visible from the Quad. The university's "grounds use policy" requires a permit to be obtained by persons who are unaffiliated with the University and wish to engage in speech activities on the Quad. This policy is challenged by an unaffiliated speaker who attempted to make a speech on the Quad while using a loudspeaker, but was sent away by a campus police officer because he lacked the permit required by the grounds use policy. Is the Quad area a traditional public forum, a designated public forum, or a nonpublic forum? *See* Keister v. Bell, 879 F.3d 1282 (11th Cir. 2018).

5. Need Advance Permit. An airport regulation requires people who wish to engage in a demonstration at the Denver International Airport (DIA) to apply for a permit one week in advance. The regulation also limits each demonstrator to the use of a sign that is no larger than 12 inches by 12 inches. On January 28, 2017, hundreds of people went to the DIA to engage in a spontaneous protest of the Executive Order signed by President Trump the previous day. That Order "established a 90-day ban on individuals from seven Muslim-majority countries from entering the United States, a 120-day suspension of all refugee admissions, and an indefinite suspension of refugee admissions from Syria." The protesters at the DIA were threatened with arrest on the ground that they had not applied for a permit one week earlier. When plaintiffs filed a § 1983 suit seeking an injunction against the advance permit requirement and size limitation for signs, what arguments will they make? How will the federal court resolve the First Amendment issues? *See McDonnell v. City and County of Denver*, 878 F.3d 1247 (10th Cir. 2018).

6. *The Perfect Gift*. The Washington Metropolitan Area Transit Authority (WMATA), operates the Metrobus systems in D.C. and funds its operations by selling advertising spaces on the exterior of its buses. After polling the community on the issue, the WMATA decides that it will not accept "issue-oriented advertising, including political, religious, and advocacy advertising," because "the economic benefits of accepting such ads are outweighed by three considerations: community and employee opposition, security risks, and vandalism." So the WMATA adopts a policy that includes this prohibition, among others: "The WMATA is prohibited from accepting advertisements that promote or oppose any religion, religious practice, or belief." Meanwhile, the Archdiocese of Washington launches its "Find the Perfect Gift" campaign, as part of its evangelization efforts to encourage individuals to return to church during Advent and to give charitably to their communities." The advertisement for the campaign includes the words, "Find the Perfect Gift," as well as the website address, "FindThePerfectGift.org" and the hashtag, "#PerfectGift." These words appear against the drawing of a night sky with three shepherds, two

sheep, and a twinkling star. When the chief administrator for the Archdiocese sends the ad to the WMATA, along with the required check to pay for its display, he is told that the ad cannot run as submitted because it violates the WMATA's policy. The Archdiocese files suit to challenge the rejection of its advertisement under the Free Speech Clause. (The suit also includes a claim of religious discrimination, as presented in problem 16 on page 906 of Chapter 13.) Does the advertising space on the exterior of a bus qualify as a nonpublic forum? If so, does the WMATA's policy satisfy the First Amendment scrutiny that applies to such a forum? *See Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 281 F. Supp. 3d 88 (D.D.C. 2017).

On p. 357, following the problem, insert the following new case and problems:

Minnesota Voters Alliance v. Mansky

136 S. Ct. 1876 (2018).

Chief Justice Roberts delivered the opinion of the Court.

Americans going to their polling places on Election Day expect to wait in 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. Voters typically deposited privately prepared ballots at the polls instead of completing official ballots on-site. These pre-made ballots often took the form of "party tickets"—printed slates of candidate selections, often distinctive in appearance, that political parties distributed to their supporters and pressed upon others around the polls. See R. BENSEL, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY 14–15 (2004). The physical arrangement confronting the voter was also different. The polling place often consisted simply of a "voting window" through which the voter would hand his ballot to an election official situated in a separate room with the ballot box. As a result of this arrangement, "the actual act of voting was usually performed in the open," frequently within view of interested onlookers. Rusk, *The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876–1908*, AM. POL. SCI. REV. 1220, 1221 (1970). As documented in *Burson* v. *Freeman*, 504 U. S. 191 (1992), "approaching the polling place under this system was akin to entering an open auction place." *Id.,* at 202. The room containing the ballot boxes was "usually quiet and orderly," but "the public space outside the window was chaotic." Bensel 13. Electioneering of all kinds was permitted. See *id.*, at 13. Crowds would gather to heckle and harass voters who appeared to be supporting the other side. Indeed, "under the conventions of the period, election etiquette required only that a 'man of ordinary courage' be able to make his way to the voting window." Bensel 20–21. "In short, these early elections were not a very pleasant spectacle for those who believed in democratic government." *Burson,* 504 U. S., at 202 (plurality opinion).

By the 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. 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) (Supp. 2017). 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. If a voter shows up wearing a prohibited item, the election judge is to ask the individual to conceal or remove it. If the individual refuses, the election judge must allow him to vote, while making clear that the incident "will be recorded and referred to appropriate authorities." Violators are subject to an administrative process before the Minnesota Office of Administrative Hearings,

which may issue a reprimand or impose a civil penalty. That administrative body may also refer the complaint to the county attorney for prosecution as a petty misdemeanor; the maximum penalty is a $300 fine.

Petitioner Minnesota Voters Alliance (MVA) is a nonprofit organization that "seeks better government through election reforms." Petitioner Andrew Cilek is a registered voter and the executive director of MVA; petitioner Susan Jeffers served in 2010 as a Ramsey County election judge. Five days before the 2010 election, MVA, Jeffers, and other likeminded groups and individuals filed a lawsuit 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 does not require individuals to show identification to vote.) One of the plaintiffs planned to wear a "Tea Party Patriots" shirt. The District Court denied the request for a temporary restraining order and preliminary injunction and allowed the apparel ban to remain in effect for the election. In response, officials distributed to election judges an "Election Day Policy," providing guidance on enforcement of the political apparel ban. The Minnesota Secretary of State 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 f 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)."

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. 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, then finally permitted to vote after an election judge recorded his information. Back in court, MVA and the other plaintiffs (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. We granted certiorari.

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*, 505 U. S. 672, 678 (1992) (*ISKCON*). Generally, 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*, 555 U. S. 460 (2009). 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 more flexibility to craft rules limiting speech. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983). 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." *Ibid.*

This Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, "no less than a private owner of property," retains the "power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966). "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 799 (1985). Accordingly, our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy. See *id.,* at 806–811; *Greer* v. *Spock*, 424 U. S. 828 (1976).

A polling place in Minnesota qualifies as a nonpublic forum. It is, 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*,

505 U. S., at 680. Rules strictly govern who may be present, for what purpose, and for how long. While the four-Justice plurality in *Burson* and Justice Scalia's concurrence 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 is whether Minnesota's ban on political apparel is "reasonable in light of the purpose served by the forum": voting. *Cornelius*, 473 U. S., at 806.

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 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. As the plurality explained, "the State of Tennessee has decided that the last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible." That was not "an unconstitutional choice."

MVA disputes the relevance of *Burson* to Minnesota's apparel ban. On MVA's reading, *Burson* considered only "active campaigning" outside the polling place by campaign workers and others trying to engage voters approaching the polls. Minnesota's law, by contrast, prohibits what MVA characterizes as "passive, silent" self-expression by voters themselves when voting. MVA also points out that the plurality focused on the extent to which the restricted zone combated "voter intimidation and election fraud,"—concerns that, in MVA's view, have little to do with a prohibition on certain types of voter apparel. Campaign buttons and apparel did come up in *Burson*, but neither the plurality nor Justice Scalia expressly addressed such applications of the law. Nor did either opinion specifically consider the interior of the polling place as opposed to its environs, and it is true that the plurality's reasoning focused on campaign activities of a sort not likely to occur in an area where, for the most part, only voters are permitted while voting. At the same time, Tennessee's law swept broadly to ban even the plain "display" of a campaign-related message, and the Court upheld the law in full. The plurality's conclusion that the State was warranted in designating an area for the voters as "their own" as they *enter* the polling place suggests an interest more significant, not less, *within* that place.

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. *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 576 (1987) ("the wearing of a T-shirt or button that contains a political message" in an airport); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 508 (1969) (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. Other States can see the matter differently, and some do. The majority, however, agree with Minnesota that at least some kinds of campaign-related clothing and accessories should stay outside. That broadly shared judgment is entitled to respect.

In light of the special purpose of the polling place, Minnesota may choose to prohibit certain apparel because of the message it conveys, so that voters may focus on the important decisions immediately at hand. 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. 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. 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 "of, 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, Minnesota's law "expands 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*, 505 U. S. 123 (1992). Far from clarifying the scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing problems. Cf. *Jews for Jesus,* 482 U. S., at 575–576. The State points to the 2010 Election Day Policy—which it continues to hold out as authoritative guidance regarding 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—"issue 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 is any subject on which a political candidate or party has taken a stance. For instance, the Election Day Policy 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 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? 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 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.

The State's "electoral choices" standard, considered together with the nonexclusive examples in the Election

Day Policy, poses riddles that even the State's top lawyers struggle to solve. A shirt declaring "All Lives Matter" could be "perceived" as political. How about a shirt bearing the name of the National Rifle Association? Definitely out. That said, a shirt displaying a rainbow flag could be worn "*unless* there was an issue on the ballot" that "related somehow to gay rights." A shirt simply displaying the text of the Second Amendment? Prohibited. But a shirt with the text of the *First* Amendment? "It would be allowed."

"Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 794 (1989). But the State's difficulties with its restriction go beyond close calls on borderline or fanciful cases. 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 "the opportunity for abuse, especially where it has received a virtually open-ended interpretation." *Jews for Jesus*, 482 U. S., at 576. 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." 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.

That is not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms. We do not suggest that such provisions set the outer limit of what a State may proscribe, and do not pass on the constitutionality of laws that are not before us. But we do hold that if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here.

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*, 504 U. S., at 198 (plurality opinion). 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.

It is so ordered.

Justice Sotomayor, with whom Justice Breyer joins, dissenting.

In holding that a polling place constitutes a nonpublic forum and that a State must establish only that its limitations on speech inside the polling place are reasonable, the Court goes a long way in preserving States' discretion to determine what measures are appropriate to further important interests in maintaining order and decorum, preventing confusion and intimidation, and protecting the integrity of the voting process. The Court errs, however, in declaring Minnesota's political apparel ban unconstitutional under that standard, without any guidance from the State's highest court on the proper interpretation of that state law. When confronting a challenge to the constitutionality of a statute," courts "will first ascertain whether a construction is fairly possible that will contain the statute within constitutional bounds," and in the context of a challenge to a state statute, federal courts should be particularly hesitant to speculate as to possible constructions of the state law when "the state courts stand willing to address questions of state law on certification." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 78 (1997).

Problem: Redrafting the Statute

Following this decision, how might Minnesota redraft the law to make it constitutional?

[2] Restrictions on Public Forum Use

On p. 361, after the case and before the problems, insert a new Notes heading and the following new notes # 1, # 2, and # 3:

Notes

1. *Appeals from Permit Denials and Criteria for Group Permits*. In *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), the Court upheld an ordinance that required a permit to be obtained in order to "conduct a public assembly, parade, picnic, or other event involving more than fifty individuals" in the Chicago parks. A permit application was required to be processed in the order of receipt and a decision by the Park District regarding the permit was required within 14 days. For any permit application that was denied, the Park District was required to specify the grounds for denial, and where feasible, to propose measures to cure the defects in the application. A written appeal from a permit denial could be made within seven days and the General Superintendent of the Park District was required to decide the appeal within seven days. If the permit denial was affirmed, judicial review could be sought in the state courts. The *Thomas* Court approved of this appeal procedure and held that the ordinance was not required to specify a deadline for judicial review of a permit denial.

The Court also held that the ordinance establishing the permit system was a permissible content-neutral, time-place-manner regulation, which provided "narrowly drawn, reasonable and definite standards" to guide the discretion of the Park District officials in determining whether to grant or deny permits. The ordinance specified 11 grounds for the denial of permits and the decision to deny a permit could be based only on one or more of these specified grounds. Here are some examples of the specified grounds for denial: 1) the failure of the applicant group to complete the application; 2) the inclusion of a material falsehood or misrepresentation in the application; 3) the failure of the applicant group to pay for damage caused on prior occasions to Park District property; 4) the existence of a conflict at the same time or place with another previously planned activity; and 5) the existence of a legal prohibition against the use or activity intended by the applicant group.

2. *Permits for Single Speakers*. The lower courts have recognized that the Supreme Court "has not addressed the validity of single-speaker permitting requirements for speech in a public forum. Most of the federal circuit courts "to have considered the issue have refused to uphold registration requirements that apply to individual speakers" in a public forum." As one circuit court explained, "the significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks." *See Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009 (en banc).

3. *Permits for Door-to-Door Canvassing and Pamphleteering*. In addition to imposing special doctrinal requirements for permit systems that derive from their character as prior restraints, the Court relies on the standards expressed in the time-place-manner doctrine for content-neutral regulations when assessing the validity of permit systems that regulate the use of the public forum by groups. However, the Court has not expressly endorsed the use of the same "intermediate scrutiny" standard expressed in "time-place-manner" doctrine for the evaluation of permit systems for groups that seek to engage in door-to-door canvassing or pamphleteering. In *Watchtower Bible & Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002), the Court described its door-to-door-regulation precedents as recognizing the need for "balancing" the advancement of the government's interests against the impact of regulations on First Amendment rights. On one side of the balance is the "value of the speech involved," with weight given to "the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas," and to the reliance on such speech as an essential form of communication for "poorly-financed causes," including those of dissenters and minorities. On the other side of the balance are the important government interests in protecting residents from intrusive solicitors and from those who may be acting illegally. The *Watchtower* Court found it unnecessary to decide whether to replace this balancing approach with the time-place-manner scrutiny standard, choosing instead to invalidate a permit scheme because of its "breadth and unprecedented nature," its failure to be advance any of the government's traditional interests, and the less intrusive means that were readily available for advancing them.

4. *Security Fees*. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Court invalidated a local parade ordinance that allowed a government administrator to vary the fee for parades based on the estimated cost of maintaining public order. The county had a history of racial tensions, and had been the site of a "March Against Fear and Intimidation." That march involved some 90 demonstrators who were opposed by some 900 counter-demonstrators who threw rocks and beer bottles and eventually managed to halt the march. The following weekend, the ranks of the demonstrators had swelled to 20,000 people, and the ranks of the counter-demonstrators had swelled to 1,000 people. Although there was sporadic rock throwing by the counter-demonstrators, the march was not halted. To provide police protection for this second demonstration, the cost was more than $670,000 of which the county paid a portion.

Following the second march, the county enacted an ordinance that required marchers to obtain a permit in

advance. The ordinance also provided that marchers must defray "the cost of necessary and reasonable protection of persons participating in or observing parades, assemblies, demonstrations, road closings and other related activities that exceed the usual and normal cost of law enforcement for which those participating should be held accountable and responsible." The amount of the fee was to be fixed "from time to time" by the Board, and provided that every permit applicant "shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place." The county administrator was empowered to "adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed."

When the Nationalist Movement applied for permit to march, the county imposed a $100 fee. The fee did not include any calculation for expenses incurred by law enforcement authorities, but was based on 10 hours of the county administrator's time in issuing the permit. The county administrator testified that the cost of his time was deliberately undervalued and that he did not charge for the clerical support involved in processing the application. The Movement brought a facial challenge against the ordinance which the Court invalidated. The Court concluded that the ordinance regulated the use of "a traditional public forum," constituted a prior restraint on speech, and came with a "heavy presumption" against validity. Although the Court recognized that permit requirements might be permissible in some instances, such schemes "may not delegate overly broad licensing discretion to a government official," may not "be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." In addition, a permit scheme must provide "adequate standards for the administrator to apply when he sets a permit fee" so that the process does not vest undue discretion in a governmental official. In other word, there must be "narrow, objective, and definite standards to guide the licensing authority." If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion" by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted. The Court noted that the county administrator had assessed the fee based on his own assessment of reasonableness in regard to the fee, and he chose not to include the cost of clerical support and staff "incident to the administration" of the permit, and he "deliberately kept the fee low by undervaluing the cost of the time he spent processing the application."

In striking down the ordinance, the Court concluded that there were no "narrowly drawn, reasonable and definite standards" guiding the hand of the Forsyth County administrator. "The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator." Indeed, the ordinance required that the fee be based on the content of the speech in the sense that it could include an amount necessary to cover "the cost of necessary and reasonable protection of persons participating in or observing said activity." In order to assess accurately the cost of security for parade participants, the administrator "must necessarily examine the content of the message," "estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee would then be based on the administrator's assessment of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." The Court emphasized that the "listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." While maintaining order is a potential justification for the ordinance, "it does not justify a content-based permit fee." Distinguishing the Forsyth County ordinance from the ordinance at issue in *Cox v. New Hampshire,* 312 U.S. 569 (1941), the Court emphasized that the ordinance involved in Cox did not call for "charging a premium in the case of a controversial political message delivered before a hostile audience."

On p. 361, after problem # 1, insert the following new problem # 2, and then renumber existing problem # 2 as # 3, and existing problem # 3 as # 4:

2. *Campus Free Speech Zones.* Suppose that a public college decides to establish a "free speech zone" and prohibits all free speech activities outside that zone. However, the zone comprises only .003% of the college's 426 acre campus, and the zone can be used only from 9:00 am to 7:00 pm, Monday through Friday. In order to use the free speech zone, a student must apply for a permit at least three days in advance, and the application must submit his or her name and the name of the organization with which he or she is affiliated. A Hispanic student at the college wishes to distribute Spanish-language versions of the U.S. Constitution to all students on campus. He objects to the free speech zone because

he believes that it is enforced in a selective and discriminatory way. Consistently with the First Amendment, can the college limit all free speech activities on campus to a small "free speech zone?" Can it require applicants to provide a copy of all information and materials that they wish to distribute as part of the permit process? *See Shaw v. Burke*, 2018 WL 459661 (C.D. Cal. Jan. 17, 2018).

3. *Presidential Press Conferences*. The White House holds regular press briefings for the media. In conducting such briefings, can the White House exclude reporters or news organizations who are hostile to, or critical of, President Trump and his policies? Suppose that the room can hold only a limited number of journalists, and the White House has simply decided to expand the pool of journalists who can participate. Although this new policy is administered in a content-neutral way, it results in some large news organizations being left out as news organizations are rotated in and out. Can the White House expand the number of news organizations allowed to participate in its briefings, and rotate participation among the outlets?

On p. 361, at the end of the newly numbered problem # 4, insert the following new citation:

See Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

On p. 362, after newly numbered problem # 4, insert the following new problem # 5, and then renumber existing problem # 4 as # 6, and existing problem # 5 as # 7:

5. *More on Security Fees*. When a conservative group at the University of Washington invited a representative of Patriot Prayer to speak on campus, the University sought to impose a "security fee" of $17,000 based on anticipated hostility to the speaker's message which it believed might result in violence. Is it permissible to charge a $17,000 security fee on a student group that seeks to invite an allegedly controversial outside speaker? *See College Republicans of the University of Washington v. Cauce*, 2018 WL 804497 (W.D. Wash. Feb. 9, 2018).

On p. 362, at the end of newly numbered problem # 6, insert the following new citation:

See Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000).

On p. 362, after newly numbered problem # 7, insert the following new problem # 8:

8. *Permits for Commercial Event*s. When the Village opened a new public park, the picturesque settings attracted a large number of commercial photographers and residents complained about the large number of groups who came to the park to pose for professional photos in makeshift outdoor studios. So the Village Council enacted an ordinance to establish a permit system for "all commercial events" in the park. Two types of permits could be obtained with the automatic approval of the Village, as long as a permit application was filed at least 48 hours before the commercial event was scheduled. For commercial events lasting no more than one hour and involving a group of no more than ten people, the permit fee was $100, whereas for commercial events lasting no more than two hours and involving a group of up to 20 people, the permit fee was $200. The purpose of the permit system was to allow particular locations in the park to be reserved for commercial events, so that traffic congestion would be reduced, as well as the wear and tear on the park's grounds and facilities. The permit fees were used to cover the administrative costs of processing the permit applications and employing a police officer to manage each commercial event, prevent interference with other park users, and enforce the park rules during the event. One of the commercial photographers filed suit to challenge the ordinance and the parties agreed that the park is a traditional public forum. What public forum arguments will be made by the attorney for the Village to defend the amended ordinance? Why is the *Central Hudson* commercial speech doctrine not relevant to this case? *See Josephine Havlak Photographer v. Village of Twin Oaks*, 864 F.3d 905 (8th Cir. 2017).

On p. 367, delete the existing problem # 1 and substitute the following new problem # 1:

1. *Sidewalks Near Embassies*. A provision of the D.C. Code makes it unlawful "to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officers thereof, or to bring into public disrepute [the] political social or economic acts, views or purposes of any foreign government, party or organization within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representatives as an embassy, legation, consulate, or for other official purposes." Plaintiffs file suit to challenge this provision because they wish to carry signs critical of the government of the Russian Federation on the public sidewalk within 500 feet of the government's embassy on Wisconsin Avenue in Washington, D.C. How will the court analyze the constitutionality of the D.C. code provision under *Mosley*? *See Boos v. Barry*, 485 U.S. 312 (1988).

On p. 370, at the end of problem # 7, add the following new citation:

See Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017).

On p. 371, at the end of problem # 9, delete the word "with" in the citation and replace it with a semi-colon, and then after the word "Compare" in the citation, insert the following new citation:

Luce Town of Campbell, 872 F.3d 512 (7th Cir. 2017);

On p. 376, change the Note heading to Notes, then number the existing note as new note # 1 with the title "Definitions of Reasonableness," and then insert the following new note # 2:

Notes

1. *Definitions of Reasonableness*.

2. *Reasonableness and Viewpoint Neutrality.* It is useful to recognize that varied interpretations of "reasonableness" may be found in lower court precedents dealing with the restriction of expressive activities in a non-public forum. One court described that standard as follows: "To support the position that [a] restriction is reasonable, there must be evidence that the restriction reasonably fulfills a legitimate need." The government's "failure to select simple available alternatives suggests that the [restriction] it has enacted is not reasonable." Moreover, when a regulation establishes broad prohibitions, a court will expect the government to submit evidence that the speech restrictions actually are needed and that they will alleviate the relevant harms. As for the additional requirement of viewpoint neutrality, viewpoint discrimination "occurs when the specific motivating ideology or the opinion or perspective of the speaker is the rationale" for the government's restriction. When "the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specif risk within that forum, it is regulating a viewpoint rather than a subject matter." Even a reasonable justification for a restriction "cannot save a regulation" that is in fact "based on the desire to suppress a particular point of view." Also, the broad nature of a restriction can provide "telling evidence""of the government's desire to suppress dissent." *See Eagle Point Education Association/SOBC/OEA v. Jackson City School District No. 9*, 880 F.3d 1097 (9th Cir. 2018).

On p. 378, at the end of problem # 3, insert the following new citation:

See Warren v. Fairfax County, 196 F.3d 186 (4th Cir. 1999).

On p. 378, at the end of problem # 4, insert the following new citation:

See General Media Communications, Inc. v. Cohen, 952 F. Supp. 1072 (S.D.N.Y.), *rev'd*, 131 F.3d 273 (2d Cir. 1997).

On p. 379, after problem # 6, insert the following new problem # 7:

7. *Teachers on Strike*. In anticipation of a teacher's strike, the Public School District (PDS) adopts the following Resolution on Picketing: "No picketing will be allowed on any property or facilities owned by the School District. Picketers are prohibited from entering school facilities during all hours for any reason whatsoever." The PSD also sent a Notification Letter to all members of the teachers' union, which read: "Union members will not be permitted on school property or inside school facilities during the strike. Any parent who is a striking teacher shall not be permitted to visit his or her child on school property or inside school facilities." Before the strike, the PSD encouraged school visits by parents and teacher-parents alike and provided the use of school facilities for outside groups who sponsored civic and recreational activities. As soon as the teacher's union went on strike, PSD security personnel immediately enforced the new policies in the Resolution and the Notification Letter. When the teachers union files suit to challenge the new PSD policies on First Amendment grounds, the parties stipulate that the school facilities and property are a non-public forum. What arguments can the attorney for the Plaintiffs make to persuade the court that the new policies are not reasonable regulations and are not viewpoint neutral? *See Eagle Point Education Association/SOBC/OEA v. Jackson City School District No. 9*, 880 F.3d 1097 (9th Cir. 2018).

On p. 392, change the Note heading to Notes, then number the existing note as new note # 1 with the title "As Applied" Challenges, and then insert the following new note # 2:

Notes

1. *"As Applied" Challenges*.

2. *Is Hill v. Colorado Still Good Law after McCullen?* One of the noteworthy aspects of the *McCullen* majority opinion is the failure of Chief Justice Roberts to discuss *Hill v. Colorado*, 530 U.S. 703 (2000). He simply noted that before enacting the *McCullen* statute, the old Massachusetts law governing clinic protesters was "modeled" on the *Hill* statute and it was upheld by lower courts on the basis of *Hill*. In his *McCullen* concurrence, Justice Scalia pointed out that the Court granted review of a second question presented in *McCullen*, namely, "If *Hill* . . . permits enforcement of this law, whether *Hill* should be limited or overruled." According to Justice Scalia, Chief Justice Roberts avoided the need to address that question "by declaring the [Massachusetts] Act to be content neutral on other grounds" that were not used in *Hill*.

Yet the *Hill* Court reasoned that the statute at issue (which created an eight-foot buffer zone around each person present within 100 feet of a health care facility) was content neutral because: 1) the law was not "a regulation of speech" but "a regulation of the places where some speech may occur"; 2) the law was not adopted "because of disagreement with the message" that the speech conveys, since the law's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech"; and 3) "the State's interests" were "unrelated to the content of the demonstrators' speech." *Hill*, 530 U.S. at 707, 719. All of this reasoning can be found in the *McCullen* majority opinion, even though the supporting citations are drawn from cases other than *Hill*.

Moreover, the eight-foot buffer zone in the *Hill* statute was less burdensome on speech and more narrowly tailored than the thirty-five-foot buffer zone in *McCullen*, since the *Hill* zone allowed advocates like the *McCullen* plaintiff to get close enough to clinic patients to offer them literature and to be heard by patients when addressing them. Notably, before the efforts of the *McCullen* plaintiffs were significantly hampered by the thirty-five-foot zones, as determined by the Court, their successes when they "collectively persuaded hundreds of women to forgo abortions" presumably occurred in the days when the old *Hill* type of buffer was in force in Massachusetts. Thus, it remains to be seen whether the *McCullen* Court's silence about *Hill* is a clear sign of its weakness as precedent. So far, the Justices who want to overrule *Hill* do not yet represent a majority of the Court.

On p. 392, after the new notes, insert the Problems heading and then insert the following new problems # 1 and #2:

Problems

1. *Fifteen-Foot Clinic Buffer*. A Pittsburgh ordinance provides that, "No person shall knowingly congregate, patrol, picket, or demonstrate in a zone extending 15 feet from any entrance to a health care facility." There are exemptions like the ones upheld in *McCullen*. It is disputed that since the ordinance prohibits any type of protesting within the 15-foot buffer zone, this prohibition includes "sidewalk counseling" inside that zone. In the late 1990s, there were violent protests at the one Planned Parenthood facility in Pittsburgh. So starting in 2001, the City paid for an overtime detail of police officers to guard the facility in an attempt to deter the incidents of pushing, shoving, and verbal harassment of patients, physical altercations between protesters and escorts, and efforts by protesters to block the entrance to the facility. But in 2010, the City ran out of money to pay for police detail and the incidents of unlawful conduct increased in number. Police officers continued to respond to 911 calls from the facility, and when their efforts to mediate confrontations failed, they would make arrests. The officers informed the Police Chief that because of the blocking efforts of some protesters, there were times when it was impossible, not just difficult, for patients to get through the clinic entrance. The ordinance with the 15-foot buffer zone was enacted in response to these circumstances. The plaintiffs who filed suit to challenge the constitutional validity of the ordinance began their sidewalk counseling only after the ordinance was enacted. Moreover, according to their records, their conversations with approaching patients outside the 15-foot buffer zone have persuaded dozens of women to forgo abortion. How will the attorneys for each side construct their arguments about the implications of *McCullen* for this suit? *See Bruni v. City of Pittsburgh*, 283 F. Supp. 3d 357 (W.D. Pa. 2017).

2. *Buffer Zone Equivalent for Circus Protesters*. The Carson & Barnes Circus is still touring in the U. S. and the City of Baltimore leases the Arena to the Circus once a year for several weeks of performances, which play to sell-out crowds with thousands of patrons. The shows also attract animal welfare protesters who object to the way the Circus treats its animals. . When the area around the Arena experienced traffic and pedestrian flow problems during the performances, the City Attorney's Office issued a written protocol with the goal of providing Circus attendees with easy access to the Arena entrances while giving protesters adequate opportunities to express their views. On Circus days, all vehicular traffic is prohibited in a twelve-square block "buffer" area around the Arena, and all the protesters must stand and remain stationary at one of the many intersections in the"buffer" area, while Circus attendees may walk freely along all the sidewalks and streets on their way to and from the Arena before and after the Circus shows. The protocol was followed annually without incident for several years, but now it has been challenged by a group of protester plaintiffs on First Amendment grounds. They argue that the protocol prevents them from communicating effectively and distributing leaflets to the Circus attendees. Moreover, the protocol is not generally applicable to all expressive activity. Is the protocol content-neutral under *McCullen*? How should the court resolve the First Amendment challenge to the protocol? *See Lucero v. Early*, 873 F.3d 466 (4th Cir. 2017).

[3] Content-Based Restrictions

On p. 403, at the end of the notes, insert the Problems heading and add the following new problems # 1, # 2, # 3, # 4, # 5, # 6, # 7, and # 8:

Problems

1. *More on Sign-Posting Ordinances.* Suppose that a city enacts an ordinance which allows most signs to be posted indefinitely, but provides that "event" signs must be removed within 30 days after the event is held. Does the ordinance violate the First Amendment if it does not distinguish between signs based on the messages they send, but simply regulates the length of time a sign may be posted. Would the ordinance be valid if applied to signs that combine "general messages of advocacy with references to specific events?" *See Act Now to Stop War and End Racism Coalition v. District of Columbia*, 846 F.3d 391 (D.C. Cir. 2017).

2. *Murals.* Atlanta has enacted an ordinance which precludes murals on private property absent the approval of the mayor, the city council and the Urban Design Commission. The ordinance provides that approval can be denied for murals that "constitute a traffic hazard or undue or dangerous distraction to motorists or pedestrians," or that is inconsistent with the city's public art program. Under *Lovell*, is the ordinance valid? If the second justification (consistency with the city's public art program) were dropped, and the city focuses only on whether a proposed mural creates a traffic hazard, would the ordinance be more likely to be upheld? *See* Complaint in *Williams v. City of Atlanta,*

Georgia, Docket No. 1:17-cv-01943, N.D. Ga., May 30, 2017, https://www.courtlistener.com/docket/6158329/williams-v-city-of-atlanta-georgia/

3. *Billboard Ordinances*. The City of San Francisco enacts a ban on new commercial billboards. The ordinance bans all general advertising signs that are not on the premises of the businesses that they promote. Noncommercial signs, such as public notices and governmental signs, are exempt. The City enacted the ordinance because of the increased number of general advertising signs, which it viewed as creating a public hazard, as well as contributing to visual clutter, and to slow the commercialization of public spaces. After *Reed*, is the ordinance valid? Is relevant that there are a number of commercial advertising billboards that are already available in the city? *See Contest Promotions LLC v. City and County of San Francisco*, 874 F.3d 597 (9th Cir. 2017).

4. *Liberal Attacks on Conservative Speakers.* In recent years, liberal activists have aggressively moved to stop conservative speakers from giving speeches on university campuses. For example, University of California at Berkeley administrators cancelled a planned speech by conservative provocateur Milo Yiannopoulous after riots broke out in advance of the speech. Afterwards, one alumnus of the school said he was glad that the school had denied "that fascist" the right to speak, but felt that it should have intervened sooner. When conservative talk show host Ann Coulter was invited to campus, University administrators changed the date of the speech, noting an obligation to ensure that First Amendment rights can be successfully exercised, and that the public is protected against violence. Fearing riots, college administrators in Illinois and Texas rescinded invitations to a U.S. Senator and a Nobel Prize-winning scientist. Is it permissible for university officials to treat conservative speakers differently than liberal speakers? What if there is a threat of violence against the conservative speakers? How specific and imminent must a threat of violence be in order to curb freedom of expression? How should officials respond to that threat?

5. *The University of Chicago Statement.* In July 2012, the University of Chicago, expressing its commitment to free speech, adopted the following policy in its Statement on Principles of Free Expression: "It is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be treated as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community." Do you agree? *See* https://freeexpression.uchicago.edu/page/statement-principles-free-expression

6. *Legislative Responses to Repression*. State legislatures in Colorado, Tennessee, Utah and Virginia have passed laws protecting free speech on campus, and similar legislation has been proposed in other states. Some of these laws that include provisions that provide for the suspension of troublemakers, or prohibit the free speech zones that some universities have established. What provisions might be permissible or impermissible in legislation designed to protect the rights of university speakers? *See* International Center for Not-For-Profit-Law (ICNL), U.S. Protest Law Tracker, Feb. 4 and May 30, 2018, www.icnl.org/protestlawtracker/

7. *More on Legislative Responses to Repression.* The Heritage Foundation has proposed that universities should adopt legislation with the following rules regarding outside speakers: 1) an official policy that strongly affirms the importance of free expression and the nullification of restrictive speech codes; 2) a declaration that the campus is open to anyone invited by members of the campus community which includes a bar against university administrators from excluding invited speakers, no matter how controversial; 3) the imposition of disciplinary sanctions on anyone who interferes with the free speech rights of others; and 4) the creation of a right to sue, by anyone whose free speech rights have been infringed, which includes the right to recover courts costs and attorneys fees. Should universities adopt such legislation?

8. *Marijuana Shirts.* A student group that promotes marijuana legalization creates fund raising t-shirts that merge images of marijuana leaves with a university's trademark logo. Although the university allows other student groups to use the logo in association with their messages, it prohibits the marijuana shirts because of the message. The university claims that the logo constitutes university speech, and that it is entitled to disassociate itself from marijuana messages. Can the university prohibit the student group from associating marijuana with its logo? *See Gerlich v. Leath*, 847 F.3d 1005 (8th Cir. 2017).

C. Campaign Finance Laws [Online Material]

2. Corporate Speech

At the end of the problems after the McCutcheon case, insert the following new problems #3, #4, #5, and #6:

3. *Base Limits on Contributions to Primaries and General Elections*. Although the *McCutcheon* Court invalidated the FECA's aggregate limits, the base limits remain intact. Under FECA, a donor in 2014 could contribute up to $2,600 to a particular candidate in a primary election, and if that candidate then also competed in the general election, the same donor could contribute up to $2,600 to that candidate. The same ceiling applies under FECA to any runoff election in which that candidate participates. The plaintiffs who challenge this provision are husband and wife – and they wish to forgo making any contributions at all in the primary election while later contributing $5,200 to a candidate in the general election alone. By challenging FECA's prohibition of their preference, the Plaintiffs effectively are challenging Congress's "per-election structure" of FECA's base limits on individual contributions. Under *Buckley* and *McCutcheon*, the challenged contribution limits will be upheld if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." How should the court resolve the issue in this case? *See Holmes v. Federal Election Commission*, 875 F.3d 1153 (D. C. Cir. 2017).

4. *Evidence of Actual or Perceived Quid Pro Quo Corruption*. Under *McCutcheon*, when assessing whether a state's contribution limits further the interest in preventing *quid pro quo* corruption or its appearance, such "appearance" is defined as "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions to particular candidates." Assume that in litigation challenging one state's contribution limits based on this government interest, the state's evidence shows that before those limits were enacted, one state senator sent a "destroy after reading" letter to party colleagues, urging them to vote for a bill so that a specified PAC would continue to make contributions to their party. Another state senator declared at a party gathering that a group had promised to contribute at least $100,000 to the party if he and his party colleagues would vote for a particular bill in the upcoming legislative session. Do these statements, and others like them, provide sufficient evidence to meet the standard to show that the contribution limits further the requisite important state interest under *McCutcheon*? *See Lair v Motl*, 873 F.3d 1170 (9th Cir. 2017).

5. *Contributions Made Earlier Than Six Months Before an Election*. When City voters approved a ballot initiative to implement new restrictions on base contributions to candidates in City elections, one challenged provision also prohibited candidates or officeholders from soliciting or accepting contributions except during the 180 days before an election. When this provision is challenged on First Amendment grounds, why will it be difficult for the city to defend this temporal limit on contributions? *See Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018).

6. *Disgorgement Provision*. Assume that City voters approved of a new "disgorgement" requirement that candidates for City offices are required after any election to "distribute the balance of funds received from political contributions (in excess of any remaining expenses for the election) to the candidate's contributors or to a charitable organization." The City defends this requirement on the theory that there is no First Amendment right to use any funds remaining after a campaign for the purpose of supporting another different campaign. Instead, the City argues that First Amendment rights associated with campaign contributions exist only during the election cycle in which a contribution is given. It is evident that the disgorgement provision is a burden on expenditures and is subject to "heightened scrutiny." When the provision is challenged on First Amendment grounds, what arguments can be made for invalidating the disgorgement provision? *See Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018).

3. Judicial Elections

At the end of the problems after the Williams-Yulee case, insert the following new problem #4 and problem #5:

4. *Judicial Candidates and Endorsements*. In Montana, judges are selected through nonpartisan popular elections. The Montana Code of Judicial Conduct provides that, "A judge or judicial candidate shall not seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate." The term "political organization" is defined as "a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political

office."

Chapter 6

Vagueness, Overbreadth, and Prior Restraints

A. Overbreadth and Vagueness

On p. 431, in the last sentence of problem # 2, delete the words "vagueness or ambiguity" and substitute the word "overbreadth"

On p. 437, at the end of the problems, add the following new problems #11, # 12, and #13:

11. *Prohibiting "Obnoxious" Behavior.* South Carolina's Disturbing Schools Law (DSL) provides as follows: "It shall be unlawful for any person willfully or unnecessarily to interfere with in any way or in any place the students or teachers of any school or college in the State or to loiter about such school or college premises or to act in an obnoxious manner therein." The DSL is challenged as vague in a suit by high school students who are among the 9,500 youths referred to the state Department of Juvenile Justice during the past six years after being arrested at the request of school officials for violating the DSL. Students who are convicted under the DSL may be sentenced with expulsion, suspension, or placement on probation in settings that do not offer the course work necessary to graduate from high school. The evidence shows that children as young as seven years old have been charged under the DSL for cursing, refusing to follow teacher instructions, or engaging in physical alterations with other students. Expert witnesses also testify that African-American students are four times as likely to be charged under the law compared with white students. What arguments can be made to support the vagueness claim of the students? *See Kenny v. Wilson*, 885 F.3d 280 (4th Cir. 2018).

12. *More on "Disorderly Conduct."* Minnesota defines the crime of "disturbing assemblies or meetings" as follows: "Whoever disturbs an assembly or meeting in a public or private place, knowing or having reasonable grounds to know that such disturbance will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct." After Robin displayed signs that blocked the view of other spectators in the public gallery at a city council meeting, the meeting was adjourned and rescheduled. At the next meeting, Robin moved her chair from the public gallery to a open space where others had been allowed to sit at the prior Council meeting. When Robin was told to return her seat to the gallery, she demanded to see the City Council policy that prohibited her from sitting in the open space. Instead, she was issued a citation for her conduct and escorted from the meeting by a police officer. Her defense counsel challenges the Minnesota statute as overbroad and vague. How should the court resolve these challenges to the statute? *See State v. Hensel*, 901 N.W.2d 166 (Minn. 2017).

B. Prior Restraints

[1] Licensing

On p. 441, at the end of the problems, add the following new problem:

4. *Murals.* Atlanta has enacted an ordinance which precludes murals on private property absent the approval of the mayor, the city council and the Urban Design Commission. The ordinance provides that approval can be denied for murals that "constitute a traffic hazard or undue or dangerous distraction to motorists or pedestrians," or that is inconsistent with the city's public art program. Under *Lovell*, is the ordinance valid? If the second justification (consistency with the city's public art program) were dropped, and the city focuses only on whether a proposed mural creates a traffic hazard, would the ordinance be more likely to be upheld? *See* Complaint in *Williams v. City of Atlanta, Georgia*, Docket No. 1:17-cv-01943, N.D. Ga., May 30, 2017, https://www.courtlistener.com/docket/6158329/williams-

v-city-of-atlanta-georgia/

[2] Injunctions

On p. 458, at the end of the problems, add the following new problem # 3:

3. *Misrepresentations and Injunctions.* Suppose that representatives an anti-abortion group, dedicated among other things to ending governmental funding for Planned Parenthood, gained admittance to a National Abortion Federation convention (NAF is a pro-choice group) by misrepresenting themselves as "journalists." Once inside, they made several undercover films which they alleged showed "shady practices" by abortion providers. They made the films even though they had agreed to an entrance contract that prohibited the film. The NAF seeks an injunction prohibiting distribution of the videtape, including on YouTube. Is an injunction appropriate in this context? *See National Abortion Federation v. Center for Medical Progress*, 685 Fed. Appx. 623 (9th Cir. 2018).

On p. 466, at the end of the problems, add the following new problems #7 and #8:

7. *3-D Printed Guns.* A non-profit organization designs firearms that can be downloaded from the Internet and printed with a 3-D printer sought to challenge a U.S. Department of State's pre-publication approval requirement for technical data published on the Internet. Using 3-D printers, individuals can create fully functional, unserialized, and untraceable metal AR–15 lower receivers in a largely automated fashion. The regulation applies even though it is legal for U.S. citizens to own the weapons that would be created with the printer. The U.S. government claims that publication of the directions is prohibited under the International Traffic in Arms Regulation which seeks to prohibit the export of certain types of weapons. The government claims a vital interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts. Suppose that the non-profit seeks an injunction allowing it to publish the 3-D instructions. Should the injunction be granted? How would you weigh the governmental interest in national defense and national security against the organization's free speech rights in this context? *See Defense Distributed v. U.S. Department of State*, 838 F.3d 451 (5th Cir. 2016).

8. *Suppression Order in Comic-Con Litigation*. Plaintiff SDCC sponsors a "Comic-Con convention" in San Diego that is dedicated to comics and other popular arts and Defendant Dan Farr Productions (DFP) produces the "Salt Lake Comic Con" in Salt Lake City for the same purposes. When plaintiff SDCC filed a trademark action against DFP, claiming that DFP's use of the term "Comic Con" infringed on SDCC's rights, DFP defended on the basis that this term is generic and descriptive. During the first three years of the litigation, DFP posted news articles and case documents on its website and on social media platforms, seeking "moral and material support from comic fans everywhere who use the term 'comic con.'" As the trial date approached, Plaintiff sought a protective order to stop DFP from making public statements about the merits of the case, arguing that the purpose of DFP's postings was to taint the jury pool. The district court granted a suppression order that prohibited DFP from posting any information or opinions about the Comic-Con litigation, including publicly available case filings. The order also required to post a disclaimer "on its website, on social media sites, and in any print or broadcast advertisement or press release" describing the terms of the suppression order. What arguments can be made by DFP's attorney that the suppression order violates the First Amendment as an unconstitutional prior restraint? *See In re Dan Farr Productions*, 874 F.3d 590 (9th Cir. 2017).

Chapter 7

Freedom of Association and Compelled Expression

A. The Right to Associate

On p. 480, at the end of the problems, add the following new problem # 4:

4. *Disclosure of Donors by Nonprofits*. A state law requires non-profit organizations to disclose to the state attorney general the names and addresses of their donors, as well as the amounts of their donations, on a yearly basis. This law applies to all entities that are required under state law to register with the attorney general as charitable organizations that are eligible to engage in fund-raising through contributions from residents of the state. A non-profit entity challenges the disclosure requirement on the theory that it violates the First Amendment by creating a "climate of fear that limits [its] ability to raise the funds to promote controversial causes," thereby giving the attorney general the power to intimidate donors because the disclosed information could be released to the public. The non-profit entity relies on *NAACP v. Alabama* in arguing for strict scrutiny. How can the attorney general defend the law by distinguishing that case and explaining why strict scrutiny is not required? *See Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2017).

On p. 485, at the end of the 1st paragraph, delete the Abood citation.

B. The Right Not to Speak

On p. 503, at the end of the notes, add the following new note:

In *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), the Court struck down the California Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act (FACT Act) which required crisis pregnancy centers, generally "pro-life" (largely Christian belief-based) organizations that are designed to offer women a range of options, besides abortions, and who offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center. The FACT Act required facilities that offer pregnancy-related services to give clients the following government-mandated notice: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." The Court struck down the notice on the ground, *inter alia*, that the law imposed a content-based restriction on speech.

On p. 504, delete existing problem # 3.

On p. 504, after problem # 1, insert the following new problems # 2 and #3, and then renumber the remaining problems (except for existing problem # 3 which has been deleted):

2. *Requiring Intercultural Competency.* According to media reports, a Clemson University administrator proposed that student government candidates should be required to pass an "intercultural competency" test before being

permitted to run for or hold office, and observed that the test could be satisfied by proof that the candidate/office holder had gone through training or workshops on intercultural competency. One student senator denounced the requirement as equivalent to "vetting candidates ideologically regarding their commitment to inclusivity and multiculturalism and brain washing. It reminds me of the kind of political totalitarianism that one sees in modern-day facist and communist regimes." The day after this story appeared in the media, the university issued a disclaimer, stating that, "One Clemson employee offered her personal observations to student government leaders at a meeting [to] which she was invited to offer her perspective on opportunities and challenges facing student leaders. There is no 'litmus test' nor did the staff member propose one." May a public university impose an "intercultural competency" test as a condition for running or holding a student government office, and require candidates to go through "intercultural competency training"? *See Clemson official proposes 'intercultural' test for student government candidates*, GREENVILLE JOURNAL, April 26, 2017, https://greenvillejournal.com/2017/04/26/clemson-official-proposes-intercultural-test-student-government-candidates/

3. *Requiring Food Warnings*. Can a city require the following sugar warning on advertisements for soda drinks: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes and tooth decay. This is a message from the City and County of San Francisco." What arguments can be made both for and against the constitutionality of the ordinance? *See American Beverage Ass'n v. San Francisco*, 871 F.3d 884 (9th Cir. 2017), *rehearing en banc granted*, 880 F.3d 1019 (9th Cir. 2018).

On p. 504, at the end of renumbered problem 4, before the period at the end of the citation, insert the following new citation:

(*Frudden II*), *aff'd in part, rev'd in part*, *Frudden v. Pilling*, 877 F.3d 821 (9th Cir. 2017).

On p. 505, before the Southworth case, add the following new case:

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

138 S.Ct. 2448 (2018).

Justice ALITO delivered the opinion of the Court.

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. Employees in the unit are not obligated to join the union, but whether they join or not, that union is their sole permitted representative. Once a union is designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours, and other conditions of employment." This authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies. This designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. Protection of the employees' interests is in the hands of the union, and the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike.

Under *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977), nonmembers may be charged for the portion of union dues attributable to activities that are "germane to the union's duties as collective-bargaining representative," but may not be required to fund the union's political and ideological projects. Outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable." The IPLRA provides that an agency fee may compensate a union for costs incurred in "the collective bargaining process, contract administration, and pursuing matters affecting wages, hours, and conditions of employment." Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." A union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. Nonmembers need not be asked, and are not required to consent. After the agency fee is fixed, the union must send nonmembers a *Hudson* notice. See *Teachers v. Hudson,*

475 U.S. 292 (1986). This notice is supposed to provide nonmembers with "an adequate explanation of the basis for the agency fee." If nonmembers "suspect that a union has improperly put certain expenses in the chargeable category," they may challenge that determination. Unions charge nonmembers, not just for the cost of collective bargaining *per se,* but also for many other supposedly connected activities. Here, the nonmembers had to pay for "lobbying," "social and recreational activities," "advertising," "membership meetings and conventions," and "litigation," as well as other unspecified "services" that "may inure to the benefit of the members of the local bargaining unit." The total chargeable amount for nonmembers was 78.06% of full union dues.

Petitioner Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. Employees in his unit are among the 35,000 public employees who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31. Janus refused to join the Union because he opposes "many of the public policy positions," including the positions it takes in collective bargaining. Janus believes that the Union's "bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize the Union." Under the agreement, he was required to pay an agency fee of $44.58 per month—about $535 per year. The Governor of the State commenced an action asking that the law be declared unconstitutional. The District Court [concluded] that the Governor could not maintain the lawsuit, but held that petitioner and other individuals had standing. The court [allowed] petitioner and the others to file their own complaint. The amended complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." Respondents moved to dismiss. The District Court granted the motion, and the Court of Appeals for the Seventh Circuit affirmed. We granted certiorari.

Abood upheld the constitutionality of an agency-shop arrangement like the one now before us, but this holding is "something of an anomaly," *Knox v. Service Employees,* 567 U.S. 298 (2012), and [it's] "analysis is questionable." The First Amendment, applicable to the States by the Fourteenth Amendment, forbids abridgment of freedom of speech. We have held that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714 (1977). The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees,* 468 U.S. 609 (1984). As Justice Jackson 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,* 319 U.S. 624, 642 (1943).

Compelling individuals to support views they find objectionable violates that cardinal constitutional command, and in most contexts, such effort would be universally condemned. Suppose that the State of Illinois required all residents to sign a document expressing support for a set of positions on controversial public issues—say, the platform of one of the political parties. No one would seriously argue that the First Amendment permits this. Perhaps because such compulsion 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 as threatening. Free speech serves many ends. It is essential to our democratic form of government, see, *e.g., Garrison v. Louisiana,* 379 U.S. 64 (1964), and it furthers the search for truth, see, *e.g., Thornhill v. Alabama,* 310 U.S. 88 (1940). 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. Individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is demeaning, and a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Barnette, supra,* at 633. Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox, supra,* at 309. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed.1950). A "significant impingement on First Amendment rights" occurs when public employees are required to provide financial support for a union that "takes positions during collective bargaining that have powerful political and civic consequences." *Knox, supra,* at 310–311.

Because the compelled subsidization of private speech impinges on First Amendment rights, it cannot be casually allowed. In *Knox,* 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. In *Harris,* an agency-fee requirement failed "exacting scrutiny." Petitioner contends that the Illinois law should be subjected to "strict scrutiny." The dissent proposes that we apply what amounts to rational-basis review. This form of minimal scrutiny is foreign to our free-speech

jurisprudence. We find it unnecessary to decide the issue because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*. In *Abood,* the main defense of the agency-fee arrangement was that it served the State's interest in "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. We assume that "labor peace" is a compelling state interest, but *Abood* cited no evidence that pandemonium would result if agency fees were not allowed. *Abood* 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 not true. Under federal law, a union chosen by majority vote is the exclusive representative of all employees, but federal law does not permit agency fees. Nevertheless, nearly a million federal employees—27% of the work force—are union members. Likewise, millions of public employees in the 28 States that have laws prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees. "Labor peace" can be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees.

Abood cited "the risk of 'free riders' " as justification reasoning that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Petitioner argues that he is more like a person shanghaied for an unwanted voyage. Avoiding free riders is not a compelling interest. Many private groups speak with the objective of obtaining government action that will benefit nonmembers. Suppose that a group lobbies or speaks out on behalf of senior citizens or veterans or physicians. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? The First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay. Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represent the interests of all public employees in the unit," whether or not they are union members. 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, unions represent millions of public employees in jurisdictions that do not permit agency fees. Designation as the exclusive representative confers many benefits. That status gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union. In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, and having dues and fees deducted directly from employee wages. The collective-bargaining agreement in this case guarantees a long list of additional privileges. These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails is an obligation not to "act solely in the interests of the union's own members." The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers It is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. Neither respondents nor any of the *amicus* briefs has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines representation. Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. When a union controls the process, it may subordinate "the interests of an individual employee to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 58 (1974). Whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. Individual nonmembers could be required to pay for that service or could be denied union representation altogether.

Nor can fees be justified on the ground that it would 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. Designating a union as the exclusive representative restricts the nonmembers' rights. Protection of their interests is in the hands of the union, and if the union were free to disregard or

even work against those interests, these employees would be wholly unprotected. Serious "constitutional questions would arise" if the union were *not* subject to the duty to represent all employees fairly. Agency fees cannot be upheld on free-rider grounds.

Implicitly acknowledging the weakness of *Abood* 's reasoning, proponents of agency fees [offer] alternative justifications for the decision. The most surprising is the Union's argument: *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees. We doubt that the Union—or its members want us to hold that public employees have "*no* free speech rights." Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563 (1968), and its progeny would fall. Indeed, *Abood* itself would go if public employees have no free speech rights. Our political patronage cases would be doomed. See, *e.g., Rutan v. Republican Party of Ill.,* 497 U.S. 62 (1990). Also imperiled would be older precedents like *Wieman v. Updegraff,* 344 U.S. 183 (1952) (loyalty oaths), *Shelton v. Tucker,* 364 U.S. 479 (1960) (disclosure of memberships and contributions), and *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589 (1967) (subversive speech). Respondents presumably want none of this. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. Most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using "contemptuous or disrespectful words against the President" and other officials, and an 1801 directive limiting electioneering by top government employees. But those examples show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. At the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist, and public-sector unions did not emerge until the mid–20th century. We do know that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. Jefferson denounced compelled support for such beliefs as "sinful and tyrannical," and others expressed similar views.

The principal defense of *Abood* is based on*Pickering* which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006), or if it involved a matter of only private concern, see *Connick, supra,* at 146. When a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the employee, as a citizen, in commenting upon matters of public concern. *Harris,* 573 U.S., at —— (slip op., at 35).

Abood was not based on *Pickering*. *Abood* cited the case once—in a footnote—and then merely to acknowledge that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." That has no bearing on the agency-fee issue. *Pickering* 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, 467 (1995). This case 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, the standard *Pickering* analysis requires modification in that situation. When such a law is at issue, the government must shoulder a "heavier" burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights. The test more closely resembles exacting scrutiny than the traditional *Pickering* analysis. The core collective-bargaining issue of wages and benefits illustrates this point. [If] a single employee complains that he or she should have received a 5% raise. This individual complaint would constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for many thousands of employees could have a serious impact on the budget of the government unit, and denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is shrunk. *Pickering* fits much less well where the government compels speech or speech subsidies in support of third parties. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the employer may insist that the employee deliver any lawful message. If *Pickering* applies at all to compelled speech—a question we do not decide—it would require adjustment. Although both *Pickering*

and *Abood* divided speech into two categories, the categorizations do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change *Abood*. Under *Abood,* a public employer is 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. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls into that category. 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. Even if we were to apply *Pickering,* Illinois' fee arrangement would not survive.

Respondents suggest that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti, i.e.,* as speech "pursuant to an employee's official duties," In general when public employees are performing their duties, their speech may be controlled by their employer. Respondents suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech. When an employee engages in speech that is part of the employee's job duties, the employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees,* not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. If the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions would be appalled by such a suggestion. *Garcetti* is totally inapposite.

The next step of *Pickering* [is] whether the speech is on a matter of public or only private concern. "It is impossible to argue that the level of state spending for employee benefits is not a matter of great public concern," Illinois, like other States suffers from severe budget problems. The Governor and public-sector unions disagree about what to do about these problems. The State claims that employment-related debt is "squeezing core programs in education, public safety, and human services, [and] limiting the State's ability to pay its bills." It "would address the financial crisis, in part, through collective bargaining." "The State's desire for savings" "drove its bargaining" positions on matters such as health-insurance benefits and holiday, overtime, and promotion policies. The Union countered with different suggestions. It advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to "pension and tax systems (closing "corporate tax loopholes," "expanding the state sales tax," and "an income tax adjusted in accordance with ability to pay"). To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square,"—is to deny reality.

Unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights. What unions say on these matters in collective bargaining is of great public importance. Take education. The public importance of subsidized union speech is especially apparent in this field, since educators make up the largest category of state and local government employees, and education is typically the largest component of state and local expenditures. Speech in this area touches on fundamental questions of education policy. Should teacher pay be based on seniority to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results? Should districts transfer more experienced teachers to lower performing schools that may have the greatest need for their skills, or should teachers be allowed to stay where they have roots? Should teachers be given tenure protection and under what conditions? On what grounds and procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means? Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are of profound "value and concern to the public." *Snyder v. Phelps,* 562 U.S. 443 (2011). Such speech "occupies the highest rung of the hierarchy of First Amendment values" and merits "special protection." Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." For instance, respondent recently filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. The union speech in this case is overwhelmingly of substantial public concern.

Defenders of *Abood* have asserted a different state interest—the State's "interest in bargaining with an adequately funded exclusive bargaining agent." This was not "the interest *Abood* recognized and protected." Although the dissent would accept the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, ample experience, shows that this is questionable.

Especially in light of *Pickering*, the balance tips decisively in favor of employees' free speech rights. "The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in

connection with regulation of the speech of the citizenry in general." The exacting scrutiny standard we apply was developed in the context of commercial speech, an area where the government has traditionally enjoyed greater-than-usual power to regulate speech. The State may require that a union serve as exclusive bargaining agent for its amplest a significant impingement on associational freedoms that would not be tolerated in other contexts. We draw the line at allowing the government to go further and require all employees to support the union irrespective of whether they share its views. Nothing in *Pickering* requires us to uphold every speech restriction the government imposes as an employer. We conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise.

"*Stare decisis* is preferred because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808 (1991). But *stare decisis* is "not an inexorable command." *Pearson v. Callahan,* 555 U.S. 223 (009). "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449 (2007) (Scalia, J., concurring). Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are important here: the quality of *Abood*'s reasoning, the workability of the rule, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

States and public-sector unions may no longer extract agency fees from nonconsenting employees. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. *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.

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

I join Justice Kagan's dissent. Although I joined the majority in *Sorrell v. IMS Health Inc.,* 564 U.S. 552 (2011), I agree with Justice Kagan that *Sorrell*—as read by this Court—has allowed courts to "wield the First Amendment in an aggressive way" as the majority does today..

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. Decisions have made plain that government entities have latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. While protecting public employees' expression about non-workplace matters, *Abood* enabled government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Today, the Court succeeds in its campaign to reverse *Abood*. Its decision will have large consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. The relationships of public employees and employers will alter in wholly unexpected ways. Rarely has the Court overruled a decision—let alone one of this import—with so little regard for *stare decisis*. *Abood* has proved workable. No recent developments have eroded its underpinnings. It is deeply entrenched. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger. The key question is whether unions without agency fees will be *able to* carry on as an effective exclusive representative. As more and more stop paying dues, those left must take up the financial slack (and feel like suckers)—so they too quit the union. When the vicious cycle ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

The government must be able, much as a private employer, to manage its workforce. A public employee must submit to "certain limitations on his or her freedom." *Garcetti v. Ceballos,* 547 U.S. 410 (2006). Government workers do not "lose their constitutional rights when they accept their positions." *Engquist,* 553 U.S., at 600. But their rights yield when weighed "against the realities of the employment context." *Ibid.* If it were otherwise—if every employment decision

were "a constitutional matter"—"Government could not function." *NASA,* 562 U.S., at 149. When the government imposes speech restrictions relating to workplace operations, of the kind a private employer would, the Court upholds them. The Court has long applied a test originating in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563 (1968). The Court first asks whether the employee "spoke as a citizen on a matter of public concern." *Garcetti,* 547 U.S., at 418. If not, a public employer can curtail her speech just as a private one could. But if she did speak as a citizen on a public matter, the employer must demonstrate "an adequate justification for treating the employee differently from any other member of the general public." The government needs to show that legitimate workplace interests lay behind the speech regulation. *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court understood that expression as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," *Borough of Duryea v. Guarnieri,* 564 U.S. 379, 391 (2011); the speech occurred in the workplace; and the speech was directed (mainly) to the employer. *Abood* allowed the government to mandate fees for collective bargaining. But the Court barred the use of fees for union speech supporting political candidates or "ideological causes." That speech was "unrelated to the union's duties as exclusive bargaining representative," but was directed at the broader public sphere. The Court saw no legitimate managerial interests in compelling its subsidization. *Abood* thus dovetailed with the Court's attitude in First Amendment cases toward the regulation of public employees' speech. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this one. The majority's distinction between compelling and restricting speech lacks force. When a government mandates a speech subsidy from a public employee—a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech.

The majority argues that "union speech in collective bargaining" is a "matter of great public concern." But the question is not whether the public is, or should be, interested in a government employee's speech. The question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. Speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering* 's first step. The next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti,* 547 U.S., at 418. This Court has reversed the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning." *Garcetti,* 547 U.S., at 419. Many government entities have found agency fees the best way to ensure a stable and productive relationship with an exclusive bargaining agent. The Court has respected those interests—just as *Abood* did. The Court allows a government entity to regulate expression in aid of managing its workforce to effectively provide public services.

On p. 508, change the title "Problem: Live Free or Die" to "Problems" Then, before the existing problem, insert "1. *Live Free or Die*"

On p. 508, at the end of the problem, insert the following new problem:

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

On pp. 514-516, delete notes ## 1-5.

On p. 516, delete problem # 2, then change the heading "Problems" to "Problem: "In God We Trust"," and delete the words "1. "In God We Trust" at the beginning of problem # 1.

C. Rights of Candidates and Political Parties

On p. 518, before the Points to Remember, add the following new Problem heading and new problem:

Problem: The Full-Slate Requirement

Under Illinois law, there are three categories of candidates – those affiliated with an "established" party, those affiliated with a "new" party, and those who run as independents. A party qualifies as "established" by receiving more than 5% of the vote in the most recent statewide election, Congressional election, or county election. When a party is not "established," it can access the ballot as a "new" party only by gathering a sufficient number of signatures in a petition and by submitting a "full slate" of candidates for each race in the relevant political subdivision. For independent candidates, the same signature requirement must be met but not the "full-slate" requirement. When the Libertarian Party could not satisfy the "full-slate" requirement to field a candidate for the 2012 election of auditor in a particular county, the Party and its candidate challenged that requirement on First Amendment grounds under the *Washington State Grange* standard. The State justified the "full slate" requirement based on the government interests in maintaining political stability, preventing ballot overcrowding, and avoiding voter confusion. What arguments can be made to support the decision to invalidate the "full-slate" requirement? *See Libertarian Party of Illinois v. Scholz*, 872 F.3d 518 (7th Cir. 2017).

Chapter 8

The Government as Employer, Educator, and Source of Funds

A. First Amendment Rights of Public Employees

[2] Other Employee Speech

On p. 531, after the Notes heading, insert the following new note # 1, and then renumber the remaining notes:

1. *Public Defender's Complaint*. In a case that resembles *Garcetti*, a similar decision was rendered in *Vidt v. City of Allegheny*, 2016 WL 6095522 (W.D. Pa. Oct. 19, 2016), which involved a public defender who complained to higher-ups about the ethical issues posed by increasing workloads. The Court rejected her First Amendment claim on the basis that she was speaking as a government employee in voicing her complaint, rather than as a private citizen.

On p. 537, after problem # 10, insert the following new problems # 11, # 12, # 13, # 14, # 15, and # 16:

11. *More on Police Speech.* In Louisville, Kentucky, a police officer posted information related to his employment on his Facebook page. Following protests against the police in the African-American community, he posted: "If we really wanted you dead all we'd have to do is stop patrolling your neighborhoods. . . . And wait." Later, he testified: "You take any neighborhood in America and if they realize the police are not patrolling, crime would go through the roof." Regarding the Black Lives Matter movement, he posted the following: "Has it occurred to anyone that if you're able to organize this many people for a protest, you can organize this many people to clean up your community and get rid of the criminal element causing the problem." In another post, he stated: "It's NOT about color. It's about the law." The police department gave him a 30 day suspension on the theory that his statements demonstrated "blatant racial bias," and "hurt relationships within our community and damaged the image of the department." Did the officer have a First Amendment right to make the statements? *See* Jason Riley, *LMPD Officer suspended for Facebook posts sues Chief claiming free speech violation*, WDRB.com, June 13, 2017, http://www.wdrb.com/story/35656758/lmpd-officer-suspended-for-facebook-posts-sues-chief-claiming-free-speech-violation

12. *The Sexual Harassment Complaint.* Would it matter whether a police officer was reporting sexual harassment? A female police officer reported to superiors that a fellow officer had referred to her as a "stupid bitch" and made other derogatory remarks to her. After she reported the harassment to her supervisor, she claims that they retaliated against her by reassigning her to a foot patrol in a dangerous neighborhood. Is the report entitled to First Amendment protection? If not, can she make a claim under other legal principles? *See Kubiak v. Chicago*, 810 F.3d 476 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 491 (2016).

13. *Prohibiting Critical Speech.* Would it be permissible for a police department to adopt a social networking policy that makes it impermissible for police officers to engage in speech that is critical of the department? What if officers were sanctioned under the policy for posting comments critical of the department's promotion policies? *See Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016).

14. *Collaboration with the FBI.* A police officer made statements to the FBI regarding alleged fraud in the city's use of federal emergency funds, and also wore a wire to record conversations by city officials. When the officials found out, they fired him. Are the officer's statements to the FBI protected under the First Amendment? Might they be protected under others laws? *See Town of Ball v. Howell*, 827 F.3d 515 (5th Cir. 2016), *cert denied*, 137 S. Ct. 815

(2017).

15. *The Police Officer's Tattoo.* A police department regulation prohibits policemen from exhibiting tattoos. A police officer, who has a tattoo that memorializes his military service, and their religious beliefs, wants to have it viewable while he is working. Does the officer have a First Amendment right to engage in this expression during work hours? *See Medici v. City of Chicago*, 856 F.3d 530 (7th Cir. 2017).

16. *The Non-Communication Policy*. A police department policy prohibits police officers from engaging in communication with ANY non-departmental and non-law enforcement entity or persons regarding the department's canine program. Is the policy valid? Can an officer be prohibited from speaking to the press about misuse of public funds or search and seizure violations? *See Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017).

[3] Associational Rights

On p. 553, at the end of note # 3, add the following new text:

Heffernan ultimately reached a $1.6 million settlement with the city.

On p. 553, at the end of the problems, insert the following new problems:

3. *The Political T-Shirt.* A police officer resigned to take a position in another organization. When the other position didn't work out, he applied to be rehired by the sheriff's office. While his application was pending, the officer's would-be boss (the current sheriff, Lamberti) was is in a tough reelection contest, and he spotted the officer wearing a t-shirt supporting his opponent ("Cops for Jerry Israel"). After Lamberti won reelection, the officer was informed that he would not be rehired because he supported the opponent. Under prior precedent, can the officer prevail on a First Amendment claim when he wasn't rehired? *See Stanley v. Israel*, 843 F.3d 920 (11th Cir. 2016).

4. *What Constitutes a Policy Maker?* A state official might have the right to dismiss policymaking employees. Suppose that an assistant city attorney is fired for supporting the city attorney's rival in an election. Borzilleri had made charging decisions, negotiated plea deals, and tried serious cases. Near the end of her tenure, she had also served as one of the office's three "Community Prosecutors," tasked with prosecuting complex crimes and liaising with local police and city residents. Should an assistant city attorney with such responsibilities be regarded as a "policymaker?" *See Borzilleri v. Mosby*, 874 F.3d 187 (4th Cir. 2017).

B. The First Amendment in the Public Schools

On ***p. 559, after the Problems heading, insert the following new problem # 1, and then renumber the remaining problems:***

1. *National School Walkout.* Following school shootings in Florida, high school students organized a National School Walkout in order to push for stronger gun laws. The "walkout" was designed to last for 17 minutes (one minute for each of the shooting victims). Some school districts were sympathetic to the walkout with one issuing a statement to the effect that "student voice and engagement are important and valued." Other districts prohibited students from walking out citing safety concerns, and some of these districts attempted to discipline students for walking out. Under *Tinker*, may a school district validly discipline a student for participating in the National School Walkout?

On p. 580, at the end of problem # 3, add the following new citation:

; *see also Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (nursing student who stated that there wasn't "enough whiskey to control his anger" and who threatened to use a hemopneumothorax (lung puncturing) device on someone).

On p. 581, at the end of the problems, add the following new problem:

9. *Harassment Outside of School*. A seventh grade student was accused of sexually harassing two disabled sixth grade in a park that was located near the school. The harassment occurred about five minutes after the end of the school day, and the park was located right next to the school. There is no clear dividing line between the school grounds and the park. When school officials found out about the harassment, they suspended the seventh grade student. Do school officials have the right to suspend a student for conduct that occurred outside of the school environment under such circumstances? *See C.R. v. Eugene School District*, 835 F.3d 1142 (9th Cir. 2016).

C. Government Financed Speech

On p. 594, following the problems, insert the following new case and problems:

Matal v. Tam
137 S. Ct. 1744 (2017).

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

This case concerns a dance-rock band's application for federal trademark registration of the band's name, "The Slants." "Slants" is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force. The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may "disparage or bring into contempt or disrepute" any "persons, living or dead." 15 U. S. C. §1052(a). We hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.

I

"The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan's goods from those of others." *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 135 S. Ct. 1293, 1299 (2015). A trademark "designates the goods as the product of a particular trader" and "protects his good will against the sale of another's product as his." *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90, 97 (1918). It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U. S. 189 (1985).

Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country. For most of the 19th century, trademark protection was the province of the States. Eventually, Congress stepped in to provide a degree of national uniformity, passing the first federal legislation protecting trademarks in 1870. See Act of July 8, 1870, §§77–84. The foundation of current federal trademark law is the Lanham Act, enacted in 1946. By that time, trademark had expanded far beyond phrases that do no more than identify a good or service. Then, as now, trademarks often consisted of catchy phrases that convey a message.

Under the Lanham Act, trademarks that are "used in commerce" may be placed on the "principal register," that is, they may be federally registered. 15 U. S. C. §1051(a)(1). Some marks "capable of distinguishing an applicant's goods or services and not registrable on the principal register which are in lawful use in commerce by the owner thereof" may instead be placed on a different federal register: the supplemental register. §1091(a). There are now more than two million marks that have active federal certificates of registration. This system of federal registration helps to ensure that trademarks are fully protected and supports the free flow of commerce. "National protection of trademarks is desirable," we have explained, "because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 531 (1987).

Without federal registration, a valid trademark may still be used in commerce. And an unregistered trademark can be enforced against would-be infringers in several ways. Even if a trademark is not federally registered, it may still

be enforceable under §43(a) of the Lanham Act, which creates a federal cause of action for trademark infringement. Unregistered trademarks may also be entitled to protection under other federal statutes, such as the Anticybersquatting Consumer Protection Act, 15 U. S. C. §1125(d). And an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State's registration system.

Federal registration, however, "confers important legal rights and benefits on trademark owners who register their marks." *B&B Hardware*, 135 S. Ct. at 1317. Registration on the principal register (1) "serves as 'constructive notice of the registrant's claim of ownership' of the mark" "is 'prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate,' " *B & B Hardware*, 135 S. Ct. At 1300 (quoting §1057(b)); and (3) can make a mark "incontestable" once a mark has been registered for five years." Registration also enables the trademark holder "to stop the importation into the United States of articles bearing an infringing mark." 15 U. S. C. §1124.

The Lanham Act contains provisions that bar certain trademarks from the principal register. For example, a trademark cannot be registered if it is "merely descriptive or deceptively misdescriptive" of goods, §1052(e)(1), or if it is so similar to an already registered trademark or trade name that it is "likely to cause confusion, or to cause mistake, or to deceive," §1052(d). At issue is one such provision, which we will call "the disparagement clause." This provision prohibits the registration of a trademark "which may disparage persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." §1052(a). This clause appeared in the original Lanham Act and has remained the same to this day. See §2(a), 60 Stat. 428.

When deciding whether a trademark is disparaging, an examiner at the PTO generally applies a "two-part test." The examiner first considers "the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services." Trademark Manual of Examining Procedure §1203.03(b)(I) (Apr. 2017), p. 1200–150 "If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols," the examiner moves to the second step, asking "whether that meaning may be disparaging to a substantial composite of the referenced group." *Ibid.* If the examiner finds that a "substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark to be disparaging in the context of contemporary attitudes," a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. *Ibid.* What is more, the PTO has specified that "the fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable." *Ibid.*

D Simon Tam is the lead singer of "The Slants." He chose this moniker in order to "reclaim" and "take ownership" of stereotypes about people of Asian ethnicity. The group "draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes" and has given its albums names such as "The Yellow Album" and "Slanted Eyes, Slanted Hearts." Tam sought federal registration of "THE SLANTS," on the principal register, but an examining attorney at the PTO rejected the request, applying the PTO's two-part framework and finding that "there is a substantial composite of persons who find the term in the applied-for mark offensive." The examining attorney relied on the fact that "numerous dictionaries define 'slants' or 'slant-eyes' as a derogatory or offensive term." The examining attorney also relied on a finding that "the band's name has been found offensive numerous times"—citing a performance that was canceled because of the band's moniker and the fact that "several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive." Tam contested the denial of registration before the examining attorney and before the PTO's Trademark Trial and Appeal Board (TTAB) to no avail. Eventually, he took the case to court, where the en banc Federal Circuit found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause. The Government filed a petition for certiorari, which we granted.

II

The clause prohibits the registration of marks that disparage "persons," and Tam claims that the term "persons" "includes only natural and juristic persons," not "non-juristic entities such as racial and ethnic groups." Tam's argument is refuted by the plain terms of the disparagement clause.

III

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we

must decide whether the clause violates the Free Speech Clause of the First Amendment. We must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends (1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new "government-program" doctrine. We address each of these arguments below.

A

Our cases recognize that "the Free Speech Clause does not regulate government speech." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467 (2009). "The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others," *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 394 (1993), but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture. But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue is the content of trademarks registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks. Except as required by statute, an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register. If the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. If an examiner finds that a mark is eligible for placement on the principal register, that decision is not reviewed by any higher official unless the registration is challenged. Moreover, once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public. For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to "make.believe" (Sony), "Think different" (Apple), "Just do it" (Nike), or "Have it your way" (Burger King)? Was the Government warning about a coming disaster when it registered the mark "EndTime Ministries"? The PTO has made it clear that registration does not constitute approval of a mark. See *In re Old Glory Condom Corp*., 26 USPQ 2d 1216, 1220, n. 3 (TTAB 1993).

None of our government speech cases even remotely supports the idea that registered trademarks are government speech. In *Johanns,* we considered advertisements promoting the sale of beef products. A federal statute called for the creation of a program of paid advertising "to advance the image and desirability of beef and beef products." 544 U. S., at 561 (quoting 7 U. S. C. § 2902(13)). Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad. Noting that "the message set out in the beef promotions was from beginning to end the message established by the Federal Government," we held that the ads were government speech. The Government's involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered. Our decision in *Summum* is similarly far afield. A small city park contained 15 monuments. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. A religious group claimed that the city, by accepting donated monuments, had created a limited public forum for private speech and was therefore obligated to place in the park a monument expressing the group's religious beliefs. Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; "public parks are often closely identified in the public mind with the government unit that owns the land"; and "the monuments that are accepted are meant to convey and have the effect of conveying a government message."

Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U. S. C. §1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government. This brings us to *Walker* which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, *Walker* cited three factors distilled from *Summum*. First, license plates have long been used by the States to convey state messages. Second, license plates "are often closely identified in the public mind" with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of "government ID." Third, Texas "maintained direct control over the messages conveyed on its specialty plates." None of these factors are present in this case.

In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way. Perhaps the most worrisome implication of the Government's argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation? The Government attempts to distinguish copyright on the ground that it is "the engine of free expression," but as this case illustrates, trademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words. Trademarks are private, not government, speech.

B

We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law. "We have held that the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.' " *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc*., 570 U.S. 205, 214. But at the same time, government is not required to subsidize activities that it does not wish to promote. Determining which of these principles applies in a particular case "is not always self-evident," but no difficult question is presented here.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust* v. *Sullivan*, 500 U. S. 173 (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts* v. *Finley*, 524 U. S. 569 (1998), cash grants were awarded to artists. Federal funding for public libraries was at issue in *United States* v. *American Library Assn., Inc.*, 539 U. S. 194 (2003). In other cases, we have regarded tax benefits as comparable to cash subsidies. See *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983). The federal registration of a trademark is nothing like the programs at issue in these cases. The PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee of $225–$600. 37 CFR §2.6(a)(1). And to maintain federal registration, the holder of a mark must pay a fee of $300–$500 every 10 years. These fees have fully supported the registration system for the past 27 years.

The Government responds that registration provides valuable non-monetary benefits that "are directly traceable to the resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks." But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways. Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests; they issue driver's licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits. Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

C

The Government urges us to sustain the disparagement clause under a new doctrine that would apply to

"government-program" cases. For the most part, this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks. The only new element consists of two cases involving a public employer's collection of union dues from its employees. But those cases occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks.

In *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177 (2007), a Washington law permitted a public employer automatically to deduct from the wages of employees who chose not to join the union the portion of union dues used for activities related to collective bargaining. But unless these employees affirmatively consented, the law did not allow the employer to collect the portion of union dues that would be used in election activities. A public employee union argued that this law unconstitutionally restricted its speech based on its content; that is, the law permitted the employer to assist union speech on matters relating to collective bargaining but made it harder for the union to collect money to support its election activities. Upholding this law, we characterized it as imposing a "modest limitation" on an "extraordinary benefit," namely, taking money from the wages of non-union members and turning it over to the union free of charge. Refusing to confer an even greater benefit, we held, did not upset the marketplace of ideas and did not abridge the union's free speech rights. *Ysursa* v. *Pocatello Ed. Assn.*, 555 U. S. 353 (2009), is similar. There, we considered an Idaho law that allowed public employees to elect to have union dues deducted from their wages but did not allow such a deduction for money remitted to the union's political action committee. We reasoned that the "the government was not required to assist others in funding the expression of particular ideas."

Davenport and *Ysursa* are akin to our subsidy cases. Although the laws at issue in *Davenport* and *Ysursa* did not provide cash subsidies to the unions, they conferred a very valuable benefit—the right to negotiate a collective-bargaining agreement under which non-members would be obligated to pay an agency fee that the public employer would collect and turn over to the union free of charge. As in the cash subsidy cases, the laws conferred this benefit because it was thought that this arrangement served important government interests. But the challenged laws did not go further and provide convenient collection mechanisms for money to be used in political activities. In essence, the Washington and Idaho lawmakers chose to confer a substantial non-cash benefit for the purpose of furthering activities that they particularly desired to promote but not to provide a similar benefit for the purpose of furthering other activities. Thus, *Davenport* and *Ysursa* are no more relevant for present purposes than the subsidy cases previously discussed.

Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb's Chapel*, 508 U. S., at 392. When government creates such a forum, in either a literal or "metaphysical" sense, some content- and speaker-based restrictions may be allowed. However, even in such cases, what we have termed "viewpoint discrimination" is forbidden.

Our cases use the term "viewpoint" discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U. S. 576, 592 (1969). See also *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46 (1988); *Coates* v. *Cincinnati*, 402 U. S. 611 (1971); *Bachellar* v. *Maryland*, 397 U. S. 564 (1970); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937).

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.

IV

[In this section of the opinion, the Court rejected the argument that the law could be upheld as a regulation of

commercial speech. That issue is discussed in Chapter 4, Section C.]

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and concurring in the judgment.

§1052(a) constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny. The Court is correct in its judgment, and I join Parts I, II, and III–A of its opinion. This separate writing explains in greater detail why the First Amendments protections against viewpoint discrimination apply to the trademark here. The viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the opinion of Justice Alito, except for Part II. I write separately because "when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.' " *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525 (2001) (Thomas, J., concurring in part and concurring in judgment). I join Part IV of Justice Alito's opinion because it correctly concludes that the disparagement clause is unconstitutional even under the less stringent test announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980).

Problems

1. *Vulgar-Sounding Trademarks*. A fashion designer tried to register the "Fuct" brand with the Patent and Trademark Office, but the Office rejected the effort on the basis that the word "Fuct" is vulgar sounding, explaining that it has an interest in prohibiting trademarks that are "scandalous or immoral." Is the fashion designed protected by the decision in *Matal*, or can that decision be distinguished? *See In re Brunette*, 877 F.3d 1330 (Fed. Cir. 2017).

2. *Wandering Dago Food Truck*. The operators of a food truck decided to use the "Wandering Dago" (WD) brand as a "nod to their Italian heritage" and to their immigrant ancestors. The sandwiches on their menu have names like "Goombah," "Guido," and "Polack." They say that the use of ethnic slurs in their business is meant to signal "an irreverent, blue collar solidarity" with their customers. When their application to participate as a food vendor in the Summer Outdoor Lunch Program in Albany's Empire State Plaza was denied by the New York State Office of General Services, the operators filed suit to challenge that decision as a violation of the First Amendment under *Matal*. The state official who denied the application found the WD branding to be "offensive" without reference to any law or regulation to justify her decision. The operators argued that the state official discriminated against their viewpoint, but counsel for the State argues that the operators' use of ethnic slurs "does not reflect any real viewpoint." How will the court resolve the First Amendment issue? *See Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018).

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

7. *Using Funding to Compel Free Speech on College Campuses.* When Milo Yiannopoulos, an editor for Breitbart News, was scheduled to speak at U.C. Berkeley in 2017, a crowd of 1,500 protesters gathered and engaged in violent acts that included throwing smoke bombs and setting fires. Police locked down the campus and the speech was cancelled. In response, President Trump tweeted as follows: "If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view – NO FEDERAL FUNDS? Would Congress violate the First Amendment by enacting a federal statute that would provide for the withdrawal of federal funds from universities based on the circumstances that occurred at Berkeley, including funding for student loans and research? Or for the withdrawal of funds under other circumstances involving the denial of the right of faculty members and students to invite speakers to their campuses?

Chapter 9

The Press

C. Access to Judicial Proceedings

On p. 634, change the heading for the section to the following:

C. Press Access

On p. 636, change the heading to Problems, number the existing problem as new problem # 1 with the title "Access to Information and Freedom of Expression," and then add the following new problem # 2:

Problems

1. *Access to Information and Freedom of Expression*.

2. *Press Access to News Conferences*. In recent years, there has been much controversy about the fact that politicians have refused to admit particular reporters to their news conferences. President Trump, for one, has excluded reporters from news organizations who have been critical of him (e.g., The New York Times, BuzzFeed News, CNN, The Los Angeles Times, Politico, the BBC and the Huffington Post). However, other politicians have engaged in similar conduct. For example, a Democratic candidate excluded a reporter from the conservative publication, the Washington Free Beacon, and a Republican candidate excluded a reporter from the liberal website, ThinkProgress. Should there be a right of access to press briefings? Can politicians limit such events to "invitees only?" More to the point, may public officials discriminate on the basis of viewpoint in terms of the reporters to whom they give access? *See* Luke M. Milligan, *Rethinking Press Rights of Equal Access*, 65 WASH. & LEE L. REV. 1103 (2008). Is it permissible for the President to give an "exclusive interview" to a favorable news outlet? Would the selective exclusion of reporters from news briefings be permissible when only a limited number of spaces are available, and when the politician (in particular, the President) is simply trying to open up such events to news organizations that have historically been excluded from such press conferences, and is willing to include all news organization on a rotating basis? *See Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977).

On p. 636, at the end of newly renumbered problem # 1, delete the citation and substitute the following new citation:

820 F.3d 938 (8th Cir. 2016).

Chapter 10

Electronic Media and the First Amendment

B. Post-Broadcasting Technology

On p. 715, after the Notes heading, delete the existing note # 1 and insert the following new note # 1:

1. *Net Neutrality.* In recent years, there has been much controversy regarding so-called "net neutrality" which would prevent broadband providers from giving preferential treatment (e.g., a speed boost) to preferred content (e.g., a company that is willing to pay for the boost), or from blocking or throttling non-preferred content. In 2015, during the Obama Administration, the FCC voted to impose net neutrality rules. Essentially, this approach treated Internet service providers as public utilities that provide telecommunication services, and therefore subjected them to "just and reasonable" regulation under Title II of the Communications Act. However, at the end of 2017, during the Trump Administration, the FCC voted to repeal its net neutrality rules. Of course, Internet service providers remain subject to antitrust and anti-competition laws, and state consumer protection laws. Although the Senate voted to reverse the FCC's decision, the House failed to do so and the repeal took effect on June 11, 2018. However, over two dozen state legislatures are considering their own legislation and two states have enacted their own laws to replace the FCC's repealed policy. A handful of governors have issued executive orders to require broadband companies doing business with the state to observe net neutrality principles. *See* Harper Neidig, *States defy FCC repeal of net neutrality*, THE HILL, June 5, 2018, https://thehill.com/regulation/technology/390674-states-defy-fcc-repeal-of-net-neutrality

On p. 717, after note # 3, add the following new note # 4, and then renumber the remaining notes:

4. *More on Gatekeepers.* Of course, there are "gatekeepers" on the Internet. For example, following the violence in Charlottesville, Google cancelled the registration of a neo-Nazi website (Daily Stormer). GoDaddy also terminated its relationship with the Daily Stormer because of complaints about it's "hate-filled stories." However, the Daily Stormer was able to remain online by moving to the so-called "Dark Web," which can only be seen using a special anonymous browsing tool Tor that hides the identity and location of its users. *See* Samuel Gibbs, *Daily Stormer jumps to dark web while Reddit and Facebook ban hate groups*, *The Guardian*, Aug. 16, 2017, https://www.theguardian.com/technology/2017/aug/16/daily-stormer-forced-dark-web-reddit-facebook-ban-hate-groups

On p. 719, at the end of the notes, add the following new note # 9:

9. *The Internet and Social Protest.* The Internet has had a profound impact on the functioning of the democratic system. During the 2016 political campaign, candidate Donald Trump used Twitter to do an end run around traditional media and communicate directly with potential supporters. That way, he limited the media's ability to filter and shape his message. Following Trump's election victory, protestors used social media to organize and coordinate protests against President Trump's policies. *See, e.g.,* Nolan D. Mccaskill, *Trump credits social media for his election*, POLITICO, Oct. 20, 2017, https://www.politico.com/2017/10/20/trump-social-media-election-244009; Fahad Manjoo, *The Alt-Majority: How Social Networks Empowered Mass Protests against Trump*, THE NEW YORK TIMES, Jan. 17, 2017, https://www.nytimes.com/2017/01/30/technology/donald-trump-social-networks-protests.html

On p. 719, after problem # 1, insert the following new problems then renumber the remaining problems:

2. *Does Net Neutrality Matter?* There has been considerable debate regarding whether net neutrality really matters. Some argue that net neutrality rules are necessary to prevent discrimination against particular types of content. One commentator contended that "Prices will go up, variety and diversity will go down and the largest, best-capitalized Internet companies will gain a significant advantage over upstart competitors." Others disagree, claiming that antitrust and competition laws remain in effect to protect consumers. In addition, one commentator claimed that the Obama-era order requiring net neutrality "caused market and regulatory uncertainty, consumer confusion, and a slowing of investment." Another commentator argued that the "end of this two-year experiment in government-controlled internet service is unlikely to be noticed by users. Websites will not go dark; prices won't rise; the internet will not die; the world will not end." Is there a clear answer to whether net neturality is desirable or undesirable?

3. *"Fake News" and Democratic Governance.* Of course, the great strength of the Internet (the fact that it enables ordinary people to mass communicate) is also its greatest weakness. Speech can be used for good or for evil, and the so-called "fake news" phenomenon illustrates the capacity for evil. Of course, "fake news" has been around for centuries in the sense that people have been able to disseminate false allegations. However, the circulation of fake news has been amplified by the Internet which enables virtually everyone to engage in mass communication. The difficulty is that, if free speech provides the foundation for democratic governance, what happens if the "speech marketplace" is polluted by fake news? For example, a recent Pew Research Center poll suggested that 64% of Americans are confused about the basic facts of current issues and events. Does the inclusion of fake news pollute the political process? Moreover, the Pew poll showed that 62% of Americans get some of their news from social media, with 14% indicating that it is their "most important" source of news, and 20% indicating that they changed their positions on political issues, and 17% changed their views on political candidates, based on what they have read on social media. *See generally* Elisa Shearer and Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, JOURNALISM & MEDIA: PEW RESEARCH CENTER, Sept. 7, 2017, https://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/

4. *Distinguishing "Fake News" from "Biased Reporting."* Is there a clear line of demarcation between "fake news" and biased reporting? Some believe that the media (except, of course, for Fox News) has a generally left-leaning slant, and tends to tilt its reporting with a left-ward bias. Is it possible to create a meaningful distinction between "fake news" and "biased reporting?" *See generally* Jason Perno, *The Difference Between "Fake News" and Media Bias*, MEDIUM.COM, July 7, 2017, https://medium.com/@therevolutioncontinues/the-difference-between-fake-news-and-media-bias-c7af9223d423 and 17% changed their views on political candidates, based on what they have read on social media.

5. *Remedies for "Fake News."* If "fake news" is undermining the political process, is there an effective remedy? Can the government impose licensing requirements which require individuals to submit proposed content to the government, and obtain permission before publishing Internet allegations? Can the government establish a "Federal Truth Commission" (FTC) which will criminally prosecute those who make false allegations? If so, how would the government decide what is "true" and what is "false?" For example, during the Obama Administration, could the FTC have prosecuted climate change deniers for circulating fake news? Conversely, during the Trump Administration, could the FTC have prosecuted climate change proponents? Is the existence of an FTC consistent with our constitutional structure? Is there a risk that biased journalists will also be prosecuted? Are potential remedies likely to be ineffective if the false allegations are coming from foreign sources or from defendants who are judgment proof?

6. *Defamation Suits and "Fake News."* Do defamation law suits provide an effective remedy for fake news? During a presidential campaign, numerous misstatements are made regarding candidates. Indeed, candidates often hurl allegations against each other. But, after the decision in *New York Times Co. v. Sullivan*, are politicians likely to sue for defamation? During the 2017 presidential campaign, a false allegation was circulated to the effect that a pizzeria, Comet Ping Pong, was running a child sex slave ring out of its basement. In an effort to protect the children, a man entered the pizzeria with an AK-15 assault rifle and repeatedly fired the weapon. Is Clinton likely to be able to recover for defamation? What about the pizza parlor? *See generally* Steven Seidenberg, *Lies and Libel: Fake News Lacks Straightfoward Cure*, ABA JOURNAL, July 2017, http://www.abajournal.com/magazine/article/fake_news_libel_law

7. *Can/Should Social Media Companies Remedy Fake News?* In the wake of allegations that the Russians tried to influence the 2017 presidential election, by trying to sow dissent or division, through the deliberate dissemination of falsehoods, social media companies have been urged to take action to control or limit fake news. Some of this disinformation was circulated through bots or automated distributors. Of course, there is a federal law that prohibits foreign nationals from spending money to influence U.S. election. In regard to the social media companies, is there a risk that they companies will exercise undue control or censorship over the flow of information? Is that desirable?

Various proposals for action by social media companies have been offered. For example, Google has proposed that it will terminate advertising revenues for fake news sites. Other social media sites have suggested that they will allow users to "flag" fake news, marking them as "false" or providing warnings to potential readers, or relegate to a less prominent role in terms of search results. Is it desirable for social media companies to exercise this type of control over news items? Could a social media company show bias towards or against climate change proponents or climate change deniers? There has also been an effort to create "fact checking" organizations which will identify fake news. Is a final proposal, from Twitter, less objectionable: to increase transparency regarding advertising by revealing the people and organizations who choose to advertise, and the details about their ads? *See* Ali Breland, *FEC introduces proposal to change digital political ad requirements?* THE HILL, March 14, 2018, http://thehill.com/policy/technology/378486-fec-seeks-comment-on-proposal-to-change-digital-political-ad-requirements

8. *Fake Information During Election Campaigns*. The French government is likely to enact a law that "aims to identify and stop deliberately false information that is 'massively' spread online in the three-month period before an election." One controversial provision would allow either a political party or a candidate to seek judicial review regarding online information that is "allegedly false or implausible," and obtain a ruling within 48 hours. A judge will be empowered to block publication of such information when it "has been massively and artificially spread online" and when "the allegedly false information could determine the course of an election." Other provisions of the law would require social media platforms to "clearly state who was sponsoring content," and the French media regulator would be empowered "to remove broadcasters' rights to air content in France if it is deemed to be deliberately fake or implausible." Is the law a desirable or necessary reform? Is it likely to be effective in suppressing what the law's supporters prefer to call the "manipulation of information" rather than "fake news"? Is the law likely to create a chilling effect on expressive freedoms? *See* Angelique Chrisafis, *French MP criticise 'hasty and inefective' fake news law*, THE GUARDIAN, June 8, 2018, https://www.theguardian.com/world/2018/jun/07/france-macron-fake-news-law-criticised-parliament

9. *Foreign Influences.* Of course, the nature of the Internet is that it operates worldwide. As we saw in earlier chapters, different countries treat different categories of speech differently. For example, some European countries prohibit Holocaust denial, and also prohibit speech that "degrades human dignity," whereas the U.S. does not. To the extent that speech occurs over social media websites, is there a risk that regulators outside the U.S. (e.g., the European Union, France or Germany) will pressure social media companies to remove or block certain types of expression, thereby limiting the speech available to those outside those jurisdictions? How should social media companies in the U.S. respond to the European Union's new privacy law, the General Data Protection Regulation? *See* Adam Satariano, *U.S. News Outlets Block European Readers Over New Privacy Rules*, THE NEW YORK TIMES, May 25, 2018, https://www.nytimes.com/2018/05/25/business/media/europe-privacy-gdpr-us.html; *see generally* Henry Farrell and Abraham Newman, *Here's how Europe's data privacy law could take down Facebook*, THE WASHINGTON POST, May 25, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/25/heres-how-europes-gdpr-may-take-down-facebook/?utm_term=.38c49db09954

9. *Artificial Intelligence, Robotic Speech, and the First Amendment*. Are your views regarding "fake news" or the internet affected by the rise of so-called "bots" which are controlled by artificial intelligence rather than by humans? Some suggest that there are now 100 million online bots which can produce messages that recipients perceive as human generated but are actually controlled by computers. Should bots be viewed as simply a free speech outlet for their human creators? Should it matter whether robotic speech is a direct reflection of the human's thoughts or has been altered by the bot? Should a bot be required to disclose that it is not human?

On p. 720, at the end of the problems, add the following new case, new Problems heading, and new problems #1 and # 2:

Packingham v. North Carolina
137 S. Ct. 1730 (2017).

JUSTICE KENNEDY delivered the opinion of the Court.

In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter. The question is whether

that law is permissible under the First Amendments Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment. A North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§14–202.5(a), (e) (2015). A "commercial social networking Web site" is defined as a website that meets four criteria. First, it "is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." §14–202.5(b). Second, it "facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." Third, it "allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." Fourth, it "provides users or visitors mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger." The statute includes two express exemptions. The statutory bar does not extend to websites that "provide only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." §14–202.5(c)(1). The law also does not encompass websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between their members or visitors." §14–202.5(c)(2). §14–202.5 applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it.

In 2002, petitioner Lester Gerard Packingham—then a 21-year-old college student—had sex with a 13-year-old girl. He pleaded guilty to taking indecent liberties with a child. Because this crime qualifies as "an offense against a minor," petitioner was required to register as a sex offender—a status that can endure for 30 years or more. See §14–208.6A; see §14–208.7(a). As a registered sex offender, petitioner was barred under §14–202.5 from gaining access to commercial social networking sites.

In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. Praise be to GOD, WOW! Thanks JESUS!" A member of the Durham Police Department was investigating registered sex offenders who were thought to be violating §14–202.5. The officer noticed that a "J.R. Gerrard" had posted the statement quoted above. By checking court records, the officer discovered that a traffic citation for petitioner had been dismissed around the time of the post. Evidence obtained by search warrant confirmed the officer's suspicions that petitioner was J.R. Gerrard. Petitioner was indicted by a grand jury for violating §14–202.5. The trial court denied his motion to dismiss the indictment on the grounds that the charge against him violated the First Amendment. Petitioner was ultimately convicted and given a suspended prison sentence. At no point did the State allege that petitioner contacted a minor—or committed any other illicit act—on the Internet. The Court of Appeals of North Carolina struck down §14–202.5 on First Amendment grounds. The North Carolina Supreme Court reversed, concluding that the law is "constitutional in all respects." The Court granted certiorari and reverses.

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 868 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited in this case, Facebook has 1.79 billion active users. This is about three times the population of North America.

Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." *Reno*, *supra,* at 870. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. On Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users

employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." *Reno*, *supra*, at 870.

The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. When awareness comes, they still may be unable to know or foresee where its changes lead. So too here. While we may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

This case is one of the first to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *McCullen* v. *Coakley*, 573 U. S. ___(2014) (slip op., at 18). In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.,* at ___ (slip op., at 19).

For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example, and the telephone another, see 1So it will be with the Internet and social media. There is also no doubt that, as this Court has recognized, "the sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 244 (2002). It is clear that a legislature "may pass valid laws to protect children" and other victims of sexual assault "from abuse." See *id.,* at 245; accord, *New York* v. *Ferber*, 458 U. S. 747 (1982). The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley* v. *Georgia*, 394 U. S. 557, 563 (1969).

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites "as commonly understood"—that is, websites like Facebook, LinkedIn, and Twitter.

Second, this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. See *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (*per curiam*). It can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. Specific laws of that type must be the State's first resort to ward off the serious harm that sexual crimes inflict. (the fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not before the Court.)

Even with these assumptions about the scope of the law and the State's interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U. S., at 870.

To foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. The primary response from the State is that the law must be this broad to serve its

preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose. See *McCullen*, 573 U. S., at ___ (slip op., at 28).

No case or holding of this Court has approved of a statute as broad in its reach. The closest analogy that the State has cited is *Burson* v. *Freeman*, 504 U. S. 191 (1992). There, the Court upheld a prohibition on campaigning within 100 feet of a polling place. That case gives little or no support. The law in *Burson* was a limited restriction that, in a context consistent with constitutional tradition, was enacted to protect another fundamental right—the right to vote. The restrictions there were far less onerous than those the State seeks to impose here. The law meant only that the last few seconds before voters entered a polling place were "their own, as free from interference as possible." The Court noted that, were the buffer zone larger than 100 feet, it "could effectively become an impermissible burden" under the First Amendment.

The better analogy is *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987), where the Court struck down an ordinance prohibiting any "First Amendment activities" at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including "talking and reading, or the wearing of campaign buttons or symbolic clothing." If a law prohibiting "all protected expression" at a single airport is not constitutional, it follows that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture. It is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft* v. *Free Speech Coalition*, 535 U. S., at 255. That is what North Carolina has done here. Its law must be held invalid.

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

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in the judgment.

The North Carolina statute was enacted to serve an interest of "surpassing importance." *New York* v. *Ferber*, 458 U. S. 747 (1982)—but it has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because of the law's extraordinary breadth, I agree that it violates the Free Speech Clause of the First Amendment.

I cannot join the opinion because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. This language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric. The North Carolina law at issue makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." As I will explain, the statutory definition of a "commercial social networking Web site" is very broad.

Packingham and the State debate the analytical framework that governs this case. The State argues that the law is content neutral and merely regulates a "place" (*i.e.*, the internet) where convicted sex offenders may wish to engage in speech. According to the State, the standard applicable to "time, place, or manner" restrictions should apply. See *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989). Packingham responds that the challenged statute is "unlike any law this Court has considered as a time, place, or manner restriction," and he advocates a more demanding standard of review.

Like the Court, I find it unnecessary to resolve this dispute because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur.

A content-neutral "time, place, or manner" restriction must serve a "legitimate" government interest, and the North Carolina law easily satisfies this requirement. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, *supra*, at 757. "Sex offenders are a serious threat," and "the victims of sexual assault are most often juveniles." *McKune* v. *Lile*, 536 U. S. 24, 32 (2002) (plurality opinion). "The interest of safeguarding the physical and psychological well-being of a minor is a compelling one," *Globe*

Newspaper Co. v. *Superior Court, County of Norfolk*, 457 U. S. 596, 607 (1982). "We have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights," *Ferber*, *supra*, at 757. Repeat sex offenders pose an especially grave risk to children. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune*, *supra*, at 33 (plurality opinion);.

The State's interest in protecting children from recidivist sex offenders plainly applies to internet use. Several factors make the internet a powerful tool for the would-be child abuser. First, children often use the internet in a way that gives offenders easy access to their personal information—by, for example, communicating with strangers and allowing sites to disclose their location. Second, the internet provides previously unavailable ways of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser's age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child's location posts on the internet to determine the pattern of the child's day-to-day activities—and even the child's location at a given moment. Such uses of the internet are already well documented, both in research[2] and in reported decisions. Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens.

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U. S., at 798. The North Carolina law fails this requirement. The text of N. C. Gen. Stat. Ann. §14–202.5 prohibits sex offenders from accessing an enormous number of websites. The law defines a "commercial social networking Web site" as one with four characteristics. First, the website must be "operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." Due to the prevalence of advertising on websites of all types, this requirement does little to limit the statute's reach. Second, the website must "facilitate the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." The term "social introduction" easily encompasses any casual exchange, and the term "information exchanges" seems to apply to any site that provides an opportunity for a visitor to post a statement or comment that may be read by other visitors. A great many websites include this feature. Third, a website must "allow users to create Web pages or personal profiles that contain information *such as* the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." This definition covers websites that allow users to create anything that can be called a "personal profile," *i.e.*, a short description of the user. Contrary to the argument of the State, everything that follows the phrase "such as" is an illustration of features that a covered website or personal profile may (but need not) include. Fourth, in order to fit within the statute, a website must "provide users or visitors mechanisms to communicate with other users, *such as* a message board, chat room, electronic mail, or instant messenger." This requirement seems to demand no more than that a website allow back-and-forth comments between users. Since a comment function is undoubtedly a "mechanism to communicate with other users," it appears to follow that any website with such a function satisfies this requirement.

The fatal problem for §14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point. Take, for example, the popular retail website Amazon.com, which allows minors to use its services[5] and meets all four requirements of §14–202.5's definition of a commercial social networking website. First, as a seller of products, Amazon unquestionably derives revenue from the operation of its website. Second, the Amazon site facilitates the social introduction of people for the purpose of information exchanges. When someone purchases a product on Amazon, the purchaser can review the product and upload photographs, and other buyers can then respond to the review. This information exchange about products that Amazon sells undoubtedly fits within the definition in §14–202.5. Third, Amazon allows a user to create a personal profile, which is then associated with the product reviews that the user uploads. Such a profile can contain an assortment of information, including the user's name, e-mail address, and picture. And fourth, given its back-and-forth comment function, Amazon satisfies the final statutory requirement.

Many news websites are also covered by this definition. For example, the Washington Post's website gives minors access and satisfies the four elements that define a commercial social networking website. The website (1) derives revenue from ads and (2) facilitates social introductions for the purpose of information exchanges. Users of the site can

comment on articles, reply to other users' comments, and recommend another user's comment. Users can also (3) create personal profiles that include a name or nickname and a photograph. The photograph and name will then appear next to every comment the user leaves on an article. Finally (4), the back-and-forth comment section is a mechanism for users to communicate among themselves. The site thus falls within §14–202.5 and is accordingly off limits for registered sex offenders in North Carolina.

Or consider WebMD—a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site. And it exhibits the four hallmarks of a "commercial social networking" website. It obtains revenue from advertisements. It facilitates information exchanges—via message boards that allow users to engage in public discussion of an assortment of health issues. It allows users to create basic profile pages: Users can upload a picture and some basic information about themselves, and other users can see their aggregated comments and "likes." WebMD also provides message boards, which are specifically mentioned in the statute as a "mechanism to communicate with other users."

As these examples illustrate, the North Carolina law has a very broad reach and covers websites that are ill suited for use in stalking or abusing children. The focus of the discussion on these sites—shopping, news, health—does not provide a convenient jumping off point for conversations that may lead to abuse. In addition, the social exchanges facilitated by these websites occur in the open, and this reduces the possibility of a child being secretly lured into an abusive situation. These websites also give sex offenders little opportunity to gather personal details about a child; the information that can be listed in a profile is limited, and the profiles are brief. What is more, none of these websites make it easy to determine a child's precise location at a given moment. For example, they do not permit photo streams (at most, a child could upload a single profile photograph), and they do not include up-to-the minute location services. Such websites would provide essentially no aid to a would-be child abuser.

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State's goal of protecting children from recidivist sex offenders. While the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.

While I thus agree with the Court that the particular law at issue violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyberspace" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral "time, place, and manner" restrictions. But if the entirety of the internet or even just "social media" sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.

I will mention a few that are relevant to internet use by sex offenders. First, it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their internet use. Second, if a sex offender is seen approaching children or loitering in a place frequented by children, this conduct may be observed by parents, teachers, or others. Third, the internet offers an unprecedented degree of anonymity and easily permits a would-be molester to assume a false identity. We should be cautious in applying our free speech precedents to the internet. Cyberspace is different from the physical world, and we should proceed circumspectly, taking one step at a time.

Problems

1. *Rewriting the Statute.* After the holding in *Packingham*, is it possible to redraft the statute to restrict sex offender access without running afoul of the First Amendment? If so, how?

2. *Sex Offender Online Disclosure Rule.* A provision of the Illinois Sex Offender Registration Act requires that convicted sex offenders must disclose their email addresses, Internet identities, and websites to their local police department, and must update this information on an annual basis. Suppose that a convicted male juvenile fails to disclose his Facebook account as required, and so he is criminally charged under the statute. Does the disclosure provision violate

the First Amendment? Is it a content-based or viewpoint-based restriction on speech? Should the restriction have been more narrowly tailored? *See People v. Minnis*, 2016 IL 119563, 67 N.E.3d 272 (Ill. 2016).

Chapter 11

Overview of the Religion Clauses

A. Defining the Subject Matter of the Religion Clauses

On p. 743, at the end of the notes, add the following new note # 3:

3. *Non-Religious Anti-Abortion Groups and the ACA*. Religious groups have challenged the ACA's contraceptive mandate as a violation of their religious beliefs, and have sought exemptions from that mandate under the Free Exercise Clause. Anti-contraception employers that do not base their objections on religious grounds have not been able to rely on that clause or on RFRA. *See Real Alternatives, Inc. v. Secretary*, 867 F.3d 338 (3d Cir. 2017). However, on May 4, 2017, President Trump issued an executive order directing HHS, the Treasury Department and the Department of Labor to address "conscience-based" objections to the mandate. As a result, these departments adopted interim final rules that "provide conscience protections" to employers who have either a religious or a moral objection "to paying for health insurance that covers contraceptive/abortifacient services." Entities "that have sincerely held religious beliefs against providing such services" are not required to do so, nor are "organizations or small businesses that have objections on the basis of moral conviction which is not based in any particular religious belief." *See* U.S. Department of Health & Human Services, *Trump Administration Issues Rules Protecting the Conscience of All Americans*, Oct. 6, 2017, https://www.hhs.gov/about/news/2017/10/06/trump-administration-rules-protecting-the-conscience-of-all-americans.html

Chapter 12

The Establishment Clause

A. Financial Aid to Religion

[3] *Agostini v. Felton*

On p. 769, at the end of problem # 7, after the word "See" in the citation, insert the following new citations:

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S .Ct. 2012 (2017); *Freedom From Religion Foundation, Inc. v. Morris County*, 232 N.J. 543, 181 A.3d 992 (N.J. 2018); *Caplan v. Town of Acton* 479 Mass. 69, 92 N.E.3d 691 (Mass. Super. 2017) (state was going to pay for the upkeep of a church's stained glass windows).

On p. 769, 4th line, after the word "See" but before the word "American," insert the following new cites:

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017); *Freedom From Religion Foundation v. Morris County*, 181 A.3d 992 (N.J. 2018); *Caplan v. Town of Acton* 479 Mass. 69, 92 N.E.3d 691 (Mass. Super. 2017) (state was going to pay for the upkeep of a church's stained glass windows).

B. School Prayer

On p. 786, after the Problems heading, insert the following new problem # 1, and then renumber the remaining problems:

1. *More on Legislative Prayer.* Suppose that, instead of bringing in outside religious officials to lead the prayers, a county commission asks the commissioners to lead the body in prayer. All of the commissioners are Christian. Those challenging the commissioner led prayer have argued that "when legislators give the prayers, the government and the prayer giver are one and the same. Would legislator-led prayer pass muster under the First Amendment? How is it similar to, or different from, prayers offered by outsiders? *See Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc); *Lund v. Rowan County*, 863 F.3d 468 (4th Cir. 2017) (en banc). Is a local school board like a legislative body so that I can also have prayers at the start of its meetings? If so, may the school board's prayers be student led? *See American Humanist Association v. McCarty*, 851 F.3d 521 (5th Cir. 2017).

D. Official Acknowledgement

On p. 821, insert a new problem # 5 that reads as follows, and then renumber the remaining problems:

5. *More on Ten Commandments Monuments.* A city decides to place a Ten Commandments monument on the city hall lawn, and it is challenged by Wiccans who claim that the display offends their religious beliefs. At the dedication ceremony, there were both secular and religious observances. The Star Spangled Banner was sung, the Pledge of Allegiance was recited, and the local Veterans of Foreign Wars chapter ceremoniously folded the American flag. But the event was inaugurated with prayer, the flag-folding was set to religious narration, and the sponsor delivered remarks emphasizing and celebrating Christian precepts. For example, he stated: "Some would believe this monument is a new thing. They have been so busy trying to remove God from every aspect of our lives.... God and his Ten Commandments

continue to protect us from our evil." He also read the disclaimer on the bottom of the Monument ("Any message hereon is of the donors and not the City of Bloomfield.") out loud. Under prior precedent, is this Ten Commandments monument valid? *See Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016).

On p. 837, insert a new problem # 2 that reads as follows, and renumber the remaining problems:

2. *"In God We Trust."* A satanist challenges inclusion of the motto "In God We Trust" on U.S. currency. He claims that, in using the currency, he is forced (against his wishes) to affirm the motto. Does the inclusion of the motto constitute an establishment of religion? *See Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018).

On p. 846, at the end of note # 3, add the following new paragraph:

Litigation regarding Latin crosses continues to percolate after the *Salazar* decision. *See, e.g., American Humanist Association v. Maryland-National Capital Park & Planning Commission*, 874 F.3d 195 (4th Cir. 2017); *Freedom From Religion Foundation, Inc. v. County of Lehigh*, 2017 WL 4310247 (E.D. Pa. 2017).

On p. 847, at the end of the notes, add the following new note:

4. *The French Principle of Laicité.* Under the French concept of laicité, public authorities are required to 2) guarantee religious freedom, including freedom of worship; & 2) insure that public officials and public agencies remain neutral regarding the separation of church and state by avoiding public recognition or funding of religion. Under that principle, public officials are prohibited from displaying signs or symbols that show a public recognition or preference for a particular religion. In evaluating holiday displays, Laicité requires consideration of the entire context of the display in an effort to determine whether the display reflects a cultural, artistic or festive purpose rather than the purpose of recognizing or showing a preference for a religion. Exterior displays are presumptively permissible unless they reveal proselytism or the expression of a religious opinion. Inside public buildings, the reverse presumption applies and it must be show that the display reflects a cultural, artistic or festive purpose in order to be sustained.

On p. 850, at the end of the problems, add the following new problem # 13:

13. *The Holiday Pageant*. A school district's holiday pageant is enjoined because it is so religious, from a Christian perspective, that it violates the Establishment Clause. Afterwards, the district modified the pageant to eliminate biblical narration, substituted mannequins for a live nativity scene, and added singing representative of Hannukkah and Kwanzaa. However, the performance still contained a significant number of traditional Christmas carols, and there were more carols than Hannukkah or Kwanzaa songs. Does it help that many of the carols were secular in nature? *See Freedom from Religion Foundation, Inc. v. Concord Community Schools*, 885 F.3d 1038 (7th Cir. 2018).

Chapter 13

Free Exercise

A. BURDENS ON RELIGION

[3] Modern Cases

On p. 872, in the first line of note # 4, delete the citation and insert the following new citation:

563 U.S. 277 (2011),

On p. 872, in the first sentence of note # 5, delete the citation and insert the following new citation:

134 S. Ct. 2751 (2014),

On p. 873, at the end of note # 5, add the following new paragraph:

Subsequently, with the election of President Trump, the landscape changed. The Trump Administration issued an interim final rule that exempted entities having religious objections from complying with Obamacare's contraceptive mandate. That rule was subsequently challenged in court. Recently, the Third Circuit held that the Little Sisters of the Poor have standing to intervene in the case in support of the interim rule. *Pennsylvania v. Trump*, 888 F.3d 52 (3rd Cir. 2018).

On p. 874, at the end of problem # 3, insert the following new citation:

See State v. Arlene's Flowers, Inc., 187 Wash.2d 804, 389 P.3d 543 (2017).

On p. 874, in problem # 6, 3rd line, following "exemption?", add the following cite:

See Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017).

On p. 875, at the end of problem # 6, add the following:

Suppose that the State of Oklahoma passes a law which provides that no child placement agency will be required to place children for adoption under circumstances that violate their written religious or moral convictions or policies. Would such a law be valid if it upholds the right of an agency to deny its services to same-sex couples?

On p. 875, insert the following new problem # 7 and renumber of the remaining problems:

7. *Christians Only*. Suppose that a housing association is built by Christians for Christians. A Jewish woman, who inherited property within the association's boundaries, but was rejected because she is not Christian, sues under the

state's Fair Housing Law. Is the association entitled to an exemption from the Fair Housing Law?

On p. 886, after the case, add the following new heading and new note:

Note: More on the Ministerial Exception

In *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017), the court held that the ministerial exception applied to a principal at a Roman Catholic elementary school. She was officially labeled as a "lay principal," but she held herself out as a spiritual leader and she performed important religious functions. In addition, she was charged with advancing the school's religious mission.

On p.886, after the new note, change the problem heading to Problems, then number the existing problem as new problem # 1 with the title "The Ministerial Exception and Child Abuse," and then insert the following new problem # 2:

Problems

1. *The Ministerial Exception and Child Abuse*.

2. *Controlling Teachings on Gender Identity.* The 2007 Iowa Civil Rights Act prohibits discrimination based on gender identity, among other classifications, in the "furnishing of accommodations, advantages, facilities, services, or privileges" by places of public accommodation. The Act also defines it as a discriminatory practice for such places "to directly or indirectly advertise or in any other manner indicate or publicize that the patronage of persons of any particular gender identity [or other classifications] is unwelcome, objectionable, not acceptable, or not solicited." The Act provides an exemption for "any religious institution with respect to any qualification the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a *bona fide* religious purpose." According to the Iowa Civil Rights Commission's guidelines, places of public accommodation "may maintain gender-segregated restrooms" under the Act, but "individuals are permitted to access those restrooms in accordance with their gender identity, rather than their assigned sex at birth." Also, places of worship "are generally exempt" from the Act, "unless the place of worship engages in non-religious activities which are open to the public," such as "an independent day care or polling place located on the premises of the place of worship." Assume that the Act is challenged by a church that maintains bathrooms facilities that are segregated according biological sex, in accordance with its religious teaching that sex is determined at birth. Could either the Act or the Commission's guidelines be used so as to prevent the church from openly expressing its views on gender identity? *See Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776 (S.D. Iowa 2016).

C. DISCRIMINATION AGAINST RELIGION

On p. 904, insert the following new case before problem # 10:

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

138 S.Ct. 1719 (2018).

JUSTICE KENNEDY delivered the opinion of the Court.

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events. Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. His "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." He seeks to "honor God through his work at Masterpiece Cakeshop." One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

[In 2012,] Charlie Craig and Dave Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed in Massachusetts and afterwards to host a reception in Denver. Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." They did not mention the design of the cake they envisioned. Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." The following day, Craig's mother telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado did not recognize same-sex marriages. He explained that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship."

Colorado has prohibited discrimination in places of public accommodation. In 1885, the General Assembly passed "An Act to Protect All Citizens in Their Civil Rights," which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." A decade later, the General Assembly expanded the requirement to apply to "all other places of public accommodation." Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows: "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. §24–34–601(2)(a) (2017). The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." §24–34–601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination are addressed in the first instance by the Colorado Civil Rights Division. [If the Division] finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. The decision of the ALJ may be appealed to the full Commission, a seven-member body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures. Available remedies include orders to cease-and-desist, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." Colorado law does not permit the Commission to assess money damages or fines.

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips. The complaint alleged that they had been denied "full and equal service" at the bakery because of their sexual orientation, and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings. The Civil Rights Division investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. The investigation found that Phillips had declined to sell custom wedding cakes to six other same-sex couples. Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." The Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. The Commission sent the case to a State ALJ. The ALJ entertained motions for summary judgment and ruled in the couple's favor. The ALJ rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law and determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended.

Phillips raised two constitutional claims. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention. Applying CADA, in the ALJ's view, did not interfere with Phillips' freedom of speech. Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First

Amendment. Citing *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips did not violate the Free Exercise Clause. The ALJ ruled against Phillips and the cakeshop on both constitutional claims. The Commission affirmed and ordered Phillips to "cease and desist from discriminating against same-sex couples by refusing to sell them wedding cakes or any product they would sell to heterosexual couples." It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with this Order." The Commission additionally required Phillips to prepare "quarterly compliance reports" for two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage" and rejected the argument that the Commission's order violated the Free Exercise Clause. This Court granted certiorari.

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. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell* v. *Hodges*, 576 U. S. ___ (2015), "the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." While those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*).

When it comes to weddings, a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations. It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. There are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded that if a baker refused to sell any goods or any cakes for gay weddings, the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

Phillips argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. The baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs. Phillips' dilemma was particularly understandable given the background in Colorado. His decision and his actions occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages. At the time, this Court had not issued its decisions in *United States* v. *Windsor*, 570 U. S. 744 (2013), or *Obergefell*. Since the State did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage. At the time, state law afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. While enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. There were responses to these arguments that the State could make when it

contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. Any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But Phillips was entitled to the neutral and respectful consideration of his claims.

The neutral and respectful consideration to which Phillips was entitled was compromised here. The Civil Rights Commission's treatment of his case has 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. At several points, 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: "If 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." These statements 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. The latter seems more likely. On July 25, 2014, another commissioner said far more to disparage Phillips' beliefs: "I would also like to reiterate what we said in 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. 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 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. 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 this Court. These statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993). In this case, 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 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 the requested cake included "wording and images the baker deemed derogatory," featured "language and images the baker deemed hateful," or displayed a message the baker "deemed as discriminatory. The treatment of the conscience-based objections 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 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 analysis of the issue to a footnote. The court stated that "this case is distinguishable from the Colorado Civil Rights Division'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. 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*, 319 U. S. 624, 642 (1943), 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*, 582 U. S. ___, ___ (2017) (opinion of Alito, J.) (slip op., at 22–23). 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 answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

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*, 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. 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."

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." The record 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. 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 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—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.

The Commission's hostility was inconsistent with the First Amendments 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.

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring.

State actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." The Colorado Civil Rights Commission did not satisfy that obligation. The Court partly relies on the "disparate consideration of Phillips' case compared to the cases of three other bakers" who "objected to a requested cake on the basis of conscience." A proper basis for distinguishing the cases was available. CADA makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. The three bakers in the Jack cases did not violate that law. [The customer in the other cases] requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. The bakers did not single [him] out because of his religion, but instead treated him in the same way they would have treated anyone else. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation.*

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

When the government fails to act neutrally toward the free exercise of religion, the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion serve a compelling interest and are narrowly tailored. Two colleagues have written to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have done so consistent with the First Amendment. I do not see how we might rescue the Commission from its error. [One customer] approached three bakers and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. All three bakers refused [the] request, stating that they found his request offensive to their secular convictions. [The customer] responded by filing complaints. He pointed to Colorado's Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. [He] argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. But the Division declined to find a violation, reasoning that the bakers didn't deny him service because of his religious faith but because the cakes were offensive to their own moral convictions. The Division pointed to the fact that the bakers said they treated [him] as they would have anyone who requested a cake with similar messages, regardless of their religion. The bakers said they were happy to provide religious persons with other cakes expressing other ideas. The Commission summarily denied relief. Craig and Mullins approached Phillips about creating a cake to celebrate their wedding. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. But Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. Phillips testified that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. Phillips refused such a request from Craig's mother. Nonetheless, the Commission held that Phillips's conduct violated the Colorado public accommodations law. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service only to honor a personal conviction. The bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. All of the bakers explained that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, the bakers would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. The bakers in the first case were happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that

* As Justice Gorsuch sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a "cake celebrating same-sex marriage." That is wrong. The cake requested was simply a wedding cake—one that is suitable for use at same-sex and opposite-sex weddings alike. A wedding cake does not become something different when a vendor like Phillips invests its sale to particular customers with "religious significance." A vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. A vendor can choose the products he sells, but not the customers he serves—no matter the reason.

mattered to the bakers.

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from "the offensive nature of the requested message." Yet, in Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a difference." It concluded that an "intent to disfavor" a protected class of persons should be "readily presumed" from the knowing failure to serve someone who belongs to that class. In its judgment, Phillips's intentions were "inextricably tied to the sexual orientation of the parties involved" and essentially "irrational." Nothing in the opinions suggests any neutral principle to reconcile these holdings. If Phillips's objection is "inextricably tied" to a protected class, then the bakers' objection in [the other] case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions *presumed* that Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in [the other] case even though the effects of the bakers' conduct were just as foreseeable. A state appellate court said that "no such showing" of actual "animus"—or intent to discriminate against persons in a protected class—was even required in Phillips's case. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required, or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. That is anything but the neutral treatment of religion.

This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, it appears the Commission wished to condemn Phillips for expressing just the kind of "irrational" or "offensive message" that the bakers in the first case refused to endorse. Many may agree with the Commission and consider Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. To be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. It must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive.

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer to observe that [one customer] requested a cake with text on it while Craig and Mullins sought a cake celebrating their wedding without discussing its decoration. It is no answer simply to slide up a level of generality to redescribe Phillips's case as involving only a wedding cake like any other, so the fact that Phillips would make one for some means he must make them for all. These arguments fail to afford Phillips's faith neutral respect. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in [the one] case while penalizing Phillips—is irrational. Imagine [that the customer] asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' wish to avoid participating in that message too. Nor can anyone doubt that a wedding cake without words conveys a message. Words or not and whatever the design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. The Commission denied Phillips that choice, even as it afforded the bakers in [the other] case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs, or whether an adherent has "correctly perceived" the commands of his religion. It is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith.

The cake at issue in Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding. We are told here to apply a sort of Goldilocks rule: describing the cake by its

ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in [the other] case in this way. It didn't declare that because the cakes requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here. If "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Jack requested.

To some, all wedding cakes appear indistinguishable. But *to Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in [the other] case. In *Thomas* a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. Of course, the line Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Thomas was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. It is no more appropriate for this Court to tell Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.

Having failed to afford Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in [the other] case. Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

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

This Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag. Once a court concludes that conduct is expressive, the Constitution limits the government's authority to restrict or compel it. "One important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say' " and "tailor" the content of his message as he sees fit.

Creating and designing custom wedding cakes is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palate with a paintbrush and baker's whisk. Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Phillips sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. Phillips also sees symbolism in wedding cakes. To him, a wedding cake communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the message he believes his faith forbids.

The First Amendment prohibits Colorado from requiring Phillips to "bear witness to these facts," or to "affirm a belief with which he disagrees." *Barnette*, 319 U. S., at 636. Even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. The Colorado Court of Appeals erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. States cannot put individuals to the choice of "being compelled to affirm someone else's belief" or "being forced to speak when they would prefer to remain silent."

Here, Colorado would be punishing Phillips because he refuses to create custom wedding cakes that express approval of same-sex marriage. Our precedents demand "the most exacting scrutiny." According to respondents, Colorado can compel Phillips' speech to prevent him from "denigrating the dignity" of same-sex couples, "asserting their inferiority," and subjecting them to "humiliation, frustration, and embarrassment." These justifications are foreign to our free-speech jurisprudence. States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, *supra*, at 414. A contrary rule would allow the government to stamp out virtually any speech at will. "It is not the role of the State or its officials to prescribe what shall be offensive." "If it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55 (1988). If the only reason a public-accommodations law regulates speech is "to produce a society free of biases" against the protected groups, that purpose is "decidedly fatal" to the law's constitutionality, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U. S., at 578. "A speech burden based on audience reactions is simply government hostility in a different guise." *Matal* v. *Tam*, 582 U. S. ___, ___ (2017) (Kennedy, J., concurring) (slip op., at 4).

Phillips told the couple, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this Court has deemed protected by the First Amendment. Moreover, it is hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, *Virginia* v. *Black*, 538 U. S. 343 (2003); conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to "Bury the niggers," *Brandenburg* v. *Ohio*, 395 U. S. 444, 446 (1969) (*per curiam*).

Nor does *Obergefell* diminish Phillips' right to free speech. "It is one thing to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share that view as bigoted" and unentitled to express a different view. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* emphasized that the traditional understanding of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." If Phillips' continued adherence to that understanding makes him a minority, that is all the more reason to insist that his speech be protected. In *Obergefell*, I warned that the Court's decision would "inevitably come into conflict" with religious liberty, "as individuals are confronted with demands to participate in and endorse civil marriages between same-sex couples." The conflict has already emerged. In future cases, freedom of speech could be essential to preventing *Obergefell* from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy."

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings. Colorado prohibits precisely the discrimination Craig and Mullins encountered. Nor was the Colorado Court of Appeals' "difference in treatment based on the government's own assessment of offensiveness." Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would display. A refusal "to design a special cake with words or images might be different from a refusal to sell any cake at all." Statements made at the Commission's public hearings on Phillips' case provide no firmer support. I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. Phillips' case is thus far removed from *Church of Lukumi* where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council. Sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance.

On p. 904, renumber problem # 10 as # 1, and renumber the following problems accordingly.

On p. 906, at the end of the problems, add the following new problems:

7. *Prohibition Against Religious Advertisements*. The Washington regional public transportation authority sells paid advertising spaces on its buses, including advertisements for secular holiday activities, but refuses to accept religious advertising. In particular, the authority rejected an advertisement from the Archdiocese of Washington. Is the prohibition on religious advertisements constitutional?

8. *Prohibition Against Religious Advertisements*. The Washington Metropolitan Area Transit Authority (WMATA), operates the Metrobus systems in D.C. and funds its operations by selling advertising spaces on the exterior of its buses. After polling the community on the issue, the WMATA decides that it will not accept "issue-oriented advertising, including political, religious, and advocacy advertising," because "the economic benefits of accepting such ads are outweighed by three considerations: community and employee opposition, security risks, and vandalism." So the WMATA adopts a policy that includes this prohibition, among others: "The WMATA is prohibited from accepting advertisements that promote or oppose any religion, religious practice, or belief." Meanwhile, the Archdiocese of Washington launches its "Find the Perfect Gift" campaign, as part of its evangelization efforts to encourage individuals to return to church during Advent and to give charitably to their communities." The advertisement for the campaign includes the words, "Find the Perfect Gift," as well as the website address, "FindThePerfectGift.org" and the hashtag, "#PerfectGift." These words appear against the drawing of a night sky with three shepherds, two sheep, and a twinkling star. When the chief administrator for the Archdiocese sends the ad to the WMATA, along with the required check to pay for its display, he is told that the ad cannot run as submitted because it violates the WMATA's policy. The Archdiocese files suit to challenge the rejection of its advertisement under the Free Exercise Clause on the grounds that the WMATA's police constitutes impermissible discrimination against religion. (The suit also includes a claim of that the policy violates the Free Speech Clause, as presented in problem 6 on page 357 of Chapter 5.) What pro and con arguments can be made by the parties in this suit? *See Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 281 F. Supp. 3d 88 (D.D.C. 2017).

Chapter 14
Establishment versus Free Exercise and Free Speech Concerns

On p. 919, in problem # 1, delete the citation to the Abood case and change the prior word "decisions" to "decision"

On p. 920, at the end of the problems, insert the following new problem:

8. *The Praying Coach*. Immediately after football games, the football coach at a high school likes to pray on the 50 yard line. Fearing that the praying might run afoul of the Establishment Clause, since the coach is a public employee, the school orders him not to continue his practice of praying on the field. The coach believes that he has a free exercise right to pray. If the school tries to sanction the coach, for refusing to cease his public praying, will the First Amendment protect the coach against sanctions? *See Kennedy v. Bremerton School District*, 869 F.3d 813 (9th Cir. 2017).

On p. 924, before the problems, insert the following new case and note:

Trinity Lutheran Church of Columbia, Inc. v. Director
137 S. Ct. 2012 (2017).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to footnote 3.

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open to serve working families in Boone County, Missouri, and the surrounding area. The Center merged with Trinity Lutheran Church and operates on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five. The Center includes a playground that is equipped with slides, swings, jungle gyms, monkey bars, and sandboxes. The surface beneath and surrounding the play equipment is gravel. Youngsters, of course, fall on the playground or tumble from the equipment. When they do, the gravel can be unforgiving. The Center sought to replace the gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program offers grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires.

The Department awards grants on a competitive basis based on several criteria, such as the poverty level and the applicant's plan to promote recycling. The Department had a strict policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution, which provides: "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively." After describing the playground and the safety hazards, the Center detailed the benefits of the proposed project: increasing access for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use. The benefits of a new surface would extend to the local community whose children often use the playground during non-school hours. The Center ranked fifth among 44 applicants in the 2012 Scrap Tire Program.

Despite its score, the Center was ineligible to receive a grant. The program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church. The

Department awarded 14 grants. The Church alleged that the Department's policy of denying grants to religiously affiliated applicants violates the Free Exercise Clause of the First Amendment. The District Court granted the Department's motion to dismiss, relying on *Locke v. Davey,* 540 U.S. 712 (2004). In that case, we upheld against a free exercise challenge the State of Washington's decision not to fund degrees in devotional theology as part of a state scholarship program. The Eighth Circuit affirmed. We granted certiorari and reverse.

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The parties agree that the Establishment Clause does not prevent Missouri from including Trinity Lutheran in the Program. Under the Free Exercise Clause, there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. The Free Exercise Clause "protects religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 533 (1993). Denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." *McDaniel v. Paty,* 435 U.S. 618 (1978) (plurality opinion). In *Everson v. Board of Education of Ewing,* 330 U.S. 1 (1947), we upheld against an Establishment Clause challenge a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools. In ruling that the Establishment Clause allowed New Jersey to extend that benefit to all its citizens regardless of their religious belief, we explained that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it 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."

Three decades later, in *McDaniel v. Paty,* the Court struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. Writing for the plurality, Chief Justice Burger acknowledged that Tennessee had disqualified ministers from serving as legislators since 1796, and that a number of early States had also disqualified ministers from legislative office. This historical tradition did not change the fact that the statute discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.' " Said Chief Justice Burger, the Tennessee law "effectively penalizes the free exercise of McDaniel's constitutional liberties." Joined by Justice Marshall in concurrence, Justice Brennan added that "because the challenged provision requires McDaniel to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion."

In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We distinguish such laws from those that single out the religious for disfavored treatment. In *Lyng*, the Free Exercise Clause did not prohibit the Government from timber harvesting or road construction on a tract of federal land, even though the Government's action would obstruct the religious practice of several Native American Tribes that held certain sites on the tract to be sacred. Accepting that "the building of a road or the harvesting of timber would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," we found no free exercise violation, because the affected individuals were not being "coerced by the Government's action into violating their religious beliefs." The Court noted that the Government action did not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." In *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), we rejected a free exercise claim by two members of a Native American church denied unemployment benefits because they had violated Oregon's drug laws by ingesting peyote for sacramental purposes. The Free Exercise Clause did not entitle the church members to a special dispensation from general criminal laws on account of their religion. The Free Exercise Clause *did* guard against the government's imposition of "special disabilities on the basis of religious views or religious status."[2] In *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* we struck down facially neutral city ordinances that outlawed certain forms of animal slaughter. Members of the Santeria religion challenged the ordinances under the Free Exercise Clause, alleging that despite their facial neutrality, the ordinances had a discriminatory purpose prohibiting

[2] This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause. *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171 (2012), held that the Religion Clauses required a ministerial exception to the neutral prohibition on employment retaliation contained in the Americans with Disabilities Act.

sacrificial rituals integral to Santeria but distasteful to local residents. Before explaining why the challenged ordinances were not, in fact, neutral or generally applicable, the Court recounted the fundamentals of our free exercise jurisprudence. A law may not discriminate against "some or all religious beliefs." Nor may a law regulate or outlaw conduct because it is religiously motivated. Citing *McDaniel* and *Smith,* we restated the familiar refrain: The Free Exercise Clause protects against laws that "impose special disabilities on the basis of religious status."

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. Such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. Like *McDaniel,* the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Trinity Lutheran is free to continue operating as a church, but at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. When the State conditions a benefit in this way, the State has punished the free exercise of religion. The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi,* which outlawed rituals central to Santeria. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. Absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church. The Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng,* 485 U.S., at 450. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert,* 374 U.S., at 404.

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deters or discourages the exercise of First Amendment rights." *Sherbert,* 374 U.S., at 405. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question is controlled by our decision in *Locke v. Davey*. In *Locke,* the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. The scholarships were paid out of the State's general fund, and eligibility was based on criteria such as an applicant's score on college admission tests and family income. While scholarship recipients were free to use the money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree—one "devotional in nature or designed to induce religious faith." Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. He sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights. This Court disagreed. Washington's selective funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." Washington's restriction on the use of its scholarship funds was different. The State had "merely chosen not to fund a distinct category of instruction." Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church. *Locke* also stated that Washington's choice was in keeping with the State's anti-establishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's anti-establishment interests come more into play." The claimant in *Locke* sought funding for an "essentially religious endeavor akin to a religious calling as well as an academic pursuit," and opposition to such funding "to support church leaders" lay at the historic core of the Religion Clauses. Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

The Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. But *Locke* took account of Washington's anti-establishment interest only after determining that the scholarship program did not "require students to choose between their religious beliefs and receiving a

government benefit." Washington's scholarship program went "a long way toward including religion in its benefits." Students in the program were free to use their scholarships at "pervasively religious schools." Davey could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another. He could also use his scholarship money to attend a religious college and take devotional theology courses there. The only thing he could not do was use the scholarship to pursue a degree in that subject. In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.[3] The State expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny. *Lukumi,* 508 U.S., at 546.[4]

Under that stringent standard, only a state interest "of the highest order" can justify the Department's discriminatory policy. *McDaniel,* 435 U.S., at 628. Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri's same policy preference on a prior occasion, "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Widmar,* 454 U.S., at 276. The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.

The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

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

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part.

"Denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified," if at all, "only by a state interest 'of the highest order.' " The Free Exercise Clause, which generally prohibits laws that facially discriminate against religion, compels this conclusion. *Locke* permitted a State to "disfavor religion" by imposing what it deemed a "relatively minor" burden on religious exercise to advance the State's antiestablishment "interest in not funding the religious training of clergy." The Court justified this law based on its view that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke* did not subject the law at issue to any form of heightened scrutiny. But it also did not suggest that discrimination against religion outside the limited context of support for ministerial training would be similarly exempt from exacting review. This Court's endorsement in *Locke* of even a "mild kind" of discrimination against religion remains troubling. Because the Court today appropriately construes *Locke* narrowly, and because no party has asked us to reconsider it, I join of the Court's opinion. I do not join footnote 3.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part.

This violates the First Amendment. The Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use.* I harbor doubts about the stability of such a line. The First Amendment's Free Exercise Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status). Generally the government may not force people to choose between participation in a public

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[3] This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

[4] "A law targeting religious beliefs as such is never permissible." *Lukumi,* 508 U.S., at 533. We do not need to decide whether the condition Missouri imposes falls within the scope of that rule, because it cannot survive strict scrutiny in any event.

program and their right to free exercise of religion. See *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707 (1981). I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way. For similar reasons, I am unable to join the footnoted observation, that "this case involves express discrimination based on religious identity with respect to playground resurfacing." The footnote is correct, but some might read it to suggest that only "playground resurfacing" cases, or those with some association with children's safety or health, or perhaps some other social good, are governed by the legal rules recounted in the Court's opinion. The general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.

JUSTICE BREYER, concurring in the judgment.

The State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children. The fact that the program funds only a limited number of projects cannot itself justify a religious distinction. Nor is there any administrative or other reason to treat church schools differently. The sole reason advanced that explains the difference is faith. It is that last-mentioned fact that calls the Free Exercise Clause into play. We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

This case is about the relationship between religious institutions and the civil government—between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights our precedents and our history, and weakens this country's longstanding commitment to a separation of church and state beneficial to both.

The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission. The government may not directly fund religious exercise. In doctrinal terms, such funding violates the Establishment Clause because it impermissibly "advances religion."[1] *Agostini v. Felton,* 521 U.S. 203 (1997). Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship. A house of worship exists to foster and further religious exercise. There, a group of people, bound by common religious beliefs, comes together "to shape its own faith and mission." *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171, 188 (2012). From its base, the faithful reach out to those not yet convinced of the group's beliefs. When a government funds a house of worship, it underwrites this religious exercise. *Tilton v. Richardson,* 403 U.S. 672 (1971), held as much. The federal program at issue provided construction grants to colleges and universities but prohibited grantees from using the funds to construct facilities "used for sectarian instruction or as a place for religious worship" or "used primarily in connection with any part of the program of a school or department of divinity." It allowed the Federal Government to recover the grant's value if a grantee violated this prohibition within twenty years of the grant. The Court unanimously agreed that this time limit on recovery violated the Establishment Clause. "The original federal grant would in part have the effect of advancing religion," a plurality explained, if a grantee "converted a facility into a chapel or otherwise used it to promote religious interests" after twenty years. Accordingly, the Court severed the twenty-year limit, ensuring that program funds would be put to secular use and thereby bringing the program in line with the Establishment Clause. This case is no different. The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface are integrated with and integral to its religious mission. The funding the Church seeks would impermissibly advance religion.

This Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution. The Church has not and cannot provide such assurances here. The Church

[1] Government aid that has the "purpose" or "effect of advancing or inhibiting religion" violates the Establishment Clause. *Agostini v. Felton,* 521 U.S. 203 (1997). Whether government aid has such an effect turns on whether it "results in governmental indoctrination," "defines its recipients by reference to religion," or "creates an excessive entanglement" between the government and religion.

has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar. When the Court last addressed direct funding of religious institutions, in *Mitchell,* it adhered to the rule that the Establishment Clause prohibits the direct funding of religious activities. At issue was a federal program that helped state and local agencies lend educational materials to public and private schools, including religious schools. The concurrence assured itself that the program would not lead to the public funding of religious activity. It pointed out that the program allocated secular aid, that it did so "on the basis of neutral, secular criteria," that the aid would not "supplant non-program funds," that "no funds ever reach the coffers of religious schools," that "evidence of actual diversion is *de minimis,*" and that the program had "adequate safeguards" to police violations. Those factors were "sufficient to find that the program did not have the impermissible effect of advancing religion." A plurality would have upheld the program based only on the secular nature of the aid and the program's "neutrality" as to the religious or secular nature of the recipient. The controlling concurrence rejected that approach. It viewed the plurality's test—"secular content aid distributed on the basis of wholly neutral criteria"—as constitutionally insufficient. This test, explained the concurrence, ignored whether the public funds subsidize religion, the touchstone of establishment jurisprudence.

Today's opinion has made the leap the *Mitchell* plurality could not. If it agrees that the funding will finance religious activities, then only a rule that considers that fact irrelevant could support a conclusion of constitutionality. The problems of the "secular and neutral" approach have been aired before. It has no basis in the history to which the Court has repeatedly turned to inform its understanding of the Establishment Clause. It permits direct subsidies for religious indoctrination, with all the attendant concerns that led to the Establishment Clause. And it favors certain religious groups, those with a belief system that allows them to compete for public dollars and those well-organized and well-funded enough to do so successfully.[2] Such a break with precedent would mark a radical mistake. The Establishment Clause protects both religion and government from the dangers that result when the two become entwined, "*not* by providing every religion with an *equal opportunity* (to secure state funding or to pray in the public schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious worship, is at issue." *Zelman v. Simmons–Harris,* 536 U.S. 639, 722 (2002) (BREYER, J., dissenting).

Even proceeding on the Court's preferred front—the Free Exercise Clause—the Court errs. It claims that the government may not draw lines based on an entity's religious "status." But we have repeatedly said that it can. When confronted with government action that draws such a line, we have carefully considered whether the interests embodied in the Religion Clauses justify that line. The question is thus whether those interests support the line drawn in Missouri's Article I, § 7, separating the State's treasury from those of houses of worship. They unquestionably do.

The Establishment Clause prohibits laws "respecting an establishment of religion" and the Free Exercise Clause prohibits laws "prohibiting the free exercise thereof." U.S. Const., Amdt. 1. "If expanded to a logical extreme," these prohibitions "would tend to clash with the other." *Walz,* 397 U.S., at 668–669. Even in the absence of a violation of one of the Religion Clauses, the interaction of government and religion can raise concerns that sound in both Clauses. For that reason, the government may sometimes act to accommodate those concerns, even when not required to do so by the Free Exercise Clause, without violating the Establishment Clause. The government may sometimes act to accommodate those concerns, even when not required to do so by the Establishment Clause, without violating the Free Exercise Clause. "There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.,* at 669. This space between the two Clauses gives 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.

This Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. It may

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[2] The Scrap Tire Program ranks more highly those applicants who agree to generate media exposure for Missouri and its program and who receive the endorsement of local solid waste management entities. It prefers applicants who agree to advertise that the government has funded it and who seek the approval of government agencies. To ignore this result is to ignore the type of state entanglement with, and endorsement of, religion the Establishment Clause guards against.

"spare the exercise of religion from the burden of property taxation levied on private profit institutions" and spare the government "the direct confrontations and conflicts that follow in the train of those legal processes" associated with taxation. Nor must a State require nonprofit religious entities to abstain from making employment decisions on the basis of religion. It may instead avoid imposing on these institutions a "fear of potential liability that might affect the way" it "carried out what it understood to be its religious mission" and on the government the sensitive task of policing compliance. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 336 (1987). But the government may not invoke the space between the Religion Clauses in a manner that "devolves into an unlawful fostering of religion." *Cutter v. Wilkinson,* 544 U.S. 709 (2005). This Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders, those "who will preach their beliefs, teach their faith, and carry out their mission," It may instead avoid the historic "antiestablishment interests" raised by the use of "taxpayer funds to support church leaders." *Locke v. Davey,* 540 U.S. 712, 722 (2004).

When reviewing a law that singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so. Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds. Its Constitution reflects that choice and provides: "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Art. I, § 7. Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment. This Nation's early experience with, and eventual rejection of, established religion—shorthand for "sponsorship, financial support, and active involvement of the sovereign in religious activity," *Walz,* 397 U.S., at 668—defies easy summary. No two States' experiences were the same. In some a religious establishment never took hold. See T. CURRY, THE FIRST FREEDOMS 19 (1986) (Curry). In others establishment varied in terms of the sect (or sects) supported, the nature and extent of that support, and the uniformity of that support across the State. Where establishment did take hold, it lost its grip at different times and at different speeds. See T. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 510–511 (1970 ed.) (Cobb).

Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. As the States disestablished, one by one, they all undid those laws.[3] Those who fought to end the public funding of religion based their opposition on the basic premise that the practice harmed both civil government and religion. The civil government could claim no authority over religious belief. Support for religion compelled by the State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. Faith, they believed, was a personal matter, entirely between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. Over and over, these arguments gained acceptance and led to the end of state laws exacting payment for the support of religion.

Locke involved a provision of Washington's Constitution that barred the use of public funds for houses of worship or ministers. Consistent with this denial, the State's college scholarship program did not allow funds to be used for devotional theology degrees. The Establishment Clause did not require the prohibition because "the link between government funds and religious training was broken by the independent and private choice of scholarship recipients." Nonetheless, the denial did not violate the Free Exercise Clause because a "historic and substantial state interest" supported the constitutional provision. The Court could "think of few areas in which a State's antiestablishment interests come more into play" than the "procuring of taxpayer funds to support church leaders." The same is true of this case. Turning over public funds to houses of worship implicates serious antiestablishment and free exercise interests. As states disestablished, they repealed laws allowing taxation to support religion because the practice threatened other forms of

[3] This Court did not hold that the Religion Clauses applied, through the Fourteenth Amendment, to the States until the 1940's. See *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Board of Ed. of Ewing,* 330 U.S. 1 (1947) (Establishment Clause). When the States dismantled their religious establishments, by the 1830's, they did so on their own in response to the lessons taught by their experiences with religious establishments.

government support for, involved some government control over, and weakened supporters' control of religion. A state may not fund religious activities without violating the Establishment Clause. A state can reasonably use status as a "house of worship" as a stand-in for "religious activities." Inside a house of worship, dividing the religious from the secular would require intrusive line-drawing by government, and monitoring those lines would entangle government with the house of worship's activities. While not every activity a house of worship undertakes will be inseparably linked to religious activity, "the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion." *Amos,* 483 U.S., at 345 (Brennan, J., concurring in judgment). Such funding implicates the free exercise rights of taxpayers by denying them the chance to decide for themselves whether and how to fund religion. If there is any " 'room for play in the joints' between" the Religion Clauses, it is here. As in *Locke,* a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. Almost all of the States that ratified the Religion Clauses operated under this rule. Today, thirty-eight States have a counterpart to Missouri's Article I, § 7. The provisions date back to or before these States' original Constitutions. That so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship "is of a different ilk."

As in *Locke,* Missouri's Article I, § 7, is closely tied to the state interests it protects. A straightforward reading of Article I, § 7, prohibits funding only for "any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such." The Missouri courts have not read the State's Constitution to reach more broadly, to prohibit funding for other religiously affiliated institutions, or more broadly still, to prohibit the funding of religious believers. Missouri will fund a religious organization not "owned or controlled by a church," if its "mission and activities are secular (separate from religion, not spiritual in) nature" and the funds "will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes." Article I, § 7, thus stops Missouri only from funding specific entities, ones that set and enforce religious doctrine for their adherents. These are the entities that most acutely raise the establishment and free exercise concerns that arise when public funds flow to religion. Even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.

The Court focuses on one aspect of Missouri's Article I, § 7: that it denies funding to a house of worship, here the Church, "simply because of what it is—a church." The Court describes this as a constitutionally impermissible line based on religious "status" that requires strict scrutiny. Its rule is out of step with our precedents. The Constitution creates specific rules that control how the government may interact with religious entities. Of course a government may act based on a religious entity's "status" as such. It is that very status that implicates the interests protected by the Religion Clauses. Sometimes a religious entity's unique status requires the government to act. Other times, it merely permits the government to act. The dispositive issue is not whether religious "status" matters—it does, or the Religion Clauses would not be at issue—but whether the government must, or may, act on that basis.

The Court recasts *Locke* as a case about a restriction that prohibited the would-be minister from "using the funds to prepare for the ministry." *Locke* stands for the proposition that the government may, but need not, choose not to fund certain religious entities where doing so raises "historic and substantial" establishment and free exercise concerns. [It also] suggests that this case is different because it involves "discrimination" in the form of the denial of access to a possible benefit. But a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination. "The First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree,* 472 U.S. 38, 52 (1985). If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision. The Court's desire to avoid discrimination is understandable. But the description is inappropriate. A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. That does not make the State "atheistic or antireligious." It means only that the State has "established neither atheism nor religion as its official creed." The Court's conclusion "that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence." Justice Breyer, like the Court, thinks that "denying a generally available benefit solely on account of religious identity imposes

a penalty on the free exercise of religion that can be justified only by a state interest of the highest order" Few would disagree. To fence out religious persons or entities from a truly generally available public benefit—one provided to all, no questions asked, such as police or fire protections—would violate the Free Exercise Clause. The Scrap Tire Program offers not a generally available benefit but a selective benefit for a few recipients each year. The comparison to truly generally available benefits is inapt.

The Religion Clauses of the First Amendment contain a promise from our government and a backstop that disables our government from breaking it. The Free Exercise Clause extends the promise. We retain our inalienable right to "the free exercise" of religion, to choose for ourselves whether to believe and how to worship. Government cannot, through the enactment of a "law respecting an establishment of religion," start us down the path to the past, when this right was routinely abridged. The Court today dismantles a core protection for religious freedom provided in these Clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that it must do so whenever it decides to create a funding program. The Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to history and leads us to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.

Note: *State Regulatory Requirements*

In *Illinois Bible Colleges Association v. Anderson*, 870 F.3d 631 (7th Cir. 2017), plaintiff sought an exemption from rules requiring state approval before offering degrees. The approval rules applied equally to secular and religious schools. In rejecting the exemption request, the court noted that religious schools "may teach their faith without interference and use whatever faculty and methods they believe appropriate." The state's rules only apply when they "venture into the secular sphere" where "regulatory oversight" is required.

On p. 924, after the Problems heading, insert the following new problem # 1, and then renumber the remaining problems:

1. *Churches and Historic Preservation Funding*. How far does the *Trinity Lutheran* decision extend? Suppose that a state offers historic preservation grants to help preserve buildings. However, because of the language of the state constitution, the state prohibits the state from providing historic preservation grants to churches. Under *Trinity Lutheran*, is the discrimination against religious organizations permissible? Should the answer depend on the historic significance of the church (e.g., the Old North Church in Boston which is Boston's oldest church, is Boston's most visited historic site, and played a role in the American Revolution)? What weight would you give to the following footnote in *Trinity Lutheran*: "this case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."