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Chapter 1
Historical Intentions and Underlying Values

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

11. *Private Speech Platforms*. Modern communication systems, involving social media platforms, predated Emerson's writings. Social media companies are not bound by the First Amendment because they are not government entities. According to the CEO of Facebook, Mark Zuckerberg, "We've been pretty clear on our policy that we think it wouldn't be right for us to do fact checks for politicians. I think in general, private companies probably shouldn't be – or especially these platform companies – shouldn't be in the position of doing that." By contrast, "in a series of tweets, Jack Dorsey, Twitter's chief executive, [said] he would not back down from the fact checking effort. 'We'll continue to point out incorrect or disputed information,' he wrote," after President Trump signed an executive order to "curtail" statutory protections in retaliation for Twitter's fact-checking of his false statements. Do Emerson's justifications retain currency today? Are there additional justifications that might be offered in an internet era? *See* Mike Isaac and Cecilia Kang, *While Twitter Confronts Trump, Zuckerberg Keeps Facebook Out of It*, *New York Times* (May 29, 2020) https://www.nytimes.com/2020/05/29/technology/twitter-facebook-zuckerberg-trump.html; Kate Conger and Mike Isaac, *Defying Trump, Twitter Doubles Down on Labeling Tweets*, *New York Times* (May 28, 2020) https://www.nytimes.com/2020/05/28/technology/trump-twitter-fact-check.html.

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

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

Chapter 2
Advocacy of Illegal Action

E. Modern Standards

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

2. *After* Brandenburg. Between 1969 and 2010, the Supreme Court addressed the issue of "advocacy of illegal action" in only two other cases after *Brandenburg*. These cases were *Hess v. Indiana*, 414 U.S. 105 (1973), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Professor L.A. Powe summarized the unanimous decision in *Claiborne Hardware* as follows:

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

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

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

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

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

9. *Liability for Violent Protester*. When a Black Lives Matter demonstration blocked a public highway in front of the Police Department, police officers were ordered to make arrests. Some protesters started throwing rocks at the police and one unidentified protester threw a rock

that hit an officer in the head. The injured officer brought a tort negligence suit against Mckesson, one of the organizers of the demonstration, alleging that he was liable for the protester's conduct. The officer's complaint alleges that Mckesson led the demonstrators to block the highway, then "did nothing to prevent the violence or to calm the crowd," and negligently allowed the violence to occur. Does *Claiborne Hardware* create a First Amendment shield for Mckesson from tort liability for the rock thrower's criminal act? *See Doe v. Mckesson*, 935 F.3d 253 (5th Cir. 2019).

10. *Riot Boosting Statute*. The South Dakota legislature enacted a statute in 2019 that provided for the establishment of a "riot boosting recovery fund" which "may be used to pay any claim for damages arising out of or in connection with a riot," and "any civil recoveries shall be deposited in the fund," which shall be "continuously appropriated to the Department of Public Safety, which shall administer the fund." The governor described this statute as creating "a legal avenue, if necessary, to go after out-of-state money funding riots that go beyond expressing a viewpoint but instead aim to slow down the pipeline build," and as allowing the State "to follow the money for riots and cut it off at the source." There are three bases for tort liability under the riot boosting statute:

> (1) who participates in any riot and who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence;"
>
> 2) "who does not personally participate in any riot but who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence;"
>
> (3) "upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law."

Do the two new riot statutes unduly burden expressive activity or freedom of association? In a pre-enforcement challenge to these statutes, how can plaintiffs argue that the statutes fail the requirements of *Brandenburg* and *Claiborne Hardware*? *See Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874 (D.S.D. 2019).

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

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

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

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

, *rev'd* 2020 WL 2200834 (U.S., May 7, 2020).

Chapter 3

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

B. Hostile Audiences

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

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

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

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

On p. 87, at the end of the problems, insert the following new problem:

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

C. Defamation

[1] The Constitutionalization of Defamation

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

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

of some California defamation plaintiffs to sue California defendants in Virginia.

[3] Application of the "Actual Malice" Standard

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

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

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

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

D. Emotional Distress

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

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

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

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

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

13. *Trolling Campaign*. When the University of Kentucky lost a crucial game in the NCAA Basketball Tournament in 2017, the team's fans blamed the officiating of a particular referee, who then "became the target of an online campaign orchestrated by Kentucky fans." A talk show host with a call-in program criticized the referee's officiating during several broadcasts and a writer for the station's website published critical articles saying that the referee's business "was getting crushed on its Facebook page" and reproduced some of the "fake and abusive reviews" being posted by fans. As a result of the trolling campaign, the referee had to close his Facebook page, his voicemail system crashed, his business ratings collapsed, his family was threatened, and his business received over 800 threatening calls. The referee sued the radio station, alleging that their "post-game coverage of him," including the speech of the talk show host and the website writer, incited the harassment by fans that caused his business losses. His complaint alleged intentional infliction of emotional distress, invasion of privacy, tortious interference with a business relationship, and civil conspiracy. The radio station moved to dismiss on the ground that the speech of the talk show host and writer were protected by the First Amendment. Should the court grant the motion to dismiss? *See Higgins v. Kentucky Sports Radio, LLC*, 951 F.3d 728 (6th Cir. 2020).

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

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

E. Invasion of Privacy

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

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

8. *The Clash Between Trademark Protection & Expressive Freedom*. Jack Daniels has a trademark on the bottle design for its Black Label Tennessee Whiskey. Jack Daniels regards its trademark as an "idealized image" of its brand as a representation of product excellence. VIP Products has decided to produce a rubber dog toy that resembles the appearance of the Jack Daniels bottle. The toy is called the Bad Spaniels Silly Squeaker" and claims to be "43% poo by volume." Since the toy is a parody of the Jack Daniels bottle, is it protected expression? Should

Jack Daniels be able to obtain an injunction against production of the toy on trademark infringement grounds?

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

F. Obscenity

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

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

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

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

Chapter 4

Content-Based Speech Restrictions: Post-Chaplinsky Categorical Exclusions

A. "Offensive" Speech

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

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

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

2. *Bans on Profanity*. After *Cohen*, can a state prohibit the utterance of profane speech? Many states have now repealed their bans on profanity. Would a law that makes it illegal to utter "vulgar and indecent language . . . in the presence of two or more persons" be constitutional?

On p. 196, after the problems, insert the following new problem:

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

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

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

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

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

B. "Hate" Speech

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

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

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

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

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

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

C. True Threats

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

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

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

On p. 239, after problem #15, insert the following new problem and renumber the remaining problem:

16. *Mother's Threat*. After her son died during a traffic stop, McGuire blamed Officer Dodd, who was present during the stop, even though her son was on meth. She was charged with harassment based on several statements that she posted on Facebook. Although Dodd was not one of her friends, a "concerned citizen" sent McGuire's posts which accused Dodd of killing her son and included the following statements: "He set my son up to die and y'all better watch out cuz I'm coming for all of you. I'm comn for u to u better watch out this mother is on a rampage and ready to shoot to kill." At the end of one post, McGuire wrote: "FUCK KPD OFFICER JERemy DODD yes I said it loud and proud." McGuire argues that her speech is protected under the First Amendment and the prosecutor argues that it was an unprotected "true threat." What result? Why?

See McGuire v. State, 132 N.E.3d 438 (Ind. App. 2019).

E. Pornography as Discrimination Against Women

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

3. *Prohibiting Harmful Depictions*. The United Kingdom's Advertising Standards Agency prohibits depictions of gender that "are likely to cause harm or to create serious or widespread offense." Would such a prohibition be permissible in the United States? In one instance, an advertisement depicted two male astronauts in space, and a male athlete with a prosthetic leg doing the leg jump and then showed a mother sitting next to a stroller on a park bench. In the U.S., could this advertisement be prohibited? *See* Rob Picheta, *Volkswagen and Philadelphia Cream Cheese Ads Banned Over Gender Stereotypes*, CNN (Aug. 14, 2019).

F. Possible Additional Categories for Exclusion From Speech Protection

On p. 273, at the end of the problem, delete the citation and add the following new citation:

See Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2013).

On p. 299, insert the following new problems ## 5 & 6, and renumber the remaining problems:

On p. 130, after the problems, add the following new problem:

5. *False Information about the Pandemic*. In a Fox News program on March 9, 2020, Sean Hannity and Trish Regan made statements on the air regarding the pandemic. Hannity opined, for example, that, "I didn't like how we're scaring people unnecessarily [about the virus]." "I see it, again, as like, let's bludgeon Trump with this new hoax." Based on those comments, the Washington League for Increased Transparency and Ethics, a nonprofit entity, filed suit against Fox News, arguing that Hannity had "deceived people about the pandemic" and claiming that his statements violated a state consumer protection law in Washington. The defendant Fox News files a motion to dismiss the suit on First Amendment grounds. Why will the state trial judge grant this motion? *See Washington League for Increased Transparency and Ethics v. Fox Corporation*, 2020 WL 2759011 (Wash. Super.) (Trial Order), May 27, 2020; Wendy Davis, *Fox News Defeats Lawsuit Over COVID-19 Comments*, MEDIA DAILY NEWS, May 27, 2020, https://www.mediapost.com/publications/article/351870/fox-news-defeats-lawsuit-over-covid-19-comments.html?edition=118551

6. *The Newton Tragedy*. In 2012, children were murdered at school in Newton, Connecticut. Afterwards, Alex Jones used his Infowars website speculated that the attack had been staged, and that crisis actors had been used to make it appear real. Plaintiff, a father of one of

the murdered children, was alleged to have lied about the death of his son in order to promote stronger gun laws. Can plaintiff recover for defamation against Jones and Infowars? *See Jones v. Heslin*, 2020 WL 1452025 (Tex.App. 2020).

G. Near Obscene

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

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

> A person commits non-consensual dissemination of private sexual images when he or she:
>
> (1) intentionally disseminates an image of another person:
>
> (A) who is at least 18 years of age; and
>
> (B) who is identifiable from the image itself or information displayed in connection with the image; and
>
> © who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and
>
> (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
>
> (3) knows or should have known that the person in an image has not consented to the dissemination.
>
> (4) Definitions:
>
> (A)"Image" includes a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body;
>
> (B) "Intimate parts" means the fully unclothed, partially unclothed or transparently clothed genitals, pubic area, anus, or if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing.
>
> © "Sexual act" includes "sexual penetration, masturbation, or sexual activity," and "sexual activity" includes the "knowing touching or fondling by the victim or another person of the intimate parts of the victim or another person for the purpose of sexual gratification or arousal."

When the statute was challenged on First Amendment grounds, the Illinois Supreme Court held that the statute is constitutional and relies on these rationales: (1) strict scrutiny is not required because the statute is not content-based; and (2) the statute may be upheld under an intermediate level of scrutiny, since it is a content-neutral time, place, and manner restriction that regulates a purely private matter." Should the Court reverse the Illinois Supreme Court's decision? On what theory? *See People v. Austin*, 2019 IL 123910 (Ill. 2019). *See State v. VanBuren*, 214 A.3d 791 (Vt. 2018).

H. Commercial Speech

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

Barr v. American Association of Political Consultants, Inc.
— S.Ct. —, 2020 WL 3633780 (2020).

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

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

I

In 1991, Congress passed and President George H. W. Bush signed the Telephone Consumer Protection Act. The Act responded to a torrent of vociferous consumer complaints about intrusive robocalls. A growing number of telemarketers were using equipment that could automatically dial a telephone number and deliver an artificial or prerecorded voice message. At the time, more than 300,000 solicitors called more than 18 million Americans every day. Consumers were "outraged" and considered robocalls an invasion of privacy "regardless of the content or the initiator of the message." In enacting the TCPA, Congress found that banning robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." The TCPA imposed various restrictions on the use of automated telephone equipment. One restriction prohibited "any call (other than a call made for emergency purposes or with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to "any telephone number assigned to a paging service, *cellular telephone service*, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." The TCPA prohibited almost all robocalls to cell phones. In 2015, Congress passed and President Obama signed the Bipartisan Budget Act. In addition to making other changes, that Act amended the TCPA's restriction on robocalls to cell phones. It stated: "(a) In General.—Section 227(b) of the Communications Act of 1934 is amended—(1) in paragraph (1)—(A) in subparagraph (A)(iii), by inserting 'unless such call is made solely to collect a debt owed to or guaranteed by the United States' after 'charged for

the call.' " In other words, Congress carved out a new government-debt exception to the general robocall restriction. The TCPA imposes tough penalties for violating the robocall restriction. Private parties can sue to recover up to $1,500 per violation or three times their actual monetary losses, which can add up quickly in a class action. States may bring civil actions against robocallers on behalf of their citizens. And the Federal Communications Commission can seek forfeiture penalties for willful or repeated violations of the statute.

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

II

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." Above "all else, the First Amendment means that government" generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972). The Court's precedents restrict the government from discriminating "in the regulation of expression on the basis of the content of that expression." *Hudgens* v. *NLRB*, 424 U. S. 507, 520 (1976). Content-based laws are subject to strict scrutiny. See *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015). A law is content-based if "a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed,* 576 U. S., at 163. That description applies to a law that "singles out specific subject matter for differential treatment." *Id.*, at 169. For example, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Ibid.* Under § 227(b)(1)(A)(iii), the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.

The Government advances three main arguments for deeming the statute content-neutral, but none is persuasive. *First*, the Government suggests that § 227(b)(1)(A)(iii) draws distinctions based on speakers (authorized debt collectors), not based on content. But this statute singles out calls "made solely to collect a debt owed to or guaranteed by the United States," not all calls from authorized debt collectors. Indeed, the Court has held that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U. S., at 170. *Second*, the Government argues that the legality of a robocall

under the statute depends simply on whether the caller is engaged in a particular economic activity, not on the content of speech. We disagree. The law here focuses on whether the caller is *speaking* about a particular topic. *Third*, according to the Government, if this statute is content-based because it singles out debt-collection speech, then so are statutes that *regulate* debt collection, like the Fair Debt Collection Practices Act. That argument is unpersuasive. As we explained in *Sorrell*, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." The courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech. The issue before us concerns only robocalls to cell phones. Our decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity.

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

III

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

It is so ordered.

Justice Sotomayor, concurring in the judgment.

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

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

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

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

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

The Court has held that entire categories of speech—for example, obscenity, fraud, and speech integral to criminal conduct—are generally unprotected by the First Amendment entirely because of their content. See *Miller* v. *California*, 413 U. S. 15, 23 (1973). As Justice Stevens pointed out, "our entire First Amendment jurisprudence creates a regime based on the content of speech." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 420 (1992) (concurring). Given that this Court looks to the nature and content of speech to determine whether, or to what extent, the First Amendment protects it, it makes little sense to treat *every* content-based distinction Congress has made as presumptively unconstitutional. Our First Amendment jurisprudence has always been contextual and has defied straightforward reduction to unyielding categorical rules. That said, I am not

arguing for the abolition of the concept of "content discrimination." There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate. Neither of those situations is present here. Outside of these circumstances, content discrimination can at times help determine the strength of a government justification or identify a potential interference with the free marketplace of ideas.

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

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

II

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

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

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

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

19. *Ads on Taxi TV*. In 2001, a New York City ordinance was enacted that bans advertisements in both for-hire vehicles (FHVs) and taxi cabs without authorization from the City Taxi and Limousine Commission (TLC). The TLC originally enacted this ban because passengers find in-ride ads to be very annoying, particularly video ads. However, in 2015, the TLC authorized a limited category of ads to appear on the screens of "Taxi TV," which new equipment the TLC required taxis to install for the purpose of allowing passengers to pay by credit card. The reason for this authorization by the TLC was to "offset the cost to the taxi owners of installing the newly mandated Taxi TV equipment. Vugo, Inc., wants to sell an advertising software platform that Vugo created for Uber and Lyft FHVs around the country. But the ban on ads in FHVs in the New York City ordinance is an obstacle that prevents Vugo from doing so. Vugo files suit to challenge the ban on the ground that it violates the *Central Hudson* test. What result and why? *See Vugo, Inc. v. City of New York*, 931 F.3d 42 (2019).

20. *Debt Collection*. The Massachusetts Attorney General issued an emergency regulation "to protect consumers from unfair and deceptive debt collection practice during [the] State of Emergency to respond to Covid-19. The ACA, a non-profit trade association composed of members who work in the credit-and-collection industry, filed suit to challenge the regulation on First Amendment grounds. The federal district court described the regulation and governmental interests as follows:

> The Regulation prohibits debt collectors from initiating telephone calls to debtors and from initiating a lawsuit to collect a debt. [But] there are exceptions. Persons seeking to collect mortgage debts, tenant debts, or debts for telephone, gas, or electric utility companies may file lawsuits and resort to their existing remedies. Debt collectors may initiate telephone conversations if the sole purpose of the call is to discuss rescheduling court appearances, or to collect a mortgage or tenant debt.
>
> The Regulation also exempts six classes of collectors from its prohibitions by excluding them from its definition of "Debt Collector." These include certain nonprofit entities, federal employees, persons collecting fiduciary-[related] or escrow-related debts, and anyone serving legal process to judicially enforce a debt. ACA members complain that their only alternative to telephone calls for the foreseeable future is letters, which "rarely yield collection results for a large proportion of the accounts in inventory and are largely used to convey the consumers' rights under federal and state law.
>
> The Attorney General invokes three separate governmental interests as substantial: "(1) shielding consumers from aggressive debt collection practices that wield undue influence in view of the coronavirus pandemic; (2) protecting residential tranquility while citizens have largely had to remain at home during the coronavirus pandemic; and (3) temporarily vouchsafing citizens' financial well-being during the coronavirus pandemic."

When the court applies the *Central Hudson* test to the regulation, what result and why? *See ACA International v. Healey*, 2020 WL 2198366 (D. Mass., May 6, 2020).

Chapter 5

Content-Neutral Speech Restrictions: Symbolic Speech and Public Fora

A. Symbolic Speech

On p. 349, at the end of problem # 3, insert the following before the period:

; *see also Tagami v. City of Chicago*, 875 F.3d 375 (7th Cir. 2017). Can a city ban "bikini baristas" under a Lewd Conduct ordinance which prohibits skimpy costumes (e.g., the display of one's genitals, anus, bottom one-half of the anal cleft, or any portion of the areola or nipple of the female breast). *See Edge v. City of Everett*, 929 F.3d 657 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 1297 (2020).

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

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

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

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

8. *Unvaccinated Children*. When the New York legislature repeals the religious exemption for unvaccinated children who attend public or private schools, this exemption is replaced by a new law that requires all children either to be vaccinated or home schooled. The parents of some of these children file suit on their behalf, claiming that the new law violates the First Amendment.

The parents argue that the act of receiving a message is symbolic speech, and that the vaccination requirement compels the children to express a rejection of their religious beliefs. What result and why? *See F. F. ex.rel Y.F. v. State*, 114 N.Y.S.3d 852 (Sup. Ct. 2019).

9. *Undercover Journalist.* Project Veritas (PV) is a non-profit entity that engages in undercover journalism. PV staff members secretly investigate candidates for office by seeking to record their statements, both in public places and in other locations in which the interactions of the candidates may be observed with their campaign staffers. A complaint was brought against PV before the Ohio Election Commission for the violation of an Ohio campaign statute, based on PV's placement of an "operative" at the campaign office of the Ohio Democratic Party for the Hillary Clinton campaign. While pretending to be a "volunteer," the operative recorded the conversations between other campaign workers and PV later published a video with clips of these recordings. Although the complaint was dismissed by the Commission because it was not filed timely, the leaders of PV decide that they cannot continue to operate in Ohio as long as the Ohio campaign statute remains in effect. Under the statute, the Commission is authorized to act upon complaints by hearing evidence and then either issuing a public reprimand, imposing a fine, or referring the matter to a state prosecutor. The criminal statute provides as follows:

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

When Plaintiff PV files suit in federal court to challenge the statute on its face as a violation of the First Amendment, how will the court analyze this challenge? Does the statute implicate activity protected by the First Amendment? If so, what type of scrutiny should the court use? If the court applies the *O'Brien* standard, will the plaintiff PV obtain an injunction to invalidate the statute? *See Project Veritas v. Ohio Election Commission*, 418 F. Supp. 3d (S.D. Ohio 2019).

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

7. *Flashing Headlights*. After passing a speed trap, a driver flashed his lights "to warn oncoming traffic to slow down and proceed with caution." A state trooper noticed the driver's action and pulled him over and issued a citation for "operating a vehicle on a highway which has displayed thereon any flashing light." When the driver called another state trooper the next day to inquire about the citation, he was informed "that it was the policy and practice of the State Patrol to stop, detain, cite, and prosecute individuals for warning of a speed trap by flashing their headlights." Was the driver's conduct an expressive activity protected by the First Amendment? Was his conduct "unprotected speech intended to facilitate the criminal activity of speeding? *See Obriecht v. Splinter*, 2019 WL 1779226 (W.D. Wis., April 23, 2019).

8. *Protected Expressive Activity.* How should the courts resolve these cases under *Spence*

and *Johnson*? 1) Plaintiff Good is a smoker who lives in HUD-funded public housing. There is a no-smoking policy at the apartment unit where he lives, which prevents him from smoking in his apartment or within 500 feet of the unit. In his suit to challenge the no-smoking policy, plaintiff argues that it is a violation of his First Amendment rights because his smoking is a form of expression. What result and why? *See Good v. United States Department of Housing and Urban Development*, 2019 WL 6839320 (N. D. Ind., December 12, 2019). 2) Fishback is a property owner who was dumping solid waste on his land in violation of local zoning laws. He was sued for that conduct by Ventura County and an order for a permanent injunction was entered by a local court to enjoin him from continuing to dump waste. Fishback violates this order by dumping a quantity of topsoil on to the bedrock area of his property, allegedly to plant crops. The County seeks a declaration that the topsoil dumping is a violation of the injunction. Fishback argues that his dumping of the topsoil is artistic expression protected by the First Amendment. What result and why? *See Fishback v. Zedmiston*, 2019 WL 7865181 (C.D. Cal., August 28, 2019).

B. Public Forum Doctrine

[1] Foundational Principles

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

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

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

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

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

On p. 377, note # 1, at the end, add the following:

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

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

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

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

2. *Custom Stamps with Political Content*. The U.S. Postal Service allows individuals to create customized stamps, but prohibited (at one time) all "controversial" content. The rule was amended to prohibit all political content on custom stamps. An art gallery operator wishes to have custom stamps that are critical of the Court's decision in *Citizens United* (a campaign finance case). In particular, he wants to promote a gallery exhibit with a stamp which states that "Democracy is Not for Sale." The USPS refuses to print the stamp because it contains political content. Is the prohibition on political content valid? *See Zukerman v. U.S.P.S.*, — F.3d — 2020 WL 3053344 (D.C. Cir. 2020).

[2] Restrictions on Public Forum Use

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

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

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

On p. 396, at the end of problem # 4, add the following new citation:

See Pen American Center, Inc. v. Trump, ___ F. Supp. 3d ___, 2020 WL 1434573 (S.D.N.Y., March 24, 2020).

On p. 397, at the end of problem # 6, after the text and before the citation, add the following new citation:

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

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

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

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

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

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

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

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

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

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

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

[3] Content-Based Restrictions

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

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

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

5. *University of Texas' Bias Response Team*. The University of Texas (UT) creates a Campus Climate Response Team to investigate and sanction speech that is deemed to be discriminatory based on race, color, religion, national origin, gender, gender identity, gender expression, age, disability, citizenship, veteran status, sexual orientation, ideology, political views, or political affiliation. Speech should be reported if it is perceived as "offensive, insulting, insensitive, or derogatory" and which occurs in a classroom, on social media, at a party or at a student organization event. A student group seeks to challenge the Team's existence as a violation of its First Amendment rights, and as having a chilling impact on its speech. Should it matter whether the Team has sanctioned anyone? *See Speech First, Inc. v. Fenves*, 384 F. Supp.3d 732 (W.D. Tex. 2019); *see also Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019).

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

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

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

13. *Stay-at-Home Orders*. In *Yang v. Powers*, 1:20-cv-00760 (E.D. Wisc., May 20, 2020), plaintiffs filed suit to challenge "Safer at Home" restrictions imposed in some counties after the

Wisconsin Supreme Court invalidated the State's similar stay-at-home order one week earlier. Plaintiffs included "salon owners, a pastor, a protest organizer and a candidate for Congress, all of whom argue that the local orders infringe in some way on their First Amendment rights." Assume that the plaintiffs object to the violations of the freedom of assembly and the freedom of speech. Do plaintiffs have a right to protest that overcomes the orders? *Compare Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416 (E.D. Va., May 1, 2020); *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 (D.N.M., April 17, 2020); *Antietam Battlefield KOA v. Hogan*, 2020 WL 2556496 (D. Md., May 20, 2020). *See* Shawn Johnson, *Federal Lawsuit Challenges Local Stay-at-Home Orders*, WPR, May 21, 2020, https://www.wpr.org/federal-lawsuit-challenges-local-stay-home-orders

C. Campaign Finance Laws [Online Material]

1] *Modern Foundations*

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

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

Chapter 6

Vagueness, Overbreadth, and Prior Restraints

A. Overbreadth & Vagueness

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

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

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

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

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

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

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

11. *Telephone Harassment*. Wash. Rev. Code § 9.61.230 prohibits telephone harassment which it defines as a phone call made the with the "intent to harass, intimidate, torment or embarrass any other person" and using "any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act . . ." Is the law unduly vague?

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

13. *Intertwined Message*. The Los Angeles City Council enacted an ordinance to limit expressive activities on the Venice Beach Boardwalk in order to achieve three governmental interests: to alleviate noise, to improve crowd control, and to enhance access for emergency service providers. Violations of the ordinance are punished by criminal fines or jail terms. The

ordinance provides as follows: "On the Venice Beach Boardwalk, no person shall hawk, peddle, vend, or sell, or request or solicit donations for, any goods, wares, merchandise, foodstuffs, or refreshments. This prohibition does not apply to the sale of merchandise constituting, carrying or making a religious, political, philosophical or ideological message or statement which is inextricably intertwined with the merchandise." Don sells sticks of his original incense, along with incense holders displaying symbols such as yin-yang, dragons, stars and moon, and yin-yang, accompanied by flyers that explain the religious and/or mythological significance of the symbols. After he is threatened with arrest under the ordinance, Don files suit to challenge the ordinance, arguing that it is void for vagueness. What result and why? *See Hunt v. City of Los Angeles*, 638 F.3d 703 (2011).

B. Prior Restraints

[1] Licensing

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

2. *National Security and Intelligence Agency Pre-Publication Review*. The federal government requires pre-publication review of books or articles that national security or intelligence officials wish to publish. As part of that process, the government reserves the right to require redaction or modification of information that might damage national security or intelligence interests. Despite the general prohibition against pre-publication review systems, courts have upheld restrictions in these areas provided that they are reasonable. *See Edgar v. Coats*, — F. Supp.3d —, 2020 WL 1890509 (D. Md. 2020).

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

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

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

[2] Injunctions

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

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

On p. 496, at the end of problem # 2, add the following new citation:

See Alexander v. United States, 509 U.S. 544 (1993).

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

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

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

On p. 502, at the end of note #2, add the following new note:

3. *Injunction Not Valid against Publisher*. When members of the Trump family sought an injunction against President Trump's niece Mary Trump and Simon & Schuster, the publisher of

her memoir TOO MUCH AND NEVER ENOUGH, HOW MY FAMILY CREATED THE WORLD'S MOST DANGEROUS MAN, they argued that both defendants were bound by a non-disclosure agreement (NDA) that Mary Trump signed as part of an settlement agreement in 2001 concerning the assets of the estate of President Trump's father. That NDA provided that neither Mary Trump nor "her agents" could publish anything she wrote about the settlement or her relationship with family members, including President Trump. A New York appellate court ruled that since Simon & Schuster was not an "agent" of Mary Trump and could not be bound by the NDA, the publisher could proceed to print and distribute the book. Based on the assumption that Mary Trump may have relinquished her First Amendment right to publish when she signed the NDA, the court left the TRO in place against her. The order effectively prevents Mary Trump from promoting the book, at least until the court determines whether the scope of the prior restraint in the NDA is "temporally and geographically reasonable" in light of how the public interest in the "restrained information" has changed during the decades since the NDA was signed. *See* Josh Gerstein, *Court narrows restraining order against Mary Trump book*, Politico.com, July 1, 2020, https://www.politico.com/news/2020/07/01/book-mary-trump-restraining-order-347769

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

See

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

Washington v. U.S. Department of State, ___ F. Supp. 3d ___, 2020 WL 1083720 (W.D. Wash.).

On p. 503, near the end of problem # 2, delete the citation after the semi-colon and replace it with:

Washington v. U.S. Department of State, 2020 WL 1083720 (W.D. Wash.).

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

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

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

8. *Nondisparagement Orders*. When the mother of a six-year-old filed for divorce, she also obtained an emergency order removing the father from the marital home and giving her sole

custody of the child. The mother then sought an order prohibiting the father from posting disparaging remarks on social media. The judge issued the following nondisparagement orders against both the father and the mother: "Neither party shall disparage the other – nor permit any third party to do so – especially when within hearing range of the child. Neither party shall post any comments, solicitations, references or other information regarding this litigation on social media." The judge's order stated that, "These orders are a means to protect the psychological well-being of the child and are justified given the demonstrated breakdown in the relationship between the mother and father." Is the order a permissible prior restraint? *See Shak v. Shak*, 484 Mass. 658, 144 N.E.3d 274 (2020).

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

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

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

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

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

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

Chapter 7

Freedom of Association and Compelled Expression

A. The Right to Associate

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

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

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

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

B. The Right Not to Speak

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

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

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

9. *Farenheit 9/11*. A college student objects to watching the movie Farenheit 9/11 in one of his classes. The student complains that his teacher has a strong left-wing bias, that he is not allowed to articulate conservative views in class, and that he receives bad grades on papers and projects unless he articulates liberal/progressive ideas regarding helping the poor or advancing social justice. If the student's claims can be validated, may he prevail on a claim that his teacher

retaliated against him for expressing conservative views and for his failure to watch the movie? *See Felkner v. Rhode Island College,* 203 A.3d 433 (R.I. 2019).

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

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

Problems

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

2. *Objecting to Mandatory Bar Membership.* A lawyer objects to a state law requiring membership in the state bar association as a requirement for practicing law in the state. Can lawyers be required to join their state bar associations as a condition of practicing law? *See Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019), *cert. denied*, 2020 WL 1124433 (2020).

Chapter 8

The Government as Employer, Educator, and Source of Funds

A. First Amendment Rights of Public Employees

[1] Prohibiting Electioneering

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

Problem: ***Additional Restrictions***

The Administrative Office of the U.S. Courts (AO) provides financial, technological, managerial and other support to the federal courts. The AO decided to impose additional restrictions (beyond the restrictions already imposed by the Hatch Act), including donating to political campaigns, attending partisan rallies, driving voters to the polls, organizing political events for candidates, and expressing political views on social media. The AO seeks to justify the restrictions as necessary to preserve the public's confidence in the integrity and impartiality of the judicial branch, and ensure that the other branches of government do not view AO employees as politically motivated in their actions related to the court system. Does the AO's asserted interests justify these registrations? Are some of these activities more objectionable than other of the listed activities? Should a distinction be made between low-level AO employees and high-level employees? *See Guffey v. Duff*, — F. Supp.3d —, 2020 WL 2065274 (D.D.C. 2020).

[2] Other Employee Speech

On p. 582, at the end of note # 2, insert the following new paragraph:

Should the same rule apply when a superintendent of schools discovers corruption by prior school officials, and reports it to governmental authorities. By law, the report was required. When the school board learned about the report, it terminated the superintendent. Was the superintendent's speech protected by the First Amendment? *See Waronker v. Hempstead Union Free School District*, 788 Fed.Appx. 788 (2d Cir. 2019), *cert. denied*, — S.Ct. —, 2020 WL 1906576 (2020).

On p. 585, insert the following new problems, and renumber the remaining problems:

2. *The Office of Disciplinary Counsel Report*. An assistant public defender witnessed serious misconduct on the part of other prosecutors in his office. He prepared a complaint that he planned to file with the bar association's Office of Disciplinary Counsel. However, his boss specifically prohibited him from filing the complaint. Accordingly, he took his concerns to a lawyer who decided to file the complaint herself. Afterwards, the assistant public defender was fired from his job. Can the assistant public defender challenge his dismissal on First Amendment grounds, or is his claim prohibited under *Garcetti*? *See Butler v. Pennington*, 803 Fed.Appx. 694 (4th Cir. 2020).

3. *Prohibiting Outside Communications*. Suppose that Glenview Hills University (GHU), a public university, issues an order to all employees prohibiting them from communicating with outsiders regarding conditions at GHU. Under the order, anyone who receives an interview request relating to those conditions are required to redirect those requests to GHU's Office of Communications. Under the First Amendment, is the order valid?

4. *The "Boorish" Posts*. Carey, who was feuding with a co-worker, made two derogatory posts about the co-worker on a local news website. One showed the co-worker (a captain in a police affairs unit) with scantily clad women, and the other showed the co-worker boasting about his gun collection. After Carey was fired, he claimed that the posts revealed misbehavior by a public official. Is Carey entitled to regain his job? Do the co-worker's activities reflect on his ability to perform his duties? *See Carey v. Throws*, 957 F.3d 468 (4th Cir. 2020).

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

18. *Pandemic Whistleblower*. Dr. Rick Bright testified before Congress after he filed a whistleblower complaint and his attorneys said "the Office of Special Counsel has determined there were 'reasonable grounds' to believe that his removal from his post" as director of the Biomedical Advanced Research and Development Authority (BARDA) "was retaliatory and therefore prohibited." The following details also appeared in his testimony: "Bright contends that he was removed from his post because he was pushing for coronavirus funding to go toward 'safe and scientifically vetted solutions, and not for drugs, vaccines and other technologies that lack scientific merit,' according to his prepared testimony, released Tuesday by the subcommittee. "His transfer to a lower-ranking post at HHS also came because of his reluctance to promote use of the anti-malarial drug hydroxychloroquine to treat patients with COVID-19, which had been touted by Trump and others." What protections under the First Amendment may be claimed by Dr. Bright? *See* Brian Naylor, *Ousted Scientist Says His Pandemic Warnings Were Dismissed as 'Commotion*,' NPR, May 14, 2020, https://www.npr.org/2020/05/14/855254610/ousted-scientist-says-window-of-opportunity-to-fight-coronavirus-is-closing

[3] Associational Rights

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

3. *Deputy Sheriffs*. A sheriff, who was a Republican, seeks to dismiss two deputy sheriffs for backing his opponent, an independent. Should a deputy sheriff be regarded as a "policymaker" so that political loyalty is an important criteria for retention? Does it matter that the sheriff is an elected official, that deputies are "at will" officials who serve at the sheriff's pleasure, and that they are sworn to "engage in law enforcement activities on behalf of the sheriff?" *See Curtis v. Christian County*, --- F.3d ----2020 WL 3477025 (2020).

B. The First Amendment in the Public Schools

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

Would you reach the same result if a student attempted to wear pro-LGBTQ t-shirts (with slogans such as "Queen Queer!" and "Lady Lesbian"), but were ordered to remove them?

On p. 613, insert a new problem # 10 that reads as follows, and then renumber the remaining problem:

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

On p. 630, insert new problems ## 2-4, and then renumber the remaining problems:

2. *The Opinion Poll*. For a class, a student was charged with creating a public opinion poll addressed to other students for her AP Government class. The survey involved an online poll with thirty questions, three of which focused on the school district's superintendent of schools. When the superintendent found out about the poll, she ordered that it be taken down. Did the superintendent have legitimate pedagogical justifications for deleting the online poll? *See Hutton v. Blaine County School District # 61,* — F. Supp.3d —, 2020 WL 1339120 (D. Idaho 2020).

3. *The Student Petition*. In the same school district, a second student wanted to submit a report to the school board on behalf of her fellow students. Among other things, the report expressed displeasure with the board's decision to change the graduation date. The superintendent required that all references to the graduation date be deleted from the report. Did the superintendent have "legitimate pedagogical reasons" for deleting all references to the graduation

date? *See Hutton v. Blaine County School District # 61,* — F. Supp.3d —, 2020 WL 1339120 (D. Idaho 2020).

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

C. Government Financed Speech

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

4. *Raising a Flag*. In front of City Hall in Boston, the U.S. flag and the Massachusetts State flag are flown from two of the flag poles on a permanent basis, whereas the Boston City flag usually flies from the third flag pole unless it is replaced temporarily by the flag of a third party that is sponsoring an event on the City-owned plaza in front of City Hall. In the past, the City has approved permit requests to fly the flags of over a dozen countries, as well as "the LGBT rainbow flag, the transgender rights flag, the Juneteenth flag commemorating the end of slavery, and that of Bunker Hill." The City has guidelines for submitting permit requests to sponsor an event or fly a flag, which requests may be denied if they are not "consistent with the City's message, policies, and practices." The director of Camp Constitution seeks a permit to sponsor an event in the Plaza for Constitution Day to celebrate religious tolerance, and to fly a "Christian flag." The flag displays a red Latin cross inside a blue square surrounded by a white background. The City grants the permit for the Plaza celebration but denies the flag request based on the City's longstanding policy of "refraining from flying non-secular flags." The director of Camp Constitution files suit, arguing that the City has violated the First Amendment by depriving the organization of access to a public forum (the third flag pole). The City argues that the expression sought by plaintiff is government speech, which allows the City to deny or grant flag permit requests as it chooses. What result and why? *See Shurtleff v. City of Boston*, 928 F.3d 166 (1st Cir. 2019).

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

1. *Post-Decision Developments*. Following the holding in the prior case, the Court was confronted by follow-up litigation in *Agency for International Development v. Alliance for Open Society International, Inc.*, — S.Ct. —, 2020 WL 3492638 (2020). That case dealt with the issue of whether participating foreign organizations were also exemption from the "policy explicitly opposing prostitution and sex trafficking." § 7631(f). Foreign organizations, that were linked to U.S. organizations, sought to claim an exemption as well. The Court held that foreign

organizations could be subjected to the requirement:

> Plaintiffs' position runs headlong into two bedrock principles of American law. *First*, it is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution. See, *e.g.*, *Boumediene* v. *Bush*, 553 U. S. 723, 770 (2008); *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 265 (1990); U. S. Const., Preamble. If the rule were otherwise, actions by American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries would be constrained by the foreign citizens' purported rights under the U. S. Constitution. That has never been the law. See *Verdugo-Urquidez*, 494 U. S., at 2734. *Second*, it is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations. See *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 474 (2003). Plaintiffs' foreign affiliates were incorporated in other countries and are legally separate from plaintiffs' American organizations. Even though the foreign organizations have affiliated with the American organizations, the foreign organizations remain legally distinct from the American organizations.
>
> That conclusion corresponds to historical practice regarding American foreign aid. The United States supplies more foreign aid than any other nation in the world. Acting with the President in the legislative process, Congress sometimes imposes conditions on foreign aid. Congress may condition funding on a foreign organization's ideological commitments—for example, pro-democracy, pro-women's rights, anti-terrorism, pro-religious freedom, anti-sex trafficking, or the like. Doing so helps ensure that U. S. foreign aid serves U. S. interests. By contrast, plaintiffs' approach would throw a constitutional wrench into American foreign policy. In particular, plaintiffs' approach would put Congress in the untenable position of either cutting off certain funding programs altogether, or instead funding foreign organizations that may not align with U. S. values. We see no constitutional justification for the Federal Judiciary to interfere in that fashion with American foreign policy and American aid to foreign organizations. In short, plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad have no First Amendment rights.

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

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

funding. And plaintiffs cannot export their own First Amendment rights to shield foreign organizations from Congress's funding conditions.

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

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

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

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

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

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

In 2019, President Trump translated his threats into an executive order which directed 12 federal agencies, including the Departments of Education and Defense and the National Science Foundation, that fund college and university research and education grants to add the following language to the agreements institutions sign to receive the money: "The heads of covered agencies shall, in coordination with the Director of the Office of Management and Budget, take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including

through compliance with all applicable Federal laws, regulations, and policies." While the order refers to "education grants," that would not include federal student aid that goes directly to students to pay college expenses. The types of "education grants" seemingly referred to in the order might, however, include institutional capacity-building grants, such as those made to minority-serving institutions. Is this EO constitutionally valid?

Chapter 9

The Press

C. Access to Judicial Proceedings

On p. 635, following the problem, add the following new problem:

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

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

3. *Data Coverups*. Press requests for data about covid-19 cases have been rejected and lawsuits have been filed to obtain the data. In Arizona, for example, when news and other media sought nursing home data, the Arizona Department of Human Services denied the request based on "overarching legal and public health responsibilities, including a responsibility to protect the privacy of Arizonans' health-related data." Media plaintiffs filed suit to obtain "public records that show the number of nursing home residents that have tested positive for coronavirus and the number of individuals who have been taken to and from the hospital as a result." The plaintiffs argue that these public records "are integral to the public's ability to monitor the safety" of Arizona's nursing home residents. *See* 12 News, 12 News and other Arizona media file suit for records of nursing homes with coronavirus outbreaks, May 5, 2020, https://www.12news.com/article/news/health/coronavirus/12-news-and-other-arizona-news-outlets-file-suit-for-names-of-nursing-homes-with-coronavirus-outbreaks/75-c886147f-f2e6-4385-ba0e-41cedf1cf60f. *See also* Allan Smith, *I'm Looking for the Truth, States Face Criticism for Covid-19 Coverups*, NBC News, May 25, 2020,
https

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

> According to press reports, the White House began requiring CDC experts to coordinate with the Office of Vice President Mike Pence before speaking with members of

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

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

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

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

E. The Press and Due Process

[3] Electronic Media in the Courtroom

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

Notes

1. *Courtroom Cameras*.

2. *Remote Oral Arguments in Supreme Court*. For the first time in the Supreme Court's history, the Court heard oral arguments "via telephone hookup" and allowed livestreaming of its audio online and on C-Span. The rules for questioning the advocates call for each Justice to ask questions "for two to three minutes each" in order of seniority. Nina Totenberg, *Supreme Court Arguments Resume, But with a Twist*, NPR, May 4, 2020, https://www.npr.org/2020/05/04/847785015/supreme-court-arguments-resume-but-with-a-twist This strategy was made necessary because of the closure of the Court's building to the public during the covid19 pandemic. According to one opinion poll, 72% of those surveyed "say they support the Court's decision to convene online during the pandemic to hear oral arguments with only 13% opposed." Notably, 61% favored the option of allowing television coverage of the oral arguments with 22% opposed, but the Court did not adopt that solution. *See Americans Want the Supreme Court to Function Remotely, and That Includes Hearing Arguments*, FIX THE COURT, April 8, 2020, https://fixthecourt.com/2020/04/americans-want-supreme-court-function-remotely-includes-hearing-arguments/

Chapter 10

Electronic Media and the First Amendment

B. Post-Broadcasting Technology

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

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

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

5. *The Section 230 Shield*. Section 230 of the Communications Decency Act draws a distinction between "publishers" (who are aware of the content that they are distributing and therefore potentially liable for that content) and "platforms" (which distribute information created by others). Section 230 was designed to insulate platforms for liability even if they engage in some content moderation on their websites. The bottom line is that social media platforms generally not be held liable, for example, for defamatory content that is posted by others on their platforms. After Twitter flagged some of President Trump's tweets for fact-checking, he issued an executive order questioning whether they were engaged in good faith moderation of content, and directed the Department of Commerce, the Federal Communications Commission and the Federal Trade Commission to look into these issues. He expressed concern that social media companies were flagging content as inappropriate, "making unannounced the unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse."

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

Would private plaintiffs fare better? In 2012, children were murdered at school in Newton, Connecticut. Afterwards, Alex Jones used his Infowars website speculated that the attack had been staged, and that crisis actors had been used to make it appear real. Plaintiff, a father of one of the murdered children, was alleged to have lied about the death of his son in order to promote stronger gun laws. Can plaintiff recover for defamation against Jones and Infowars? *See Jones v. Heslin*, 2020 WL 1452025 (Tex.App. 2020).

On p. 784, at the end of the second full sentence, insert the following:

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

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

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

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

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

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

Chapter 11

Overview of the Religion Clauses

A. Defining the Subject Matter of the Religion Clauses

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

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

Chapter 12

The Establishment Clause

A. Financial Aid to Religion

[4] School Vouchers

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

However, in *Espinoza v. Montana Department of Revenue,* — S.Ct. —, 2020 WL 3518364 (2020), the Court broke new ground. *Espinoza* involved a Montana which sought to create parental and student choice through the creation of a scholarship program for students attending private schools. The program created a tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship organization" which, in turn, passed the money on as scholarships to students who attended private schools. However, the legislature directed that the aid program be administered consistently with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring direct or indirect governmental aid to sectarian schools. In order to comply with the no aid provision, the Montana Supreme Court terminated the aid program for all students whether is sectarian or secular schools. The Court held that Montana acted improperly in terminating the program and in denying aid to sectarian schools:

> The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran*, 582 U. S., at ___. Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. The provision plainly excludes schools from government aid solely because of religious status.
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> The Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. So applied, the provision "imposes special disabilities on the basis of religious status" and "conditions the availability of benefits upon a recipient's willingness to surrender its religiously impelled status." *Trinity Lutheran*, 582 U. S., at ___ (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993), and *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978) (plurality opinion)). To be eligible for government aid, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges

> "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 582 U. S., at ___ (slip op., at 11). The Free Exercise Clause protects against even "indirect coercion," and a State "punishes the free exercise of religion" by disqualifying the religious from government aid as Montana did here. *Trinity Lutheran*, 582 U. S., at ___ (slip op., at 10–11). Such status-based discrimination is subject to "the strictest scrutiny." *Id.*, at ___ (slip op., at 11). It is enough to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

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

B. School Prayer

On p. 859, before the Wallace case, add the following new problem:

6. *"So Help Me God."* A woman wishes to become a naturalized U.S. citizen, but she is an atheist, and does not want to say the concluding words: "so help me God." She is offered the option of a private oath that does not include the concluding phrase, and she is also offered the option of remaining silent during the concluding phrase, but she declines both options. Does the oath run afoul of the Establishment Clause because of the addition of the concluding phrase? Would it matter whether the concluding phrase is evaluated under *Lemon* or under the endorsement test? *See Perrier-Bilbo v. United States*, 954 F.3d 1213 (1st Cir. 2020).

Chapter 13

Free Exercise

A. BURDENS ON RELIGION

[3] Modern Cases

On p. 960, delete the final paragraph and replace it with the following:

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, — S.Ct. —, 2020 WL 3808424 (2020), relying on RFRA, the Court held that the Government had created lawful exemptions from a regulatory requirement implementing the Patient Protection and Affordable Care Act of 2010 (ACA). The requirement at issue obligated certain employers to provide contraceptive coverage to their employees through their group health plans. Though contraceptive coverage was not required by (or even mentioned in) the ACA, the Government mandated such coverage by promulgating interim final rules (IFRs) shortly after the ACA's passage. After six years of protracted litigation, the Departments of Health and Human Services, Labor, and the Treasury (Departments)—which jointly administer the relevant ACA provision—exempted certain employers who have religious and conscientious objections from this agency-created mandate. The Court held that the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections.

On p. 962, problem # 4, change the cite on the Arlene's Flowers case to read as follows (after the case name):

193 Wash.2d 469, 441 P.3d 1203 (Wash. 2020).

On p. 974, at the end of the note, insert the following new note:

2. *The Ministerial Exception and Lay Teachers*. In *Our Lady of Guadalupe School v. Morrisey-Berru*, — S.Ct. —, 2020 WL 3808420 (2020), the Court extended the ministerial exception to lay teachers who are entrusted with responsibility of instructing their students in the faith:

> The academic requirements of a position may show that the church regards the position as having an important responsibility in elucidating or teaching the tenets of the

faith. What matters is what an employee does. Implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. Morrissey-Berru and Biel both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of Perich's. Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important. When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.

Justice Thomas, with whom Justice Gorsuch joins, concurring.

Judges lack the requisite "understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." Moreover, because the application of the exception turns on religious beliefs, the duties that a given religious organization will deem "ministerial" are sure to vary. To avoid disadvantaging these minority faiths and interfering in "a religious group's right to shape its own faith and mission," courts should defer to a religious organization's sincere determination that a position is "ministerial."

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

Neither school publicly represented that either teacher was a Catholic spiritual leader or "minister." Rather, the schools referred to both as "lay" teachers. Neither teacher had a "significant degree of religious training" or underwent a "formal process of commissioning." Nor did either school require such training or commissioning as a prerequisite to gaining (or keeping) employment. Neither held herself out as having a leadership role in the faith community. Neither claimed any benefits (tax, governmental,

ceremonial, or administrative) available only to spiritual leaders. Nor does it matter that all teachers signed contracts agreeing to model and impart Catholic values. This component of the *Hosanna-Tabor* inquiry focuses on outward-facing behavior, and neither Biel nor Morrissey-Berru publicly represented herself as anything more than a fifth-grade teacher. The time spent on secular instruction far surpassed their time teaching religion. Both Biel and Morrissey-Berru had almost exclusively secular duties, making it especially improper to deprive them of all legal protection when their employers have not offered any religious reason for the alleged discrimination. Morrissey-Berru did lead classroom prayers, bring her students to a cathedral once a year, direct the school Easter play, and sign a contract directing her to "assist with Liturgy Planning." But these occasional tasks should not trigger as a matter of law the ministerial exception. Morrissey-Berru did not lead mass, deliver sermons, or select hymns. And there is no evidence that Morrissey-Berru led devotional exercises. Her limited religious role does not fit *Hosanna-Tabor*'s description of a "minister to the faithful." Teaching religion in school alone cannot dictate ministerial status. If it did, then *Hosanna-Tabor* wasted precious pages discussing titles, training, and other objective indicia to examine whether Cheryl Perich was a minister.

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

3. *The Prisoner's Meals*. A Muslim prisoner has religious objections to eating pork. By and large, the prison serves porkless meals to the prisoner, but occasionally serves him pork. Does it violate the prisoner's free exercise rights to occasionally serve him pork? Would you view the situation differently if pork was a staple of the prison menu and the prison made no accommodations for a Muslim prisoner? *See Mbonyunkiza v. Beasley*, --- F.3d ---- 2020 WL 1969404 (8th Cir. 2020).

On p. 979, insert the following new problem # 2 and renumber the remaining problems:

2. *Church Services During the Coronavirus Pandemic*. In early 2020, as the Covid-19 pandemic settled in, the Commonwealth of Kentucky imposed a "Healthy at Home" order which required most businesses to close, and also prohibited mass gatherings. The objective of these restrictions was to limit transmission of the virus, and to "flatten the curve" of infections so that hospitals could handle the demand for their services. The order also sought to prohibit in-person church services for fear that they would bring people together and therefore could result in additional infections. Suppose that the On Fire church wishes to continue having services, and commits to maintaining "social distancing" by keeping all worshipers at least six feet apart from each other, and requiring everyone to wear a face mask. Must the prohibition against mass gatherings give way to the religious right of free exercise in this context? Should it matter that Kentucky allows other businesses to operate provided that they maintain adequate social distancing? Does the fact that church goers sing and talk during the services enhance the risk that

droplets will infect others? Should that matter? *See Elim Romanian Pentecostal Church v. Pritzker,* --- F.3d ----2020 WL 3249062 (2020); *Soos v. Cuomo*, — F. Supp.3d —, 2020 WL 3488742 (N.D. N.Y. 2020).

B. DISCRIMINATION AGAINST RELIGION

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

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

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

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

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

On p. 1002, at the end of problem # 3, before the final period, add:

cert. granted, 140 S.Ct. 1104 (2020)

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

897 F.3d 314 (D.C. Cir. 2018), *cert. denied*, — S.Ct. —, 2020 WL 1668292 (2020).

Chapter 14
Establishment versus Free Exercise and Free Speech Concerns

On p. 1025, before the existing note, insert the following new note:

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

Note: *Discrimination and School Vouchers*

In *Espinoza v. Montana Department of Revenue,* — S.Ct. —, 2020 WL 3518364 (2020), the Court extended the *Trinity Lutheran* decision. *Espinoza* involved a Montana which sought to create parental and student choice through the creation of a scholarship program for students attending private schools. The program created a tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship organization" which, in turn, passed the money on as scholarships to students who attended private schools. However, the legislature directed that the aid program be administered consistently with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring direct or indirect governmental aid to sectarian schools. In order to comply with the no aid provision, the Montana Supreme Court terminated the aid program for all students whether is sectarian or secular schools. The Court held that Montana acted improperly in terminating the program and in denying aid to sectarian schools:

> The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran*, 582 U. S., at ___. Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. The provision plainly excludes schools from government aid solely because of religious status.
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> The Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. So applied, the provision "imposes special disabilities on the basis of religious status" and "conditions the availability of benefits upon a recipient's willingness to surrender its religiously impelled status." *Trinity Lutheran*, 582 U. S., at ___ (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993), and *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978) (plurality opinion)). To be eligible for government aid, a school must divorce itself from

> any religious control or affiliation. Placing such a condition on benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 582 U. S., at ___ (slip op., at 11). The Free Exercise Clause protects against even "indirect coercion," and a State "punishes the free exercise of religion" by disqualifying the religious from government aid as Montana did here. *Trinity Lutheran*, 582 U. S., at ___ (slip op., at 10–11). Such status-based discrimination is subject to "the strictest scrutiny." *Id.*, at ___ (slip op., at 11). It is enough to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

The Court distinguished *Locke v. Davey*:

> The Department contends that this case is instead governed by *Locke* v. *Davey*, 540 U. S. 712 (2004). *Locke* differs from this case in two critical ways. First, Washington had "merely chosen not to fund a distinct category of instruction": the "essentially religious endeavor" of training a minister "to lead a congregation." Thus, Davey "was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." Apart from that narrow restriction, Washington's program allowed scholarships to be used at "pervasively religious schools" that incorporated religious instruction throughout their classes. By contrast, Montana's Constitution does not zero in on any particular "essentially religious" course of instruction at a religious school. Rather, the no-aid provision bars all aid to a religious school "simply because of what it is," putting the school to a choice between being religious or receiving government benefits. At the same time, the provision puts families to a choice between sending their children to a religious school or receiving such benefits. Second, *Locke* invoked a "historic and substantial" state interest in not funding the training of clergy, explaining that "opposition to funding 'to support church leaders' lay at the historic core of the Religion Clauses," *Locke* emphasized that the propriety of state-supported clergy was a central subject of founding-era debates, and that most state constitutions from that era prohibited the expenditure of tax dollars to support the clergy.

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