The First Amendment

CASES, PROBLEMS, AND MATERIALS

SEVENTH EDITION

2024 SUPPLEMENT

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Chapter 1
Historical Intentions and Underlying Values

B. Underlying Values

On p. 17, at the end of Note and Question # 5, insert the following new text:

Are Emerson's justifications for speech protections relevant to such censorship by social media companies?

On p. 18, after Note and Question # 6, add the following new Note and Question:

7. *Coronavirus Pandemic*. 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 freedom of speech and assembly (specifically, temporary numerical limits on attendance at public gatherings that include religious worship), in an effort to combat a virus that had killed (as of May 29, 2020) "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) (Roberts, C.J., concurrence) (denying emergency interlocutory application for injunctive relief). Should such restrictions be upheld during a pandemic when they would not otherwise be allowed?

Chapter 2
Advocacy of Illegal Action

E. Modern Standards

On p. 46, delete the last sentence in the text before the Watts case, then add the following new paragraph of text:

The *Brandenburg* case represented the culmination of fifty years of intense debates about the meaning of the "clear and present danger" doctrine's distinction between unprotected "incitement" speech and protected political advocacy of ideas. Notably, the *per curiam* opinion

in *Brandenburg* chose not to refer explicitly to the "clear and present danger" concept, declaring instead that the unprotected speech category in question should be defined as "advocacy of the use of force or law violation" when "such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action." The *Brandenburg* language of imminence and incitement was foreshadowed in the opinions of Justices Brandeis and Holmes in the 1920s. In this way, *Brandenburg* expanded the scope of constitutional protection for the abstract advocacy of violence, only two months before the Warren Court era ended.

On pp. 46-47, delete the Watts opinion and the unnumbered note that follows it; then insert the Watts opinion on p. 219 after heading C. on True Threats, with the following new text to precede that opinion:

As recognized in *R.A.V.,* threats of violence have been treated as a category of unprotected speech since the Court's earliest First Amendment decisions. The following per curiam opinion in *Watts v. United States* illustrates the Court's earliest attempt to carve out a category of protected "political hyperbole" speech that cannot be punished as unprotected "true threat" speech.

On p. 49, at the end of the FYI box, insert the following:

The founder of the "Oath Keepers" was convicted of seditious conspiracy, along with the Florida chapter leader and four additional associates. Three associates were acquitted and three pleaded guilty. *See* Associated Press and Spectrum News Staff, *Four members of Oath Keepers found guilty of seditious conspiracy*, SPECTRUM NEWS, NY1, June 18, 2023, https://www.ny1.com/NYC/all-boroughs/news/2023/01/23/oath-keepers-seditious-conspiracy-trial The sentences ranged from eighteen years for the founder to three years for the associates. Four leaders of the "Proud Boys" also were convicted of seditious conspiracy and other serious crimes. *See* U. S. Department of Justice, Office of Public Affairs, JUSTICE NEWS, *Jury Convicts Four Leaders of the Proud Boys of Seditious Conspiracy Related to U.S. Capitol Breach*, May 4, 2023, https://www.justice.gov/opa/pr/jury-convicts-four-leaders-proud-boys-seditious-conspiracy-related-us-capitol-breach (describing how these leaders "directed, mobilized, and led a group" of "Proud Boys" and others "onto the Capitol grounds, leading to dismantling of metal barricades, destruction of property, breaching of the Capitol building, and assaults on law enforcement").

On p. 52, delete note # 2, and insert the following new notes:

2. *January 6 Defendants.*. Members of the Oath Keepers and the Proud Boys were convicted of "seditious conspiracy" for the Jan. 6, 2021, attack on the U.S. Capitol. The statute required the prosecution to prove that two or more people intentionally conspired to use force to

oppose the authority of the federal government or to prevent, hinder or delay the execution of any U.S. law. The conviction was based on hundreds of text messages, video footage and call logs discussing or related to the attack. Defendants unsuccessfully argued that they did not engage in a seditious conspiracy, but were simply prepared in case then President Trump invoked the Insurrection Act (something that he did not do), and asked them for help. In that event, they claimed that they would have intervened as peace keepers.

3. *Encouraging Illegal Immigration*. In *United States v. Hansen*, 599 U.S. 762 (2023), the Court upheld a federal statute that made it a crime to "encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." Defendant and the dissenters argued that the law was overbroad because the terms "encourage" or "induce" could have broad application. The Court disagreed, noting that defendant's conduct fell squarely within the scope of the law, and the law only prohibited "the intentional solicitation or facilitation of certain unlawful acts." In the case, defendant was attempting to defraud aliens with the promise of U.S. citizenship.

On *p. 54, in problem # 5, delete the title and the first two lines of text before the word "suppose"; then capitalize "Suppose" and insert the remaining lines of text at the end of the new unnumbered problem that has been relocated after the Watts opinion on p. 219.*

On p. 54, renumber the problems remaining after the deleted problem # 5 as problems # 5, # 6, #7, #8, and #9.

On p. 57, insert the Notes heading, change the unnumbered Note heading to the heading for note #1, and add the following new note # 2:

Notes

1. *Protected Advocacy Versus Illegal Conspiracy*.

2. *After* Brandenburg *and* Hess. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court once more addressed the definition of "advocacy of illegal action," holding unanimously that an economic boycott constituted protected First Amendment activity. One scholar summarized the Court's reasoning 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. 58, after problem # 1, insert the following:

Food for Thought

Suppose that a professor at a state university makes the following post on his Facebook page: "Although I do not advocate violating federal and state criminal codes, I think it is far more admirable to kill a racist, homophobic or transphobic speaker than it is to shout them down." He goes on to argue that "bigots" come to campus to provoke incidents and attract publicity, and it strengthens their arguments when they are shouted down. Under Brandenburg, can the professor be indicted for inciting murder? Even if he isn't charged, could his university suspend him for "justifying murder?"

On p. 59, delete existing problem # 4; then after problem # 3, add the following new problems # 4, # 5, # 6, and # 7:

4. *Liability for Violent Protester*. When a Black Lives Matter demonstration blocked a public highway in front of the Police Department, police officers were ordered to make arrests. Some protesters started throwing rocks at the police and one unidentified protester threw a rock that hit an officer in the head. The injured officer brought a tort negligence suit against Mckesson, one of the organizers of the demonstration, alleging that he was liable for the protester's conduct. The officer's complaint alleges that Mckesson led the demonstrators to block the highway, then "did nothing to prevent the violence or to calm the crowd," and negligently allowed the violence to occur. Does *Claiborne Hardware* create a First Amendment shield for Mckesson from tort liability for the rock thrower's criminal act? *See Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019), *judgment vacated and remanded*, *Mckesson v. Doe*, 592 U.S. 1 (2020). If state law recognizes a duty not to negligently precipitate the crime of a third party, how does that legal duty relate to the First Amendment protection established in *Claiborne Hardware*, *Hess*, and *Brandenburg*? *Compare Mckesson v. Doe*, 339 So.3d 524 (La. 2022).

5. *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." The governor described the 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." There are three categories of defendants who are subject to tort liability under the statute: (1) any person who participates in any riot and who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence;" 2) "any person who does not personally participate in any riot but who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence;" (3) "any person who upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law." How can plaintiffs argue that the statutes violate the First Amendment according to the protections established in *Brandenburg* and *Claiborne Hardware*? *See Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874 (D.S.D. 2019).

6. *Mask Free Zone*. When a public health emergency due to COVID19 was declared by Wisconsin Governor Tony Evers during the summer of 2020, he issued mandates requiring that signs must be worn in public spaces and commercial spaces; and that signs must be posted on all the pubic entrances to these spaces, carrying the warning that,"Masks Are Required for Entry." Casey is the owner of Café in Madison, and since he objects to both mandates, he posted a sign on the café door which stated: "This is a Mask Free Zone. Please remove mask before entering." The County Health Department imposed fines on Casey, who argued that his own sign was an expression of political protest. The Department's position is that Casey's sign is not protected speech under *Brandenburg* and *Hess*. What result regarding Casey's First Amendment claim and why? *See Helbachs Café, LLC v. Madison*, 571 F.Supp.3d 999 (W.D. Wis., Nov. 16, 2021).

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

Chapter 3

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

On p. 70, at the end of the second paragraph, insert the following:

In addition, courts have generally applied strict scrutiny to governmental attempts to restrict freedom of expression.

National Rifle Association v. Vullo

602 U.S. 175 (2024).

Justice SOTOMAYOR delivered the opinion of the Court.

Six decades ago, this Court held that a government entity's "threat of invoking legal sanctions and other means of coercion" against a third party "to achieve the suppression" of disfavored speech violates the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors. Petitioner National Rifle Association (NRA) plausibly alleges that respondent Maria Vullo did just that. As superintendent of the New York Department of Financial Services, Vullo allegedly pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups. Those allegations, if true, state a First Amendment claim. Because this case comes to us at the motion-to-dismiss stage, the Court assumes the truth of "well-pleaded factual allegations" and "reasonable inferences" therefrom. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The New York Department of Financial Services (DFS) oversees insurance companies and financial services institutions doing business in the State. See N.Y. Fin. Servs. Law Ann. § 201(a) (West 2012). DFS can initiate investigations and civil enforcement actions against regulated entities, and can refer potential criminal violations to the State's attorney general for prosecution. §§ 301(b), (c)(4). The DFS-regulated entities in this case are insurers that had business relationships with the NRA. Since 2000, the NRA has offered a variety of insurance programs as a benefit to its members. The NRA contracted with affiliates of Lockton Companies, LLC (Lockton), to administer the various policies of these affinity insurance programs, which Chubb Limited (Chubb) and Lloyd's of London (Lloyd's) would underwrite. In return, the NRA received a percentage of its members' premium payments. One of the NRA's affinity products, Carry Guard, covered personal-injury and criminal-defense costs related to licensed firearm use, and "insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person."

In September 2017, a gun-control advocacy group contacted the New York County District Attorney's office to tip them off to "compliance infirmities in Carry Guard." That office passed on the allegations to DFS. The next month, then-Superintendent of DFS Vullo began investigating Carry Guard, focusing on Chubb and Lockton. The investigation revealed at least two kinds of violations of New York law: that Carry Guard insured intentional criminal acts, and the NRA promoted Carry Guard without an insurance producer license. By mid-November, Lockton and Chubb suspended Carry Guard. Vullo then expanded her investigation into the NRA's other affinity insurance programs, many of which were underwritten by Lloyd's and administered by Lockton. These NRA-endorsed programs provided similar coverage and suffered from the same legal infirmities.

In the midst of the investigation, a gunman opened fire at Marjory Stoneman Douglas High School, murdering 17 students and staff members. Following the shooting, the NRA and other gun-advocacy groups experienced "intense backlash." Major business institutions, including DFS-regulated entities, spoke out against the NRA, and some even cut ties with the organization. MetLife, for example, ended a discount program it offered with the NRA. On February 25, 2018, Lockton's chairman "placed a distraught telephone call to the NRA," in which he privately shared that Lockton would sever all ties with the NRA to avoid "losing its license to do business in New York." Lockton publicly announced its decision the next day. Following Lockton's decision, the NRA's corporate insurance carrier also severed ties with the organization and refused to renew coverage at any price. The NRA contends that Lockton and the corporate insurance carrier took these steps not because of the shooting(s) but because they feared "reprisal" from Vullo.

Around that time, Vullo also began to meet with executives at the insurance companies doing business with the NRA. On February 27, Vullo met with senior executives at Lloyd's. Speaking on behalf of DFS and then-Governor Andrew Cuomo, Vullo "presented their views on gun control and their desire to leverage their powers to combat the availability of firearms, including specifically by weakening the NRA." She also "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace" in New York. Vullo told the Lloyd's executives "that DFS was less interested in pursuing these infractions" unrelated to any NRA business "so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." Vullo and Lloyd's struck a deal: Lloyd's "would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business," and "in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies."

On April 19, 2018, Vullo issued two virtually identical guidance letters on DFS letterhead entitled, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." Vullo sent one of the letters to insurance companies and the other to financial services institutions. In the letters, Vullo pointed to the "social backlash" against the NRA and other groups "that promote guns that lead to senseless violence" following "several recent horrific shootings, including in Parkland, Florida." Vullo then cited recent instances of businesses severing their ties with the NRA as examples of companies "fulfilling their corporate social responsibility." In the Guidance Letters' final paragraph, Vullo "encouraged" DFS-regulated entities to: (1) "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations"; (2) "review any relationships they have with the NRA or similar gun promotion organizations"; and (3) "take prompt actions to manage these risks and promote public health and safety."[2] The same day that DFS issued the Guidance Letters, Vullo and Governor Cuomo issued a joint press release that echoed many of the letters' statements. The press release included a quote from

[2] The financial-regulatory term "reputational risk" is " 'the risk to current or projected financial condition and resilience arising from negative public opinion,' which 'may impair a bank's competitiveness by affecting its ability to establish new relationships or services or continue servicing existing relationships.' " DFS monitors the reputational risk of regulated institutions because of its potential effect on market stability.

Vullo "urging all insurance companies and banks doing business in New York' " to join those "that have already discontinued their arrangements with the NRA." The press release cited Chubb's decision to stop underwriting Carry Guard as an example to emulate. The next day, Cuomo tweeted: "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public."

Less than two weeks after the Guidance Letters and press release went out, DFS entered into consent decrees with Lockton (on May 2), and Chubb. The decrees stipulated that Carry Guard violated New York insurance law because it provided insurance coverage for intentional criminal acts, and because the NRA promoted Carry Guard, along with other NRA-endorsed programs, without an insurance producer license. The decrees also listed other infractions of the State's insurance law. Both Lockton and Chubb admitted liability, agreed not to provide any NRA-endorsed insurance programs (even if lawful) but were permitted to sell corporate insurance to the NRA, and agreed to pay fines of $7 million and $1.3 million respectively. On May 9, Lloyd's officially instructed its syndicates to terminate existing agreements with the NRA and not to insure new ones. It publicly announced its decision to cut ties with the NRA that same day. On December 20, 2018, DFS and Lloyd's entered into their own consent decree, which imposed similar terms and a $5 million fine.

The claims before the Court today are claims that Vullo violated the First Amendment by coercing DFS-regulated parties to punish or suppress "the NRA's pro-Second Amendment viewpoint" and "core political speech." The District Court denied Vullo's motion to dismiss the NRA's First-Amendment damages claims. The Second Circuit reversed. This Court granted certiorari.

Vullo was free to criticize the NRA and pursue the conceded violations of New York insurance law. She could not wield her power, however, to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy. Because the complaint plausibly alleges that Vullo did just that, the Court holds that the NRA stated a First Amendment violation.

At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society. The Clause prohibits government entities and actors from "abridging freedom of speech." When government officials are "engaging in their own expressive conduct," "the Free Speech Clause has no application." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The government can "say what it wishes" and "select the views that it wants to express." *Id.*, at 467. "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others," and thus does not need to "maintain viewpoint-neutrality when its officers and employees speak about that venture." *Matal v. Tam*, 582 U.S. 218, 234 (2017).

A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do is use the power of the State to punish or suppress disfavored expression. See *Rosenberger*, 515 U.S., at 830. In such cases, it is "the application of state power which we are asked to scrutinize." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463

(1958). In *Bantam Books*, this Court explored the distinction between permissible attempts to persuade and impermissible attempts to coerce. There, a state commission used its power to investigate and recommend criminal prosecution to censor publications that, in its view, were "objectionable" because they threatened "youthful morals." The commission sent official notices to a distributor for blacklisted publications that highlighted the commission's "duty to recommend to the Attorney General" violations of the State's obscenity laws. The notices also informed the distributor that the lists of blacklisted publications "were circulated to local police departments," and that the distributor's cooperation in removing the publications from the shelves would "eliminate the necessity" of any referral for prosecution. A local police officer also conducted followup visits to ensure compliance. In response, the distributor took "steps to stop further circulation of copies of the listed publications" out of fear of facing "a court action." The publishers of the blacklisted publications sued the commission, alleging that this scheme of informal censorship violated their First Amendment rights. The commission responded that "it did not regulate or suppress obscenity but simply exhorted booksellers and advised them of their legal rights." This Court sided with the publishers, holding that the commission violated their free-speech rights by coercing the distributor to stop selling and displaying the listed publications. The First Amendment prohibits government officials from relying on the "threat of invoking legal sanctions and other means of coercion to achieve the suppression" of disfavored speech. Although the commission lacked the "power to apply formal legal sanctions," the distributor "reasonably understood" the commission to threaten adverse action, and thus the distributor's "compliance with the commission's directives was not voluntary." The Court considered the commission's coordination with law enforcement and its authority to refer matters for prosecution; the notices themselves, which were "phrased virtually as orders" containing "thinly veiled threats to institute criminal proceedings" if the distributor did not come around; and the distributor's reaction to the notices and followup visits.

Since *Bantam Books*, the Courts of Appeals have considered similar factors to determine whether a challenged communication is reasonably understood to be a coercive threat. Take the decision below. The Second Circuit purported to consider: "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences." Other Circuits have taken similarly fact-intensive approaches, utilizing a multifactor test or a totality-of-the-circumstances analysis. "No one factor is dispositive." Ultimately, *Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.

To state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff 's speech. The NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress the NRA's gun-promotion advocacy.

Consider Vullo's authority. The power that a government official wields, while not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive

the official's communication as coercive. Generally speaking, the greater and more direct the government official's authority, the less likely a person will feel to disregard a directive from the official. For example, imagine a local affinity group in New York that receives a strongly worded letter. One would reasonably expect that organization to react differently if the letter came from the U. S. Attorney for the Southern District of New York than if it came from an out-of-state school board.

As DFS superintendent, Vullo had direct regulatory and enforcement authority over all insurance companies and financial service institutions doing business in New York. Like the commission in *Bantam Books*, Vullo could initiate investigations and refer cases for prosecution. Vullo also had the power to notice civil charges and enter into consent decrees that impose significant monetary penalties. Consider Vullo's communications with the DFS-regulated entities, particularly with Lloyd's. Vullo brought a variety of insurance-law violations to the Lloyd's executives' attention during a private meeting in February 2018. The violations included technical infractions that allegedly plagued the affinity insurance market in New York and that were unrelated to any NRA business. Vullo allegedly said she would be "less interested in pursuing these infractions so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." Vullo therefore wanted Lloyd's to disassociate from all gun groups, although there was no indication that such groups had unlawful insurance policies similar to the NRA's. Vullo also told the Lloyd's executives she would "focus" her enforcement actions "solely" on the syndicates with ties to the NRA, "and ignore other syndicates writing similar policies." The message was loud and clear: Lloyd's "could avoid liability for [unrelated] infractions" if it "aided DFS's campaign against gun groups" by terminating its business relationships with them. Vullo's communications with Lloyd's can be reasonably understood as a threat or as an inducement. Either can be coercive. As Vullo concedes, the "threat need not be explicit," and as the Solicitor General explains, "the Constitution does not distinguish between 'comply or I'll prosecute' and 'comply and I'll look the other way,' " So, whether analyzed as a threat or as an inducement, the conclusion is the same: Vullo allegedly coerced Lloyd's by saying she would ignore unrelated infractions and focus her enforcement efforts on NRA-related business alone, if Lloyd's ceased underwriting NRA policies and disassociated from gun-promotion groups. The reaction from Lloyd's confirms the communications' coercive nature. At the meeting, Lloyd's "agreed that it would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business." Minutes from a subsequent board of directors' meeting reveal that Lloyd's thought "the DFS investigation had transformed the gun issue into 'a regulatory, legal, and compliance matter.' " That reaction is consistent with Lloyd's public announcement that it had directed its syndicates to "terminate all insurance related to the NRA and not to provide any insurance to the NRA in the future."

Other allegations reinforce the NRA's First Amendment claim. Consider the April 2018 Guidance Letters and accompanying press release, which Vullo issued on official letterhead. Just like in her meeting with the Lloyd's executives, Vullo singled out the NRA and other gun-promotion organizations as the targets of her call to action. This time, the Guidance Letters reminded DFS-regulated entities of their obligation to consider their "reputational risks," and then tied that obligation to an encouragement for "prompt action to manage these risks." Evocative of Vullo's private conversation with the Lloyd's executives a few weeks earlier, the

press release revealed how to manage the risks by encouraging DFS-regulated entities to "discontinue their arrangements with the NRA," just like Chubb did when it stopped underwriting Carry Guard. A follow-on tweet from Cuomo reaffirmed the message: Businesses in New York should "consider their reputations" and "revisit any ties they have to the NRA," which he called "an extremist organization." In sum, the complaint plausibly alleges that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy. If true, that violates the First Amendment.

Moreover, the complaint alleges that Vullo made a not-so-subtle, sanctions-backed threat to Lloyd's to cut all business ties with the NRA and other gun-promotion groups, although there was no sign that other gun groups also had unlawful insurance policies. It is also relevant that Vullo made this alleged threat in a meeting where she presented her "desire to leverage her powers to combat the availability of firearms, including specifically by weakening the NRA." Given the obligation to draw reasonable inferences in the NRA's favor and consider the allegations as a whole, the Second Circuit erred in reading the complaint as involving only individual instances of "permissible government speech" and the execution of Vullo's "regulatory responsibilities."

Of course, discovery might show that the allegations of coercion are false, or that certain actions should be understood differently in light of newly disclosed evidence. At this stage, the Court must assume the well-pleaded factual allegations in the complaint are true. Moreover, the conceded illegality of the NRA-endorsed insurance programs does not insulate Vullo from First Amendment scrutiny under the *Bantam Books* framework. Indeed, the commission in that case targeted the distribution and display of material that, in its view, violated the State's obscenity laws. *Bantam Books* held that the commission violated the First Amendment by invoking legal sanctions to suppress disfavored publications, some of which may or may not contain protected speech (*i.e.*, nonobscene material). Although Vullo can pursue violations of state insurance law, she cannot do so in order to punish or suppress the NRA's protected expression. So, the contention that the NRA and the insurers violated New York law does not excuse Vullo from allegedly employing coercive threats to stifle gun-promotion advocacy.

Vullo next argues that this case does not involve unconstitutional coercion because her challenged actions in fact targeted business practices and relationships, which qualify as "nonexpressive activity." That Vullo "regulated" business activities stemming from the NRA's "relationships with insurers and banks" does not change the allegations that her actions were aimed at punishing or suppressing speech. In *Bantam Books*, the commission interfered with the business relationship between the distributor and the publishers in order to suppress the publishers' disfavored speech. One can reasonably infer from the complaint that Vullo coerced DFS-regulated entities to cut their ties with the NRA in order to stifle the NRA's gun-promotion advocacy and advance her views on gun control. Vullo knew, after all, that the NRA relied on insurance and financing "to disseminate its message."[3]

The NRA's allegations, if true, highlight the constitutional concerns with the kind of intermediary strategy that Vullo purportedly adopted to target the NRA's advocacy. Such a

[3] Vullo's boss, Governor Cuomo, also urged businesses to disassociate with the NRA to put the organization "into financial jeopardy" and "shut them down."

strategy allows government officials to "expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over." It also allows government officials to be more effective in their speech-suppression efforts "because intermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire." The allegations here bear this out. Although "the NRA was not even the directly regulated party," Vullo allegedly used the power of her office to target gun promotion by going after the NRA's business partners. Insurers in turn followed Vullo's lead, fearing regulatory hostility.

Nothing gives advocacy groups like the NRA a "right to absolute immunity from government investigation," or a "right to disregard [state or federal] laws." *Patterson*, 357 U.S., at 463. Similarly, nothing prevents government officials from forcefully condemning views with which they disagree. For those permissible actions, the Constitution "relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff v. Boston*, 596 U.S. 243, 252 (2022). Yet where a government official makes coercive threats in a private meeting behind closed doors, the "ballot box" is an especially poor check on that official's authority. Ultimately, the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.

For the reasons discussed above, the Court holds that the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities to terminate their business relationships with the NRA in order to punish or suppress the NRA's advocacy.

The judgment of the U. S. Court of Appeals for the Second Circuit is vacated, and the case remanded for further proceedings consistent with this opinion.[4]

It is so ordered.

Justice GORSUCH, concurring.

The critical question is whether the plaintiff has "plausibly alleged conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff 's speech."

Justice JACKSON, concurring.

Coercion of a third party can be the means by which the government violates the First Amendment rights of another. But coercion, without more, does not state a First Amendment claim. Courts must assess how that coercion actually violates a speaker's First Amendment rights.

Bantam Books held that a Rhode Island commission's efforts to coerce intermediary book distributors into pulling certain publications from circulation violated the First Amendment rights of the books' publishers. By threatening third-party conduits of speech, the state commission had effectively "subjected the distribution of publications to a system of prior administrative restraints" lacking the requisite constitutional safeguards. By exerting pressure on a third party, the State had constructed a "system of informal censorship." Coercing an entity in the business of disseminating speech to stop disseminating someone else's speech obviously

[4] On remand, the Second Circuit is free to reconsider whether Vullo is entitled to qualified immunity.

implicates the First Amendment, insofar as it may result in censorship similar to the prior restraint identified in *Bantam Books*.

The censorship theory is an awkward fit with *this* case. According to the complaint, Vullo coerced various regulated entities to cut business ties with the National Rifle Association (NRA). The NRA does not contend that its insurance products offered through those business relationships were themselves "speech," akin to a billboard, a television ad, or a book. Nor does the complaint allege that Vullo pressured the printer of American Rifleman (a longstanding NRA periodical) to stop printing the magazine, or coerced a convention center into canceling the NRA's annual meeting. The effect of Vullo's alleged coercion on the NRA's speech is significantly more attenuated here than in *Bantam Books* or most decisions applying it. None of that means that Vullo may target with impunity the NRA's "nonexpressive" activity if she is doing so to punish the NRA for its expression. But our First Amendment retaliation cases might provide a better framework for analyzing these kinds of allegations.

"The First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." *Houston Community College System v. Wilson*, 595 U.S. 468, 474 (2022). "A plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an 'adverse action' in response to his speech that 'would not have been taken absent the retaliatory motive.' " *Wilson*, 595 U.S., at 477 (quoting *Nieves*, 587 U.S., at 399). We have generally required plaintiffs claiming First Amendment retaliation to "establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury,' " *Nieves*, 587 U.S., at 398. In this case, Vullo's alleged conduct, if not done for retaliatory reasons, might otherwise be legitimate enforcement of New York's insurance regulations. The NRA would have to plausibly allege that a retaliatory motive was a "substantial" or "motivating factor" in Vullo's targeting of the regulated entities doing business with the NRA. Vullo, in turn, could rebut that allegation by showing that she would have taken the same action "even in the absence of the [NRA's] protected conduct."

On p. 70, before the 3rd paragraph, insert the following new heading:

Notes

A. "Fighting Words"

On p. 78, after note # 4, add the following new note # 5:

5. *Fighting Words and College Students*. Consider the legality of a speech code at one college campus that is called the "fighting words harassment policy" and bans "terms or gestures widely recognized to be derogatory references to race, ethnicity, religion, gender, sexual orientation disability, and other personal characteristics." Even though federal courts "have refused to uphold university speech codes that regulate offensive or indecent language," and

even though the "fighting words" doctrine is rarely applied today, would the Court be inclined to uphold sanctions imposed under such a code? *See* Sean Clark, *Misconceptions about the Fighting Words Exception*, FIRST AMENDMENT NEWS, FIREDOG, September 20, 2006, https://www.thefire.org/misconceptions-about-the-fighting-words-exception/

B. Hostile Audiences

On p. 81, in the first sentence in note # 2, insert the words "aspects of" after the word "adopted"; then at the end of note #2, insert the following two new paragraphs of text:

There are several reasons why the Court has refused to apply or extend the *Feiner* precedent. First, the Court has frequently found that speech is protected, concluding that the speech is a "far cry" from *Feiner*. Second, the Court has introduced the more demanding clear and present standard to replace *Feiner*'s acceptance of the *Cantwell* justification for police intervention based on "interference with traffic upon the public streets. Third, the Court abandoned the deference shown in *Feiner* to the findings of lower courts. Finally, *Feiner*'s analysis is outdated because the 1951 ruling was decided before two major doctrinal developments that expanded First Amendment protections for speech: the public forum doctrine that protects speech in the "traditional public fora" of the streets, sidewalks, and parks, and the First Amendment principle requiring strict scrutiny for content-based speech regulations and intermediate scrutiny for content-neutral regulations. *Feiner*'s validation of police authority to censor speech in the public forum reflects a level of judicial deference that is not characteristic of either the public forum doctrine or the scrutiny doctrines.

On p. 81, after note #2, add the following new note # 3:

3. *Imposing Limits on Police Dispersal Orders.* Lower courts have recognized *Feiner*'s flaws and have attempted to define the scope of police to issue dispersal orders in hostile audience scenarios. The elements of such attempts may include, for example, the recognition that lawful dispersal orders may be issued "when there is 'immediate danger' to speakers and protesters," which make it "necessary" to "prevent a riot or serious bodily injury to those gathered," when conditions "bespeak dispersal as a necessary means of averting danger and damage." In these circumstances, some courts hold that even people whose speech is protected may be arrested for defying a dispersal order. *See, e.g., McGowan v. City of Milwaukee*, 2022 WL 3354736 (E.D. Wis. Aug. 12, 2022) (quoting *Bell v. Keating*, 697 F.3d 445, 457 (7th Cir. 2012)). However, the failure to comply with a dispersal order may be insufficient to justify arrest when speakers are not "inhibiting" the ability of police to "maintain order." *Id.*

On p. 82, at the end of problem # 2, add the following new citation:

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

On p. 83, after problem # 6, add the following new problem #7:

7. *Public Safety Concerns.* St. Michael's Media of Baltimore (SMMB) is a non-profit entity that publishes news stories about issues of interest to Catholics. SMMB applied to hold a "prayer rally and conference" at the Baltimore Amphitheater on the same day that the U.S. Conference of Catholic Bishops (USCCB) planned to hold its annual meeting at the hotel across the street. The Amphitheater is owned and operated by the City and available for rent by local groups. The SMMB application included a list of speakers and described the SMMB event as an effort to publicize the failures of the USCCB to provide remedies for the adult victims of child sexual abuse by members of the clergy. City officials decided to reject the SMMB application based on internet sources indicating that some of the SMMB speakers described the January 6 defendants as "political prisoners." The City officials informed the SMMB that since "the views of some of the speakers would be expected provoke a strong reaction from a hostile audience that increased the likelihood of clashes and disturbances," the City's well-founded "public safety concerns" in avoiding "the prospect of property damage and violence" required the rejection of the SMMB's application. When the SMMB files suit to challenge the City's decision, is it likely to succeed on the merits of its claim that the City's rejection violated the First Amendment? *See St. Michael's Media, Inc. v. Mayor and City Council of Baltimore*, 566 F. Supp.3d 327 (D. Md. 2021).

C. Defamation

1. The Constitutionalization of Defamation

On p. 96, insert a new problem 5, and renumber the remaining problem:

5. *ChatGPT and Defamation*. ChatGPT can be problematic for defamation purposes. In one case, ChatGPT generated a false complaint alleging that a Georgia radio host had embezzled money from a gun rights group. The document was similar to the brief filed by a New York lawyer, which was prepared by ChatGPT and cited false legal precedents, because it provided false information. Can the Georgia radio host bring a defamation action against the artificial intelligence (AI) company that created ChatGPT for the false complaint? If the false complaint is posted on a social media platform, can the social media platform be liable? Does Section 230 of the Communications Decency Act (discussed on p. 728 of the casebook) provide the social media platform with a defense?

2. "Public Figures" and "Private Plaintiffs"

On p. 97, at the bottom of the page, insert the following:

Food for Thought

Suppose that Congresswoman Maxine Waters falsely claims that her opponent in her reelection campaign was dishonorably discharged from the Navy. Collins, the opponent, shows Waters a document indicating that he was honorably discharged. Waters did not bother to verify the authenticity of the document. Does Waters' attitude suggest "willful blindness" if she renews her allegation of a dishonorable discharge? If so, does this amount to actual malice? Suppose the facts show that Collins had sued the Navy seeking to have his discharge changed from "dishonorable" to "honorable" and prevailed. Would that make a difference to the outcome? *See Collins v. Waters*, 308 Cal. Rptr. 3rd 326 (Cal. App. 2023).

On p. 107, after note # 6, insert the following new note # 7:

7. *Replacement for Anti-SLAPP Statute*. In 2021, the Uniform Public Expression Act (UPEPA) was enacted for the first time in any state as a response to "the perceived failure of [the] prior anti-SLAPP statute" in Washington to achieve the societal goals sought by the legislature." The UPEPA's purpose is to provide "for early adjudication of baseless claims aimed at preventing an individual from exercising the constitutional right of free speech," while also incorporating "standards for adjudication that mirror those utilized" in the state rules of civil procedure that serve the functions of FRCP Rules 12 and 56. *See Jha v. Khan*, 24 Wash. App. 2d 377, 520 P.3d 470 (2022).

On p. 107, replace note # 10 with the following:

Sandy Hook & Alex Jones

Following the Sandy Hook massacre of schoolchildren, Alex Jones and his Infowars website claimed that allegations of a mass shooting were a "giant hoax" and he accused the parents of faking their childrens' deaths. Some of the parents sued Jones for defamation and intentional infliction of mental and emotional distress. After Jones repeatedly refuses to comply with court-ordered discovery requests, default judgments were entered against him. One verdict was for $4.11 million and another was for $965 million. The U.S. Supreme Court refused to review the verdict.

On p. 111, at the end of problem # 5, insert the following cite after "See" in the 5th line from the bottom:

Animal Legal Defense Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021);

On p. 111, at the end of problem # 6, insert the following:

Suppose that defendants take video as a pro-choice convention and seek to use it to promote pro-life positions. However, when he attended the convention, he agreed not to videotape or publicize anything learned there. Does the agreement constitute a waiver of the right to publish? *See National Abortion Federation v. Center for Medical Progress*, 2022 WL 3572943 (9th Cir.).

On p. 111, at the end of the problems, insert the following:

Food for Thought

Social media posts have falsely implied that certain people have monkeypox. In one case, a TikTok video depicted a women with small raised tumors and implied that she might have monkeypox. In fact, she had a genetic condition which causes the tumor. Was the woman defamed? What burden of proof should apply?

3. Application of the "Actual Malice" Standard

On p. 114, before the notes, add the following:

Dominion Voting Systems v. Fox News

The other major recent defamation case involved Dominion Voting Systems, Inc.'s $1.6 billion defamation suit against Fox News. In the suit Dominion claimed that Fox News knowingly aired false claims that Dominion helped rig the outcome of the 2020 presidential election in favor of Joe Biden. Dominion's claims were helped by the release of internal Fox News communications showing that Fox executives were skeptical regarding former President Donald Trump's claims of election fraud. Fox News ultimately settled the litigation for $787.5 million. Following the settlement, Fox News still faced a $2.7 billion defamation suit by another voting machine company (Smartmatic) over allegations that it helped rig the 2020 election. Other publishers are also facing defamation suits over similar allegations.

Trump and Punitive Damages

A jury awarded plaintiff E. Jean Carroll three million dollars in her defamation suit against former President Donald Trump, which verdict included $280,000 in punitive damages. Carroll's claim was based on Trump's false and defamatory statements denying that he sexually abused Carroll in the mid-1990s as she described in her memoir published in 2019. Trump's denial included statements that Carroll was a liar who had invented her claim of sexual abuse in order to sell more books. The case was unusual because Trump declined to testify and therefore offered only a truncated defense. The day after the verdict, Trump made additional denials during a CNN town hall meeting on cable television, stating that he had never met Carroll, that her claim of sexual abuse was "a fake story, made up story," and that she was a "whack job." Carroll immediately filed a motion to amend a prior and still pending defamation suit against

Trump by adding a claim for $10 million dollars in compensatory damages based on his post-verdict remarks. The trial court granted Carroll's motion. *See* Kelly Garrity, *Judge lets E. Jean Carroll Add Trump's post-verdict remarks to original defamation case*, POLITICO, June 13, 2013,

Food for Thought

Defamation litigation potentially will be affected by artificial intelligence, particularly the rise of so-called "deep fakes" which involve video and audio which are "fakes" but which appear real. It is expected that deep fakes will only become realistic and accessible in the coming years. It is unclear how such developments will affect defamation litigation. For example, might defamation defendants be better able to challenge the authenticity of seemingly refutable evidence? Moreover, might a reporter have valid reasons for refusing (before publishing a story) to review potential evidence (a videotape) that the reporter has reason to believe is a "fake"?

On p. 116, following the problems, insert the following:

Food for Thought

The American Civil Liberties Union (ACLU) issued a letter and press release implying that a police detective was a racist and claiming that he had committed jury tampering. The evidence showed that the detective had a friend on the jury who complained about the jury as well as about a fellow juror (who was black). The officer did nothing more than tell the juror to go to the bailiff and the judge with any concerns that she might have. When the juror did, the judge declared a mistrial. Before making the allegation, the ACLU had access to (and reviewed) the court transcript which showed that the detective told the juror to do the right thing, to vote her conscious, and to bring any problems to the court. Can the detective satisfy the actual malice standard in a suit against the police officer? *See Zabriskie v. American Civil Liberties Union of Michigan*, 2022 WL 3572105 (Mich. App.).

4. Fact Versus Opinion

On p. 124, before the problems, insert the following new "Food for Thought":

Food for Thought

Plaintiff is an organization that raises funds to support women who wish to have abortions. Dickson, the Director of an anti-abortion group, refers to plaintiff as a "criminal organization." Plaintiff sues Dickson for defamation. Does the allegation constitute actionable defamation or is it simply an expression of opinion? Might it be regarded as rhetorical hyperbole? *See Dickson v. Lilith Fund for Reproductive Equity*, 647 S.W.3d 410 (Tex. App. 2021).

D. Emotional Distress

On p. 142, at the end of note # 1, add the following new citation:

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

E. Invasion of Privacy

On p. 152, at the end of the notes, insert the following new note:

8. *Artificial Intelligence and Post-Mortem Publicity Rights*. Paul McCartney is planning to issue a new Beatles song that uses generative artificial intelligence (AI) to include John Lennon's voice in a new song. AI was used to isolate and "extricate" Lennon's voice from a demo tape created before his death, and to incorporate his voice into the new song. Should Lennon's heirs be entitled to sue for infringement of his right of publicity? As it turns on local law. Some states provide for post-mortem rights. Some do not.

On p. 155, delete problem # 7 and renumber the remaining problems.

F. Obscenity

On p. 172, at the end of problem # 1, add the following new citation:

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

On p. 167, before the problems, insert the following:

Food for Thought

Tennessee enacts a law that expands the state's obscenity laws to include performances that feature topless or exotic dancers or "male or female impersonators" with entertainment that appeals "to a prurient interest." Would an ordinary drag show fit within *Miller's* definition of obscenity? What about a Florida law that prohibits establishments from allowing children to attend "adult live performances" that "include lewd exposure" to "prosthetic or imitation genitals and breasts?"

On p. 182, in problem # 3, change the duplicative title to the following new title:

3. *More on the International Treaty on the Internet and Minors*.

Chapter 4

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

A. "Offensive" Speech

On p. 194, following the note, add the following:

Following its victory regarding the trademark "Fuct," Brunetti tried to register the trademark "Fuck." The Trademark Trial and Appeal Board denied the request, noting that the word is "so ubiquitous that it now appears without fuss in an impressive range of cultural domains." It functions as a "word intensifier, insults or offends, and notes sadness, confusion, panic, boredom, annoyance, disgust or pleasure." Thus, it cannot be claimed by one business as a trademark.

In *Vidal v. Elster,* 602 U.S. 286 (2024), the Court upheld a restriction imposed by the Lanham Act which prohibited the registration of a trademark that "consists of or comprises a name . . . identifying a particular living individual except by his written consent." 60 Stat. 428, 15 U. S. C. § 1052©. The restriction is referred to as the "names clause." The case involved an attempt by a man to trademark the phrase "Trump Too Small" as a parody of a statement made by Trump during a presidential debate. While the Court concluded that the restriction was content-based, it was not viewpoint-based: "No matter the message, the names clause prohibits marks that use another person's name without consent. It does not matter "whether the use of the name is flattering, critical or neutral." As a result, the Court distinguished *Tam* and *Brunetti* on the basis that the restrictions involved in those cases were viewpoint-based.

On p. 194, after problem # 1, insert the following:

Food for Thought

A town council's public participation guidelines provide that any comments "must be respectful and courteous, and free of rude, personal or slanderous remarks." Can the guidelines be justified as a way to "maintain order and decorum, as well as to prevent disruptions at council meetings? Should it matter that the council is not required to allow the public to offer comments? *See Barron v. Southborough Board of Selectmen,* (Mass. 2023).

B. "Hate" Speech

On p. 211, insert the following new problem # 5 and renumber the remaining problems:

5. *The Israeli-Hamas Conflict*. On university campuses, there have been mass demonstrations related to this conflict which began when Hamas launched an attack on Israel and took Israeli hostages. Israel responded with overwhelming force attacking sites in the Gaza strip, damaging and destroying homes and neighborhoods, killing civilians, and leading to hunger and starvation. The campus protests have involved make-shift tent cities, anti-Jewish rhetoric, and some have involved calls for liberating Palestine "from the river to the sea. Palestine will be free." (which would eliminate Israel). Some Jewish students claim to be traumatized and that the situation has created a "hostile" environment. What can or should university administrators do without running afoul of the First Amendment?

On p. 211, after problem # 5, insert the following:

Food for Thought

The American Bar Association has approved a rule designed to prohibit harassment and discrimination by attorneys. The standard extends beyond workplace settings, like courthouses, to include law-related events such as association meetings and outings with colleagues. Is such a rule consistent with the First Amendment? Connecticut, which rejected the ABA language as too broad, provides that comments have to be directed at a person and cannot just involve the expression of controversial views at a bar event, In addition, the Connecticut rule explicitly provides that it does not extend to statements protected by the First Amendment.

Food for Thought

New York has enacted The Online Hate Speech Law which requires social media networks to "provide and maintain a clear and easily accessible mechanism for individual users to report incidents of hateful conduct," including speech that vilifies, humiliates or incites violence, and requires them to provide a direct response to any individual reporting hateful conduct informing them of how the matter is being handled." The law is enforceable through investigations by the N.Y. attorney general's office, as well as through subpoenas and daily fines of $1,000 per violation. Suppose that plaintiffs sue New York, claiming that social media platforms will be strong armed into censoring protected speech. Does the law run afoul of the First Amendment?

On p. 213, after problem # 12, insert the following:

Food for Thought

Defendants place white supremacist literature in various places in a small N.Y. town, including parks, doorways, driveways and the door of a synagogue. One of them contains the words "Aryan National Army" and shows an image of a skull inside of a swastika. If some community members are upset by the literature, can defendants be charged with aggravated assault?

On p. 217, at the end of the notes, add the following:

3. *Web Postings and Conspiracy Charges*. The prosecutor charged defendant with conspiracy to murder based on the fact that he was a member of a gang, had access to weapons, and posted comments on the internet celebrating violence against rival gang members. Although the evidence showed that two co-defendants had either committed the murders, or aided and abetted the commission, there was no comparable proof regarding defendant. The court held that the mere fact that defendant belonged to the same gang, had access to weapons, and celebrated the violence with internet posts were insufficient to convict defendant as a co-conspirator to the murders. *See People v. Ware*, 14 Cal.5th 151 (Cal. 2022).

4. *Rap Videos*. Defendant, who was charged with murder, had produced rap videos regarding guns and criminal activity. The videos were introduced at his trial. However, there was no evidence that he had wrote the lyrics, and the appellate court concluded that admission of the videos was highly prejudicial. As a result, the court reversed his conviction. *See Hart v. Texas*, 688 S.W.3d 883 (Tex. Crim. App. 2024).

C. True Threats

On p. 229, delete the third paragraph and replace it with the following:

In *Counterman v. Colorado*, 600 U.S. 66 (2023), the Court finally defined the mens rea for true threats. The case involved involved Billy Counterman who sent hundreds of Facebook messages to C. W., a local singer and musician, over a two year period. Some of the messages were harmless ("Good morning sweetheart"; "I am going to the store would you like anything?"), but other suggested that Counterman might be surveilling C. W. ("was that you in the white Jeep?", "a fine display with your partner"), and a few suggested anger and envisaged harm befalling her ("Fuck off permanently." "Staying in cyber life is going to kill you." "You're not being good for human relations. Die."). C. W. claimed that the message put her in fear that Counterman was "threatening her life," put her in fear that Counterman was following her, and might hurt her. As a result, she had "a lot of trouble sleeping," suffered severe anxiety, declined social engagements, and canceled performances.

The Court worried that true threat prosecutions might chill protected speech: "Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not." As a result, the Court held that the First Amendment requires some proof that the defendant had a subjective understanding of the threatening nature of his statements. However, the Court held that the the mens rea of "recklessness" was sufficient, meaning that the state must prove that defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The Court remanded the case for consideration under a recklessness standard.

On p. 230, before note # 3, insert the following new note and renumber the remaining notes:

3. *Planned Parenthood v. ACLA. In Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), the court applied the so-called "true threat" doctrine (which applies when a reasonable observer would believe that the listener reasonably believes that he will be subjected to physical violence) to an attempt to intimidate physicians. The plaintiff physicians, who performed lawful abortions, alleged that the American Coalition of Life Activists (ACLA) engaged in "a campaign of terror and intimidation" by targeting them with specific threats—the "Deadly Dozen GUILTY" poster (which identified Hern and the Newhalls among others), the "Crist" poster (which contained Crist's name, addresses, and photograph), and the "Nuremberg Files" (a compilation of those whom the ACLA members believed might be put on trial for crimes against humanity one day). The posters identifying these physicians were circulated in the wake of a series of "WANTED" and "unWANTED" posters that had identified other doctors who performed abortions and who were murdered after the "WANTED" and "unwanted" posters were circulated. The suit alleged that the ACLA had violated or conspired to violate the Freedom of Access to Clinic Entrances (FACE) Act and the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§1961–1968. Plaintiffs were awarded both compensatory damages and punitive damages. However, the initial award of $108.5 million in punitive damages was remitted to $45,000 to $75,000 per defendant. Suppose that the ACLA comes to you for advice. What can the ACLA do to publicize its views on abortion without running afoul of the true threat doctrine? Would it be ever be permissible for the ACLA to print the names, addresses, and photographs of abortion providers on its website? If so, explain how it could do so despite the "true threat" doctrine.

On p. 231, before the problems, add the following:

Food for Thought

During the pandemic, while the nation was under lock down, defendant posts on Facebook that he is going to pay someone with Covid-19 to lick groceries at a supermarket. The post was false, and defendant claimed that he was simply trying to encourage the public to take stay-at-home orders more seriously, but defendant is nonetheless charged under the biological weapons statute with making a “true threat.” Defendant responds that Covid-19 is not easily spread through such contact. Defendant claims that his post constituted protected speech. Is he correct? *See United States v. Perez*, 43 F.4th 437 (5th Cir. 2022).

D. Child Pornography

On p. 242, insert a new note # 1 and renumber the remaining notes:

1. *Possession of Ferber Child Pornography*. Even though the possession of unprotected obscene speech may not be prosecuted as a crime under *Stanley v. Georgia*, 394 U.S. 557 (1969), the same is not true for the crime of possession of child pornography. In *Osborne v. Ohio*, 495 U.S. 103 (1990), the Court concluded that the two types of unprotected speech are sufficiently different to justify the enforcement of child pornography crimes without preserving First Amendment protection for the possession of child pornography.

On p. 243, delete note # 2 and insert the following new note #2:

2. *Paying for the Victim's Losses*. The restitution provision in 18 U.S.C. § 2259 authorizes and mandates that federal district courts order defendants to pay a victim "the full amount of the victim's losses as determined by the court." In *Paroline v. United States*, 572 U.S. 434 (2014), the Court held that the amount of restitution depends on the extent to which the victim's losses were proximately caused by the defendant. The court should award restitution "in an amount comporting with the defendant's relative role in the causal process underlying the victim's general losses."

On p. 252, before the problems, insert the following:

The Fight Online Sex Trafficking Act

In 2018, Congress enacted the Fight Online Sex Trafficking Act which allowed the victims of online sex trafficking to sue websites that knew about the trafficking on their platforms. However, it is not clear how the new act will be reconciled with Section 230 of the Communications Decency Act which limits the liability of social media platforms for content posted on their sites by third parties. *See Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022).

E. Pornography as Discrimination Against Women

F. Possible Additional Categories for Exclusion From Speech Protection

On p. 267, in the citation at the end of the problem, add the following to the citation (immediately after "See"):

Tingley v. Ferguson, 47 F.4 1055 (9th Cir. 2022);

On p. 275, at the end of the problem, add the following:

See Black Emergency Response Team v. Drummond, — F. Supp. 3d —, 2024 WL 3015359 (W.D. Okla. 2024).

On p. 275, after the problem, add the following:

Food for Thought

In the prior problem, Florida's legislature attempts to ban the teaching of critical race theory in the public schools. Suppose that, rather than on focusing on what is taught in public schools, Florida seeks to ban private employers from offering mandatory workplace diversity, equity and inclusion (DEI) training to employees where people of a certain race or gender should feel guilty for the actions of their ancestors. Employers are free to offer such training, but cannot create a "captive audience" situation in which employees are not free to "opt out." Challengers claim that the bans impose viewpoint-based restrictions on speech. Supporters claim that the laws are designed to prohibit discrimination and avoid creating a hostile work environment. May states (as Utah did) enact laws prohibiting employers from requiring employees to affirm that they agree with the lessons taught in DEI courses? *See Honeyfund.com v. Governor*, 94 F.4th 1272 (11th Cir. 2024). .

On p. 275, following the problem, add the following:

Problem: Prohibiting Race "Guilt" Training

The Florida legislature enacts The Stop WOKE Act which labels as "discrimination" employment training that endorses concepts related to racism, sexism, privilege, and merit-based advancement, and suggests that individuals "must feel guilt, anguish, or other forms of psychological distress" because of the past actions by other people of the same race or sex, constitutes discrimination based on race, color, sex, or national origin. Is the law constitutional? Does it involve a content-based or viewpoint-based restriction on speech? *See Falls v. DeSantis*, 609 F.Supp.3d 1273 (N.D. Fla. 2022); *Honeyfund.com Inc. v. DeSantis*, 622 F.Supp.3d 1159 (N.D. Fla. 2022).

On p. 288, following problem # 5, insert the following:

Food for Thought

In many states, certification bodies have monopolistic control over credentialing in their respective specialties. The Department of Homeland Security issues a press release that calls on various agencies, including medical certification boards, to "make recommendations that appropriately address disinformation that poses a threat to the homeland." In light of the press release, Plaintiff doctors, who disagree with the government's statements regarding Covid-19 claim that the press release chills their ability to express dissenting views regarding Covid-19 and vaccines. Can the medical boards effectively prohibit physician members from expressing

dissenting views about Covid-19? *See Association of American Physicians and Surgeons Educational Foundation v. American Board of Internal Medicine*, 103 F.4th 383 (5th Cir. 2024).

G. Near Obscene

On p. 298, before the problems, insert the following:

Food for Thought

In 2022, Tennessee passed a law prohibiting "adult cabaret performances" within 1,000 feet of schools, public parks or places of worship, or at any other place where children might be present. The law defines "adult cabaret performances" as events that feature topless or exotic dancers or "male or female impersonators" that provide entertainment appealing "to a prurient interest." After Renton, is the law constitutional?

H. Commercial Speech

On p. 325, at the end of problem # 2, add the following:

Would it be deceptive for a company to advertise its vegetable-based products with words like "chorizo," "ham roast," and "hot dogs" provided that it includes either the words "all vegan," "plant based," "vegetarian," or "veggie"? *See Turtle Island Foods SPC v. Soman*, 632 F. Supp. 3d 909 (E.D. Ark. 2022).

Food for Thought

Would it be permissible for a state to prohibit the marketing of firearms to minors? Could the state instead ban the marketing of weapons "that reasonably appears to be attractive to minors?" *See Junior Sports Magazines, Inc. v. Bonta*, 2022 WL 14365026 (C.D. Cal.).

On p. 325, before problem # 2, insert the following:

Food for Thought

Connecticut enacts the following law: "Any person who, by his advertisement, ridicules or holds up to contempt any person or class of persons, on account of the creed, religion, color, denomination, nationality or race of such person or class of persons, shall be guilty of a class D misdemeanor." Would the law be constitutional if it was not limited to advertisements? On the other hand, if it is so limited, can it pass constitutional muster? *See Cerame v. Lamont*, 346 Conn. 422, 201 A.3d 601 (D. Conn. 2023).

On p. 328, before the Points to Remember, insert the following new section:

I. Copyright and Trademark

There has always been an uneasy relationship between free speech doctrine and the competing areas of copyright and trademark. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the Court concluded that the Framers viewed copyright law as "the engine of free expression" because it created a "marketable right to the use of one's expression" and thereby created an "economic incentive to create and disseminate ideas." Moreover, copyright law "distinguishes between ideas and expression and makes only the latter eligible for copyright protection." Thus, the Copyright Act permits free communication of facts while still protecting an author's expression," thereby making "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication." Trademark, by contrast, protects an individual's (or corporation's) interest in protecting a company's trademark for its intended use. The following case illustrates how free speech law and trademark law can come into conflict.

Jack Daniel's Properties, Inc. v. VIP Products LLC
599 U.S. 140 (2023).

Justice KAGAN delivered the opinion of the Court.

Respondent VIP Products makes a squeaky, chewable dog toy designed to look like a bottle of Jack Daniel's whiskey. The words "Jack Daniel's" become "Bad Spaniels." The descriptive phrase "Old No. 7 Brand Tennessee Sour Mash Whiskey" turns into "The Old No. 2 On Your Tennessee Carpet." The jokes did not impress Jack Daniel's Properties. It owns trademarks in the distinctive Jack Daniel's bottle and in many of the words and graphics on the label. And it believed Bad Spaniels had infringed and diluted those trademarks by leading consumers to think that Jack Daniel's had created, or was otherwise responsible for, the dog toy. And Bad Spaniels had diluted the marks, the argument went, by associating the famed whiskey with excrement. The Court of Appeals [held that] the First Amendment compels a stringent threshold test when a suit challenges a so-called expressive work. And that test knocked out Jack Daniel's claim, whatever the likelihood of confusion. Likewise, Jack's dilution claim failed. Trademark law provides that the "noncommercial" use of a mark cannot count as dilution. 15 U.S.C. § 1125(c)(3)©. The Bad Spaniels marks, the court held, fell within that exemption because the toy communicated a kind of parody about Jack Daniel's. We reject both conclusions. It is not appropriate when the accused infringer has used a trademark to designate the source of its own goods—in other words, has used a trademark as a trademark. That kind of use falls within the heartland of trademark law, and does not receive special First Amendment protection. The dilution issue is more simply addressed. The use of a mark does not count as noncommercial just because it parodies, or otherwise comments on, another's products.

The Lanham Act, the core federal trademark statute, defines a trademark as follows: "Any word, name, symbol, or device, or any combination thereof " that a person uses "to identify and distinguish his or her goods ... from those manufactured or sold by others and to indicate the source of the goods." § 1127. The first part of that definition, identifying the kind of things covered, is broad: It encompasses words (think "Google"), graphic designs (Nike's swoosh), and

so-called trade dress, the overall appearance of a product and its packaging (a Hershey's Kiss, in its silver wrapper). The second part of the definition describes trademark's "primary" function: "to identify the origin or ownership of the article to which it is affixed." *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916). Trademarks can catch a consumer's eye, appeal to his fancies, and convey every manner of message. But whatever else it may do, a trademark is not a trademark unless it identifies a product's source (this is a Nike) and distinguishes that source from others (not any other sneaker brand). See generally 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 3:1 (5th ed. 2023). In other words, a mark tells the public who is responsible for a product.

Trademarks benefit consumers and producers alike. A source-identifying mark enables customers to select "the goods and services that they wish to purchase, as well as those they want to avoid." *Matal v. Tam*, 582 U.S. 218, 224 (2017). The mark "quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past." *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 164 (1995). Because that is so, the producer of a quality product may derive significant value from its marks. They ensure that the producer—and not some "imitating competitor"—will reap the financial rewards associated with the product's good reputation.

To help protect marks, the Lanham Act sets up a voluntary registration system. Any mark owner may apply to the Patent and Trademark Office to get its mark placed on a federal register. The lead criterion for registration is that the mark "serve as a 'trademark' to identify and distinguish goods." 3 MCCARTHY § 19:10. If it does, and the statute's other criteria also are met, the registering trademark owner receives certain benefits, useful in infringement litigation. See, *e.g.*, *Iancu* v. *Brunetti*, 139 S.Ct. 2294 (2019) ("registration constitutes '*prima facie* evidence' of the mark's validity"). But the owner of even an unregistered trademark can "use the mark in commerce and enforce it against infringers." *Ibid.* The Lanham Act also creates a federal cause of action for trademark infringement. In the typical case, the owner of a mark sues someone using a mark that closely resembles its own. The court must decide whether the defendant's use is "likely to cause confusion, or to cause mistake, or to deceive." §§ 1114(1)(A), 1125(a)(1)(A). The "keystone" is "likelihood of confusion." The type of confusion most commonly in trademark law's sights is confusion "about the source of a product or service." *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 428 (2003). Confusion as to source is the bête noire of trademark law—the thing that stands directly opposed to the law's twin goals of facilitating consumers' choice and protecting producers' good will.

Finally, the Lanham Act creates a cause of action for the dilution of famous marks, which can succeed without likelihood of confusion. A famous mark is one "widely recognized" by the public as "designating the source" of the mark owner's goods. Dilution of such a mark can occur "by tarnishment" (as well as by "blurring," not relevant here).§ 1125(c)(1). An "association arising from the similarity between" two marks—one of them famous—may "harm the reputation of the famous mark," and thus make the other mark's owner liable. § 1125(c)(2)©. But there are "exclusions"—categories of activity not "actionable as dilution." One exclusion protects any "noncommercial use of a mark." § 1125(c)(3)©. Another protects a "fair use" of a mark "in connection with parodying, criticizing, or commenting upon the famous mark owner or

its goods." § 1125(c)(3)(A)(ii). The fair-use exclusion, though, comes with a caveat. A defendant cannot get its benefit—even if engaging in parody, criticism, or commentary—when using the similar-looking mark "as a designation of source for the defendant's own goods." § 1125(c)(3)(A). In other words, the exclusion does not apply if the defendant uses the similar mark as a mark.

A bottle of Jack Daniel's—no, Jack Daniel's Old No. 7 Tennessee Sour Mash Whiskey—boasts a fair number of trademarks. "Jack Daniel's" is a registered trademark, as is "Old No. 7." So too the arched Jack Daniel's logo. And the stylized label with filigree (*i.e.*, twirling white lines). Finally, what might be thought of as the platform for all those marks—the whiskey's distinctive square bottle—is itself registered. VIP is a dog toy company, making and selling a product line of chewable rubber toys that it calls "Silly Squeakers." (Yes, they squeak when bitten.) Most of the toys in the line are designed to look like—and to parody—popular beverage brands. There are, to take a sampling, Dos Perros (cf. Dos Equis), Smella Arpaw (cf. Stella Artois), and Doggie Walker (cf. Johnnie Walker). VIP has registered trademarks in all those names, as in the umbrella term "Silly Squeakers."

In 2014, VIP added the Bad Spaniels toy to the line. VIP did not apply to register the name, or any other feature of, Bad Spaniels. But VIP both "owns" and "uses" the " 'Bad Spaniels' trademark and trade dress." And Bad Spaniels' trade dress, like the dress of many Silly Squeakers toys, is designed to evoke a distinctive beverage bottle-with-label. Even if you didn't already know, you'd probably not have much trouble identifying which one. Bad Spaniels is about the same size and shape as an ordinary bottle of Jack Daniel's. The faux bottle, like the original, has a black label with stylized white text and a white filigreed border. The words "Bad Spaniels" replace "Jack Daniel's" in a like font and arch. Above the arch is an image of a spaniel. (This is a dog toy, after all.) Below the arch, "The Old No. 2 On Your Tennessee Carpet" replaces "Old No. 7 Tennessee Sour Mash Whiskey" in similar graphic form. The small print at the bottom substitutes "43% poo by vol." and "100% smelly" for "40% alc. by vol. (80 proof)." The toy is packaged for sale with a cardboard hangtag (so it can be hung on store shelves). At the bottom is a disclaimer: "This product is not affiliated with Jack Daniel Distillery." In the middle are some warnings and guarantees. And at the top are two product logos—on the left for the Silly Squeakers line, and on the right for the Bad Spaniels toy.

Soon after Bad Spaniels hit the market, Jack Daniel's sent VIP a letter demanding that it stop selling the product. VIP responded by bringing this suit, seeking a declaratory judgment that Bad Spaniels neither infringed nor diluted Jack Daniel's trademarks. The complaint alleged that VIP is "the owner of all rights in its 'Bad Spaniels' trademark and trade dress for its durable rubber squeaky novelty dog toy." Jack Daniel's counterclaimed under the Lanham Act for both trademark infringement and trademark dilution by tarnishment. VIP moved for summary judgment. VIP argued that Jack Daniel's infringement claim failed under a threshold test derived from the First Amendment to protect "expressive works"—like the Bad Spaniels toy. When those works are involved, VIP contended, the so-called *Rogers* test requires dismissal of an infringement claim unless the complainant can show one of two things: that the challenged use of a mark "has no artistic relevance to the underlying work" or that it "explicitly misleads as to the source or the content of the work." *Rogers v. Grimaldi*, 875 F.2d 994, 999 (C.A.2 1989). Because Jack Daniel's could make neither showing, VIP argued, the likelihood-of-confusion

issue became irrelevant. VIP urged that Jack Daniel's could not succeed on a dilution claim because Bad Spaniels was a "parody" of Jack Daniel's, and therefore made "fair use" of its famous marks. The District Court rejected both contentions. VIP had used the cribbed Jack Daniel's features as trademarks—to identify the source of its own products. In the court's view, when "another's trademark is used for source identification," the *Rogers* test does not apply. Instead, the suit must address the "standard" infringement question: whether the use is "likely to cause consumer confusion." Likewise, VIP could not invoke the dilution provision's fair-use exclusion. Parodies fall within that exclusion, the court explained, only when the uses they make of famous marks do not serve as "a designation of source for the [alleged diluter's] own goods." The case proceeded to a bench trial, where Jack Daniel's prevailed. The District Court found, based largely on survey evidence, that consumers were likely to be confused about the source of the Bad Spaniels toy. The court thought that the toy, by creating "negative associations" with "canine excrement," would cause Jack Daniel's "reputational harm." *Id.*, at 903. The Ninth Circuit reversed. We granted certiorari.

[On] Jack Daniel's infringement claim: Should the company have had to satisfy the *Rogers* threshold test before the case could proceed to the Lanham Act's likelihood-of-confusion inquiry?[5] We hold that it does not when an alleged infringer uses a trademark in the way the Lanham Act most cares about: as a designation of source for the infringer's own goods. VIP used the marks derived from Jack Daniel's in that way, so the infringement claim here rises or falls on likelihood of confusion. But that inquiry is not blind to the expressive aspect of the Bad Spaniels toy. VIP uses the marks at issue in an effort to "parody" or "make fun" of Jack Daniel's. And that kind of message matters in assessing confusion because consumers are not so likely to think that the maker of a mocked product is itself doing the mocking.

To see why the *Rogers* test does not apply, consider the case from which it emerged. Defendants there had produced and distributed a film by Federico Fellini titled "Ginger and Fred" about two fictional Italian cabaret dancers (Pippo and Amelia) who imitated Ginger Rogers and Fred Astaire. When the film was released in the United States, Ginger Rogers objected under the Lanham Act to the use of her name. The Second Circuit rejected the claim. It reasoned that the titles of "artistic works," like the works themselves, have an "expressive element" implicating "First Amendment values." Such names posed only a "slight risk" of confusing consumers about either "the source or the content of the work." A threshold filter was appropriate. When a title "with at least some artistic relevance" was not "explicitly misleading as to source or content," the claim could not go forward. But the court made clear that it was not announcing a general rule. In the typical case, the court thought, the name of a product was more likely to indicate its source, and to be taken by consumers in just that way.

Over the decades, the lower courts adopting *Rogers* have confined it to similar cases, in which a trademark is used not to designate a work's source, but solely to perform some other expressive function. So, for example, when the toymaker Mattel sued a band over the song "Barbie Girl"—with lyrics including "Life in plastic, it's fantastic" and "I'm a blond bimbo girl, in a fantasy world"—the Ninth Circuit applied *Rogers*. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901 (2002). That was because, the court reasoned, the band's use of the Barbie name

[5] To be clear, when we refer to "the *Rogers* threshold test," we mean any threshold First Amendment filter.

was "not [as] a source identifier": The use did not "speak to the song's origin." *Id.*, at 900, 902; see *id.*, at 902 (a consumer would no more think, "upon hearing Janis Joplin croon 'Oh Lord, won't you buy me a Mercedes Benz?,' ... suspect that she and the carmaker had entered into a joint venture"). Similarly, the Eleventh Circuit dismissed a suit under *Rogers* when a sports artist depicted the Crimson Tide's trademarked football uniforms solely to "memorialize" a notable event in "football history." *University of Ala. Bd. of Trustees v. New Life Art, Inc.*, 683 F.3d 1266, 1279 (2012). And when Louis Vuitton sued because a character in the film The Hangover: Part II described his luggage as a "Louis Vuitton" (though pronouncing it *Lewis*), a district court dismissed the complaint. See *Louis Vuitton Malletier S. A. v. Warner Bros. Entertainment Inc.*, 868 F.Supp.2d 172 (S.D.N.Y. 2012). The film was not using the Louis Vuitton mark as its "own identifying trademark." When that is so, "confusion will usually be unlikely," and the "interest in free expression" counsels in favor of avoiding the standard Lanham Act test.

The same courts, though, routinely conduct likelihood-of-confusion analysis, without mentioning *Rogers*, when trademarks are used as trademarks—*i.e.*, to designate source. And the Second Circuit—*Rogers*' home court—has made especially clear that *Rogers* does not apply in that context. For example, that court held that an offshoot political group's use of the trademark "United We Stand America" got no *Rogers* help because the use was as a source identifier. True, that slogan had expressive content. But the defendant group was using it "as a mark," to suggest the "same source identification" as the original "political movement." And similarly, the Second Circuit (indeed, the judge who authored *Rogers*) rejected a motorcycle mechanic's view that his modified version of Harley Davidson's bar-and-shield logo was an expressive parody entitled to *Rogers*' protection. See *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 812 (1999). The court acknowledged that the mechanic's adapted logo conveyed a "somewhat humorous" message. But his use of the logo was a quintessential "trademark use": to brand his "repair and parts business"—through signage, a newsletter, and T-shirts—with images "similar" to Harley-Davidson's. The point is that whatever you make of *Rogers*, it has applied only to cases involving "non-trademark uses," cases in which "the defendant has used the mark" at issue in a "non-source-identifying way." S. Dogan & M. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669, 1684 (2007). The test has not insulated from ordinary trademark scrutiny the use of trademarks as trademarks, "to identify or brand a defendant's goods or services." *Id.*, at 1683.

We offer one last example. Defendant sold "a line of pet perfumes whose names parody elegant brands sold for human consumption." *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F.Supp.2d 410, 412 (S.D.N.Y. 2002). The product was named Timmy Holedigger—which Tommy Hilfiger didn't much like. Defendant asked for application of *Rogers*. The court declined, relying on *Harley-Davidson*. *Rogers*, the court explained, kicks in when a suit involves solely "nontrademark uses of a mark—that is, where the trademark is not being used to indicate the source or origin" of a product, but only to convey a different kind of message. When the use is "at least in part" for "source identification"—when the defendant may be "trading on the good will of the trademark owner to market its own goods"—*Rogers* has no proper role. That is so even if the defendant is *also* "making an expressive comment," including a parody of a different product. Defendant is still "making trademark use of another's mark," and must meet an infringement claim on the usual battleground of "likelihood of confusion."

That conclusion fits trademark law, and reflects its primary mission. From its definition of "trademark" onward, the Lanham Act views marks as source identifiers—as things that function to "indicate the source" of goods, and so to "distinguish" them from ones "manufactured or sold by others." § 1127. The cardinal sin under the law is to undermine that function. It is to confuse consumers about source—to make (some of) them think that one producer's products are another's. And that kind of confusion is most likely to arise when someone uses another's trademark as a trademark—meaning as a source identifier—rather than for some other expressive function. Suppose a filmmaker uses a Louis Vuitton suitcase to convey something about a character (he is the kind of person who wants to be seen with the product but doesn't know how to pronounce its name). Now think about a different scenario: A luggage manufacturer uses an ever-so-slightly modified LV logo to make inroads in the suitcase market. The greater likelihood of confusion inheres in the latter use, because it is the one conveying information (or misinformation) about who is responsible for a product. That kind of use "implicates the core concerns of trademark law" and creates "the paradigmatic infringement case." G. Dinwoodie & M. Janis, *Confusion Over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597, 1636 (2007). So the *Rogers* test has no proper application.

Nor does that result change because the use of a mark has other expressive content—*i.e.*, because it conveys some message on top of source. Here we part ways with the Ninth Circuit, which thought that because Bad Spaniels "communicates a humorous message," it is automatically entitled to *Rogers*' protection. On that view, *Rogers* might take over much of the world. For trademarks are often expressive, in any number of ways. Consider how one liqueur brand's trade dress (beyond identifying source) tells a story, with a bottle in the shape of a friar's habit connoting the product's olden monastic roots. Or take a band name that "not only identifies the band but expresses a view about social issues." *Tam*, 582 U.S., at 245 (opinion of ALITO, J.) (discussing "The Slants"). Or note how a mark can both function as a mark and have parodic content—as the court found in the Hilfiger/Holedigger litigation. The examples could go on and on. As a leading treatise puts the point, the Ninth Circuit's expansion of *Rogers* "potentially encompasses just about everything" because names, phrases, symbols, designs, and their varied combinations often "contain some 'expressive' message" unrelated to source. 6 MCCARTHY § 31:144.50. That message may well be relevant in assessing the likelihood of confusion between two marks, as we address below. But few cases would even get to the likelihood-of-confusion inquiry if all expressive content triggered the *Rogers* filter. In that event, the *Rogers* exception would become the general rule, in conflict with courts' longstanding view of trademark law.

The Ninth Circuit thought that trademark law would otherwise "fail to account for the full weight of the public's interest in free expression." But "whatever first amendment rights you may have in calling the brew you make in your bathtub 'Pepsi' " are "outweighed by the buyer's interest in not being fooled into buying it." Or in less colorful terms: "To the extent a trademark is confusing" as to a product's source "the law can protect consumers and trademark owners." *Tam*, 582 U.S., at 252 (KENNEDY, J., concurring). "Trademark law generally prevails over the First Amendment" when "another's trademark (or a confusingly similar mark) is used without permission" as a means of "source identification." *Yankee Publishing Inc. v. News Am. Publishing Inc.*, 809 F.Supp. 267, 276 (S.D.N.Y. 1992) (LEVAL, J.). The District Court correctly held that "VIP uses its Bad Spaniels trademark and trade dress as source identifiers of

its dog toy." The company represented in this suit that the mark and dress, although not registered, are used to "identify and distinguish VIP's goods" and to "indicate their source." There is the way the product is marketed. On the hangtag, the Bad Spaniels logo sits opposite the concededly trademarked Silly Squeakers logo, with both appearing to serve the same source-identifying function. There is VIP's practice as to other products in the Silly Squeakers line. The company has consistently argued in court that it owns, though has never registered, the trademark and trade dress in dog toys like "Jose Perro" (cf. Jose Cuervo) and "HeinieSniff 'n" (cf. Heineken). And it has chosen to register the names of still other dog toys, including Dos Perros, Smella Arpaw, and Doggie Walker. VIP's conduct is its own admission that it is using the Bad Spaniels (née Jack Daniel's) trademarks as trademarks, to identify product source.

Because that is so, the only question is whether the Bad Spaniels marks are likely to cause confusion. A trademark's expressive message, particularly a parodic one, may figure in assessing the likelihood of confusion. See, *e.g.*, *Louis Vuitton Malletier S. A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (C.A.4 2007). A parody must "conjure up" "enough of an original to make the object of its critical wit recognizable." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994). To succeed, the parody must also create contrasts, so that its message of ridicule or pointed humor comes clear. Once that is done, a parody is not often likely to create confusion. Self-deprecation is one thing; self-mockery far less ordinary. So although VIP's effort to ridicule Jack Daniel's does not justify use of the *Rogers* test, it may make a difference in the standard trademark analysis. We remand that issue to the courts below.

Our second question concerns Jack Daniel's claim of dilution by tarnishment (for the linkage of its whiskey to less savory substances). The Ninth Circuit dismissed that claim based on one of the Lanham Act's "exclusions" for "any noncommercial use of a mark." § 1125(c)(3)©. On the court's view, the "use of a mark may be 'noncommercial' even if used to sell a product." And VIP's use is so, the court continued, because it "parodies" and "conveys a humorous message" about Jack Daniel's.

The "fair use" exclusion specifically covers uses "parodying, criticizing, or commenting upon" a famous mark owner. § 1125(c)(3)(A)(ii). Critically, fair-use has its own exclusion: It does not apply when the use is "as a designation of source for the person's own goods or services." § 1125(c)(3)(A). In that event, no parody, criticism, or commentary will rescue the alleged dilutor. It will be subject to liability. Parody (and criticism and commentary, humorous or otherwise) is exempt from liability only if *not* used to designate source.

We do not decide whether the *Rogers* test is ever appropriate, or how far the "noncommercial use" exclusion goes. On infringement, we hold only that *Rogers* does not apply when the challenged use of a mark is as a mark. On dilution, we hold only that the noncommercial exclusion does not shield parody or other commentary when its use of a mark is similarly source-identifying.

For the reasons stated, we vacate the judgment below and remand for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, with whom Justice ALITO joins, concurring.

Plaintiffs in trademark infringement cases often commission surveys that purport to show that consumers are likely to be confused by an allegedly infringing product. Allowing such survey results to drive the infringement analysis would risk silencing a great many parodies, even ones that by other metrics are unlikely to result in the confusion about sourcing that is the core concern of the Lanham Act. Well-heeled brands with the resources to commission surveys would be handed an effective veto over mockery. After all, "no one likes to be the butt of a joke, not even a trademark." 6 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 31:153 (5th ed. 2023). Courts should thus ensure surveys do not completely displace other likelihood-of-confusion factors, which may more accurately track the experiences of actual consumers in the marketplace.

Fair Use and Copyright

In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), the Court provided guidance regarding application of the "fair use" doctrine. The case involved photographs taken by Lynn Goldsmith of famous figures (e.g., Prince & Marilyn Monroe) which she licensed to Vanity Fair. However, the photos were used by artist Andy Warhol (who had been hired by Vanity Fair to help with its project), but he continued to use the photos after the project ended, creating 13 silkscreen prints and two pencil drawings. The works were collectively referred to as the "Prince Series." Goldsmith sued for copyrigh infringement and AWF (which owned the rights to the Warhol works) claimed "fair use." The Court held that the governing act requires consideration of four factors in deciding whether "fair use" applies: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." In applying those factors to Warhol's work, it concluded that Warhol's work did not involve "fair use."

Chapter 5

Content-Neutral Speech Restrictions: Symbolic Speech and Public Fora

A. Symbolic Speech

On p. 341, at the end of the problems, insert the following:

Food for Thought

In 2022, Tennessee passed a law prohibiting "adult cabaret performances" within 1,000 feet of schools, public parks or places of worship, or at any other place where children might be present. The law defines "adult cabaret performances" as events that feature topless or exotic dancers or "male or female impersonators" that provide entertainment appealing "to a prurient interest." Do drag performances constitute protected speech? Does the law involve content-neutral or content-based discrimination against speech? What standard of review should apply?

On p. 346, at the end of the problems, add the following new problem:

3. *Honking As A Political Gesture*. A state law prohibits a driver from honking his/her car horn except to warn another driver. As a woman drove by a rally in support of her elected representative, she honked in support of him. A police officer ticketed her for violating the state law. Does the state law constitute an unlawful restriction on free speech activity? Can it be used to prosecute truck drivers who honk their horns outside the governor's mansion in protest of the governor's policies?

On p. 354, at the end of the problems, insert the following:

Food for Thought

Plaintiff's application for permission to build a 10,000 square foot mid-century modern style mansion in Palm Beach, Florida, is denied on the basis that it is not "in harmony" with the other mansions in the neighborhood. Plaintiff sues claiming that his modern design constitutes symbolic speech and claims that the denial constitutes an infringement of his First Amendment rights. Should a mansion's style be regarded as symbolic speech that is protected by the First Amendment? If plaintiff's architectural plans show that the mansion will be hidden behind a wall and landscaping and is not observable from the road, does that undercut the symbolic speech argument? *See Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021).

B. Public Forum Doctrine

2. Restrictions on Public Forum Use

On p. 358, insert the following new notes # 3 & 4, and renumber the remaining note:

3. *Protests During the Pandemic*. Public forum protests were particularly difficult during the pandemic when governments restricted the ability of people to gather in public fora. *See* Conor Doughtery & John Eligon, *How to Protest When You're Ordered Not to Gather, The New*

York Times B3 (Apr. 25, 2020). A silver lining is that some protestors were forced to learn how to access and utilize social media. *Id.*

4. *Campus Protests Related to the Israel-Hamas War*. In 2024, protests erupted at college campuses all across the U.S., and even at some foreign law schools. The war began when Hamas invaded Israel, killing approximately 1,200 Israelis and taking scores of hostages. Claiming that Hamas had embedded itself in the civilian population, Israel attacked even civilian areas in Gaza. More than 34,000 Palestinians were killed. Some students, viewing Israel's actions as genocide, made various demands, including university divestment from Israeli companies and businesses that (like weapons manufacturers) that profit from the war, a cease fire between Israel and Hamas, and an end to academic partnerships with Israel. At Columbia University, students established a tent city in the middle of campus, and eventually entered and damaged an administration building. Similar encampments popped up at colleges all over the U.S. Some Jewish students claimed that they felt threatened by the atmosphere on their college campuses. At Columbia, one student leader claimed that "Zionists don't have a right to live" and "Be grateful that I'm not just going out and murdering Zionists."

On p. 358, delete the title to the problem, insert a new title "Problems" insert the following and then pickup with the existing problem.:

1. *The Permissible Scope of Campus Protests*. At many universities, students set up encampments on campus grounds. The encampments included both enrolled students and non-students. Do public universities have the right to prohibit the encampments? Can It have the campers arrested if they refuse to leave after being requested to do so? Should a distinction be made between students and non-students? Does it matter whether the university has a pre-existing rule prohibiting camping on campus without permission? What if the university permits camping on campus grounds? May the university suspend/expel students who refuse to leave?

2. *Occupying Campus Buildings*. Would students have the right to occupy one of the administration buildings as part of a "sit in" which is part of their protest? Would it matter whether the students entered peacefully when the buildings were open to the campus, or whether they broke into the buildings in the evening when the buildings were locked? Are the students allowed to pen graffiti on the exterior and interior walls of the buildings in an effort to publicize their concerns?

3. *Hate Speech and the Protests*. Consider the comments made by the protestors to Jewish students (in note 4, *supra*). Do any of those comments rise to the level of "true threats?" Can the university discipline the protestors for making such statements on the basis that they create a hostile academic environment? What about the statement about liberating Palestine "from the river to the sea" (a phrase that includes all of Israel)? Or the phrase "kill the Jews."

4. *Door-to-Door Solicitation*.

On p. 367, before problem # 3, insert the following new case:

Lindke v. Freed
601 U.S. 187 (2024).

Justice BARRETT delivered the opinion of the Court.

Like millions of Americans, James Freed maintained a Facebook account on which he posted about a wide range of topics, including his family and his job. Like most of those Americans, Freed occasionally received unwelcome comments on his posts. In response, Freed took a step familiar to Facebook users: He deleted the comments and blocked those who made them. For most people with a Facebook account, that would have been the end of it. But Kevin Lindke, one of the unwelcome commenters, sued Freed for violating his right to free speech. Because the First Amendment binds only the government, this claim is a nonstarter if Freed posted as a private citizen. Freed, however, is not only a private citizen but also the city manager of Port Huron, Michigan—and while Freed insists that his Facebook account was strictly personal, Lindke argues that Freed acted in his official capacity when he silenced Lindke's speech.

Sometime before 2008, while he was a college student, James Freed created a private Facebook profile that he shared only with "friends." In Facebook lingo, "friends" are not necessarily confidants or even real-life acquaintances. Users become "friends" when one accepts a "friend request" from another; after that, the two can generally see and comment on one another's posts and photos. When Freed, an avid Facebook user, began nearing the platform's 5,000-friend limit, he converted his profile to a public "page." This meant that *anyone* could see and comment on his posts. Freed chose "public figure" for his page's category, "James Freed" for its title, and "JamesRFreed1" as his username. Facebook did not require Freed to satisfy any special criteria either to convert his Facebook profile to a public page or to describe himself as a public figure.

In 2014, Freed was appointed city manager of Port Huron, Michigan, and he updated his Facebook page to reflect the new job. For his profile picture, Freed chose a photo of himself in a suit with a city lapel pin. In the "About" section, Freed added his title, a link to the city's website, and the city's general email address. He described himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." As before, Freed operated his Facebook page himself. As before his appointment, Freed posted prolifically (and primarily) about his personal life. He uploaded hundreds of photos of his daughter. He shared about outings like the Daddy Daughter Dance, dinner with his wife, and a family nature walk. He posted Bible verses, updates on home-improvement projects, and pictures of his dog, Winston. Freed also posted information related to his job. He described mundane activities, like visiting local high schools, as well as splashier ones, like starting reconstruction of the city's boat launch. He shared news about the city's efforts to streamline leaf pickup and stabilize water intake from a local river. He highlighted communications from other city officials, like a press release from the fire chief and an annual financial report from the finance department. On occasion, Freed solicited feedback from the public—for instance, he once posted a link to a city survey about housing and encouraged his audience to complete it.

Freed's readers frequently commented on his posts, sometimes with reactions (for example, "Good job it takes skills" on a picture of his sleeping daughter) and sometimes with

questions (for example, "Can you allow city residents to have chickens?"). Freed often replied to the comments, including by answering inquiries from city residents. (City residents can have chickens and should "call the Planning Dept for details.") He occasionally deleted comments that he thought were "derogatory" or "stupid." After the COVID–19 pandemic began, Freed posted about that. Some posts were personal, like pictures of his family spending time at home and outdoors to "stay safe" and "save lives." Some contained general information, like case counts and weekly hospitalization numbers. Others related to Freed's job, like a description of the city's hiring freeze and a screenshot of a press release about a relief package that he helped prepare.

Enter Kevin Lindke. Unhappy with the city's approach to the pandemic, Lindke visited Freed's page and said so. In response to one of Freed's posts, Lindke commented that the city's pandemic response was "abysmal" and that "the city deserves better." When Freed posted a photo of himself and the mayor picking up takeout from a local restaurant, Lindke complained that while "residents were suffering," the city's leaders were eating at an expensive restaurant "instead of out talking to the community." Initially, Freed deleted Lindke's comments; ultimately, he blocked him. Once blocked, Lindke could see Freed's posts but could no longer comment on them. Lindke sued Freed under 42 U.S.C. § 1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page, which he characterized as a public forum. Freed, Lindke claimed, had engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them. The District Court granted summary judgment to Freed. The Sixth Circuit affirmed. We granted certiorari.

Section 1983 provides a cause of action against "every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*" deprives someone of a federal constitutional or statutory right. This provision protects against acts attributable to a State, not those of a private person. This tracks the Fourteenth Amendment, which obligates *States* to honor the constitutional rights that § 1983 protects. § 1 ("No *State* shall ... nor shall any *State* deprive ... " The need for governmental action is also explicit in the Free Speech Clause, the guarantee that Lindke invokes in this case. Amdt. 1 ("*Congress* shall make no law ... abridging the freedom of speech ... " In short, the state-action requirement is both well established and reinforced by multiple sources. In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether § 1983 applies to the actions of police officers, public schools, or prison officials. See, *e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989). Absent unusual facts, no one would credit a child's assertion of free speech rights against a parent, or a plaintiff 's complaint that a nosy neighbor unlawfully searched his garage. Sometimes, the line between private conduct and state action is difficult to draw. *Griffin* v. *Maryland* is a good example. 378 U.S. 130 (1964). There, we held that a security guard at a privately owned amusement park engaged in state action when he enforced the park's policy of segregation against black protesters. Though employed by the park, the guard had been "deputized as a sheriff of Montgomery County" and possessed "the same power and authority" as any other deputy sheriff. The State had therefore allowed its power to be exercised by someone in the private sector. The source of the power, not the identity of the employer, controlled.

Our state-action precedents have grappled with variations of the question posed in *Griffin*: whether a nominally private person has engaged in state action for purposes of § 1983.

See, *e.g.*, *Marsh v. Alabama*, 326 U.S. 501, 502 (1946) (company town); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). Today's case requires us to analyze whether a *state official* engaged in state action or functioned as a private citizen. The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. By excluding from liability "acts of officers in the ambit of their personal pursuits," *Screws v. United States*, 325 U.S. 91 (1945) (plurality opinion), the state-action requirement "protects a robust sphere of individual liberty" for those who serve as public officials or employees, *Halleck*, 587 U.S. at 808.

The dispute between Lindke and Freed illustrates this dynamic. Freed did not relinquish his First Amendment rights when he became city manager. On the contrary, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). This right includes the ability to speak about "information related to or learned through public employment," so long as the speech is not "itself ordinarily within the scope of [the] employee's duties." *Lane v. Franks*, 573 U.S. 228, 236 (2014). Where the right exists, "editorial control over speech and speakers on [the public employee's] properties or platforms" is part and parcel of it. *Halleck*, 587 U.S. at 816. Thus, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own. So Lindke cannot hang his hat on Freed's status as a state employee. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look.

A close look is definitely necessary in the context of a public official using social media. There are approximately 20 million state and local government employees across the Nation, with an extraordinarily wide range of job descriptions—from Governors, mayors, and police chiefs to teachers, healthcare professionals, and transportation workers. Many use social media for personal communication, official communication, or both—and the line between the two is often blurred. Moreover, social media involves a variety of different and rapidly changing platforms, each with distinct features for speaking, viewing, and removing speech. The Court has frequently emphasized that the state-action doctrine demands a fact-intensive inquiry. See, *e.g.*, *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967). We repeat that caution here.

Our precedent articulates principles that govern cases analogous to this one. A public official's social-media activity constitutes state action under § 1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first. The first prong of this test is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*." *Lugar*, 457 U.S. at 937. An act is not attributable to a State unless it is traceable to the State's power or

authority. Private action—no matter how "official" it looks—lacks the necessary lineage. *Griffin* stresses that the security guard was "possessed of state authority" and "purported to act under that authority." 378 U.S. at 135. *West* v. *Atkins* states that the "traditional definition" of state action "requires that the defendant ... have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

Lindke insists that Freed's social-media activity constitutes state action because Freed's Facebook page looks and functions like an outlet for city updates and citizen concerns. But Freed's conduct is not attributable to the State unless he was "possessed of state authority" to post city updates and register citizen concerns. *Griffin*, 378 U.S. at 135. If the State did not entrust Freed with these responsibilities, it cannot "fairly be blamed" for the way he discharged them. *Lugar*, 457 U.S. at 936. Lindke imagines that Freed can conjure the power of the State through his own efforts. Yet the presence of state authority must be real, not a mirage. Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. For example, imagine that Freed posted a list of local restaurants with health-code violations and deleted snarky comments made by other users. If public health is not within the portfolio of the city manager, then neither the post nor the deletions would be traceable to Freed's state authority—because he had none. For state action to exist, the State must be "responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). There must be a tie between the official's authority and "the gravamen of the plaintiff 's complaint." *Id.*, at 1003.

The "*misuse* of power, possessed by virtue of state law," constitutes state action. *Classic*, 313 U.S. at 326. While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights—*e.g.*, the power to arrest—it encompasses cases where his "particular action"—*e.g.*, an arrest made with excessive force—violated state or federal law. *Griffin*, 378 U.S. at 135. Every § 1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place. Where does the power come from? Section 1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Statutes, ordinances, and regulations refer to written law through which a State can authorize an official to speak on its behalf. "Custom" and "usage" encompass "persistent practices of state officials" that are "so permanent and well settled" that they carry "the force of law." *Adickes*, 398 U.S. at 167. A city manager like Freed would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements. He would also have that authority even in the absence of written law if prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager's power to do so has become "permanent and well settled." *Id.*, at 168. If an official has authority to speak for the State, he may have the authority to do so on social media even if the law does not make that explicit.

Determining the scope of an official's power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage. In some cases, a grant of authority over particular subject matter may reasonably encompass authority to speak about it officially. For example, state law might grant a high-ranking official like the director of the state department of

transportation broad responsibility for the state highway system that, in context, includes authority to make official announcements on that subject. At the same time, courts must not rely on "excessively broad job descriptions" to conclude that a government employee is authorized to speak for the State. *Kennedy v. Bremerton School Dist.*, 597 U.S. 507 (2022). The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do. In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action.

For social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. *Griffin*, 378 U.S. at 135. State officials have a choice about the capacity in which they choose to speak. "Generally, a public employee" purports to speak on behalf of the State while speaking "in his official capacity or" when he uses his speech to fulfill "his responsibilities pursuant to state law." *West*, 487 U.S. at 50. If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice. Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president.

The context of Freed's speech is hazier than that of the hypothetical school board president. Had Freed's account carried a label (*e.g.*, "this is the personal page of James R. Freed") or a disclaimer (*e.g.*, "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a "personal" page is personal (absent significant evidence indicating that a post is official).[6] Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (*e.g.*, a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (*e.g.*, an "@PHuronCityMgr" Instagram account). Freed's page, however, was not designated either "personal" or "official," raising the prospect that it was "mixed use"—a place where he made some posts in his personal capacity and others in his capacity as city manager.

[6] An official cannot insulate government business from scrutiny by conducting it on a personal page. The Solicitor General offers the example of an official who designates space on his personal page as the official channel for receiving comments on a proposed regulation. Because the power to conduct notice-and-comment rulemaking belongs exclusively to the State, its exercise is necessarily governmental. Similarly, a mayor would engage in state action if he hosted a city council meeting online by streaming it only on his personal Facebook page. By contrast, a post that is compatible with either a "personal capacity" or "official capacity" designation is "personal" if it appears on a personal page.

Categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations. In some circumstances, the post's content and function might make the plaintiff's argument a slam dunk. Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty. If, by contrast, the mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city's webpage—it is far less likely that he is purporting to exercise the power of his office. Instead, it is much more likely that he is engaging in private speech "related to his public employment" or "concerning information learned during that employment." *Lane*, 573 U.S. at 238.

Hard-to-classify cases require awareness that an official does not necessarily purport to exercise his authority simply by posting about a matter within it. He might post job-related information for any number of personal reasons, from a desire to raise public awareness to promoting his prospects for reelection. Moreover, many public officials possess a broad portfolio of governmental authority that includes routine interaction with the public, and it may not be easy to discern a boundary between their public and private lives. Yet these officials too have the right to speak about public affairs in their personal capacities. Lest any official lose that right, it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts. When there is doubt, additional factors might cast light—for example, an official who uses government staff to make a post will be hard pressed to deny that he was conducting government business.

The nature of the technology matters to the state-action analysis. Freed performed two actions to which Lindke objected: He deleted Lindke's comments and blocked him from commenting again. So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.[7] A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.

The state-action doctrine requires Lindke to show that Freed (1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts. To the extent that this test differs from the one applied by the Sixth Circuit, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

[7] On some platforms, a blocked user might be unable even to *see* the blocker's posts.

On p. 377, before the problems, add the following:

Food for Thought

Plaintiffs are animal rights activists who believe that their city's use of horse drawn carriages constitutes cruelty to animals. The city, purporting to enact reasonable time, place and manner restrictions, enacted an ordinance requiring plaintiffs to stay approximately 100 feet away from the carriage loading site, and prohibiting them from approaching or offering leaflets to individuals waiting for carriage rides. Under the ordinance, protestors were allowed to distribute leaflets to individuals as they left the carriage rides. The city seeks to justify the restriction as a way of "preserving the peace" and "preventing criminal conduct." Plaintiff's claim that the restrictions were imposed by the city simply because it feared that the protests might drive away customers. Is the ordinance valid under the First Amendment? *See Saltz v. City of Frederick*, 538 F.Supp.3d 510 (D. Md. 2021).

On p. 377, insert the following new problem # 1, and renumber the remaining problems:

1. *City Council Meetings*. At its council meetings, a city allows local citizens to appear and be heard. However, after a man confronted a city councilman at a meeting, the city obtained an order barring him from appearing at future council meetings. Does a city council meeting qualify as a public forum? A designated public forum? Can the city ban the man from appearing at any future council meeting, as well as from speaking at those meetings? If the man cannot be prohibited from attending future meetings, can he be removed if he attends and is disruptive? *See McDonough v. Garcia*, 90 F.4th 1080 (11th Cir. 2024).

On p. 377, following problem # 2, add the following:

Food for Thought

Outside the Bronx County Hall of Justice, plaintiff seeks to peacefully hand out pamphlets promoting the idea of jury nullification. Based on a New York law which provides that a person is guilty of criminal contempt in the second degree if, within a radius of 200 feet of a courthouse, he or she "calls aloud, shouts, holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse." NY claims that the law is based upon a "compelling state interest," namely, "to protect the integrity of the judicial process by shielding trial participants, including jurors and witnesses, from undue influence during their engagement in trials," which "promotes the rule of law and the legitimate functioning of the justice system." Based on the law, a police officer tells plaintiff (who is not protesting related to a particular trial) that he must move at least 200 feet away from the courthouse or be arrested. Is it permissible for New York to require protestors to stay at least 200 feet away from courthouses. Plaintiff is not being loud or intrusive. Is the NY law content-based? Should it be upheld as applied to plaintiff's conduct? *See Picard v. Magliano*, 42 F.4th 89 (2nd Cir. 2022).

On p. 379, insert the following new problem ## 7 & 8, and renumber the remaining problem:

7. *The "All Lives Matter" Mural*. A student at Indiana University applied to the City of Bloomington for permission to pain an "All Lives Matter" mural on campus, but the application was denied on the basis that the "city does not take recommendations for art in its rights-of-way." However, under the City's "Public Art Master Plan," the city expressed a clear intent to encourage members of the general public to develop art to be displayed in public rights-of-way. However, the city recently granted a request by the Black Collegians group. Can the denied student demand an explanation from the City? *See Indiana University Chapter of Turning Point USA v. Bloomington*, 641 F. Supp.3d 538 (S.D. Ind. 2022).

8. *Prohibiting Teacher Criticism*. A school board adopts a rule which prohibits the discussion of "personnel matters" at school board meetings. The board interprets this policy to prohibit any and all criticism or praise of teachers. Under the policy, the board refuses to let a community member talk about how particular teachers are handling LGBTQ+ and gender identity issues. Is the meeting considered to be a "public forum?" Is the restriction considered to be content-based? What standard of review applies? *See McBreairty v. Miller*, 2023 WL 3096787 (Me.).

On p. 393, after the Problem., insert the following:

Food for Thought

Individual who were evicted from their homes, and an organization that protests against foreclosure and displacement, held protests outside the residence of the developer who bought the home out of foreclosure. The developer sues the protestors in an effort to halt the protests. California has an anti-SLAPP (strategic lawsuit against public participation) statute which was designed to prevent "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Based on the statute, the protestors move to dismiss? Is this a good place to deploy the statute? *See Geiser v. Kuhns*, 515 P.3d 623 (Cal. 2022).

4. *The Ohio Law*. An Ohio law makes it "an unfair labor practice for an employee organization, its agents, or representatives, or public employees to induce or encourage any individual in connection with a labor relations dispute to picket the residence or any place of private employment of any public official or representative of the public employer." After the members of an education association picket outside the residences or places of employment of the state's employment relations board. Is the prohibition content-neutral? Does it pass strict scrutiny? *See Portage County Educators Association v. State Employment Relations Board*, 169 Ohio St.3d 167, 202 N.E.3d 690 (Ohio 2022).

4. Content-Based and Viewpoint-Based Restrictions in Non-Public Fora

On p. 409, following the case, insert the following:

FYI

On remand, the trial court upheld the Austin sign law, concluding that it was narrowly tailored to serve a significant government interest, was facially neutral and was not enacted with an impermissible purpose. *See Reagan National Advertising of Austin, Inc. v. City of Austin*, 64 F.4th 287 (5th Cir. 2023).

On p. 410, after the problems, insert the following:

Food for Thought

Can a state government impose content-based restrictions in the public schools? For example, the State of Florida enacted a law that prohibits discussion of sexual identity and gender identity for children in grades kindergarten through third grade. The state regards such materials as "unsuitable" for such young children. LGBTQ advocates decry the restriction claiming that Florida is "marginalizing" LGBTQ individuals. Is the law vague or overbroad? Could Florida extend the law to include, not only kindergartners, but all students through grade 12?

C. Campaign Finance Laws [Online Material]

1. Modern Foundations

After last paragraph in the text after this heading, add the following new text:

In *Thompson v. Hebdon*, 589 U.S. 1 (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. 434, before the notes, insert the following new case:

United States v. Hansen
599 U.S. 762 (2023).

Justice BARRETT delivered the opinion of the Court.

A federal law prohibits "encouraging or inducing" illegal immigration. 8 U.S.C. § 1324(a)(1)(A)(iv). After concluding that this statute criminalizes immigration advocacy and other protected speech, the Ninth Circuit held it unconstitutionally overbroad under the First Amendment. That was error. Properly interpreted, this provision forbids only the intentional solicitation or facilitation of certain unlawful acts. It does not "prohibit a substantial amount of protected speech"—let alone enough to justify throwing out the law's "plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). We reverse.

Mana Nailati, a citizen of Fiji, heard that he could become a U. S. citizen through an "adult adoption" program run by Helaman Hansen. Eager for citizenship, Nailati flew to California. Hansen's wife told Nailati that adult adoption was the "quickest and easiest way to get citizenship here in America." For $4,500, Hansen's organization would arrange Nailati's adoption, and he could then inherit U. S. citizenship from his new parent. Nailati signed up. It was too good to be true. There is no path to citizenship through "adult adoption," so Nailati waited for months with nothing to show for it. Faced with the expiration of his visa, he asked Hansen what to do. Hansen advised him to stay: "Once you're in the program," Hansen explained, "you're safe. Immigration cannot touch you." Believing that citizenship was around the corner, Nailati took Hansen's advice and remained in the country unlawfully. Hansen peddled his scam to other noncitizens too. After hearing about the program from their pastor, one husband and wife wrote him a check for $9,000—initially saved for a payment on a house in Mexico. Another noncitizen paid Hansen out of savings he had accumulated over 21 years as a housepainter. Still others borrowed from relatives and friends. All told, Hansen lured over 450 noncitizens into his program, and he raked in nearly $2 million.

The United States charged Hansen with violations of § 1324(a)(1)(A)(iv). That clause forbids "encouraging or inducing an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." In addition to convicting him under clause (iv), the jury found that Hansen

had acted "for the purpose of private financial gain," triggering a higher maximum penalty. Another case involving § 1324(a)(1)(A)(iv), *United States* v. *Sineneng-Smith*, was pending before the Ninth Circuit, which raised the question whether the clause was an unconstitutionally overbroad restriction of speech. [So,] Hansen moved to dismiss the clause (iv) charges on First Amendment overbreadth grounds. The District Court rejected Hansen's argument and sentenced him. While Hansen's appeal was pending, the Ninth Circuit held in *Sineneng-Smith* that clause (iv) is unconstitutionally overbroad. [Even though that holding was vacated, Hansen raised the same claim in his appeal.] The Ninth Circuit [held] that clause (iv) criminalizes speech such as "encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants." Concluding that clause (iv) covers an "alarming" amount of protected speech relative to its narrow legitimate sweep, the Ninth Circuit held the provision facially overbroad. We granted certiorari.

Hansen does not claim that the First Amendment protects the communications for which he was prosecuted. Cf. *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003) ("The First Amendment does not shield fraud"). Instead, he argues that clause (iv) punishes so much protected speech that it cannot be applied to *anyone*, including him. An overbreadth challenge is unusual. For one thing, litigants typically lack standing to assert the constitutional rights of third parties. For another, litigants mounting a facial challenge to a statute normally "must establish that *no set of circumstances* exists under which the statute would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Breaking from these rules, the overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied.

We have justified this doctrine on the ground that it provides breathing room for free expression. Overbroad laws "may deter or 'chill' constitutionally protected speech," and if would-be speakers remain silent, society will lose their contributions to the "marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119, (2003). To guard against those harms, the overbreadth doctrine allows a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak. *Williams*, 553 U.S. at 292. If the challenger demonstrates that the statute "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep," then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid. Because it destroys some good along with the bad, "invalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.' " *Williams*, 553 U.S. at 293. To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep. *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1 (1988). In the absence of a lopsided ratio, courts must handle unconstitutional applications case-by-case.

§ 1324(a)(1)(A)(iv) makes it unlawful to "encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law."[1] The issue is whether Congress used

"encourage" and "induce" as terms of art referring to criminal solicitation and facilitation (thus capturing only a narrow band of speech) or instead as those terms are used in everyday conversation (thus encompassing a broader swath). An overbreadth challenge obviously has better odds on the latter view.

Criminal solicitation is the intentional encouragement of an unlawful act. ALI, Model Penal Code § 5.02(1), p. 364 (1985) (MPC); 2 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.1 (3d ed. 2022). Facilitation—also called aiding and abetting—is the provision of assistance to a wrongdoer with the intent to further an offense's commission. See, *e.g., Twitter, Inc.* v. *Taamneh*, 143 S.Ct. 1206 (2023). While the crime of solicitation is complete as soon as the encouragement occurs, liability for aiding and abetting requires that a wrongful act be carried out. Neither solicitation nor facilitation requires lending physical aid; for both, words may be enough. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). Both require an intent to bring about a particular unlawful act. See, *e.g.*, *Hicks v. United States*, 150 U.S. 442 (1893). And both are longstanding criminal theories targeting those who support the crimes of a principal wrongdoer.

The terms "encourage" and "induce" are among the "most common" verbs used to denote solicitation and facilitation. *Id.*, § 13.2(a). In fact, their criminal-law usage dates back hundreds of years. A prominent early American legal dictionary, for instance, defines "abet" as "to *encourage* or set another on to commit a crime." 1 J. BOUVIER, LAW DICTIONARY 30 (1839). Other sources agree. See, *e.g.*, 1 J. OHLIN, WHARTON'S CRIMINAL LAW § 10:1, p. 298 (16th ed. 2021). This pattern is on display in the federal criminal code, which, for over a century, has punished one who "induces" a crime as a principal. See Act of Mar. 4, 1909, § 332, 35 Stat. 1152 ("Whoever aids, abets, counsels, commands, *induces*, or procures the commission of an offense is a principal"); 18 U.S.C. § 2(a) The Government offers other examples as well: The ban on soliciting a crime of violence penalizes those who "solicit, command, *induce*, or otherwise endeavor to persuade" another person "to engage in the unlawful conduct." § 373(a). Federal law also criminalizes "persuading, *inducing*, enticing, or coercing" one "to engage in prostitution" or other unlawful sexual activity involving interstate commerce. §§ 2422(a), (b). The Model Penal Code echoes these formulations, defining solicitation as, in relevant part, "commanding, *encouraging* or requesting another person to engage in specific unlawful conduct." MPC § 5.02(1), at 364. And the commentary to the Model Penal Code notes that similar prohibitions may employ other verbs, such as "induce." See *id.*, Comment 3, at 372.

The use of both verbs to describe solicitation and facilitation is widespread in the States too. Nevada considers "every person" who "aided, abetted, counseled, *encouraged*, hired, commanded, *induced*, or procured" an offense to be a principal. Nev. Rev. Stat. § 195.020 (2021). Arizona provides that one who "commands, *encourages*, requests, or solicits another person to engage in specific conduct" commits the offense of solicitation. Ariz. Rev. Stat. Ann. § 13–1002(A) (2020). And New Mexico imposes criminal liability on one who "with the intent" for another to commit a crime "solicits, commands, requests, *induces* or otherwise attempts to promote or facilitate" the offense. N. M. Stat. Ann. § 30–28–3(A) (2018). These States are by no means outliers—"induce" or "encourage" describe similar offenses in the criminal codes of *every* State. See, *e.g.*, Ala. Code § 13A–2–23(1) (2015) ("induces"); Colo. Rev. Stat. § 18–1–603 (2022) ("encourages"). In sum, the use of "encourage" and "induce" to describe solicitation and facilitation is both longstanding and pervasive. And if 8 U.S.C. § 1324(a)(1)(A)(iv) refers to

solicitation and facilitation as they are typically understood, an overbreadth challenge would be hard to sustain.

Hansen, like the Ninth Circuit, insists that clause (iv) uses "encourages" and "induces" in their ordinary rather than their specialized sense. While he offers definitions from multiple dictionaries, the terms are so familiar that two samples suffice. In ordinary parlance, "induce" means "to lead on; to influence; to prevail on; to move by persuasion or influence." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1269 (2d ed. 1953). And "encourage" means to "inspire with courage, spirit, or hope." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 747 (1966). In Hansen's view, clause (iv)'s use of the bare words "encourages" or "induces" conveys these ordinary meanings. "That encouragement can *include* aiding and abetting," he says, "does not mean it is *restricted* to aiding and abetting." And because clause (iv) "proscribes encouragement, full stop," it prohibits even an "op-ed or public speech criticizing the immigration system and supporting the rights of long-term undocumented noncitizens to remain, at least where the author or speaker knows that, or recklessly disregards whether, any of her readers or listeners are undocumented." If the statute reaches the many examples that Hansen posits, its applications to protected speech might swamp its lawful applications, rendering it vulnerable to an overbreadth challenge.

We hold that clause (iv) uses "encourages or induces" in its specialized, criminal-law sense—that is, as incorporating common-law liability for solicitation and facilitation. In truth, the clash between definitions is not much of a contest. "Encourage" and "induce" have well-established legal meanings—and when Congress "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

To see how this works, consider the word "attempts," which appears in clause (iv)'s next-door neighbors. See §§ 1324(a)(1)(A)(i)–(iii). In a criminal prohibition, we would not understand "attempt" in its ordinary sense of "try." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 133 (2d ed. 2001). We would instead understand it to mean taking "a substantial step" toward the completion of a crime with the requisite *mens rea*. *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007). "Encourages or induces" likewise carries a specialized meaning. After all, when a criminal-law term is used in a criminal-law statute, that—in and of itself—is a good clue that it takes its criminal-law meaning. And the inference is even stronger here, because clause (iv) prohibits "encouraging" and "inducing" *a violation of law*. See § 1324(a)(1)(A)(iv). That is the focus of criminal solicitation and facilitation too.

In concluding otherwise, the Ninth Circuit stacked the deck in favor of ordinary meaning. When words have several plausible definitions, context differentiates among them. That is just as true when the choice is between ordinary and specialized meanings, see, *e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974), as it is when a court must choose among multiple ordinary meanings, see, *e.g.*, *Muscarello v. United States*, 524 U.S. 125, 127 (1998). The context of these words indicates that Congress used them as terms of art.

Statutory history is an important part of this context. In 1885, Congress enacted a law that would become the template for clause (iv). That law prohibited "knowingly assisting, *encouraging* or soliciting" immigration under a contract to perform labor. Act of Feb. 26, 1885,

ch. 164, § 3, 23 Stat. 333 (1885 Act). Then, as now, "encourage" had a specialized meaning that channeled accomplice liability. See 1 BOUVIER, LAW DICTIONARY 30 ("abet" means "to encourage or set another on to commit a crime"). And the words "assisting" and "soliciting," which appeared alongside "encouraging" in the 1885 Act, reinforce that Congress gave the word "encouraging" its narrower criminal-law meaning. See *Dubin* v. *United States*, 143 S.Ct. 1557 (2023). Unsurprisingly, when this Court upheld the 1885 Act against a constitutional challenge, it explained that Congress "has the power to punish any who *assist*" in introducing noncitizens into the country—without suggesting that the term "encouraging" altered the scope of the prohibition. *Lees v. United States*, 150 U.S. 476, 480 (1893)..

In the ensuing decades, Congress both added to and subtracted from the "encouraging" prohibition in the 1885 Act. Throughout, it continued to place "encouraging" alongside "assisting" and "soliciting." See Act of Mar. 3, 1903, § 5, 32 Stat. 1214–1215; Act of Feb. 20, 1907, § 5, 34 Stat. 900. In 1917, Congress added "induce" to the string of verbs. Act of Feb. 5, 1917, § 5, 39 Stat. 879 (1917 Act) (making it a crime "to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer into the United States"). Like "encourage," the word "induce" carried solicitation and facilitation overtones at the time of this enactment. See BLACK'S LAW DICTIONARY 617 (1891). In fact, Congress had just recently used the term in a catchall prohibition on criminal facilitation. See Act of Mar. 4, 1909, § 332, 35 Stat. 1152 ("Whoever ... aids, abets, counsels, commands, *induces*, or procures [the commission of an offense], is a principal"). And as with "encourage," the meaning of "induce" was clarified and narrowed by its statutory neighbors in the 1917 Act—"assist" and "solicit."

Congress enacted the immediate forerunner of the modern clause (iv) in 1952 and, in doing so, simplified the language from the 1917 Act. Most notably, the 1952 version dropped the words "assist" and "solicit," instead making it a crime to "willfully or knowingly encourage or induce, or attempt to encourage or induce, either directly or indirectly, the entry into the United States of ... any alien ... not lawfully entitled to enter or reside within the United States." Immigration and Nationality Act, § 274(a)(4), 66 Stat. 229. Three decades later, Congress brought 8 U.S.C. § 1324(a)(1)(A)(iv) into its current form—still without the words "assist" or "solicit." Immigration Reform and Control Act of 1986, § 112(a), 100 Stat. 3382 (making it a crime to "encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law").

On Hansen's view, these changes dramatically broadened the scope of clause (iv)'s prohibition on encouragement. Before 1952, he says, the words "assist" and "solicit" may have cabined "encourage" and "induce," but eliminating them severed any connection the prohibition had to solicitation and facilitation. In other words, Hansen claims, the 1952 and 1986 revisions show that Congress opted to make "protected speech, not conduct, a crime." We do not agree that the mere removal of the words "assist" and "solicit" turned an ordinary solicitation and facilitation offense into a novel and boundless restriction on speech. Hansen's argument would require us to assume that Congress took a circuitous route to convey a sweeping—and constitutionally dubious—message. The better understanding is that Congress simply "streamlined" the pre-1952 statutory language—which, as any nonlawyer who has picked up the

U. S. Code can tell you, is a commendable effort. In fact, the streamlined formulation mirrors this Court's own description of the 1917 Act, which is further evidence that Congress was engaged in a cleanup project, not a renovation. See *United States v. Lem Hoy*, 330 U.S. 724, 727, 67 S.Ct. 1004, 91 L.Ed. 1204 (1947) (explaining that the 1917 Act barred "contract laborers, defined as persons *induced or encouraged* to come to this country by offers or promises of employment". And critically, the terms that Congress retained ("encourage" and "induce") substantially overlap in meaning with the terms it omitted ("assist" and "solicit"). LaFave § 13.2(a). Clause (iv) is best understood as a continuation of the past, not a sharp break from it.

Hansen's primary counterargument is that clause (iv) is missing the necessary *mens rea* for solicitation and facilitation. Both, as traditionally understood, require that the defendant specifically intend that a particular act be carried out. "Encourages or induces," however, is not modified by any express intent requirement. Because the text of clause (iv) lacks that essential element, Hansen protests, it cannot possibly be limited to either solicitation or facilitation. Hansen ignores the longstanding history of these words. When Congress placed "encourages" and "induces" in clause (iv), the traditional intent associated with solicitation and facilitation was part of the package. That is precisely how the federal aiding-and-abetting statute works. It contains no express *mens rea* requirement, providing only that a person who "aids, abets, counsels, commands, induces or procures" a federal offense is "punishable as a principal." 18 U.S.C. § 2(a). Yet, consistent with "a centuries-old view of culpability," we have held that the statute implicitly incorporates the traditional state of mind required for aiding and abetting. *Rosemond v. United States*, 572 U.S. 65, 70 (2014). Clause (iv) is situated among other provisions that work the same way. Consider those that immediately follow it: The first makes it a crime to "engage in any conspiracy to commit any of the preceding acts," and the second makes it a crime to "aid or abet the commission of any of the preceding acts." Neither of these clauses explicitly states an intent requirement. Yet both conspiracy and aiding and abetting are familiar common-law offenses that contain a particular *mens rea*. Take an obvious example: If the words "aids or abets" in clause (v)(II) were considered in a vacuum, they could be read to cover a person who inadvertently helps another commit a § 1324(a)(1)(A) offense. But a prosecutor who tried to bring such a case would not succeed. Why? Because aiding and abetting implicitly carries a *mens rea* requirement—the defendant generally must *intend* to facilitate the commission of a crime. Since "encourages or induces" in clause (iv) draws on the same common-law principles, it too incorporates them implicitly.

Hansen reiterates that if Congress had wanted to require intent, it could easily have said so—as it did elsewhere in clause (iv). Hansen says this reflects that Congress aimed to make a defendant liable for "encouraging or inducing" without respect to her state of mind. But there is a simple explanation for why "encourages or induces" is not modified by an express *mens rea* requirement: There is no need for it. "Encourage" and "induce," as terms of art, carry the usual attributes of solicitation and facilitation—including the traditional *mens rea*. Congress might have rightfully seen the express *mens rea* requirement as unnecessary and cut it in [an] effort to streamline clause (iv). In any event, the omission of the modifier is certainly not enough to overcome the "presumption of scienter" that typically separates wrongful acts "from 'otherwise innocent conduct.' " *Xiulu Ruan* v. *United States*, 597 U. S. —— (2022) (slip op., at 5). Nor does the scienter applicable to a distinct element within clause (iv)—that the defendant "know" or

"recklessly disregard the fact that" the noncitizen's "coming to, entry, or residence is or will be in violation of law"—tell us anything about the *mens rea* for "encourages or induces." Many criminal statutes do not require knowledge of illegality, but rather only "factual knowledge as distinguished from knowledge of the law." *Bryan v. United States*, 524 U.S. 184, 192 (1998). So Congress's choice to specify a mental state for this element tells us something that we might not normally infer, whereas the inclusion of a *mens rea* requirement for "encourages or induces" would add nothing.

Section 1324(a)(1)(A)(iv) reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law. So understood, the statute does not "prohibit a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U.S. at 292. The provision encompasses a great deal of nonexpressive conduct—which does not implicate the First Amendment at all. Consider just a few examples: smuggling noncitizens into the country, providing counterfeit immigration documents, and issuing fraudulent Social Security numbers to noncitizens, These are heartland clause (iv) prosecutions. So the "plainly legitimate sweep" of the provision is extensive. Hansen fails to identify a single prosecution for ostensibly protected expression in the 70 years since Congress enacted clause (iv)'s immediate predecessor. Instead, he offers a string of hypotheticals, all premised on expansive ordinary meanings of "encourage" and "induce." In his view, clause (iv) would punish the author of an op-ed criticizing the immigration system, "a minister who welcomes undocumented people into the congregation and expresses the community's love and support," and a government official who instructs "undocumented members of the community to shelter in place during a natural disaster." Yet none of Hansen's examples are filtered through the elements of solicitation or facilitation—the requirement that a defendant *intend* to bring about a specific result. Clause (iv) does not have the scope Hansen claims, so it does not produce the horribles he parades.

To the extent that clause (iv) reaches *any* speech, it stretches no further than speech integral to unlawful conduct.[8] "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected. We have applied this principle many times, including to the promotion of a particular piece of contraband, solicitation of unlawful employment, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), and picketing with the "sole, unlawful and immediate objective" of "inducing" a target to violate the law, *Giboney*, 336 U.S. at 502. It applies to clause (iv) too.

Hansen [recognizes] that clause (iv) criminalizes speech that solicits or facilitates a *criminal* violation, like crossing the border unlawfully or remaining in the country while subject to a removal order. But he resists the idea that the First Amendment permits Congress to

[8] We also note that a number of clause (iv) prosecutions (like Hansen's) are predicated on fraudulent representations through speech for personal gain. "False claims that are made to effect a fraud or secure moneys or other valuable considerations" are not protected by the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion). These examples increase the list of lawful applications.

criminalize speech that solicits or facilitates a *civil* violation—and some immigration violations are only civil. We need not address this novel theory. To succeed, he has to show that clause (iv)'s overbreadth is "*substantial* relative to its plainly legitimate sweep." *Williams*, 553 U.S. at 292. Even assuming that clause (iv) reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify the "strong medicine" of facial invalidation for overbreadth. As-applied challenges can take it from here.

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

It is so ordered.

Justice THOMAS, concurring.

The facial overbreadth doctrine "lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges," and distorts the judicial role. *Americans for Prosperity Foundation* v. *Bonta*, 594 U. S. —— (2021) (THOMAS, J., concurring) (slip op., at 2). Respondent defrauded nearly 500 aliens knowing full well that his scheme would not lead to citizenship. Yet, instead of applying Congress' duly enacted law, the Ninth Circuit took the doctrine as license to "speculate about imaginary cases and sift through an endless stream of fanciful hypotheticals" and determined that they were "substantial" enough to warrant holding the law unconstitutional *in toto*. That is nothing short of a society-wide policy determination of the sort that legislatures perform. This approach is fundamentally inconsistent with judicial duty.

Justice JACKSON, with whom Justice SOTOMAYOR joins, dissenting.

"In ordinary parlance, 'induce' means 'to lead on; to influence; to prevail on; to move by persuasion or influence,' " and "encourage' means to 'inspire with courage, spirit, or hope." Thus, the encouragement provision's use of the terms "encourage" and "induce" seems to encompass any and all speech that merely persuades, influences, or inspires a noncitizen to come to, enter, or reside in this country in violation of law. If speech of this nature is sufficient to trigger potential prosecution, the provision would put all manner of protected speech in the Government's prosecutorial crosshairs. The encouragement provision would also punish abstract advocacy of illegal conduct, even though such speech is plainly permissible under the First Amendment. The plain text of the statute appears to prohibit a person from saying to a noncitizen who has no authorization to reside here, "I encourage you to live in the United States." That speech is plainly protected.

The Government argues that the statute can be saved from today's overbreadth challenge by construing the broad terms of the encouragement provision narrowly—and reading them as authorizing prosecution only for solicitation or facilitation. In the overbreadth context, the Court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." The encouragement provision is *not* susceptible to the solicitation or facilitation construction. The majority starts "with some background on solicitation and facilitation." Ordinarily, we start with the text of the statute being interpreted. Yet the words "solicitation" and "facilitation" appear nowhere in the encouragement provision. The majority explains that the

terms that *do* appear in the encouragement provision—"encourage" and "induce"—are often used to define "solicitation" and "facilitation." The fact that a word is used to help define another word does not necessarily mean that the former is synonymous with the latter or incorporates all of its connotations. Solicitation and facilitation require "an *intent* to bring about a particular unlawful act." But the encouragement provision simply prohibits "encouraging or inducing" a noncitizen "to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." § 1324(a)(1)(A)(iv).

This statute is fundamentally different from aiding-and-abetting liability and solicitation. Aiding-and-abetting liability is a form of vicarious liability—*i.e.*, a way in which a person becomes liable for the crimes of the principal. For solicitation, "the punishment is usually geared to the punishment provided for the offense solicited." WHARTON'S § 9:11. But, a person who violates the encouragement provision is not punished as if he were a principal of the underlying offense, nor does the prescribed punishment depend on the penalty for the offense. Even if the underlying immigration offense is a civil violation, the person who encourages or induces that infraction could be punished by up to 10 years' imprisonment. Aiding-and-abetting liability (but not solicitation) requires that the principal *actually* commit the underlying offense. 2 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.3© (3d ed. 2018). The encouragement provision does not require that a noncitizen actually enter or reside in the United States.

Absent overbreadth doctrine, "the contours of regulations" that impinge on freedom of speech "would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Dombrowski*, 380 U.S. at 486. We thus allow defendants whose speech is constitutionally proscribed by a statute to argue that the statute is facially invalid under the First Amendment on the grounds that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473. By permitting this kind of challenge, the Court has "avoided making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski*, 380 U.S. at 487.

The majority attempts to downplay the encouragement provision's threat to free expression by highlighting that Hansen "fails to identify a single prosecution for ostensibly protected expression in the 70 years since Congress enacted clause (iv)'s immediate predecessor." The number of people who have not exercised their right to speak out of fear of prosecution is unknowable. What may seem "fanciful" to this Court might well prove to be a significant obstacle for those who operate daily in the shadow of the law.

On p. 436, before the problems, insert the following:

Food for Thought

A public college has a policy that prohibits anyone from posting flyers with "inappropriate" or "offensive" language. Young Americans for Freedom wishes to post a pro life flyer. Although the college allows others greater freedom to post flyers, Young Americans was allowed to post its poster on a free speech kiosk and then for only a limited time. Does the policy

suffer from an unconstitutional level of vagueness? *See Flores v. Bennett*, 635 F.Supp.3d 1020 (E.D. Cal. 2022).

On p. 436, insert a new problem # 3, and renumber the remaining problems:

3. *The January 6th Riot at the Capitol*. Nassif, who was one of the rioters who broke into the Capitol Building on January 6th, was charged with parading, demonstrating or picketing in the Capitol building. The evidence shows that Nassif was present at the Capitol on January 6th, and helped lead a chant: "Whose house? Our House.!" Nassif encouraged people coming out of the building to "keep fighting" and then forced his way into the Capitol Rotunda. Once inside, Nassif gestured for other protestors to join him inside, and ultimately left the building in about 10 minutes. Nassif defends against a charge on the ground that the law is unduly vague. Do you agree: *See United States v. Nassif*, 97 F.4th 968 (D.C. Cir. 2024).

On p. 437, after the problems, insert the following:

Food for Thought

The American Bar Association has approved a rule designed to prohibit harassment and discrimination by attorneys while practicing law. The standard extends beyond workplace settings, like courthouses, to include law-related events such as association meetings and outings with colleagues. Some have questioned whether the rule is too broad and therefore inconsistent with the First Amendment. The Connecticut bar, worried that the rule might be too broad, limits the rule in two ways. First, it provides that comments have to be directed at a person and cannot just involve the expression of controversial views at a bar event. Second, Connecticut's rule explicitly provides that it does not extend to statements protected by the First Amendment. Does the ABA rule suffer from vagueness or overbreadth? Do the Connecticut amendments save the rule?

B. Prior Restraints

1. Licensing

On p. 445, before the problems, insert the following new Food for Thought:

Food for Thought

In 2018, entrepreneur Elon Musk tweeted that he had secured the funding to take Tesla private. The tweet caused the price of the automaker to surge. Claiming that Musk had misled shareholders, the Securities and Exchange Commission sued, claiming that Musk had misled shareholders. The SEC obtained a $20 million judgment against Musk and also extracted an agreement from Musk that he would allow an in-house lawyer approve all of his social media

posts. Does the approval provision constitute a prior restraint? It is presumptively unconstitutional? *See* Greg Stohr, *SEC Urges Supreme Court to Reject Musk's 'Twitter Sitter' Appeal*, Bloomberg Law News (Mar. 22, 2024).

2. Injunctions

On p. 469, at the end of note # 1, delete the final sentence and replace it with:

Assange holed up in a foreign embassy in London (in an effort to escape arrest), but was eventually arrested and the U.S. sought to extradite him for trial. The charges were resolved in 2024 when Assange agreed to plead guilty to leaking U.S. national security secrets.

On p. 470, before the problems, insert the following:

Food for Thought

The government issues a "transparency report" which provides a numerical breakdown of national security-related date requests from the prior year. Twitter protests the accuracy of the report and seeks to release details regarding national security letters requesting information about subscribers and orders under FISA (Foreign Intelligence Security Act). The government opposes the request, claiming that the proposed disclosure would risk informing our adversaries aware of what is (and is not) being surveilled. Suppose that you are the judge assigned to hear the case. How will you go about deciding whether Twitter can release the information? *See Twitter v. Garland*, 61 F.4th 686 (9th Cir. 2023).

On p. 471, after the problems, insert the following:

Food for Thought

Plaintiff created a social media page mocking the police department. The page was styled to look like it was an official police department page, but discussed things (among other things) a Pedophile Reform Event at which pedophiles would receive honorary police commissions, and an advertisement strongly encouraging minorities to apply. The police arrested plaintiff for unlawfully impairing police department functions. Did the page contain protected speech? *See Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019).

Chapter 7

Freedom of Association and Compelled Expression

A. The Right to Associate

On p. 488, after problem #5, add the following:

Food for Thought

Delaware requires political balance (between Republicans and Democrats) in the composition of its courts. As a result, an independent is precluded from serving as a judge. The balance provision is challenged by a lawyer who is independent, and therefore politically unaffiliated, but who wishes to be appointed to the bench. Does the balance provision infringe the lawyer's right of association? *See Adams v. Carney*, 2022 WL 4448196 (D. Del.).

B. The Right Not to Speak

On p. 512, before the problems, add the following new case:

303 CREATIVE LLC. v. AUBREY ELENIS
600 U.S. 570 (2023).

Justice Gorsuch delivered the opinion of the Court.

Like many States, Colorado has a law forbidding businesses from engaging in discrimination when they sell goods and services to the public. Laws along these lines have done much to secure the civil rights of all Americans. But in this case Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe. The question we face is whether that course violates the Free Speech Clause of the First Amendment.

Through her business, 303 Creative LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. As she envisions it, her websites will provide couples with text, graphic arts, and videos to "celebrate" and "convey" the "details" of their "unique love story." The websites will discuss how the couple met, explain their backgrounds, families, and future plans, and provide information about their upcoming wedding. All of the text and graphics on these websites will be "original," "customized," and "tailored" creations. The websites will be "expressive in nature," designed "to communicate a particular message." "The websites are Ms. Smith's original artwork," the name of the company she owns and operates by herself will be displayed on every one.

While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans. She worries that, if she does, Colorado will force her to express views with which she disagrees. Ms. Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation. But she has never created expressions that contradict her own views for anyone—whether that means generating works that encourage violence, demean another person, or defy her religious beliefs by, say, promoting atheism. Ms. Smith does not wish to do otherwise now, but she worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman. Ms. Smith acknowledges that her views about marriage may not be popular in all quarters. But, she asserts, the First Amendment's Free Speech Clause protects her from being compelled to speak what she does not believe. The Constitution, she insists, protects her right to differ.

Ms. Smith filed a lawsuit in federal district court. She sought an injunction to prevent the State from forcing her to create wedding websites celebrating marriages that defy her beliefs. Ms. Smith first had to establish her standing to sue. That required her to show "a credible threat" existed that Colorado would seek to compel speech from her that she did not wish to produce. *Susan B. Anthony List* v. *Driehaus,* 573 U. S. 149 (2014). Ms. Smith [directed] the court to the Colorado Anti-Discrimination Act (CADA). That law defines a "public accommodation broadly to include almost every public-facing business in the State. Colo. Rev. Stat. §24–34–601(1) (2022). In its "Accommodation Clause," the law prohibits a public accommodation from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. Either state officials or

private citizens may bring actions to enforce the law. Courts can order fines up to $500 per violation. The Colorado Commission on Civil Rights can issue cease-and-desist orders, and require violators to take various other "affirmative actions." In the past, these have included participation in mandatory educational programs and the submission of ongoing compliance reports to state officials. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___ (2018) (slip op., at 8).[9] Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse. Ms. Smith pointed to Colorado's record of past enforcement actions under CADA, including one that worked its way to this Court five years ago. See *Masterpiece Cakeshop*, 584 U. S., at ___ (slip op., at 9). Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," and she "will gladly create custom graphics and websites" for clients of any sexual orientation. She will not produce content that "contradicts biblical truth" regardless of who orders it. Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction. All of the graphic and website design services Ms. Smith provides are "expressive." The websites and graphics Ms. Smith designs are "original, customized" creations that "contribute] to the overal messages" her business conveys "through the websites" it creates. Just like the other services she provides, the wedding websites Ms. Smith plans to create "will be expressive in nature." Those wedding websites will be "customized and tailored" through close collaboration with individual couples, and they will "express Ms. Smith's and 303 Creative's message celebrating and promoting" her view of marriage. Viewers of Ms. Smith's websites "will know that the websites are Ms. Smith's and 303 Creative's original artwork." To the extent Ms. Smith may not be able to provide certain services to a potential customer, "there are numerous companies in the State of Colorado and across the nation that offer custom website design services."

Ultimately, the district court ruled against Ms. Smith. So did the Tenth Circuit [which] held that Ms. Smith had standing to sue. She had established a credible threat that, if she follows through on her plans to offer wedding website services, Colorado will invoke CADA to force her to create speech she does not believe or endorse. The court pointed to the fact that "Colorado has a history of past enforcement against nearly identical conduct—*i.e.*, *Masterpiece Cakeshop*"; that anyone in the State may file a complaint against Ms. Smith and initiate "a potentially burdensome administrative hearing" process; and that "Colorado has declined to disavow future enforcement" proceedings against her. Before us, no party challenges these conclusions. Turning to the merits, the Tenth Circuit held that Ms. Smith was not entitled to the injunction. The court acknowledged that Ms. Smith's planned wedding websites qualify as "pure speech" protected by the First Amendment. As a result, Colorado had to satisfy "strict scrutiny" before compelling

[9] CADA [also] contains a "Communication Clause" that prohibits a public accommodation from "publishing any written communication" indicating that a person will be denied "the full and equal enjoyment" of services or that he will be "unwelcome, objectionable, unacceptable, or undesirable" based on a protected classification. Colo. Rev. Stat. §24–34–601(2)(a) (2022). The Communication Clause prohibits any speech inconsistent with the Accommodation Clause. Because Colorado[ʻ] authority to apply the Communication Clause to Ms. Smith stands or falls with its authority to apply the Accommodation Clause, we focus on the Accommodation Clause.

speech from her that she did not wish to create. A divided panel concluded that Colorado has a compelling interest in ensuring "equal access to publicly available goods and services," and no option short of coercing speech can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere."

The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 660 (2000). They saw freedom of speech "both as an end and as a means." *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring); see also 12 THE PAPERS OF JAMES MADISON 193–194 ©. Hobson & R. Rutland eds. 1979). An end because the freedom to think and speak is among our inalienable human rights. A means because the freedom of thought and speech is "indispensable to the discovery and spread of political truth." *Whitney*, 274 U. S., at 375 (Brandeis, J., concurring). By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For these reasons, "if there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), it is the principle that the government may not interfere with "an uninhibited marketplace of ideas," *McCullen* v. *Coakley*, 573 U. S. 464, 476 (2014).

From time to time, governments in this country have sought to test these foundational principles. In *Barnette*, for example, the Court faced an effort by the State of West Virginia to force schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance. If students refused, the State threatened to expel them and fine or jail their parents. Some families objected on the ground that the State sought to compel their children to express views at odds with their faith as Jehovah's Witnesses. In seeking to compel students to salute the flag and recite a pledge, the Court held, state authorities had "transcended constitutional limitations on their powers." Their dictates "invaded the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control." A similar story unfolded in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995). There, veterans organizing a St. Patrick's Day parade in Boston refused to include a group of gay, lesbian, and bisexual individuals. The group argued that Massachusetts's public accommodations statute entitled it to participate in the parade. Lower courts agreed. But this Court reversed. The parade was constitutionally protected speech and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their parade." The veterans' choice of what to say (and not say) might have been unpopular, but they had a First Amendment right to present their message undiluted by views they did not share. [In] *Boy Scouts of America* v. *Dale*, the Boy Scouts excluded James Dale, an assistant scoutmaster, from membership after learning he was gay. Mr. Dale argued that New Jersey's public accommodations law required the Scouts to reinstate him. The New Jersey Supreme Court sided with Mr. Dale, but again this Court reversed. The decision to exclude Mr. Dale may not have implicated pure speech, but this Court held that the Boy Scouts "is an expressive association" entitled to First Amendment protection. Forcing the Scouts to include Mr. Dale would "interfere with its choice not to propound a point of view contrary to its beliefs."

As these cases illustrate, the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," and likely to cause "anguish" or "incalculable grief," *Snyder* v. *Phelps*, 562

U. S. 443, 456 (2011). Equally, the First Amendment protects acts of expressive association. Generally, the government may not compel a person to speak its own preferred messages. See *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969); see also, *e.g.*, *Wooley* v. *Maynard*, 430 U. S. 705 (1977); *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ___ (2018) (*NIFLA*) (slip op., at 8). Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. See *Hurley*, 515 U. S., at 568. All that offends the First Amendment just the same.

The wedding websites Ms. Smith seeks to create qualify as "pure speech." Ms. Smith's websites promise to contain "images, words, symbols, and other modes of expression." Every website will be her "original, customized" creation. Ms. Smith will create these websites to communicate ideas—to "celebrate and promote the couple's wedding and unique love story" and to "celebrate and promote" what Ms. Smith understands to be a true marriage. A hundred years ago, Ms. Smith might have furnished her services using pen and paper. Those services are no less protected today because they are conveyed with a "voice that resonates farther than it could from any soapbox." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 870 (1997). All manner of speech—from "pictures, films, paintings, drawings, and engravings," to "oral utterance and the printed word"—qualify for the First Amendment's protections; no less can hold true when it comes to speech like Ms. Smith's conveyed over the Internet. The wedding websites Ms. Smith seeks to create involve *her* speech. Ms. Smith intends to "vet" each prospective project to determine whether it is one she is willing to endorse. She will consult with clients to discuss "their unique stories as source material." And she will produce a story for each couple using her own words and her own "original artwork." Of course, Ms. Smith's speech may combine with the couple's in the final product. But for purposes of the First Amendment that changes nothing. An individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication. *Hurley*, 515 U. S., at 569.

As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide. If Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to "force her to create custom websites" celebrating other marriages she does not. Colorado seeks to compel this speech in order to "excise certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 633, 642 (1994). The coercive "elimination" of dissenting "ideas" about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith.

While [the Tenth Circuit] thought Colorado could compel speech from Ms. Smith consistent with the Constitution, our First Amendment precedents teach otherwise. In *Hurley*, the Court found that Massachusetts impermissibly compelled speech in violation of the First Amendment when it sought to force parade organizers to accept participants who would "affect their message." In *Dale*, the Court held that New Jersey intruded on the Boy Scouts' First Amendment rights when it tried to require the group to "propound a point of view contrary to its beliefs" by directing its membership choices. In *Barnette*, this Court found impermissible coercion when West Virginia required schoolchildren to recite a pledge that contravened their convictions on threat of punishment or expulsion. Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face

sanctions for expressing her own beliefs, sanctions that may include compulsory participation in "remedial training," filing periodic compliance reports as officials deem necessary, and paying monetary fines. Under our precedents, that is more than enough to represent an impermissible abridgment of the First Amendment's right to speak freely.

Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait. That principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require "an unwilling Muslim movie director to make a film with a Zionist message," or "an atheist muralist to accept a commission celebrating Evangelical zeal," so long as they would make films or murals for other members of the public with different messages. The government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. As our precedents recognize, the First Amendment tolerates none of that.

We do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984). Public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 250 (1964). Over time, governments in this country have expanded public accommodations laws. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees. See, *e.g., Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 (1889). Some States, Colorado included, have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public. States have also expanded their laws to prohibit more forms of discrimination. Today, approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation. This is "unexceptional." States may "protect gay persons, just as they can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. There are innumerable goods and services that no one could argue implicate the First Amendment." Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses.

No public accommodations law is immune from the demands of the Constitution. Public accommodations statutes can sweep too broadly when deployed to compel speech. In *Hurley*, the Court commented favorably on Massachusetts' public accommodations law, but made plain it could not be "applied to expressive activity" to compel speech. In *Dale*, the Court observed that New Jersey's public accommodations law had many lawful applications but held that it could

"not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." What was true in those cases must hold true here. When a state public accommodations law and the Constitution collide, there can be no question which must prevail. U. S. Const., Art. VI, cl. 2. Nor is it any answer Ms. Smith's services are "unique." Her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes. In *Hurley*, the veterans had an "enviable" outlet for speech; their parade was a notable and singular event. In *Dale*, the Boy Scouts offered what some might consider a unique experience. But in both cases the State could not use its public accommodations statute to deny speakers the right "to choose the content of their own messages." Were the rule otherwise, the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government's preferred messages. That would not respect the First Amendment.

Colorado seems to acknowledge that the First Amendment *does* forbid it from coercing Ms. Smith to create websites endorsing same-sex marriage or expressing any other message with which she disagrees. Instead, Colorado [advances] an alternative theory: to comply with Colorado law, the State says, all Ms. Smith must do is repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*. She sells a product to some, the State reasons, so she must sell the same product to all. Colorado's theory rests on a belief that the Tenth Circuit erred when it said this case implicates pure speech. Colorado says this case involves only the sale of an ordinary commercial product and any burden on Ms. Smith's speech is purely "incidental." On the State's telling, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny. The dissent seems to advance the same line of argument. This theory is difficult to square with the parties' stipulations. The State stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create "customized and tailored" speech for each couple. The State stipulated that "each website 303 Creative designs and creates is an original, customized creation for each client." The State stipulated that Ms. Smith's wedding websites "will be expressive in nature, using text, graphics, and videos to celebrate and promote the couple's wedding and unique love story." Colorado seeks to compel the sort of speech that it tacitly concedes lies beyond the reach of its powers.

As the State emphasizes, Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is "the sole member-owner." But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers.

Colorado urges us to focus on the *reason* Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the "protected characteristics" of certain customers. But the parties agree that Ms. Smith "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites" do not violate her beliefs. That is a

condition Ms. Smith applies to "all customers." Ms. Smith stresses that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments. Nor do First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive. See *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449 (2007); *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977); *Snyder*, 562 U. S., at 456.[10]

Colorado suggests that this Court's decision in *FAIR* supports affirmance. In *FAIR*, a group of schools challenged a law requiring them, as a condition of accepting federal funds, to permit military recruiters space on campus on equal terms with other potential employers. The only expressive activity required of the law schools involved the posting of logistical notices along these lines: "The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m." And, the Court reasoned, compelled speech of this sort was "incidental" and a "far cry" from the speech at issue in our "leading First Amendment precedents that have established the principle that freedom of speech prohibits the government from telling people what they must say." Our cases have held that the government may sometimes "require the dissemination of purely factual and uncontroversial information," particularly in the context of "commercial advertising." *Hurley*, 515 U. S., at 573. But this case involves nothing like that. Here, Colorado does not seek to impose an incidental burden on speech. It seeks to force an individual to "utter what is not in her mind" about a question of political and religious significance. And that, *FAIR* reaffirmed, is something the First Amendment does not tolerate. No government may affect a "speaker's message" by "forcing" her to "accommodate" other views; no government may "alter" the "expressive content" of her message, and no government may "interfere with" her "desired message."

It is difficult to read the dissent and conclude we are looking at the same case. Much of it focuses on the evolution of public accommodations laws, and the strides gay Americans have made towards securing equal justice under law. There is much to applaud here. But none of this answers the question we face today: Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message? The dissent reimagines the facts of this case. The dissent claims that Colorado wishes to regulate Ms. Smith's "conduct," not her speech. Forget Colorado's stipulation that Ms. Smith's activities are "expressive," and the Tenth Circuit's conclusion that the State seeks to compel "pure speech." The dissent chides us for deciding a pre-enforcement challenge. But it ignores the Tenth Circuit's finding that Ms. Smith faces a credible threat of sanctions unless she conforms her views to the State's. The dissent suggests that any burden on speech here is "incidental." All despite the Tenth Circuit's

[10] The dissent labels the distinction between status and message "amusing" and "embarrassing." But the dissent ignores a fundamental feature of the Free Speech Clause. While it does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message—even when we may disapprove of the speaker's motive or the message itself. The dissent ignores the fact that Colorado *itself* has, in other contexts, distinguished status-based discrimination (forbidden) from the right of a speaker to control his own message (protected). Nor is the distinction unusual in societies committed both to nondiscrimination rules and free expression.

finding that Colorado intends to force Ms. Smith to convey a message she does not believe with the "very purpose" of "eliminating ideas" that differ from its own. Nor does the dissent's reimagination end there. It claims that, "for the first time in its history," the Court "grants a business open to the public" a "right to refuse to serve members of a protected class." We do no such thing and Colorado has stipulated Ms. Smith will (as CADA requires) "work with all people regardless of sexual orientation." The dissent would have this Court do something truly novel by allowing a government to coerce an individual to speak contrary to her beliefs on a significant issue of personal conviction, all in order to eliminate ideas that differ from its own.

The dissent asserts that we "sweep under the rug petitioners' challenge to CADA's Communication Clause." The parties and the Tenth Circuit recognized that Ms. Smith's Communication Clause challenge hinges on her Accommodation Clause challenge. The dissent even suggests that our decision is akin to endorsing a "separate but equal" regime that would allow law firms to refuse women admission into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a "White Applicants Only" sign. Pure fiction. The dissent gets so turned around about the facts that it opens fire on its own position. While stressing that a Colorado company cannot refuse "the full and equal enjoyment of its services" based on a customer's protected status, the dissent assures us that a company selling creative services "to the public" *does* have a right "to decide what messages to include or not to include." If that is true, what are we even debating?

Instead of addressing the parties' stipulations, the dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment. Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve "pure speech."

The dissent's treatment of precedent parallels its handling of the facts. Take its remarkable suggestion that a government forcing an individual to create speech on weighty issues with which she disagrees only "incidentally" burdens First Amendment liberties. Far from embracing a notion like that, our cases have rejected it time after time—including in the context of public accommodations laws.[11]

The First Amendment protections furnished in *Barnette*, *Hurley*, and *Dale*, the dissent declares, were limited to schoolchildren and "nonprofits." But our precedents endorse nothing like the limits the dissent would project on them. Instead, the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters,

[11] The dissent observes that public accommodations laws may sometimes touch on speech incidentally as they work to ensure ordinary, non-expressive goods and services are sold on equal terms. But there is nothing "incidental" about an infringement on speech when a public accommodations law is applied to compel expressive activity. *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572 (1995). Our case law has not sustained every First Amendment objection to an antidiscrimination rule, as with a law firm that sought to exclude women from partnership. But the dissent disregards *Dale*'s holding that context matters and that very different considerations come into play when a law is used to force individuals to toe the government's preferred line when speaking (or associating to express themselves) on matters of significance.

artists, and website designers). If anything is truly dispiriting, it is the dissent's failure to take seriously this Court's enduring commitment to protecting the speech rights of all comers, no matter how controversial—or even repugnant—many may find the message at hand.

Finally, the dissent says what it really means: Once Ms. Smith offers some speech, Colorado "would require her to create and sell speech, notwithstanding her sincere objection." The dissent refuses to acknowledge where its reasoning leads. Governments could force "an unwilling Muslim movie director to make a film with a Zionist message," they could compel "an atheist muralist to accept a commission celebrating Evangelical zeal," and they could require a gay website designer to create websites for a group advocating against same-sex marriage, so long as these speakers would accept commissions from the public with different messages. Perhaps the dissent finds these possibilities untroubling because it trusts state governments to coerce only "enlightened" speech. But if that is the calculation, it is a dangerous one indeed.[7]

Eighty years ago in *Barnette*, this Court affirmed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." The Court did so despite the fact that the speech rights it defended were deeply unpopular; at the time, the world was at war and many thought respect for the flag and the pledge "essential for the welfare of the state." Fifty years ago, this Court protected the right of Nazis to march through a town home to many Holocaust survivors and along the way espouse ideas antithetical to those for which this Nation stands. See *Skokie,* 432 U. S., at 43. Five years ago, the Court stressed that "it is not the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop,* 584 U. S., at ___ (slip op., at 16). Just days ago, Members of today's dissent joined in holding that the First Amendment restricts how States may prosecute stalkers despite the "harmful," "low-value," and "upsetting" nature of their speech. *Counterman* v. *Colorado,* 600 U. S. ___ (2023) (slip op., at 6). Today, the dissent abandons what this Court's cases have recognized time and time again: A commitment to speech for only *some* messages and *some* persons is no commitment at all. By approving a government's effort to "eliminate" disfavored "ideas," today's dissent is emblematic of an unfortunate tendency to defend First Amendment values only when they find the speaker's message sympathetic. But "if liberty means anything at all, it means the right to tell people what they do not want to hear." 6 F. 4th, at 1190 (Tymkovich, C. J., dissenting) (quoting G. Orwell).

In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. Other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment's boundaries by seeking to compel speech. But the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Abiding the Constitution's commitment to freedom of speech means all of us will encounter ideas we consider "unattractive," "misguided, or even hurtful." But tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is

Reversed.

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

A "public accommodations law" guarantees to every person the full and equal enjoyment of places of public accommodation without unjust discrimination. Colorado adopted the Colorado Anti-Discrimination Act (CADA), which provides: "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. §24–34–601(2)(a). This provision, the "Accommodation Clause," applies to any business engaged in sales "to the public." The Clause does not apply to any "church, synagogue, mosque, or other place that is principally used for religious purposes." In addition, CADA contains the "Communication Clause," which makes it unlawful to advertise that services "will be refused, withheld from, or denied," or that an individual is "unwelcome" at a place of public accommodation, based on the same protected traits. Just as a business open to the public may not refuse to serve customers based on race, religion, or sexual orientation, the business may not hang a sign that says, "No Blacks, No Muslims, No Gays."

A public accommodations law has two purposes. First, the law ensures "*equal access* to publicly available goods and services." *Roberts* v. *United States Jaycees*, 468 U. S. 609, 624 (1984). Protected persons receive "equally effective and meaningful opportunity to benefit from all aspects of life in America," 135 Cong. Rec. 8506 (1989) (remarks of Sen. Harkin), and "society," in return, receives "the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U. S., at 625. Second, a public accommodations law ensures *equal dignity* in the common market. That is the law's "fundamental object": "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' " *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 250 (1964) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964)). This purpose does not depend on whether goods or services are otherwise available. "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable because of his [social identity]. A public accommodations law regulates only businesses that choose to sell goods or services "to the general public." The law does not compel any business to sell any particular good or service. But if a business chooses to profit from the public market, established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination. The state may ensure that groups historically marked for second-class status are not denied goods or services on equal terms.

The legal duty of a business open to the public to serve the public without unjust discrimination is deeply rooted in our history. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 571 (1995) (quoting *Lane* v. *Cotton*, 12 Mod. 472, 485, 88 Eng. Rep. 1458, 1465 (K. B. 1701) (Holt, C. J.)). A business's duty to serve all comers derived from its choice to hold itself out as ready to serve the public. See 2 J. KENT, COMMENTARIES ON AMERICAN LAW 464–465 (1827). After the Civil War, some States codified the common-law duty of public accommodations to serve all comers. Early state statutes prohibited discrimination

based on race or color. Congress passed Title II of the Civil Rights Act of 1964, which declares: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination on the ground of race, color, religion, or national origin." 42 U. S. C. §2000a. In enacting this statute, Congress invoked the holding-out rationale: "one who employed his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain." In response to a movement for women's liberation, numerous States banned discrimination in public accommodations on the basis of "sex." In the decades that followed, Congress banned discrimination on [the basis of disability] and secured by law disabled people's equal access to public spaces [through the] Americans with Disabilities Act of 1990 (ADA). Such laws have also expanded to include more goods and services as "public accommodations." What began with common inns, carriers, and smiths has grown to include restaurants, bars, movie theaters, sports arenas, retail stores, salons, gyms, hospitals, funeral homes, and transportation networks. Today, laws like Colorado's cover "any place of business engaged in any sales to the public and any place offering services to the public." Colo. Rev. Stat. §24–34–601(1). Numerous other States extend such protections to businesses offering goods or services to "the general public." This broader scope is in keeping with the fundamental principle that the duty to serve without unjust discrimination is owed to everyone, and it extends to any business that holds itself out as ready to serve the public. Colorado amended its antidiscrimination law in 2008 to prohibit the denial of publicly available goods or services on the basis of "sexual orientation."

As long as public accommodations laws have been around, businesses have sought exemptions. Opponents of the Civil Rights Act of 1964 objected that the law would [deny] business owners "freedom to speak or to act on the basis of their religious convictions or their deep-rooted preferences for associating or not associating with certain classifications of people." 110 Cong. Rec. 7778 (1964) (remarks of Sen. Tower). Congress rejected those arguments. In *Heart of Atlanta Motel*, [this Court held] that "prohibition of racial discrimination in public accommodations" did not "interfere with personal liberty." In *Katzenbach* v. *McClung*, 379 U. S. 294 (1964), Ollie's Barbecue argued that Title II's application to his business violated the "personal rights of persons in their personal convictions" to deny services to Black people. This Court rejected that claim. [In] *Runyon* v. *McCrary*, 427 U. S. 160 (1976), the Court confronted the question whether "commercially operated" schools had a First Amendment right to exclude Black children, notwithstanding a federal law against racial discrimination in contracting. The Court reasoned that the schools' "*practice*" of denying educational services to racial minorities was not shielded by the First Amendment: First, "the Constitution places no value on discrimination." Second, the government's regulation of conduct did not "inhibit" the schools' ability to teach its preferred "ideas or dogma." In *Roberts* v. *United States Jaycees*, the United States Jaycees sought an exemption from a Minnesota law that forbids discrimination on the basis of sex in public accommodations. The organization alleged that applying the law to require it to include women would violate its "members' constitutional rights of free speech and association." "The power of the state to change the membership of an organization is inevitably the power to *change the way in which it speaks*," the Jaycees argued. The Court held that the "application of the Minnesota statute to compel the Jaycees to accept women" did not infringe

the organization's First Amendment "freedom of expressive association." If the State had applied the law "for the *purpose* of hampering the organization's ability to express its views," that would be a different matter. The law's purpose was "eliminating discrimination and assuring the State's citizens equal access to publicly available goods and services." "That goal was unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order."

Time and again, businesses and other commercial entities have claimed constitutional rights to discriminate. And time and again, this Court has courageously stood up to those claims—until today. A business claims that it would like to sell wedding websites to the general public, yet deny those same websites to gay and lesbian couples. Under state law, the business is free to include, or not to include, any lawful message it wants in its wedding websites. The only thing the business may not do is deny whatever websites it offers on the basis of sexual orientation. This Court grants the business a broad exemption from state law and allows the business to post a notice that says: Wedding websites will be refused to gays and lesbians. The Court's decision, which conflates denial of service and protected expression, is a grave error. The First Amendment does not entitle petitioners to an exemption from a state law that simply requires them to serve all members of the public on equal terms. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 62 (2006) (*FAIR*). Consider *United States* v. *O'Brien*, 391 U. S. 367 (1968). In that case, the Court upheld a law against the destruction of draft cards to a defendant who had burned his draft card to protest the Vietnam War. The protester's conduct was indisputably expressive. Indeed, it was political expression, which lies at the heart of the First Amendment. *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring). Yet *O'Brien* focused on whether the Government's interest in regulating the conduct was to burden expression. Because it was not, the regulation was subject to lesser constitutional scrutiny. The *O'Brien* standard is satisfied if a regulation is unrelated to the suppression of expression and "promotes a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*, 547 U. S., at 67.

FAIR confronted the interaction between this principle and an equal-access law. The law at issue was the Solomon Amendment, which prohibits an institution of higher education in receipt of federal funding from denying a military recruiter "the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access." 547 U. S., at 55. A group of law schools challenged the Solomon Amendment based on their sincere objection to the military's "Don't Ask, Don't Tell" policy [which] was a homophobic policy that barred openly LGBT people from serving in the military. LGBT people could serve only if they kept their identities secret. The law schools in *FAIR* claimed that the Solomon Amendment infringed the schools' First Amendment freedom of speech. The schools provided recruiting assistance in the form of emails, notices on bulletin boards, and flyers. Those services "clearly involve speech." And the Solomon Amendment required "schools offering such services to other recruiters" to provide them equally "on behalf of the military," even if the school deeply objected to creating such speech. But that did not transform the equal provision of services into "compelled speech" of the kind barred by the First Amendment, because the school's speech was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters." Thus, any speech compulsion was "incidental to the Solomon Amendment's regulation of conduct." The same principle resolves this case. Smith wants to post a notice on her company's

homepage that the company will refuse to sell a website for a same-sex couple's wedding. This Court has said that "a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." Even "pure speech" may be burdened incident to a valid regulation of conduct.

It is well settled that a public accommodations law like the Accommodation Clause does not "target speech or discriminate on the basis of its content." *Hurley*, 515 U. S., at 572. Rather, "the focal point" is "on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." The law applies only to status-based refusals to provide the full and equal enjoyment of whatever services petitioners choose to sell to the public. Colorado does not require the company to "speak the State's preferred message." Nor does it prohibit the company from speaking the company's preferred message. The company could offer only wedding websites with biblical quotations describing marriage as between one man and one woman. The company could also refuse to include the words "Love is Love" if it would not provide those words to any customer. All the company has to do is offer its services without regard to customers' protected characteristics. Any effect on the company's speech is therefore "incidental" to the State's content-neutral regulation of conduct. Petitioners remain free to advocate the idea that same-sex marriage betrays God's laws. Even if Smith believes God is calling her to do so through her for-profit company, the company need not hold out its goods or services to the public at large. Many filmmakers, visual artists, and writers never do. (That is why the law does not require Steven Spielberg or Banksy to make films or art for anyone who asks). Even if the company offers its goods or services to the public, it remains free to decide what messages to include or not to include. The company can put whatever "harmful" or "low-value" speech it wants on its websites. It can "tell people what they do not want to hear." All the company may not do is offer wedding websites to the public yet refuse those same websites to gay and lesbian couples. A professional photographer is generally free to choose her subjects. She can make a living taking photos of flowers or celebrities. The State does not regulate that choice. If the photographer opens a portrait photography business to the public, however, the business may not deny to any person, because of race, sex, national origin, or other protected characteristic, the full and equal enjoyment of whatever services the business chooses to offer. That is so even though portrait photography services are customized and expressive. If the business offers school photos, it may not deny those services to multiracial children because the owner does not want to create any speech indicating that interracial couples are acceptable. If the business offers corporate headshots, it may not deny those services to women because the owner believes a woman's place is in the home. If the business offers passport photos, it may not deny those services to Mexican Americans because the owner opposes immigration from Mexico. The same is true for sexual-orientation discrimination. If a photographer opens a photo booth outside of city hall and offers to sell newlywed photos captioned with the words "Just Married," she may not refuse to sell that service to a newlywed gay or lesbian couple, even if she believes the couple is not just married because in her view their marriage is "false."

Because any burden on petitioners' speech is incidental to CADA's neutral regulation of commercial conduct, the regulation is subject to the standard set forth in *O'Brien*. That standard is easily satisfied because the law's application "promotes a substantial government interest that would be achieved less effectively absent the regulation." The State's goal of "eliminating

discrimination and assuring its citizens equal access to publicly available goods and services" is "unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Roberts*, 468 U. S., at 624. The Court has also held that by prohibiting only "*acts* of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages," the law "responds precisely to the substantive problem which legitimately concerns the State and abridges no more speech than is necessary to accomplish that purpose." *Id.*, at 628. Because Colorado seeks to apply CADA only to the refusal to provide same-sex couples the full and equal enjoyment of the company's publicly available services, so that the company's speech "is only 'compelled' if, and to the extent," the company chooses to offer "such speech" to the public, any burden on speech is "plainly incidental" to a content-neutral regulation of conduct.

The majority insists that petitioners discriminate based on message, not status. The company will not sell same-sex wedding websites to anyone. It will sell only opposite-sex wedding websites; that is its service. Petitioners, however, "cannot define their service as 'opposite-sex wedding websites' any more than a hotel can recast its services as 'whites-only lodgings.' " To allow a business open to the public to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws. It would mean that a large retail store could sell "passport photos for white people." The majority protests that Smith will gladly sell her goods and services to anyone, including same-sex *couples*. She just will not sell websites for same-sex *weddings*. Smith answers that she will sell other websites for gay or lesbian clients. But she discriminates against LGBT people by offering them a limited menu.

The majority analogizes this case to *Hurley* and *Boy Scouts of America* v. *Dale*. *Hurley* and *Dale* involved "peculiar" applications of public accommodations laws, not to "the act of discriminating in the provision of publicly available goods" by "clearly commercial entities," but rather to private, nonprofit expressive associations in ways that directly burdened speech. *Hurley*, 515 U. S., at 572 (private parade); *Dale*, 530 U. S., at 657 (Boy Scouts). The Court stressed that the speech burdens in those cases were not incidental to prohibitions on status-based discrimination because the associations did not assert that "mere acceptance of a member from a particular group would impair [the association's] message." Here, the opposite is true. 303 Creative LLC is a "clearly commercial entity." The company comes under CADA only if it sells services to the public, and only if it denies the equal enjoyment of such services because of sexual orientation. The company is free to include or not to include any message in whatever services it chooses to offer. The company confirms that it plans to engage in status-based discrimination. Any burden on the company's expression is incidental to the State's content-neutral regulation of commercial conduct.

The majority [asserts] that "Colorado seeks to compel [the company's] speech in order to excise certain ideas or viewpoints from the public dialogue." The State's "very purpose in seeking to apply its law," in the majority's view, is "the coercive elimination of dissenting ideas about marriage."[14] That is an astonishing view. It is contrary to the fact that a law requiring public-facing businesses to accept all comers "is textbook viewpoint neutral," contrary to the fact that the Accommodation Clause allows Smith to include in her company's goods and services whatever "dissenting views about marriage" she wants, and contrary to this Court's clear holdings that the purpose of a public accommodations law, as applied to the commercial act of

discrimination in the sale of publicly available goods and services, is to ensure equal access to and equal dignity in the public marketplace. So it is dispiriting to read the majority suggest that this case resembles *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943). Requiring Smith's company to abide by a law against invidious discrimination in commercial sales to the public does not conscript her into espousing the government's message. All it does is require her to stick to her bargain: "The owner who hangs a shingle and offers her services to the public cannot retreat from the promise of open service. It is to convey the promise of a free and open society and then take the prize away from the despised few." J. Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B. U. L. REV. 929, 949 (2015).

The immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. The decision inflicts a stigmatic harm, on top of any harm caused by denials of service. These "affronts and denials" "are intensely human and personal." Sometimes they "harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity." It reminds LGBT people that there are some public places where they can be themselves, and some where they cannot. All members of the public are entitled to inhabit public spaces on equal terms. A slew of anti-LGBT laws have been passed in some parts of the country. In this pivotal moment, the Court had an opportunity to reaffirm its commitment to equality on behalf of all members of society, including LGBT people. It does not do so. The decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. A website designer could equally refuse to create a wedding website for an interracial couple. A large retail store could reserve its family portrait services for "traditional" families.

Wedding websites, birth announcements, family portraits, epitaphs. These are not just words and images. They are the most profound moments in a human's life. They are the moments that give that life personal and cultural meaning. The lesson of the history of public accommodations laws is that in a free and democratic society, there can be no social castes. For that to be true, it must be true in the public market. The "promise of freedom" is empty if Government is "powerless to assure that a dollar in the hands of one person will purchase the same thing as a dollar in the hands of another." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 443 (1968).

On p. 512, insert the following new problem # 2, and renumber the remaining problems:

2. *DEI Training*. Suppose that a school district issues an official policy requiring all employees to be "equity champions," an to be "anti-racist educators." Under the policy, anyone who believes in "colorblindness" and "equality generally," but who does not subscribe to being an "equity champion" or "anti-racist" is deemed to be a white supremacist. Would school teachers have standing to challenge the policy if no adverse action has been taken against them? Suppose that, in a DEI training session, the teachers state their views and the moderator pushes back? What if the employees are reprimanded or otherwise disciplined for their views? *See Henderson v. School District of Springfield No. 12*, 2023 WL 3853971 (8th Cir.).

On p. 523, at the end of problem # 2, add the following:

Can a lawyer refuse to pay that portion of a bar association's "mandatory dues" that are not "germane" to improving the legal profession? *See McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2022).

Chapter 8

The Government as Employer, Educator, and Source of Funds

A. First Amendment Rights of Public Employees

1. Prohibiting Electioneering

On p. 540, at the end of the notes, add the following:

Food for Thought

In an effort to maintain the public perception that the Administrative Office of the United States Courts (AOUCS) is impartial, the office prohibits its employees from engaging in partisan political activities. Is the restriction constitutional if AOUCS employees do not participate in judicial decisionmaking, but instead simply provide financial, technological, managerial and other support to the federal courts? What about the argument that "nefarious foreign actors" could falsely paint the judicial system as "partisan" if AOUCS employees engage in partisan political activities? *See Guffey v. Mauskopf*, 45 F.4th 442 (D.C. Cir. 2022).

2. Other Employee Speech

On p. 544, before the notes, insert the following:

Food for Thought

Suppose that teachers at a high school oppose the school's policies on pronoun use (requiring teachers to refer to students by their preferred), and its bathroom policy (which allows students to use the bathroom associated with their chosen gender). Do the teachers have a First Amendment right to refuse to refer to students by their preferred pronouns? *See Damiano v. Grants Pass School District*, 2023 WL 2687259 (D. Or.). Would you view the situation

differently if the teachers used school resources and work time to create a YouTube video and other social media urging the public to oppose the policies, and the district received 150 complaints regarding the videos? Would it matter that the school allowed other teachers to produce videos expressing their views on matters such as "Black Lives Matter?"

On p. 546, before the problems, insert the following:

Food for Thought

The University of Florida, worried about potential discord with the state legislature which controls its funding, requires employees to report and gain approval before engaging in any activity that may present a "conflict of interest." The policy provides that employees shall "report professional, commercial or personal interests or activities outside of the University that affect, or appear to affect, their professional judgement or obligations to the University." When several professors were asked to serve as expert witnesses against the State of Florida, the professors reported a potential conflict and were denied the right to work on those cases. The University stated that "outside activities that may pose a conflict to the executive branch of the state of Florida create a conflict for the University of Florida." Has the University imposed a content-based or viewpoint-based restriction on its professors? Does the University have the power to prohibit professors from serving as expert witnesses in litigation against the state? *See Austin v. University of Florida Board of Trustees*, 580 F.Supp.3d 1137 (N.D. Fla. 2022).

On p. 547, after problem # 4, insert the following:

Food for Thought

A sixth-grade science teacher owns a MAGA (Make American Great Again) hat which he wore to teacher-only training on cultural sensitivity and racial bias, but took it off before entering the building. After one teacher cried, and another told the principal that she found the hat "intimidating." The teacher then wore the same hat to training at a different school the next day, and again removed the hat before entering the building. Even though the teacher did nothing more than wear the hat (outside the building), the principal called him a racist, a homophobe, a liar and a hateful bigot, and told the teacher that he would "need his union representative" if she ever sees him wearing the hat again. The record shows that the school does not ban political speech, and that there is a Black Lives Matter poster in the building. Suppose that the teacher sues the principal, claiming viewpoint discrimination against his political speech. What result? *See Dodge v. Evergreen School District # 114*, 56 F.4th 767 (9th Cir. 2022).

On p. 548, after the problems, insert the following:

Food for Thought

In response to media inquires, a city's EMTs and paramedics spoke to the media about the impact of the Covid-19 pandemic on their working conditions. One paramedic reported that she suffered "anxiety" and "crying fits" while working during the pandemic. Another paramedic reported that the pandemic had taken a toll on her. A third talked about a shortage of gloves and N95 masks which he referred to as "madness." All of the workers were either suspended or placed on restrictive duty because of their comments. Was it permissible for the city to discipline these employees for speaking to the media?

On p. 558, before the problems, insert the following:

Food for Thought

A school bus driver, who was elected as the vice-president of the bus drivers' union, raised safety concerns regarding the school district's buses. Suppose that the school district decides to discipline the bus driver for his comments. Should the drivers' comments be regarded as within the scope of his employment and therefore unprotected under *Garcetti*? Do the comments serve the public interest so that they should be protected? *See Shara v. Maine-Endwell Central School District*, 46 F.4th 77 (2nd Cir. 2022).

Food for Thought

During an internal investigation of a school district's finances, an employee who managed the district's HVAC systems raised questions regarding whether the superintendent of schools had misused funds. The district had required the employee to cooperate with the investigation. Following the completion of the investigation, the employee's statements were revealed to members of the district's board. Even though the employee had never been disciplined, and had always received positive performance evaluations, he was dismissed from his job. If the employee made the statements as part of his job responsibilities (e.g., cooperating with the internal investigation as required), was the dismissal constitutionally appropriate? *See Hawkland v. Hall*, 860 Fed.Appx. 326 (5th Cir. 2021).

On p. 561, at the end of the problems, insert the following new problems:

8. *The Disciplined Fire Marshall*. A city fire marshall, who was charged with investigating the caus of a fire on a movie set that destroyed a five story building, concluded that it resulted from the film crew's use of high intensity lights. His supervisors, upset with his conclusions, ordered him to file a report stating that the fire was attributable to a flue in the building's boiler. The fire marshall refused, believing that he was being asked to file a false report, and submitted a report indicating what he believed to be the correct cause. Can the fire marshall be disciplined for his failure to follow his supervisor's instructions? *See Specht v. City of New York*, 15 F.4th 594 (2nd Cir. 2021).

9. *The Confederate Flag*. A police officer, who is authorized to take her police car home in the evenings, displays the Confederate Battle Flag outside of her home. When the police chief learns about the display, he fires her. The officer sues, claiming a violation of her First

Amendment rights. The chief responds that he has tried hard to foster positive relations with the black community, especially given racial tensions between the community and the police department. Does the display constitute an adequate basis for firing the officer? *See Cortiss v. City of Roswell,* 2022 WL 2345729 (11th Cir. 2022).

3. Associational Rights

B. The First Amendment in the Public Schools

On p. 578, before the problems, add the following new Food for Thought:

Food for Thought

Ordinarily, as we know, government cannot discriminate against speech based on content or viewpoint. However, should different rules apply to school libraries? We know that schools have an educational responsibility to the students under their tutelage. Should schools have the right to decide that certain content (e.g., sexually explicit materials or materials dealing with particular issues (e.g., describing sexual acts) are not appropriate for children at their institution? Does that rationale also apply to material discussing same-sex relationships? Could a school refuse to purchase materials because of its content in order to protect children against content that they find "unsuitable?" Should a distinction be made between high school students and elementary school students? If a school has always purchased a book, and placed it on school shelves, can it change its mind and remove the book? Should a distinction be made between removals made by school administrators or librarians and removals encouraged or pushed by school boards? *See GLBT Youth in Iowa Schools v. Reynolds,* --- F.Supp.3d ---- 2023 WL 9052113 (8th Cir. 2024); *PEN American Center, Inc. v. Escambia County School District*, 2024 WL 133213 (N.D. Fla.).

On p. 578, add the following new problems ## 2-4, and then renumber the remaining problems and Food for Thought:

2. *Book Bans*. Do school libraries have the authority to remove books from their collections that they deem unsuitable for their school-age patrons? Might school districts have a legitimate interest in restricting access to books depicting sexual activity or that involve pornography? What about books that depict LGBTQ activity? May school boards be involved in reviewing the collections and demanding the removal of particular books? Does the age of the children matter? For example, might the librarians and the school districts have greater authority when the children are young? What if they are teenagers?

3. *Sex Ratings for Books*. Could a state require book sellers to assign sex-content ratings for books sold to public schools? Suppose that the state requires sellers to rate the books as "sexually explicit," "sexually relevant" or "no rating." The goal is to provide school districts with information about the books they purchase. Is the law permissible under the First

Amendment? Does this law constitute constitutionally impermissible compelled speech? *See Book People Inc. v. Wong*, 91 F.4th 318 (5th Cir. 2024).

4. *Black Lives Matter Posters*. Following the murder of George Floyd in Minneapolis, a school district allowed "Black Lives Matters" posters to be placed in classrooms. The posters were created by private individuals and were put up despite a school board policy prohibiting political messages in classrooms. Thereafter, the school district denied student requests to put up posters saying "All Lives Matter" or "Blue Lives Matters." Does the First Amendment allow the school district to discriminate between messages in this manner? Might the "Black Lives Matter" posters be regarded as governmental speech?

Food for Thought

Suppose that a school generally permits students to engage in freedom of expression. As a result, the school permits students to wear T-shirts which say things like "Black Lives Matter," or even "Abortion is Muder." However, a second policy protects students against messages that are demeaning of race, sex, religion or sexual orientation. When a student wears a T-shirt stating that "There are only TWO GENDERS," the student is told that the T-shirt is prohibited because it is demeaning to others Can the school prohibit the student from wearing the T-shirt? *See L.M. v. Town of Middlesborough*, 677 F.3d 29 (1st Cir. 2023).

On p. 581, at the end of the problems, insert the following:

Food for Thought

To what extent does the state have the right to determine what shall be taught in public schools? Presumably, the state has the right to mandate that certain subjects (e.g., math, science, history) be taught in elementary and secondary schools. It might, perhaps, as well, mandate civic education. Can it also prohibit the teaching of such things as "critical race studies," education regarding LGTBQ or trans issues generally?

C. Government-Financed Speech

On p. 604, before the problems, add the following new Food for Thought:

Food for Thought

The State of Texas allows private entities to erect holiday displays at the state capitol with the permission of a state board. Pursuant to that policy, Texas allows a Christian group to set-up a traditional nativity scene. However, when the Freedom of Religion Foundation seeks to establish a "Bill of Rights manger," the request is refused. The nativity scene would contain cutouts of Benjamin Franklin, Thomas Jefferson, George Washington, and the Statue of Liberty, and would contain the sign "Keep State and Church Separate/On behalf of Texas members of the Freedom from Religion Foundation." Under the First Amendment, could Texas allow the Christian nativity scene but prohibit the Bill of Rights manger? Can the exclusion be justified on

the theory that the displays involve government speech? Can it discriminate between religious and non-religious displays? *See Freedom From Religion Foundation v. Abbott,* 58 F.4th 824 (W.D. Tex. 2024).

Chapter 9

The Press

A. Does the Constitution Grant the Press a Privileged Position

C. Access to Judicial Proceedings

On p. 650, before the problems, insert the following:

Note: Release of Court Records

In *Courthouse News Service v. Schaefer*, 2 F.4th 318 (4th Cir. 2021), a news organization was having difficulty gaining access to newly-filed complaints. The court held that the court should give the public access the same day, when practicable, or at least by the end of the next business day. The Court recognized that there might be situations when a longer delay is justifiable (e.g., for inclement weather or security concerns). Likewise, in *Hartford Courant Co. v. Carroll*, 986 F.3d 211 (2d Cir. 2021), the court held that juvenile records had to be made available (despite a state law requiring that they be sealed) once the cases were transferred from juvenile court to a regular criminal court.

Food for Thought

A Texas law makes it illegal for an individual to solicit information that isn't yet public from a public servant for personal benefit. Suppose that a journalist is conducting an investigation regarding a car crash and regarding a man who committed suicide. During her investigation, she asks a police officer the names of the people involved in the crash and the suicide. Does the First Amendment protect her request? Can she be prosecuted under the Texas law for soliciting information that is not yet public? *See Villareal v. City of Laredo*, 44 F.4th 363 (5th Cir. 2022).

E. The Press and Due Process

2. Gag Orders

On p. 673, insert a new problems ## 1 & 2, and renumber the remaining problems:

1. *The Trump Gag Orders*. In 2024, as former President Donald Trump was being subjected to multiple civil and criminal prosecutions, courts began issuing gag orders against him. Citing fears of violence, these orders prohibited Trump from making "disparaging and inflammatory or intimidating" public statements about witnesses, the jury pool, the judge, the prosecutors, the judge, court employees and their families. Is the order overbroad? Is it appropriate to limit a party's presumptive presidential candidate's speech during election season, especially when he argues that the prosecution is politically motivated? *See* Patricia Hurtado, *Trump Gag Order Expanded by NY Judge Before Hugh-Money Trial*, Bloomberg Law News (Apr. 1, 2024). There was evidence that one prosecutor received "intimidating communications" after Trump spoke out about him, and a judge received a death threat. Was the order properly tailored? Can the gag order extend to social media communications? The gag order was partially lifted right before the presidential debate. The revised order allowed Trump to criticize the criminal proceedings, but still prohibited him from revealing the identity of the jurors.

2. *Gag Orders During Investigations*. New Jersey adopted a regulation requiring that investigators in harassment and discrimination investigations in state workplaces "request" (the prior version of the regulation allowed the investigators to "direct") that anyone interviewed "not discuss any aspect of the investigation with others." The ban extends to the interviewed person's spouse and attorney, as well as the public absent a "legitimate business reason." Suppose that interviewees who violate the regulation are threatened with termination. Is the regulation an infringement of employee First Amendment rights? *See Usachenok v. New Jersey Department of the Treasury*, 257 N.J. 184 313 A.3d 53 (N.J. 2024).

Chapter 10

Electronic Media and the First Amendment

B. Post-Broadcasting Technology

On p. 722, at the bottom of the page, insert the following new Food for Thought:

Food for Thought

In *Reno*, the Court rejected the idea that the CDA should be upheld because it contained an age verification requirement. While the Court held that such a requirement is technologically

feasible, and is used by commercial providers of sexually explicit material, it expressed concerns regarding the economic feasability of the requirement and concluded that the burden on noncommercial speech was too great. Moreover, the Court doubted that existing systems would preclude children from posing as adults and therefore content providers would be forced to run the risk of criminal sanctions. By 2024, a number of states, including Texas, imposed such requirements on pornographic websites if more than a third of their content is deemed to be harmful to minors. Texas seeks to justify the law on the basis that existing precedent allows states to bar the dissemination of pornography to minors. Should an age verification requirement be upheld in this context? *See Free Speech Coalition v. Paxton*, 95 F.4th 263 (5th Cir. 2024).

On p. 731, at the end of note # 10, insert the following:

By contrast, in *United States v. Egli*, 13 F.4th 1139 (10th Cir. 2021), the court upheld a total internet ban as a condition of a child pornography defendant's supervised release. The court emphasized that defendant had ignored previously-imposed partial internet bans.

On p. 731, at the end of the notes, insert the following:

Food for Thought

The social media platform TikTok has come under increasing scrutiny in recent years. Some complain that the platform is a privacy risk because the Chinese government has the power to access individual data collected by the app (although there is no evidence that China has exercised that power), and TikTok exposes minors to inappropriate content (e.g., regarding sex, drugs, alcohol and violence), thereby adversely affecting their mental health. Recently, Montana decided to ban TikTok within its borders by making it illegal. Under the ban, app platforms are prohibited from allowing Montana residents to download the TikTok app, and makes it illegal for Montanans to use the app. Is the ban enforceable? Is it realistic to think that an internet service provider to block a single platform, but only when it is within a particular state? Is the ban constitutional?

Afterwards, Congress enacted a law that required TikTok's parent company, ByteDance, to either sell the app within a year or be banned from the United States. Congress expressed concern that ByteDance Might be using its platform to disseminate propaganda or access sensitive U.S. user data, thereby infringing national security interests. TikTok and a number of its users are challenging the law as a violation of the First Amendment. TikTok claims that it does not collect user date or disseminate propaganda. What level of proof must be shown to justify the sale or ban requirement? Is the restriction narrowly tailored.

On p. 731, after problem # 1, insert the following new problem # 2 and Food for Thought, and renumber the remaining problems:

2. *The Impact of Social Media on Adolescents*. Increasingly, social media has come under attack for its impact on adolescents. Some claim that social media platforms encourage unhealthy body images as well as suicide and are addictive. Can the platforms be considered a "product" for social media purposes, and can these harmful effects be considered product defects so that the platforms can be held liable for injuries caused to youths? *See In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 2023 WL 7524912 (N.D. Cal. 2023). Does Section 230 of the Communications Decency Act insulate social media platforms against liability? *See id.* Ohio has enacted the Social Media Parental Notification Act which requires platforms to verify whether users are 18 years of age or older, and requires parental consent for underage users. Is the Act valid as applied to all social media content?

Food for Thought

Individual states have begun enacting legislation designed to deal with the impact of social media on adolescents. For example, California enacted a law designed to protect the online privacy of adolescents which included a ban on infinite scrolling. Florida requires parental consent for minors under the age of 16 to access social media and bans children under the age of 14 from doing so. Maryland enacted a law that requires social media platforms with annual revenue of $25 million or more (and meet thresholds for receiving and selling consumer data) to assess how their design and data practices affect children. While the Maryland law does not restrict what adolescents can see, it requires the platforms to prioritize the well-being of children by preventing "reasonably foreseeable" physical, financial, psychological or emotional harm. In particular, platforms must determine whether their algorithms invade privacy or cause other harms. Are these various laws constitutional?

On p. 731, before the problems, insert the following new case:

Moody v. Netchoice, LLC
144 S.Ct. 2383 (2024).

Justice Kagan delivered the opinion of the Court.[*]

The "Internet is an international network of interconnected computers." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 849 (1997). [In 1997], 40 million people used the internet. Today, Facebook and YouTube alone have over two billion users each. [The] years have brought a dizzying transformation in how people communicate. Social-media platforms, as well as websites, have gone from unheard-of to inescapable. They structure how we relate to family and friends, as well as to businesses, civic organizations, and governments. The novel services they offer make our lives better, and make them worse—create unparalleled opportunities and unprecedented dangers. The questions of whether, when, and how to regulate online entities, and in particular the social-media giants, are understandably on the front-burner

[*] Justice Jackson joins Parts I, II, and III–A of this opinion.

of many legislatures and agencies. Those government actors will generally be better positioned to respond to the emerging challenges social-media entities pose.

But courts have a necessary role in protecting those entities' rights of speech, as courts have historically protected traditional media's rights. To the extent that social-media platforms create expressive products, they receive First Amendment's protection. Although these cases are in a preliminary posture, the record suggests that some platforms, in some functions, are engaged in expression. In constructing certain feeds, those platforms make choices about what third-party speech to display and how to display it. They include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression. While much about social media is new, the essence is something this Court has seen before. Traditional publishers and editors select and shape other parties' expression into their own curated speech products. We have repeatedly held that laws curtailing their editorial choices must meet the First Amendment's requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world. In the latter, as in the former, government efforts to alter an edited compilation of third-party expression are subject to judicial review for compliance with the First Amendment.

We consider whether two state laws regulating social-media platforms and other websites facially violate the First Amendment. The laws, from Florida and Texas, restrict the ability of social-media platforms to control whether and how third-party posts are presented to users. The laws limit the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post. In addition, the laws require a platform to provide an individualized explanation to a user if it removes or alters her posts. NetChoice, an internet trade association, challenged both laws on their face—rather than as to particular applications. The Court of Appeals for the Eleventh Circuit upheld an injunction, finding that the Florida law was not likely to survive First Amendment review. The Court of Appeals for the Fifth Circuit reversed a similar injunction, reasoning that the Texas law does not regulate speech and does not implicate the First Amendment. We vacate both decisions because neither Court of Appeals properly considered the facial nature of NetChoice's challenge. The parties mainly argued these cases as if the laws applied only to the curated feeds offered by the largest and most paradigmatic social-media platforms—as if, say, each case presented an as-applied challenge brought by Facebook protesting its loss of control over the content of its News Feed. But argument revealed that the laws might apply to, and differently affect, other kinds of websites and apps. In a facial challenge, that could matter. The question in such a case is whether a law's unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other. Neither court performed that necessary inquiry.

Contrary to what the Fifth Circuit thought, the current record indicates that the Texas law does regulate speech when applied in the way the parties focused on below—when applied, that is, to prevent Facebook (or YouTube) from using its content-moderation standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in

the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. The law—in that specific application—is unlikely to withstand First Amendment scrutiny. Texas justified the law as necessary to balance the mix of speech on Facebook's News Feed and similar platforms; and Texas officials passed it because they thought those feeds skewed against politically conservative voices. But it is no job for government to decide what counts as the right balance of private expression—to "un-bias" what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others. In sum, there is much work to do below on both these cases, given the facial nature of NetChoice's challenges.

I

The term "social media platforms" typically refers to websites and mobile apps that allow users to upload content—messages, pictures, videos, and so on—to share with others. Those viewing the content can react to it, comment on it, or share it themselves. The biggest social-media companies—like Facebook and YouTube—host a staggering amount of content. Facebook users share more than 100 billion messages every day. And YouTube sees more than 500 hours of video uploaded every minute. In the face of that deluge, the major platforms cull and organize uploaded posts in a variety of ways. A user does not see everything—even everything from the people she follows—in reverse-chronological order. The platforms will have removed some content entirely; ranked or otherwise prioritized what remains; and sometimes added warnings or labels. Of relevance here, Facebook and YouTube make some of those decisions in conformity with content-moderation policies they call Community Standards and Community Guidelines. Those rules list the subjects or messages the platform prohibits or discourages—say, pornography, hate speech, or misinformation on select topics. The rules thus lead Facebook and YouTube to remove, disfavor, or label various posts based on their content.

In 2021, Florida and Texas enacted statutes regulating internet platforms, including the large social-media companies just mentioned. The States' laws differ in the entities they cover and the activities they limit. But both contain content-moderation provisions, restricting covered platforms' choices about whether and how to display usergenerated content to the public. Both include individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices. Florida's law regulates "social media platforms" that have annual gross revenue of over $100 million or more than 100 million monthly active users. Fla. Stat. § 501.2041(1)(g) (2023). The statute restricts varied ways of "censoring" or otherwise disfavoring posts—including deleting, altering, labeling, or deprioritizing them—based on their content or source. For example, the law prohibits a platform from taking those actions against "a journalistic enterprise based on the content of its publication or broadcast." Similarly, the law prevents deprioritizing posts by or about political candidates. And the law requires platforms to apply their content-moderation practices to users "in a consistent manner." In addition, the Florida law mandates that a platform provide an explanation to a user any time it removes or alters any of her posts. The requisite notice must be delivered within seven days, and contain both a "thorough rationale" for the action and an account of how the platform became aware of the targeted material. The Texas law regulates any social-media platform, having over 50 million monthly active users, that allows its users "to communicate with other users for the primary

purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code Ann. §§ 120.001(1), 120.002(b) (West Cum. Supp. 2023). With several exceptions, the statute prevents platforms from "censoring" a user or a user's expression based on viewpoint. That ban on "censoring" covers any action to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." The statute also requires that "concurrently with the removal" of user content, the platform shall "notify the user" and "explain the reason the content was removed." The user gets a right of appeal, and the platform must address an appeal within 14 days.

NetChoice LLC and the Computer & Communications Industry Association (collectively, NetChoice)—trade associations whose members include Facebook and YouTube—brought facial First Amendment challenges against the two laws. District courts in both States entered preliminary injunctions, halting the laws' enforcement. [On appeal, one circuit upheld the injunction and the other reversed.] We granted certiorari.

II

NetChoice chose to litigate these cases as facial challenges. Courts usually handle constitutional claims case by case, not en masse. See *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442 (2008). "Claims of facial invalidity often rest on speculation" about the law's coverage and its future enforcement. And "facial challenges threaten to short circuit the democratic process" by preventing duly enacted laws from being implemented in constitutional ways. This Court has therefore made facial challenges hard to win. That is true even when a facial suit is based on the First Amendment, although then a different standard applies. In other cases, a plaintiff cannot succeed on a facial challenge unless he "establishes that no set of circumstances exists under which the law would be valid," or he shows that the law lacks a "plainly legitimate sweep." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). In First Amendment cases, this Court has lowered that very high bar. To "provide breathing room for free expression," we have substituted a less demanding though still rigorous standard. *United States* v. *Hansen*, 599 U. S. 762 (2023). The question is whether "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Americans for Prosperity Foundation* v. *Bonta*, 594 U. S. 595, 615 (2021). So in this singular context, even a law with "a plainly legitimate sweep" may be struck down in its entirety. But that is so only if the law's unconstitutional applications substantially outweigh its constitutional ones.

In the lower courts, NetChoice and the States alike treated the laws as having certain heartland applications, More specifically, the focus was on how the laws applied to Facebook's News Feed and YouTube's homepage. The Eleventh and Fifth Circuits mostly confined their analysis to whether a state law can regulate the content-moderation practices used in Facebook's News Feed (or near equivalents). They did not address the full range of activities the laws cover, and measure the constitutional against the unconstitutional applications. In short, they treated these cases more like as-applied claims than like facial ones.

The first step in the proper facial analysis is to assess the state laws' scope. The laws differ. But both appear to apply beyond Facebook's News Feed and its ilk. Starting with Facebook and the other giants: To what extent, if at all, do the laws affect their other services,

like direct messaging or events management? Beyond those social-media entities, what do the laws have to say about how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends' financial exchanges, or how a ride-sharing service like Uber runs? The online world is variegated and complex, encompassing an ever-growing number of apps, services, functionalities, and methods for communication and connection. Each might have to change because of the provisions, as to either content moderation or individualized explanation, in Florida's or Texas's law. Before a court can do anything with these facial challenges, it must "determine what [the law] covers." *Hansen*, 599 U. S., at 770.

The next order of business is to decide which of the laws' applications violate the First Amendment. For the content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion. For the individualized-explanation provisions, it means asking, again as to each thing covered, whether the required disclosures unduly burden expression. See *Zauderer*, 471 U. S., at 651. The answers might differ as between regulation of Facebook's News Feed (considered below) and, say, its direct messaging service (not considered). Curating a feed and transmitting direct messages, one might think, involve different levels of editorial choice, so that the one creates an expressive product and the other does not. If so, regulation of those diverse activities could well fall on different sides of the constitutional line. To decide the facial challenges, the courts below must explore the laws' full range of applications—the constitutionally impermissible and permissible both—and compare the two sets. Maybe the parties treated the content-moderation choices reflected in Facebook's News Feed and YouTube's homepage as the laws' heartland applications because they *are* the principal things regulated, and should have just that weight in the facial analysis. Or maybe not: Maybe the parties' focus had all to do with litigation strategy, and there is a sphere of other applications—and constitutional ones—that would prevent the laws' facial invalidation.

This Court cannot undertake the needed inquiries. "We are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718 (2005). Neither the Eleventh Circuit nor the Fifth Circuit performed the facial analysis in the way just described. The parties have not briefed the critical issues, and the record is underdeveloped. So we vacate the decisions below and remand these cases. That will enable the lower courts to consider the scope of the laws' applications, and weigh the unconstitutional as against the constitutional ones.

III

It 0is necessary to say more about how the First Amendment relates to the laws' content-moderation provisions, to ensure that the facial analysis proceeds on the right path in the courts below. The Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression.

A

Despite the relative novelty of the technology, the main problem in this case—and the inquiry it calls for—is not new. At bottom, Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay. The platforms object that the

law thus forces them to alter the content of their expression—a particular edited compilation of third-party speech. We have repeatedly faced the question whether ordering a party to provide a forum for someone else's views implicates the First Amendment. We have repeatedly held that it does so if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. So too we have held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others.

The seminal case is *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). There, a Florida law required a newspaper to give a political candidate a right to reply when it published "criticism and attacks on his record." The Court held the law to violate the First Amendment because it interfered with the newspaper's "exercise of editorial control and judgment." Forcing the paper to print what "it would not otherwise print," the Court explained, "intruded into the function of editors." That function was, first and foremost, to make decisions about the "content of the paper" and "the choice of material to go into" it. In protecting that right of editorial control, the Court recognized a possible downside. It noted the access advocates' view (similar to the States' view here) that "modern media empires" had gained ever greater capacity to "shape" and even "manipulate popular opinion." And the Court expressed sympathy with that diagnosis. But the cure proposed collided with the First Amendment's antipathy to *state* manipulation of the speech market. Florida, the Court explained, could not substitute "governmental regulation" for the "crucial process" of editorial choice. Next up was *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1 (1986) (*PG&E*), which the Court thought to follow naturally from *Tornillo*. A private utility in California regularly put a newsletter in its billing envelopes expressing its views of energy policy. The State directed it to include as well material from a consumer-advocacy group giving a different perspective. The utility objected, and the Court held that the interest in "offering the public a greater variety of views" could not justify the regulation. California was compelling the utility (as Florida had compelled a newspaper) "to carry speech with which it disagreed" and thus to "alter its own message."

In *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994) (*Turner I*), the Court underscored the constitutional protection given to editorial choice. At issue were federal "must-carry" rules, requiring cable operators to allocate some of their channels to local broadcast stations. The Court had no doubt that the First Amendment was implicated, because the operators were engaging in expressive activity. They were "exercising editorial discretion over which stations or programs to include in [their] repertoire." The rules "interfered" with that discretion by forcing the operators to carry stations they would not otherwise have chosen. In a later decision, the Court ruled that the regulation survived First Amendment review because it was necessary to prevent the demise of local broadcasting. See *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180 (1997). The takeaway of *Turner* is [that a] private party's collection of third-party content into a single speech product (the operators' programming) is itself expressive, and intrusion into that activity must be specially justified under the First Amendment.

In *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995), the Court considered a parade. The question was whether Massachusetts could require the organizers of a St. Patrick's Day parade to admit as a participant a gay and lesbian

group seeking to convey a message of "pride." The Court held that the First Amendment precluded that compulsion. The "selection of contingents to make a parade" is entitled to First Amendment protection, no less than a newspaper's "presentation of an edited compilation of [other persons'] speech." That meant the State could not tell the parade organizers whom to include. Because "every participating unit affects the message," ordering the group's admittance would "alter the expressive content of the parade." The organizers had "decided to exclude a message they did not like from the communication they chose to make," and that was their decision alone.

On two other occasions, the Court distinguished *Tornillo* and its progeny for the flip-side reason—because in those cases the compelled access did *not* affect the complaining party's own expression. First, in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), the Court rejected a shopping mall's First Amendment challenge to a California law requiring it to allow members of the public to distribute handbills on its property. The mall owner did not claim that he (or the mall) was engaged in any expressive activity. Indeed, he "did not even allege that he objected to the content of the pamphlets" passed out at the mall. Similarly, in *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47 (2006) (*FAIR*), the Court reiterated that a First Amendment claim will not succeed when the entity objecting to hosting third-party speech is not itself engaged in expression. The statute required law schools to allow the military to participate in on-campus recruiting. The Court held that the schools had no First Amendment right to exclude the military based on its hiring policies, because the schools "are not speaking when they host interviews." Because a "law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper," the required "accommodation of a military recruiter" did not "interfere with any message of the school."

Consider three general points to wrap up. First, an entity "exercising editorial discretion in the selection and presentation" of content is "engaged in speech activity." *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 674 (1998). That is as true when the content comes from third parties as when it does not. Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own. When the government interferes with such editorial choices—say, by ordering the excluded to be included—it alters the content of the compilation. In so doing—in overriding a private party's expressive choices—the government confronts the First Amendment. Second, none of that changes just because a compiler includes most items and excludes just a few. It "is enough" for a compiler to exclude the handful of messages it most "disfavors." Suppose that the newspaper in *Tornillo* had granted a right of reply to all but one candidate. It would have made no difference; the Florida statute still could not have altered the paper's policy. Third, the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas. It is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. The government can take varied measures, like enforcing competition laws, to protect that access. But the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm. The *Tornillo* Court [recounted] a critique of the media environment—in particular, the disproportionate "influence" of a few speakers—similar to one heard today. It made no difference. However imperfect the private marketplace of ideas, here

was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others.

B

"Whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles" of the First Amendment "do not vary." *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786 (2011). New communications media differ from old ones in a host of ways: No one thinks Facebook's News Feed much resembles an insert put in a billing envelope. Social media pose dangers not seen earlier: No one feared the effects of newspaper opinion pages on adolescents' mental health. But analogies to old media, if imperfect, can be useful. Better still as guides to decision are settled principles about freedom of expression. Those principles have served the Nation well over many years, even as one communications method has given way to another. They have much to say about the laws at issue here. These cases are at an early stage; the record is incomplete even as to the major social-media platforms' main feeds, much less the other applications that must now be considered. But the Fifth Circuit got its likelihood-of-success finding wrong. Texas is not likely to succeed in enforcing its law against the platforms' application of their content-moderation policies to the feeds that were the focus of the proceedings below. The government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey.

Most readers are familiar with Facebook's News Feed or YouTube's homepage. Each of those feeds presents a user with a continually updating stream of other users' posts. For Facebook's News Feed, any user may upload a message, whether verbal or visual, with content running the gamut from "vacation pictures from friends" to "articles from local or national news outlets." Whenever a user signs on, Facebook delivers a personalized collection of those stories. Similarly for YouTube. Its users upload all manner of videos. And any person opening the website or mobile app receives an individualized list of video recommendations. The key to the scheme is prioritization of content, achieved through the use of algorithms. Of the billions of posts or videos (plus advertisements) that could wind up on a user's customized feed or recommendations list, only the tiniest fraction do. The selection and ranking is most often based on a user's expressed interests and past activities. But it may also be based on more general features of the communication or its creator. Facebook's Community Standards and YouTube's Community Guidelines detail the messages and videos that the platforms disfavor. The platforms write algorithms to implement those standards—for example, to prefer content deemed particularly trustworthy or to suppress content viewed as deceptive (like videos promoting "conspiracy theories").

Beyond rankings lie labels. The platforms may attach "warnings, disclaimers, or general commentary"—for example, informing users that certain content has "not been verified by official sources." Likewise, they may use "information panels" to give users "context on content relating to topics and news prone to misinformation, as well as context about who submitted the content." For example, YouTube identifies content submitted by state-supported media channels, including those funded by the Russian Government. But sometimes, the platforms decide, providing more information is not enough; instead, removing a post is the right course. The platforms' content-moderation policies also say when that is so. Facebook's Standards proscribe

posts—with exceptions for "newsworthiness" and other "public interest value"—in categories and subcategories including: Violence and Criminal Behavior (*e.g.*, violence and incitement, coordinating harm and publicizing crime, fraud and deception); Safety (*e.g.*, suicide and self-injury, sexual exploitation, bullying and harassment); Objectionable Content (*e.g.*, hate speech, violent and graphic content); Integrity and Authenticity (*e.g.*, false news, manipulated media). YouTube's Guidelines similarly target videos falling within categories like: hate speech, violent or graphic content, child safety, and misinformation (including about elections and vaccines). The platforms thus unabashedly control the content that will appear to users, exercising authority to remove, label or demote messages they disfavor.[12]

Texas's law limits their power to do so. The law's central provision prohibits the large social-media platforms (and maybe other entities) from "censoring" a "user's expression" based on its "viewpoint." The law defines "expression" broadly, thus including pretty much anything that might be posted. It defines "censor" to mean "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." § 143A.001(1).[13] The platforms cannot do any of the things they typically do (on their main feeds) to posts they disapprove—cannot demote, label, or remove them—whenever the action is based on the post's viewpoint.[14] Doubtless some of the platforms' content-moderation practices are based on characteristics of speech other than viewpoint (*e.g.*, subject matter). But if Texas's law is enforced, the platforms could not—as they do now—disfavor posts because they: support Nazi ideology; advocate for terrorism; espouse racism, Islamophobia, or anti-Semitism; glorify rape or other gender-based violence; encourage teenage suicide and self-injury; discourage the use of vaccines; advise phony treatments for diseases; advance false claims of election fraud. Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey.

We have held that type of regulation to interfere with protected speech. Like the editors, cable operators, and parade organizers, the major social-media platforms are in the business, when curating their feeds, of combining "multifarious voices" to create a distinctive expressive offering. The individual messages may originate with third parties, but the larger offering is the platform's. It is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so).

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[12] We do not deal with feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without regard to independent content standards. The Community Standards and Community Guidelines make a wealth of user-agnostic judgments about what kinds of speech, including what viewpoints, are not worthy of promotion. Those judgments show up in Facebook's and YouTube's main feeds.

[13] The law [also] prohibits taking the designated "censorial" actions against any "user" based on his "viewpoint," regardless of whether that "viewpoint is expressed on a social media platform." Because the Fifth Circuit did not focus on that provision, we do the same.

[14] The Texas solicitor general explained that the Texas law allows the platforms to remove "categories" of speech, so long as they are not based on viewpoint. The example he gave was speech about Al-Qaeda. Under the law, a platform could remove all posts about Al-Qaeda, regardless of viewpoint. But it could not stop the "proAl-Qaeda" speech alone; it would have to stop the "anti-Al-Qaeda" speech too. The law prevents the platforms from disfavoring posts because they express one view of a subject.

In the aggregate they give the feed a particular expressive quality. Consider again an opinion page editor, as in *Tornillo*, who wants to publish a variety of views, but thinks some things off-limits (or worth only a couple of column inches). "The choice of material," the "decisions made [as to] content," the "treatment of public issues"—"whether fair or unfair"—all these "constitute the exercise of editorial control and judgment." *Tornillo*, 418 U. S., at 258. For a paper, and for a platform. The Texas law targets those expressive choices—by forcing the major platforms to present and promote content on their feeds that they regard as objectionable.

That those platforms happily convey the lion's share of posts submitted to them makes no significant First Amendment difference. To begin with, Facebook and YouTube exclude (not to mention, label or demote) lots of content from their News Feed and homepage. The Community Standards and Community Guidelines set out in copious detail the varied kinds of speech the platforms want no truck with. In a single quarter of 2021, Facebook removed from its News Feed more than 25 million pieces of "hate speech content" and almost 9 million pieces of "bullying and harassment content." YouTube deleted in one quarter more than 6 million videos violating its Guidelines. And among those are the removals the Texas law targets. This Court has rightly declined to focus on the ratio of rejected to accepted content. In *Hurley*, the parade organizers welcomed pretty much everyone, excluding only those who expressed a message of gay pride. The organizers' "lenient" admissions policy—and their resulting failure to express a "particularized message"—did "not forfeit" their right to reject the few messages they found harmful or offensive. So too here. That Facebook and YouTube convey a mass of messages does not license Texas to prohibit them from deleting posts with, say, "hate speech" based on "sexual orientation." It is as much an editorial choice to convey all speech except in select categories as to convey only speech within them.

The major social-media platforms do not lose their First Amendment protection just because no one will wrongly attribute to them the views in an individual post. Users may well attribute to the platforms the messages that the posts convey *in toto*. Those messages—communicated by the feeds as a whole—derive largely from the platforms' editorial decisions about which posts to remove, label, or demote. Because that is so, the platforms may indeed "own" the overall speech environment. In any event, this Court has never hinged a compiler's First Amendment protection on the risk of misattribution. The Court did not think in *Turner*—and could not have thought in *Tornillo* or *PG&E*—that anyone would view the entity conveying the third-party speech at issue as endorsing its content. Yet all those entities, the Court held, were entitled to First Amendment protection for refusing to carry the speech. When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection.

C

The interest Texas relies on cannot sustain its law. In the usual First Amendment case, we must decide whether to apply strict or intermediate scrutiny. Even assuming that the less stringent form of First Amendment review applies, Texas's law does not pass. Under that standard, a law must further a "substantial governmental interest" that is "unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). The

interest Texas has asserted is very much related to the suppression of free expression, and is not valid, let alone substantial.

Texas objective is to correct the mix of speech that the major social-media platforms present. Texas described its law as "responding" to the platforms' practice of "favoring certain viewpoints." The large social-media platforms throw out (or encumber) certain messages; Texas wants them kept in (and free from encumbrances), because it thinks that would create a better speech balance. The current amalgam, the State explained was "skewed" to one side. That assessment mirrored the views of those who enacted the law. The law's main sponsor explained that the "West Coast oligarchs" who ran social-media companies were "silencing conservative viewpoints and ideas." The Governor, in signing the legislation, echoed the point: The companies were fomenting a "dangerous movement" to "silence" conservatives.

But a State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are right to want an expressive realm in which the public has access to a wide range of views. That is a fundamental aim of the First Amendment. But the First Amendment achieves that goal by preventing *the government* from "tilting public debate in a preferred direction." *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 578 (2011). It is not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over others. That is so even when those actors possess "enviable vehicles" for expression. *Hurley*, 515 U. S., at 577. In a better world, there would be fewer inequities in speech opportunities; and the government can take steps to bring that world closer. But it cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. The government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley* v. *Valeo*, 424 U. S. 1, 48 (1976) (*per curiam*). That interest is not "unrelated to the suppression of free expression," and the government may not pursue it consistent with the First Amendment.

The Court's decisions about editorial control make that point. The question those cases had in common was whether the government could force a private speaker, including a compiler and curator of third-party speech, to convey views it disapproved. In most of those cases, the government defended its regulation as yielding greater balance in the marketplace of ideas. But the Court—in *Tornillo*, in *PG&E*, and again in *Hurley*—held that such an interest could not support the government's effort to alter the speaker's own expression. "the State cannot advance some points of view by burdening the expression of others." 475 U. S., at 20. So the newspaper, the public utility, the parade organizer—whether acting "fairly or unfairly"—could exclude the unwanted message, free from government interference. *Tornillo*, 418 U. S., at 258.

The interest Texas asserts is in changing the balance of speech on the major platforms' feeds, so that messages now excluded will be included. The State borrows language from this Court's First Amendment cases, maintaining that it is preventing "viewpoint discrimination." But the Court uses that language to say what governments cannot do: They cannot prohibit private actors from expressing certain views. Texas uses that language to say [that] private actors cannot decide for themselves what views to convey. The reason Texas is regulating the content moderation policies is to change the speech that will be displayed. Texas does not like the way

platforms are selecting and moderating content, and wants them to create a different expressive product, communicating different values and priorities. Under the First Amendment, that is a preference Texas may not impose.

IV

These are facial challenges. To succeed on its First Amendment claim, NetChoice must show that the law at issue (whether Texas or Florida) "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Hansen*, 599 U. S., at 770. In the First Amendment context, facial challenges are disfavored, and neither parties nor courts can disregard the requisite inquiry into how a law works in all of its applications. On remand, each court must evaluate the full scope of the law's coverage. It must then decide which of the law's applications are constitutionally permissible and which are not, and weigh one against the other.

There has been enough litigation to know that the Fifth Circuit, if it stayed the course, would get wrong at least one significant input into the facial analysis. The parties treated Facebook's News Feed and YouTube's homepage as the heartland applications of the Texas law. The editorial judgments influencing the content of those feeds are protected expressive activity. Texas may not interfere with those judgments simply because it would prefer a different mix of messages. How that matters for the requisite facial analysis is for the Fifth Circuit to decide. But it should conduct that analysis in keeping with two First Amendment precepts. First, presenting a curated and "edited compilation of [third party] speech" is protected speech. Second, a State "cannot advance some points of view by burdening the expression of others." *PG&E*, 475 U. S., at 20. To give government that power is to enable it to control the expression of ideas, promoting those it favors and suppressing those it does not. That is what the First Amendment protects us from.

We accordingly vacate the judgments of the Courts of Appeals for the Fifth and Eleventh Circuits and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

Justice Barrett, concurring.

A function qualifies for First Amendment protection only if it is inherently expressive. For a prototypical social-media feed, making this determination involves more than meets the eye. Platforms use algorithms to prioritize and remove content on their feeds. Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop. The algorithm would simply implement human beings' inherently expressive choice "to exclude a message [they] did not like from" their speech compilation. But what if a platform's algorithm just presents automatically to each user whatever the algorithm thinks the user will like—*e.g.*, content similar to posts with which the user previously engaged? The First Amendment implications of the Florida and Texas laws might be different for that kind of algorithm. What if a platform's owners hand the reins to an AI tool and ask it simply to remove "hateful" content? If the AI relies on large language models to determine what is "hateful" and should be removed, has a human being

with First Amendment rights made an inherently expressive "choice ... not to propound a particular point of view"? In other words, technology may attenuate the connection between content-moderation *actions* (*e.g.*, removing posts) and human beings' constitutionally protected right to "*decide for [themselves]* the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641 (1994). The way platforms use this sort of technology might have constitutional significance. While the governing constitutional principles are straightforward, applying them in one fell swoop to the entire social-media universe is not.

Justice Jackson, concurring in part and concurring in the judgment.

The question is not whether an entire category of corporations (like social media companies) or a particular entity (like Facebook) is generally engaged in expression. Nor is it enough to say that a given activity (say, content moderation) for a particular service (the News Feed, for example) seems roughly analogous to a more familiar example from our precedent. When evaluating a broad facial challenge, courts must make sure they carefully parse not only what entities are regulated, but how the regulated activities *actually function* before deciding if the activity in question constitutes expression and therefore comes within the First Amendment's ambit. Thus, further factual development may be necessary before either of today's challenges can be fully and fairly addressed.

Justice Thomas, concurring in the judgment.

I agree with the Court's decision to vacate and remand. I cannot agree with the Court's decision to opine on certain applications of those statutes. The discussion is unnecessary. The Court faults the Courts of Appeals for focusing on only one subset of applications, rather than determining whether each statute's "full range of applications" are constitutional. But, the Court repeats that same error. Out of the sea of "variegated and complex" functions that platforms perform, the Court plucks out two (Facebook's News Feed and YouTube's homepage), and declares that they may be protected by the First Amendment. The Court's approach is unwarranted and mistaken. The common-carrier doctrine should continue to guide the lower courts' examination of the trade associations' claims on remand. "Our legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers." *Biden* v. *Knight First Amendment Institute at Columbia Univ.*, 593 U. S. ___ (2021) (Thomas, J., concurring in grant of certiorari) (slip op., at 3). Moreover, "there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers" given their many similarities.

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

NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Given the incompleteness of this record, there is no need and no reason to decide anything other than the facial unconstitutionality question. Some cases have involved [an] aspect of the free speech right, namely, the right to "present ... an edited compilation of speech generated by other persons" for the purpose of expressing a particular message. See *Hurley* v.

Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U. S. 557 (1995). The famous Oxford Book of English Poetry illustrates why a compilation may constitute expression on the part of the compiler. The editors' selection of the poems included in this volume expresses their view about the poets and poems that most deserve the attention of their anticipated readers. Forcing the editors to exclude or include a poem could alter the expression that the editors wish to convey. Not all compilations have this expressive characteristic. Suppose that the head of a neighborhood group prepares a directory consisting of contact information submitted by all the residents who want to be listed. This directory would not include any meaningful expression on the part of the compiler. Because not all compilers express a message of their own, not all compilations are protected by the First Amendment. The First Amendment protects only those compilations that are "inherently expressive" in their own right, meaning that they select and present speech created by other persons in order "to spread [the compiler's] own message." *FAIR*, 547 U. S., at 66. A claimant must establish that its practice is to exercise "editorial discretion in the selection and presentation" of the content it hosts. *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666 (1998). The host must use the compilation of speech to express "some sort of collective point"—even if only at a fairly abstract level. Thus, a parade organizer who claims a First Amendment right to exclude certain groups or individuals would need to show at least that the message conveyed by the groups or individuals who are allowed to march comport with the parade's theme. A parade comprising "unrelated segments" that lumber along together willy-nilly would likely not express anything at all.

On p. 736, before the "Points to Remember," insert the following new case:

Twitter, Inc. v. Taamneh
598 U.S. 471 (2023).

Justice Thomas delivered the opinion of the Court.

Under 18 U. S. C. §2333, United States nationals who have been "injured by reason of an act of international terrorism" may sue for damages. §2333(a). They are not limited to suing the individual terrorists or organizations that directly carried out the attack because §2333(d)(2) also imposes civil liability on "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."

Plaintiffs (respondents) were allegedly injured by a terrorist attack carried out by ISIS. But plaintiffs are not suing ISIS. Instead, they brought suit against three of the largest social-media companies in the world—Facebook, Twitter (petitioner), and Google (which owns YouTube)—for allegedly aiding and abetting ISIS. Plaintiffs allege ISIS has used defendants' social-media platforms to recruit new terrorists and to raise funds for terrorism. Defendants allegedly knew that ISIS was using their platforms but failed to stop it from doing so. Plaintiffs seek to hold Facebook, Twitter, and Google liable for the terrorist attack that allegedly injured them. We conclude that plaintiffs' allegations are insufficient to establish that defendants aided and abetted ISIS in carrying out the relevant attack.

Plaintiffs' case arises from a 2017 terrorist attack on the Reina nightclub in Istanbul, Turkey. The attack was carried out by Abdulkadir Masharipov on behalf of the Islamic State of Iraq and Syria (ISIS).[15] Born in Uzbekistan, Masharipov received military training with al Qaeda in Afghanistan in 2011 and eventually became affiliated with ISIS. In 2016, he was ordered by ISIS to travel to Turkey and launch an attack in Istanbul on New Year's Eve. After planning and coordinating the attack with ISIS emir Abu Shuhada, Masharipov entered the Reina nightclub in the early hours of January 1, 2017, and fired over 120 rounds into a crowd of more than 700 people. Masharipov killed 39 people and injured 69. ISIS [claimed] responsibility for the attack.

One of Masharipov's victims was Nawras Alassaf, who was killed in the attack. Several members of Alassaf's family brought the present lawsuit under §2333, alleging that they had been injured by the attack. Invoking §2333(d)(2), plaintiffs sued three major social-media companies—Facebook, Inc., Google, Inc., and Twitter, Inc.—claiming that they aided and abetted ISIS and thus were liable for the Reina nightclub attack.[16] These three companies control three of the largest and most ubiquitous platforms on the internet: Facebook, YouTube, and Twitter. At the time of the Reina attack, Facebook had over 2 billion active users each month, YouTube had over 1 billion, and Twitter had around 330 million. For Facebook and YouTube, those numbers are even higher today.

Everyone agrees on the basic aspects of these platforms' business models. People from around the world sign up for the platforms and start posting content free of charge and without much (if any) advance screening by defendants. Users can upload messages, videos, and other types of content, which others on the platform can then view, respond to, and share. Billions of people have done just that. As a result, the amount of content on defendants' platforms is staggering. For *every minute* of the day, approximately 500 hours of video are uploaded to YouTube, 510,000 comments are posted on Facebook, and 347,000 tweets are sent on Twitter. On YouTube alone, users collectively watch more than 1 billion hours of video *every day*. Defendants profit from this content largely by charging third parties to advertise on their platforms. Those advertisements are placed on or near the billions of videos, posts, comments, and tweets uploaded by the platforms' users. To organize and present all those advertisements and pieces of content, defendants have developed "recommendation" algorithms that automatically match advertisements and content with each user; the algorithms generate those outputs based on a wide range of information about the user, the advertisement, and the content being viewed. So, for example, a person who watches cooking shows on YouTube is more likely to see cooking-based videos and advertisements for cookbooks, whereas someone who likes to watch professorial lectures might see collegiate debates and advertisements for TED Talks.

But not all of the content on defendants' platforms is benign. ISIS and its adherents have used these platforms for years as tools for recruiting, fundraising, and spreading their

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[15] ISIS has been designated a Foreign Terrorist Organization since 2004; it has also been known as the Islamic State of Iraq and the Levant, al Qaeda in Iraq, and the al-Zarqawi Network.

[16] Although Twitter, Inc., is the named petitioner and defendant, Twitter, Inc., has since been merged into X Corp., a subsidiary of X Holdings Corp. Although Facebook, Inc., and Google, Inc., are the named defendants, Facebook, Inc., is now known as Meta Platforms, Inc., and Google, Inc., is now Google LLC, a subsidiary of Alphabet, Inc.

propaganda. Like many others around the world, ISIS and its supporters opened accounts on Facebook, YouTube, and Twitter and uploaded videos and messages for others to see. Like most other content on those platforms, ISIS' videos and messages were then matched with other users based on those users' information and use history. Like most other content, advertisements were displayed with ISIS' messages, posts, and videos based on information about the viewer and the content being viewed. Unlike most other content, ISIS' videos and messages celebrated terrorism and recruited new terrorists. For example, ISIS uploaded videos that fundraised for weapons of terror and that showed brutal executions of soldiers and civilians alike. And plaintiffs allege that these platforms have been crucial to ISIS' growth, allowing it to reach new audiences, gain new members, and spread its message of terror.

Plaintiffs allege that defendants have known that ISIS has used their platforms for years. Yet, plaintiffs claim that defendants have failed to detect and remove a substantial number of ISIS-related accounts, posts, and videos. (For example, plaintiffs aver that defendants "have failed to implement a basic account detection methodology" to prevent ISIS supporters from generating multiple accounts on their platforms.) Accordingly, plaintiffs assert that defendants aided and abetted ISIS by knowingly allowing ISIS and its supporters to use their platforms and benefit from their "recommendation" algorithms, enabling ISIS to connect with the broader public, fundraise, and radicalize new recruits. Defendants allegedly have profited from the advertisements placed on ISIS' tweets, posts, and videos. Plaintiffs also provide a set of allegations specific to Google. According to plaintiffs, Google has established a system that shares revenue gained from certain advertisements on YouTube with users who posted the videos watched with the advertisement. As part of that system, Google allegedly reviews and approves certain videos before Google permits ads to accompany that video. Plaintiffs allege that Google has reviewed and approved at least some ISIS videos under that system, thereby sharing some amount of revenue with ISIS.

The District Court dismissed plaintiffs' complaint for failure to state a claim. But the Ninth Circuit reversed, finding that plaintiffs had plausibly alleged that defendants aided and abetted ISIS within the meaning of §2333(d)(2) and thus could be held secondarily liable for the Reina nightclub attack. We granted certiorari.

Section 2333 was originally enacted as part of the Antiterrorism Act (ATA) in 1990. 104 Stat. 2250. At that time, Congress authorized United States nationals or their "estate, survivors, or heirs" to bring civil lawsuits when "injured in [their] person, property, or business by reason of an act of international terrorism." Plaintiff could recover treble damages and the cost of the suit, including attorney's fees. But the ATA did not explicitly impose liability on anyone who only helped the terrorists carry out the attack or conspired with them. Prior to 2016, some courts determined that the ATA did not authorize that sort of secondary civil liability. Then, in 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA) to provide for a form of secondary civil liability. Thus, those injured by an act of international terrorism can sue the relevant terrorists directly under §2333(a)—or they can sue anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism" under §2333(d)(2). For such a secondary-liability claim, the "act of international terrorism" must have been "committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under 8 U. S. C. §1189

as of the date on which such act of international terrorism was committed, planned, or authorized." Plaintiffs seeking secondary liability can recover treble damages and the cost of the suit, including attorney's fees.

The parties do not dispute that the first three components of §2333(d)(2) have been adequately alleged: The Reina nightclub attack was an "act of international terrorism"; the attack was "committed, planned, or authorized" by ISIS; and ISIS was "designated as a foreign terrorist organization" as of the date of the Reina nightclub attack. §2333(d)(2). The central question is thus whether defendants' conduct constitutes "aiding and abetting, by knowingly providing substantial assistance," such that they can be held liable for the Reina nightclub attack.

We start with the text of §2333. That text immediately begs two questions: First, what exactly does it mean to "aid and abet"? Second, what precisely must the defendant have "aided and abetted"? We turn first to the meaning of the phrase "aids and abets, by knowingly providing substantial assistance." Nothing in the statute defines any of those critical terms. Yet terms like "aids and abets" are familiar to the common law, which has long held aiders-and-abettors secondarily liable for the wrongful acts of others. We generally presume that such common-law terms "bring the old soil" with them. In enacting JASTA, Congress provided additional context by pointing to *Halberstam* v. *Welch*, 705 F. 2d 472 (CADC 1983), as "providing the proper legal framework" for "civil aiding and abetting and conspiracy liability." §2(a)(5), 130 Stat. 852. We thus begin with *Halberstam*'s "legal framework," viewed in context of the common-law tradition from which it arose.

Long regarded as a leading case on civil aiding-and- abetting and conspiracy liability, *Halberstam* arose from a distinctive fact pattern. Bernard Welch was a serial burglar who had killed Michael Halberstam during a break-in. Halberstam's estate then sued Welch's live-in partner, Linda Hamilton, for aiding and abetting and conspiring with Welch. Hamilton was not present for Halberstam's murder, or even allegedly aware of the murder. But the facts made clear that "she was a willing partner in Welch's criminal activities." Hamilton had lived with Welch for five years, during which time the couple had risen from modest circumstances to possess a substantial fortune. This rapid ascent was remarkable because Welch had no outside employment. Rather, he left the house most evenings and returned with antiques, jewelry, and precious metals—some of which he melted down into gold and silver ingots by using a smelting furnace that he had installed in their garage. Meanwhile, Hamilton did bookkeeping work for Welch's "business," facilitating the sale of those stolen goods. She had Welch's customers make checks payable to her, falsified her tax returns at Welch's direction, and kept records of incoming payments from Welch's customers—with no records of outgoing funds to his "suppliers." Their arrangement continued until Welch was arrested after he killed Halberstam while burglarizing Halberstam's home. To determine Hamilton's liability, the D. C. Circuit undertook an extensive survey of the common law, examining a series of state and federal cases, the Restatement (Second) of Torts, and prominent treatises that discussed secondary liability in tort. With respect to aiding and abetting, the court synthesized the cases as resting on three main elements: First, "the party whom the defendant aids must perform a wrongful act that causes an injury." Second, "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance." *Ibid.* And, third, "the defendant must knowingly and substantially assist the principal violation." *Halberstam* then articulated six

factors to help determine whether a defendant's assistance was "substantial." Those factors are (1) "the nature of the act assisted," (2) the "amount of assistance" provided, (3) whether the defendant was "present at the time" of the principal tort, (4) the defendant's "relation to the tortious actor," (5) the "defendant's state of mind," and (6) the "duration of the assistance" given. Last, *Halberstam* clarified that those who aid and abet "a tortious act may be liable" not only for the act itself but also "for other reasonably foreseeable acts done in connection with it." Applying that framework, the D. C. Circuit held that Hamilton was liable for aiding and abetting Halberstam's murder. The court first determined that Welch had committed a wrong (in killing Halberstam during the burglary) and that Hamilton was generally aware of her role in Welch's criminal enterprise. It then explained that Hamilton had given knowing and substantial assistance to Welch's activities by helping him turn his "stolen goods into 'legitimate' wealth," thereby intending to help Welch succeed by performing a function crucial to any thief. *Ibid.* And it clarified that Hamilton knew Welch was committing some sort of "personal property crime," the "foreseeable risk" of which was "violence and killing." The court therefore concluded that Hamilton substantially helped Welch commit personal property crimes and was liable for Halberstam's death, which was a foreseeable result of such crimes. That articulation of the common law thus resolved *Halberstam*. But *Halberstam* recognized that the elements and factors it provided could "be merged or articulated somewhat differently without affecting their basic thrust." It thus cautioned—in a typical common-law fashion—that its formulations should "not be accepted as immutable components." Rather, *Halberstam* suggested that its framework should be "adapted as new cases test their usefulness in evaluating vicarious liability."

The allegations before us today are a far cry from the facts of *Halberstam*. Rather than dealing with a serial burglar and his live-in partner-in-crime, we are faced with international terrorist networks and world-spanning internet platforms. By *Halberstam*'s own lights, its precise three-element and six-factor test thus may not be entirely adequate to resolve these new facts. And JASTA itself points only to *Halberstam*'s "framework," not its facts or its exact phrasings and formulations, as the benchmark for aiding and abetting. §2(a)(5), 130 Stat. 852. We therefore must ascertain the "basic thrust" of *Halberstam*'s elements and determine how to "adapt" its framework to the facts before us today. To do so, we turn to the common law of aiding and abetting upon which *Halberstam* rested and to which JASTA's common-law terminology points.

As we have recognized, "aiding and abetting is an ancient criminal law doctrine" that has substantially influenced its analog in tort. *Central Bank of Denver*, 511 U. S., at 181. In one early statement of the criminal-law doctrine, William Blackstone explained that those who were "present, aiding and abetting the fact to be done," or "procured, counseled, or commanded another to commit a crime," were guilty and punishable. 4 COMMENTARIES ON THE LAWS OF ENGLAND 34, 36 (1795). Over the years, many statutes and courts have offered variations on that basic rule. See *United States* v. *Peoni*, 100 F. 2d 401 (CA2 1938) (L. Hand, J.). Yet, the basic "view of culpability" that animates the doctrine is straightforward: "A person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Rosemond* v. *United States*, 572 U. S. 65, 70 (2014).

Importantly, the concept of "helping" in the commission of a crime—or a tort—has never been boundless. That is because, if it were, aiding-and-abetting liability could sweep in innocent

bystanders as well as those who gave only tangential assistance. Assume that any assistance of any kind were sufficient to create liability. If that were the case, anyone who passively watched a robbery could be said to commit aiding and abetting by failing to call the police. Yet, our legal system generally does not impose liability for mere omissions, inactions, or nonfeasance; although inaction can be culpable in the face of some independent duty to act, the law does not impose a generalized duty to rescue. See 1 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW §6.1 (3d ed. 2018) (LaFave); W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 373–375 (5th ed. 1984). Moreover, both criminal and tort law typically sanction only "wrongful conduct," bad acts, and misfeasance. Some level of blameworthiness is ordinarily required. But, if aiding-and-abetting liability were taken too far, ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer. And those who merely deliver mail or transmit emails could be liable for the tortious messages contained therein. See RESTATEMENT (SECOND) OF TORTS §876, Comment *d*, Illus. 9, p. 318 (1979).

For these reasons, courts have long recognized the need to cabin aiding-and-abetting liability to cases of truly culpable conduct. They have cautioned that not "all those present at the commission of a trespass are liable as principals" merely because they "make no opposition or manifest no disapprobation of the wrongful" acts of another. *Brown* v. *Perkins*, 83 Mass. 89, 98 (1861). Put another way, overly broad liability would allow "one person to be made a trespasser and even a felon against his or her consent, and by the mere rashness or precipitancy or overheated zeal of another." *Bird* v. *Lynn*, 49 Ky. 422, 423 (1850). Unlike its close cousin conspiracy, aiding and abetting does not require any agreement with the primary wrongdoer to commit wrongful acts, thus eliminating a significant limiting principle. See *Nye & Nissen* v. *United States*, 336 U. S. 613, 620 (1949).

To keep aiding-and-abetting liability grounded in culpable misconduct, criminal law thus requires "that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed' " before he could be held liable. *Id.*, at 619 (quoting *Peoni*, 100 F. 2d, at 402). In other words, defendant has to take some "affirmative act" "with the intent of facilitating the offense's commission." *Rosemond*, 572 U. S., at 71. Such intentional participation can come in many forms, including abetting, inducing, encouraging, soliciting, or advising the commission of the offense, such as through words of encouragement or driving the getaway car. 2 LAFAVE §13.2(a), at 457. Regardless of the particulars, it is clear that some culpable conduct is needed. See *Rosemond*, 572 U. S., at 73.[17]

Similar principles and concerns have shaped aiding-and-abetting doctrine in tort law, with numerous cases directly employing them to help articulate the standard for tortious aiding and abetting. See, *e.g.*, *Zoelsch* v. *Arthur Andersen & Co.*, 824 F. 2d 27, 35 (CADC 1987). Similar to the criminal-law rule, some cases have required that the defendant's assistance "must have had a direct relation to the trespass, and have been calculated and intended to produce it" to

[17] Conversely, conspiracy liability could be premised on a "more attenuated relation with the principal violation" because the defendant and the principal wrongdoer had agreed to a wrongful enterprise. *Halberstam*, 705 F. 2d, at 485.

warrant liability for the resulting tort. *Bird*, 49 Ky., at 423. Other cases have emphasized the need for some "culpable conduct" and "some degree of knowledge that a defendant's actions are aiding the primary violator" before holding the defendant secondarily liable. *Camp*, 948 F. 2d, at 460. Still others have explained that "culpability of some sort is necessary to justify punishment of a secondary actor," lest mostly passive actors like banks become liable for all of their customers' crimes by virtue of carrying out routine transactions. *Monsen* v. *Consolidated Dressed Beef Co.*, 579 F. 2d 793, 799 (CA3 1978). And others have suggested that "inaction cannot create liability as an aider and abettor" absent a duty to act. *Zoelsch*, 824 F. 2d, at 36.

In articulating those limits, courts simultaneously began to crystalize the framework for aiding and abetting that *Halberstam* identified and applied. As in *Halberstam*, that framework generally required what the text of §2333(d)(2) demands: that the defendant have given knowing and substantial assistance to the primary tortfeasor. See, *e.g.*, *Monsen*, 579 F. 2d, at 799. Notably, courts often viewed those twin requirements as working in tandem, with a lesser showing of one demanding a greater showing of the other. In other words, less substantial assistance required more scienter before a court could infer conscious and culpable assistance. And, vice versa, if the assistance were direct and extraordinary, then a court might more readily infer conscious participation in the underlying tort. In moving back and forth between all these guideposts, the courts thus largely tracked the same distinctions drawn above to ensure that liability fell only on those who had abetted the underlying tort through conscious, "culpable conduct." *Camp*, 948 F. 2d, at 460.

Halberstam's framework reflected and distilled those common-law principles. Indeed, *Halberstam* started with a survey of many earlier common-law cases. As part of that survey, *Halberstam* explicitly distinguished different types of aid along the same culpability axis that grounded the common law. For example, *Halberstam* recognized that giving verbal encouragement (such as yelling "Kill him!") could be substantial assistance, but that passively watching an assault after hearing an assailant threaten the victim likely would not be. Those same lines have long been drawn for aiding-and-abetting liability under the common law. And *Halberstam*'s six factors for "substantial assistance" call for the same balancing that courts had undertaken previously between the nature and amount of assistance on the one hand and the defendant's scienter on the other.

Despite that deep-rooted common-law basis, the Ninth Circuit appears to have understood JASTA's approval of *Halberstam*'s "legal framework" as requiring it to hew tightly to the precise formulations that *Halberstam* used. But any approach that too rigidly focuses on *Halberstam*'s facts or its exact phraseology risks missing the mark. *Halberstam* is by its own terms a common-law case and provided its elements and factors as a way to synthesize the common-law approach to aiding and abetting. And JASTA employs the common-law terms "aids and abets," pointing to *Halberstam*'s common-law "framework" as the primary guidepost for understanding the scope of §2333(d)(2). At bottom, both JASTA and *Halberstam*'s elements and factors rest on the same conceptual core that has animated aiding-and-abetting liability for centuries: that the defendant consciously and culpably "participated" in a wrongful act so as to help "make it succeed." *Nye & Nissen*, 336 U. S., at 619. To be sure, nuances may establish daylight between the rules for aiding and abetting in criminal and tort law; we have described the doctrines as "roughly similar," not identical. But we need not resolve the extent of those

differences today; it is enough for our purposes to recognize the framework that *Halberstam* set forth and the basis on which it rests. The phrase "aids and abets" in §2333(d)(2), as elsewhere, refers to a conscious, voluntary, and culpable participation in another's wrongdoing.

The next question is what precisely a defendant must aid and abet. JASTA imposes liability on anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." §2333(d)(2). The parties dispute the textual object of the term "aids and abets": Plaintiffs assert that it is "the person," and defendants insist that it is the "act of international terrorism." So, plaintiffs contend, defendants can be liable if they aided and abetted ISIS generally—there is no need for defendants to have aided and abetted the specific Reina nightclub attack. Conversely, defendants posit that they are liable only if they directly aided and abetted the Reina nightclub attack, with a strict nexus between their assistance and that attack. Neither side is quite right. We find it unnecessary to parse whether the textual object of "aids and abets" is "the person" or the "act of international terrorism." Aiding and abetting is inherently a rule of secondary liability for specific wrongful acts. See PROSSER & KEETON 323. The rule imposes liability for a wrong on those who "help another to complete *its commission*." *Rosemond*, 572 U. S., at 70. As *Halberstam* put it, the defendant must aid and abet "a tortious act." 705 F. 2d, at 484.

Nor would a contrary rule make sense for torts. That is because tort law imposes liability only when someone commits an actual tort; merely agreeing to commit a tort or suggesting a tortious act is not, without more, tortious. "Enterprises" or "conspiracies" alone are therefore not tortious—the focus must remain on the tort itself. The same is true here: The ATA opens the courthouse doors only if the plaintiff is "injured by reason of an act of international terrorism." §2333(a). JASTA further restricts secondary liability by requiring that the "act of international terrorism" be "committed, planned, or authorized by" a foreign terrorist organization designated as such "as of the date on which such act of international terrorism was committed, planned, or authorized." §2333(d). Thus, it is not enough that a defendant have given substantial assistance to a transcendent "enterprise" separate from and floating above all the actionable wrongs that constitute it. Rather, a defendant must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong—here, an act of international terrorism. See, *e.g.*, Restatement (Second) of Torts §876(b); *Halberstam*, 705 F. 2d, at 488.

Plaintiffs insist that *Halberstam* proves the contrary, but their argument misses the gist of that case. To be sure, Linda Hamilton was not on the scene for the burglary of Halberstam's house and did not lend any specific support to Halberstam's murder. But Hamilton's assistance to Welch was so intentional and systematic that she assisted each and every burglary committed by Welch; any time that Welch left the house to burglarize, he would have relied on Hamilton's assistance in laundering the stolen goods and transforming them into usable wealth. Thus, Hamilton did aid and abet Welch in burglarizing Halberstam's home—and killing Halberstam was a foreseeable consequence of that burglary.

On the other hand, defendants overstate the nexus that §2333(d)(2) requires between the alleged assistance and the wrongful act. Aiding and abetting does not require the defendant to have known "all particulars of the primary actor's plan." RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS §10, Comment *c*, p. 104 (Tent. Draft No. 3, Apr. 6, 2018). For

example, a defendant might be held liable for aiding and abetting the burning of a building if he intentionally helped others break into the building at night and then, unknown to him, the others lit torches to guide them through the dark and accidentally started a fire. See RESTATEMENT (SECOND) OF TORTS §876, Comment *d*, Illus. 10, at 318. As *Halberstam* makes clear, people who aid and abet a tort can be held liable for other torts that were "a foreseeable risk" of the intended tort. Accordingly, a close nexus between the assistance and the tort might help establish that the defendant aided and abetted the tort, but even more remote support can still constitute aiding and abetting in the right case.

In appropriate circumstances, a secondary defendant's role in an illicit enterprise can be so systemic that the secondary defendant is aiding and abetting every wrongful act committed by that enterprise—as in *Halberstam* itself. At this point, aiding-and-abetting liability begins to blur with conspiracy liability, which typically holds co-conspirators liable for all reasonably foreseeable acts taken to further the conspiracy. See *Pinkerton* v. *United States*, 328 U. S. 640, 647 (1946). Yet, aiding and abetting lacks the requisite agreement that justifies such extensive conspiracy liability. *See* RESTATEMENT (SECOND) OF TORTS §876, Comment *a*, at 316; *Pinkerton*, 328 U. S., at 646. Thus, while the facts of *Halberstam* are not totemic, its facts are useful when determining whether a defendant has so consciously "participated in" a series of tortious acts in order to "make each one succeed." *Nye & Nissen*, 336 U. S., at 619.

To summarize the requirements of §2333(d)(2), the phrase "aids and abets, by knowingly providing substantial assistance," points to the elements and factors articulated by *Halberstam*. But, those elements and factors should not be taken as inflexible codes; rather, they should be understood in light of the common law and applied as a framework designed to hold defendants liable when they consciously and culpably "participated in" a tortious act in such a way as to help "it succeed." *Nye & Nissen*, 336 U. S., at 619. The text requires that defendants have aided and abetted the act of international terrorism that injured the plaintiffs—though that requirement does not always demand a strict nexus between the alleged assistance and the terrorist act.

Under the appropriate framework, some aspects of today's case become immediately clear: First, because they are trying to hold defendants liable for the Reina attack, plaintiffs must plausibly allege that defendants aided and abetted ISIS in carrying out that attack. Next, plaintiffs have satisfied *Halberstam*'s first two elements by alleging both that ISIS committed a wrong and that defendants knew they were playing some sort of role in ISIS' enterprise. The key question is whether defendants gave such knowing and substantial assistance to ISIS that they culpably participated in the Reina attack. The allegations here fall short of that showing under *Halberstam*'s framework as properly understood by reference to the common-law principles it applied.

Recall the basic ways that defendants as a group allegedly helped ISIS. First, ISIS was active on defendants' social-media platforms, which are generally available to the internet-using public with little to no front-end screening by defendants. In other words, ISIS was able to upload content to the platforms and connect with third parties, just like everyone else. Second, defendants' recommendation algorithms matched ISIS-related content to users most likely to be interested in that content—again, just like any other content. And, third, defendants allegedly knew that ISIS was uploading this content to such effect, but took insufficient steps to ensure that ISIS supporters and ISIS-related content were removed from their platforms. Notably,

plaintiffs never allege that ISIS used defendants' platforms to plan or coordinate the Reina attack; in fact, they do not allege that Masharipov himself ever used Facebook, YouTube, or Twitter. None of those allegations suggest that defendants culpably "associated themselves with" the Reina attack, "participated in it as something that they wished to bring about," or sought "by their action to make it succeed." *Nye & Nissen*, 336 U. S., at 619. The only affirmative "conduct" defendants allegedly undertook was creating their platforms and setting up their algorithms to display content relevant to user inputs and user history. Plaintiffs never allege that, after defendants established their platforms, they gave ISIS any special treatment or words of encouragement. Nor is there reason to think that defendants selected or took any action at all with respect to ISIS' content (except, perhaps, blocking some of it).[18] Indeed, there is not even reason to think that defendants carefully screened any content before allowing users to upload it onto their platforms. If anything, the opposite is true: By plaintiffs' own allegations, these platforms appear to transmit most content without inspecting it.

The mere creation of those platforms is not culpable. To be sure, it might be that bad actors like ISIS are able to use platforms like defendants' for illegal—and sometimes terrible—ends. But the same could be said of cell phones, email, or the internet generally. Yet, we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large. Nor do we think that such providers would normally be described as aiding and abetting, for example, illegal drug deals brokered over cell phones—even if the provider's conference-call or video-call features made the sale easier.

Plaintiffs assert that defendants' "recommendation" algorithms go beyond passive aid and constitute active, substantial assistance. We disagree. By plaintiffs' own telling, their claim is based on defendants' "provision of the infrastructure which provides material support to ISIS." Defendants' "recommendation" algorithms are merely part of that infrastructure. All the content on their platforms is filtered through these algorithms, which allegedly sort the content by information and inputs provided by users and found in the content itself. The algorithms appear agnostic as to the nature of the content, matching any content (including ISIS' content) with any user who is more likely to view that content. The fact that these algorithms matched some ISIS content with some users does not convert defendants' passive assistance into active abetting. Once the platform and sorting-tool algorithms were up and running, defendants at most allegedly stood back and watched; they are not alleged to have taken any further action with respect to ISIS. At bottom, the claim here rests less on affirmative misconduct and more on an alleged failure to stop ISIS from using these platforms. But both tort and criminal law have long been leery of imposing aiding-and-abetting liability for mere passive nonfeasance. To show that defendants' failure to stop ISIS from using these platforms is somehow culpable with respect to the Reina attack, a strong showing of assistance and scienter would thus be required. Plaintiffs have not made that showing.

The relationship between defendants and the Reina attack is highly attenuated. Defendants' platforms are global in scale and allow hundreds of millions (or billions) of people to upload vast quantities of information on a daily basis. There are no allegations that defendants

[18] Plaintiffs concede that defendants attempted to remove at least some ISIS-sponsored accounts and content after they were brought to their attention.

treated ISIS any differently from anyone else. Defendants' relationship with ISIS and its supporters appears to have been the same as their relationship with their billion-plus other users: arm's length, passive, and largely indifferent. Telationship with the Reina attack is even further removed, given the lack of allegations connecting the Reina attack with ISIS' use of these platforms. Because of the distance between defendants' acts (or failures to act) and the Reina attack, plaintiffs would need [a] very good reason to think that defendants were consciously trying to help or otherwise "participate in" the Reina attack. They have offered no such reason. Plaintiffs point to no act of encouraging, soliciting, or advising the commission of the Reina attack that would normally support an aiding-and-abetting claim. Rather, they essentially portray defendants as bystanders, watching passively as ISIS carried out its nefarious schemes. Such allegations do not state a claim for culpable assistance or participation in the Reina attack.

Because plaintiffs' complaint rests so heavily on defendants' failure to act, their claims might have more purchase if they could identify some independent duty in tort that would have required defendants to remove ISIS' content. But plaintiffs identify no duty that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends.[19] There may be situations where some such duty exists, and we need not resolve the issue today. Even if there were such a duty, it would not transform defendants' distant inaction into knowing and substantial assistance that could establish aiding and abetting the Reina attack.

Given the lack of any concrete nexus between defendants' services and the Reina attack, plaintiffs' claims would necessarily hold defendants liable as having aided and abetted each and every ISIS terrorist act committed anywhere in the world. Under plaintiffs' theory, any U. S. national victimized by an ISIS attack could bring the same claim based on the same services allegedly provided to ISIS. Plaintiffs thus must allege that defendants so systemically and pervasively assisted ISIS that defendants could be said to aid and abet every single ISIS attack. Viewed in that light, the allegations here fall short. Plaintiffs do not claim that defendants intentionally associated themselves with ISIS' operations or affirmatively gave aid that would assist each of ISIS' terrorist acts. Nor have they alleged that defendants and ISIS formed a near-common enterprise of the kind that could establish such broad liability. These allegations are thus a far cry from the type of pervasive, systemic, and culpable assistance to a series of terrorist activities that could be described as aiding and abetting each terrorist act.

We cannot rule out the possibility that some set of allegations involving aid to a known terrorist group would justify holding a secondary defendant liable for all of the group's actions or perhaps some definable subset of terrorist acts. There may be situations where the provider of routine services does so in an unusual way or provides such dangerous wares that selling those goods to a terrorist group could constitute aiding and abetting a foreseeable terror attack. Cf. *Direct Sales Co.* v. *United States*, 319 U. S. 703 (1943) (registered morphine distributor could be liable as a co-conspirator of an illicit operation to which it mailed morphine far in excess of normal amounts). If a platform consciously and selectively chose to promote content provided by a particular terrorist group, perhaps it could be said to have culpably assisted the terrorist group.

[19] When legislatures have wanted to impose a duty to remove content on these types of entities, they have done so by statute.

In those cases, the defendants would arguably have offered aid that is more direct, active, and substantial than what we review here; in such cases, plaintiffs might be able to establish liability with a lesser showing of scienter. But we need not consider every iteration. In this case, it is enough that there is no allegation that the platforms here do more than transmit information by billions of people, most of whom use the platforms for interactions that once took place via mail, on the phone, or in public areas. The fact that some bad actors took advantage of these platforms is insufficient to state a claim that defendants knowingly gave substantial assistance and thereby aided and abetted those wrongdoers' acts. A contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That conclusion would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings.

That leaves the allegations specific to Google. Plaintiffs allege that Google reviewed and approved ISIS videos on YouTube as part of its revenue-sharing system and thereby shared advertising revenue with ISIS. The complaint alleges nothing about the amount of money that Google supposedly shared with ISIS, the number of accounts approved for revenue sharing, or the content of the videos that were approved. It thus could be that Google approved only one ISIS-related video and shared only $50 with someone affiliated with ISIS; the complaint simply does not say, nor does it give any other reason to view Google's revenue sharing as substantial assistance. Without more, plaintiffs have not plausibly alleged that Google knowingly provided substantial assistance to the Reina attack, let alone (as their theory of liability requires) every single terrorist act committed by ISIS.

The concepts of aiding and abetting and substantial assistance do not lend themselves to crisp, bright-line distinctions. However, both the common law and *Halberstam* provide some clear guideposts: The point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort. When there is a direct nexus between the defendant's acts and the tort, courts may more easily infer such culpable assistance. The more attenuated the nexus, the more courts should demand that plaintiffs show culpable participation through intentional aid that substantially furthered the tort. If a plaintiff 's theory would hold a defendant liable for all the torts of an enterprise, then a showing of pervasive and systemic aid is required to ensure that defendants actually aided and abetted each tort of that enterprise. Here, the nexus between defendants and the Reina attack is far removed. Defendants designed virtual platforms and knowingly failed to do "enough" to remove ISIS-affiliated users and ISIS-related content—out of hundreds of millions of users worldwide and an immense ocean of content—from their platforms. Yet, plaintiffs have failed to allege that defendants intentionally provided any substantial aid to the Reina attack or otherwise consciously participated in the Reina attack—much less that defendants so pervasively and systemically assisted ISIS as to render them liable for every ISIS attack. Plaintiffs accordingly have failed to state a claim under §2333(d)(2).

We therefore reverse the judgment of the Ninth Circuit.

It is so ordered.

Justice Jackson, concurring.

Today's decisions are narrow in important respects. This case and its companion case came to this Court at the motion-to-dismiss stage, with no factual record. The Court's view of the facts—including its characterizations of the social-media platforms and algorithms at issue—properly rests on the allegations in those complaints. The Court draws on general principles of tort and criminal law to inform its understanding of §2333(d)(2). The common-law propositions this Court identifies in interpreting §2333(d)(2) do not necessarily translate to other contexts.

On p. 733, replace problem # 3 with the following new problem # 3:

3. *The Media's Role in Disinformation & Political Division*. Many commentators are keen to try to control disinformation on social media platforms, but they are generally very reluctant to impose controls on newspapers or the broadcast media. In a poll conducted by the Associated Press-NORC Center for Public Affairs Research and the nonprofit, Robert F. Kennedy Human Rights nearly 75% of U.S. residents stated that the media is increasing political polarization in the U.S., and nearly half of the people indicated that they had little or no trust in the media's ability to report the news fairly and accurately. *See* David Kelpper, *Poll: Most fault media for division, The Courier-Journal* 10A (May 2, 2023). Only 16% of respondents to the poll were "very confident" that the media reports fairly and accurately, and 45% say that they have little or no confidence in the media. *Id.* As a result, some say that they are more willing to rely on the internet rather than media to inform themselves. *Id.* 40% of respondents indicated that the media is damaging democracy. *Id.* 90% of people believe that disinformation is a problem, with nearly two-thirds of people seeing the internet as less trustworthy than the media, but 60% of respondents see the media as at fault as well. *Id.* If it is necessary to control misinformation or disinformation on the internet, in order to protect democracy, should actions also be taken against the broadcast media? Would such action be consistent with our free speech tradition?

However, there is ample evidence of bias by the media. Fox News is viewed as bias and indeed was forced into paying a large defamation judgment. Despite the claims of some, media bias is hardly limited to Fox News. For example, there have been allegations that National Public Radio (NPR) has a decidedly left-wing bias. *See* Brett Zongker, *NPR's Williams Is Fired After Muslim Remarks, The Courier-Journal*, A2 (Oct. 22, 2010). Indeed, NPR's then-fundraiser, Mr. Ron Schiller, was videotaped making disparaging remarks about conservatives. *See* Associated Press, *NPR Chief Executive Quits Over Hidden Camera Video*, National Public Radio (Mar. 9, 2011), http://www.npr.org/blogs/thetwo-way/2011/03/10/134388981/npr-ceo-vivian-schiller-resigns If NPR's bias were limited to its fundraisers, that would not necessarily be a problem. However, the evidence suggests that NPR's left-wing bias goes well beyond its fundraisers. In a detailed analysis, NPR Senior Correspondent Uri Berliner argues that NPR has "lost its way." *See* Uri Berliner, *I've Been at NPR for 25 Years. Here's How We Lost America's Trust*, The Free Press (Apr. 11, 2024). https://www.thefp.com/p/npr-editor-how-npr-lost-americas-trust That shift is reflected in NPR's listening audience. Whereas 26% of NPR listeners described themselves as conservative, 23% are "as middle of the road," and 37 percent as liberal in 2011, those numbers had shifted considerably by 2023: only "11 percent described themselves as very or somewhat conservative, 21 percent as middle of the road, and 67 percent of listeners said they

were very or somewhat liberal." *Id.* He claims that the shift occurred as NPR moved from a neutral news reporting outlet to an advocacy organization. *Id.* While NPR is concerned about promoting diversity in the racial sense, and in other "woke" ways, it is not terribly interested in ideological diversity. *Id.*

On p. 735, after problem # 11, insert the following new problem and renumber the remaining problems:

11. *Prohibiting Teens from Social Media*. A Florida law prohibits children under the age of 14 from having social media accounts. Those who are 14 or 15 can have social media accounts with their parent's consent. Does the Florida law unduly restrict the First Amendment rights of teenagers? Does it unduly restrict the ability of teenagers to receive information and participate in onilne communities?

On p. 736, at the end of the problems, insert the following:

Food for Thought

Utah adopts a law requiring that parental consent be given for minors to sign up for social media accounts and that platforms verify the age of users younger than 18. The law also gives parents access to their children's posts and messages, and imposes fines of up to $250,000 on social media platforms if they use addictive features on minors. Utah seeks to justify the law because of the impact of social media on teens' mental health.

On p. 732, before the problems, insert the following:

Food for Thought

In recent years, states have taken steps to regulate internet content. For example, Florida and Texas have sought to treat social media platforms as public carriers and prohibit them from engaging in content-based or viewpoint-based discrimination. Both states expressed concern that that social media platforms were censoring conservative viewpoints. In challenging the laws, social media platforms expressed concern that the laws would require them to permit Russian propaganda, neo-Nazi or KKK speech. Texas responds that its law allows platforms to censor illegal speech or speech that incites violence. Taking a slightly different approach, California enacted a law requiring social media platforms to reveal their content moderation policies and to submit semiannual reports detailing their moderation activities. The Florida and laws are currently being litigated. However, are the various laws constitutional? Do the laws interfere with editorial discretion? Do they simply bring transparency to the content moderation processes?

On p. 732, following problem # 1, insert the following:

Food for Thought

In 2022, the U.S. Supreme Court struck down New York's law requiring that a person wanting to carry a handgun in public must show "proper cause" or a "special need" for such protection. In response, New York passed a law requiring applicants for a carry license to complete firearms training, meet with a licensing officer, provide household information, and submit a list of their social media account from the past three years to allow law enforcement officials to "confirm information regarding the applicant's character and Conduct." Does the social media disclosure aspect of the law run afoul of the First Amendment?

On p. 732, following problem # 2, insert the following:

Food for Thought

In 2022, the Homeland Security Agency (HSA) decided to create a Disinformation Governance Board to counter the spread of false information. The board will focus on disinformation coming from Russia as well as misleading messages about the U.S.-Mexico border, the Associated Press reports. The immediate focus will be on misinformation from human smugglers, who spread false claims about U.S. border policy to migrants to help drum up business. The Board was met with a firestorm of criticism and HSA ultimately decided to suspend its operations. Is a Disinformation Board a good idea? In a free and democratic society, is it a good idea to allow government to control the flow of information?

On p. 734, after problem # 5, insert the following:

Food for Thought

In recent years, artificial intelligence has led to the creation of so-called "deep fakes" which involve video and audio which suggest that certain things happened, but which in fact did not. For example, a particular person (e.g., Barrack Obama) might be shown speaking, but the words are not his. So, the video is a "fake" in the sense that it suggests that Obama said something that he did not say. In terms of dealing with disinformation, how should society deal with "deep fakes?"

On p. 735, following problem # 8, insert the following:

Food for Thought

Social media platforms have always been regarded as private companies, and therefore it has been assumed that they have the right to control the content on their platforms. Thus, they are not prohibited from engaging in content-based or viewpoint-based discrimination. However, in recent years, it has become clear that the U.S. government has increasingly attempted to

influence or control content moderation decisions made by social media companies. Congress routinely calls the heads of social media platforms before them and pressures them to censor more content. In addition, when Elon Musk released the Twitter files, it became clear that the White House and the FBI have pressured social media platforms regarding their content decisions. In *Missouri v. Biden*, 680 F. Supp.3d 630 (W.D. La. 2023), a federal district court concluded that government officials had "coerced" social media platforms regarding their censorship decisions, rendering those decisions governmentally-imposed content-based and viewpoint-based restrictions on speech, and therefore the court ordered the government not to contact social media platforms regarding their content decisions. The decision is currently on appeal. In *Murthy v. Missouri*, 144 S.Ct. 1972 (2024), the Court dismissed the case on standing grounds. Is there enough governmental involvement so that the content decisions of social media companies constitute state action, and therefore their decisions should be subject to the strictures of the First Amendment?

Chapter 11

Overview of the Religion Clauses

B. Defining the Subject Matter of the Religion Clauses

On p. 756, before the problems, insert the following:

Food for Thought

How far does the prohibition against judicial involvement in ecclesiastical disputes extend? Belya became a bishop of the Russian Orthodox Church in 2019. Shortly thereafter, when defendants (Russian Orthodox Church officials) published accusations suggesting that Belya had forged the documents relating to his appointment, Belya sued them for defamation. Even though courts won't involve themselves in ecclesiastical disputes, can they entertain a defamation action? *See Belya v. Kapral*, 45 F.4th 621 (2nd Cir. 2022).

On p. 757, at the end of problem # 4, insert the following:

See Huntsman v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, 94 F.4th 781(9th Cir. 2024).

On p. 762, before the problems, insert the following new Food for Thought:

Food for Thought

Christian Identity is an "explicitly racist" and anti-Semitic religion. It believes that white people are favored by God in the Bible, and that people of color are inferior and soulless. Suppose that the Michigan Department of Corrections refuses to recognize Christian Identity as a religion and refuses to allow it to hold services. Does Christian Identity have the right to be recognized as a religion given the nature of its beliefs? *See Fox v. Washington*, 71 F.4th 533 (6th Cir. 2023).

Chapter 12

The Establishment Clause

A. Financial Aid to Religion

3. Doctrinal Change: *Agostini v. Felton* & *Lemon's* Demise

4. Parental Choice and Financial Support

On p. 804, before "B. School Prayer," insert the following:

Food for Thought

An Oklahoma school district has decided to create a publicly-funded religious charter school. Given the public funding, should charter schools be treated as "public schools" rather than "private schools" and therefore subject to the Establishment Clause of the First Amendment? If "public," must they remain secular? Or, in the Court's jurisprudence, is there room for a charter school which is fully-funded by the government but is very religious? Is this different than a parental choice program?

On p. 804, change the title of the section from "B. School Prayer" to "B. Governmental Prayer."

B. School Prayer

On p. 810, before the problems, insert the following:

Food for Thought

Suppose that a trial court judge begins every session with a prayer, but posts a notice on the courtroom door letting litigants know that their attendance at the prayer is optional. The prayers are given by chaplains who are part of the Justice Court Chaplaincy program (which the judge created). The judge recruited a variety of religious leaders to participate in the program, and chaplains of different faiths have participated in the program on a rotational basis. However, 90% of the chaplains are from Protestant Christian denominations. When the judge's practice is challenged as an establishment of religion, he responds by claiming that the practice is the judicial equivalent of legislative prayer, and is consistent with the history and traditions of the nation. Is the practice constitutional?

On p. 827, after the problem, insert the following:

Food for Thought

Following a shooting spree during which several children were injured, the city's police chief and some police department employees and volunteer police chaplains worked with a community activist to organize and sponsor a prayer vigil on the town square. On the police department's Facebook page, the department encouraged the citizenry to join the vigil. At the vigil, police officers wore their uniforms and sang and prayer. Several humanists and atheists sued claiming a violation of the Establishment Clause. Following the holding in Kennedy, is there an Establishment Clause violation? *See Rojas v. City of Ocala*, 40 F.4th 1347 (11th Cir. 2022).

C. Curricular Issues

On p. 830, before the problems, add the following:

Food for Thought

Has the law changed? Would *Schempp* be decided the same way? Recently, Oklahoma's Superintendent of Schools mandated that the Bible be taught in public schools with an emphasis on history and literature. Oklahoma claims that the Bible was used in schools even prior to the creation of public schools, and that the Bible was the principal book used at that time. It was used to teach reading, writing and arithmetic, as well as basic morality. In addition, Oklahoma believes that the Bible helps students understand historical documents such as the Declaration of Independence which declares that all men as "endowed by their creator with certain unalienable rights." In addition, the Bible can help students understand the Rev. Martin Luther King Jr's "Letter from Birmingham Jail" which includes references to Jesus and his teachings. As a result, Oklahoma's Superintendent concludes, "I don't know how you teach English without the No. 1 best-selling book in American history as part of that curriculum."

D. Official Acknowledgement

On p. 863, before the problems, add the following:

in 2024, Louisiana's legislature adopted a law requiring that a poster-size version of the Ten Commandments be posted in all public school classrooms. The law specifies the exact language that must be printed on the displays, and provides that the text of Ten Commandments must be the focus of the display. The bill's sponsor stated that the Ten Commandments are rooted in legal history, and the displays place a moral code in the classroom. In signing the law, Louisiana's governor declared that "If you want to respect the rule of law, you must start from the original law which was given to Moses. He received his commandments from God." Is this law sufficiently distinguishable from the McCreary County displays so that it is constitutional? Alternatively, has the law changed sufficiently so that this new display should be upheld?

Chapter 13

Free Exercise

A. Burdens on Religion

3. The *Smith* Test: Neutrality and General Applicability

On p. 922, after problem # 1, insert the following:

Food for Thought

Meriwether, who teaches at a small public college, is devoutly religious. He believes that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." As a result, Meriwether refuses to refer to students by their preferred pronouns. The college seeks to discipline Meriwether after a transgender woman complains that Meriwether referred to "her" as a "he." Do Meriwether's religious beliefs provide him with a defense against the disciplinary proceeding? *See Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

On p. 922, following problem # 3, insert the following:

Food for Thought

The New York City police department requires people who are arrested to remove their religious head coverings for book photos. Two Muslim women sue after they were required to

remove their hijabs during booking. The police department claims that the policy is reasonably related to its interest in identifying prisoners and maintaining safety and security. The women sue, claiming that photographing them in the hijabs actually reflects their ordinary appearance and therefore better serves the city's objectives. Did the women have the right to wear their hijabs during the booking photos? *See Clark v. City of New York*, 2022 WL 17496225 (S.D.N.Y. 2022).

On p. 923, after problem # 6, insert the following:

Food for Thought

New York City's Human Rights Law prohibits discrimination based on sexual orientation. Yeshiva University refuses to recognize the YU Pride Alliance on the basis that it conflicts with the university's religious beliefs and the religious formation of its student in the Jewish faith. Under Employment Division v. Smith, is the university entitled to an exemption from NYC's Human Rights Law? *See Yeshiva University v. YU Pride Alliance*, 211 A.D.3d 562 (2nd Cir. 2022).

On p. 923, insert the following new problems ## 10 & 11, and renumber the remaining problem:

10. *Objections to "Gender Affirming" Care*. Suppose that certain Christian health care workers believe that an individual's gender is fixed at birth, and object to providing gender affirming care (e.g., performing mastectomies hysterectomies or other surgeries designed to further gender transitions, referring patient for gender-conforming treatments, or using language affirming gender identity, including using preferred or binary pronouns) to patients. Believing that federal law (a Health and Human Services rule implementing a federal law) requires them to provide such care, they sue. If the rule is "neutral and generally applicable," can the providers be required to provide gender affirming care despite their religious beliefs? *See American College of Pediatricians v. Becerra*, 2022 WL 17084365 (E.D. Tenn).

11. *Religious Objections to Covid-19 Vaccine Requirements*. During the Covid-19 pandemic, suppose that a public university requires all faculty, staff and students to take the Covid-19 vaccine. Likewise, a public hospital also requires staff, including physicians and nurses, to take the vaccine. Some refuse, claiming that, although the vaccines do not themselves contain fetal cells, plaintiffs believe that they are "derived" from aborted fetal cells. Can the students and hospital employees be required to be injected on pain of losing their employment if they refuse? Should the doctors and nurses be treated differently than the hospital employees? *See Doe v. Board of Regents of the University of Colorado,* 100 F.4th 1251 (10th Cir. 2024); *Keene v. City and County of San Francisco*, 2023 WL 3451687 (9th Cir.).

On p. 924, after the first paragraph, insert the following:

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 requires employers to accommodate an employee's religious practice unless to do so would impose an "undue hardship" on the employer. In *Groff v. Dejoy*, 600 U.S. 447 (2023), the Court clarified the standard to be applied to employee requests for accommodations of their religious practices. Groff was an Evangelical Christian who believed for religious reasons that Sunday should be devoted to worship and rest, not "secular labor" and the "transportation" of worldly "goods." So, he refused to work on Sundays and he requested an accommodation that would exempt him from Sunday work. Prior decisions had held that an accommodation would be considered as involving an "undue hardship" if it imposed more than a *de minimis* hardship on the employer. In *Groff*, the Court disagreed and held that a hardship is more severe than a mere burden. As a result, an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and the burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. However, a reviewing court must consider the effect of a possible accommodation on "the conduct of the employer's business," including on co-workers. The Court remanded the case for a determination of whether Groff's requested accommodation involved an "undue hardship."

On p. 926, before the problems, insert the following:

Food for Thought

Suppose that the Affordable Care Act prohibits discrimination based on someone's gender identity or transgender status, and therefore requires health-care providers to perform gender-transition procedures, and forces employers to pay for such procedures. Suppose that Catholic health-care providers have sincerely held religious beliefs that preclude them from performing or covering such procedures. Can the federal government require Catholic health-care providers to perform or cover transgender procedures, or are the providers entitled to an exemption? *See Religious Sisters of Mercy v. Azar*, 513 F.Supp.3d 1113 (D. N.D. 2021).

On p. 938, at the end of the first paragraph, insert the following:

Food for Thought

A catholic high school discharges a teacher of English and drama because he is gay. The teacher challenges the dismissal under a local anti-discrimination law. The school defends against the claim, alleging that teachers play a "vital role as a messenger" of the faith, and that he was a teacher of Christian thought" and was required to provide a "classroom environment consistent with Catholicism." In carrying out his duties, the teacher consulted other teachers to make sure that his teachings were consistent with the Catholic faith. However, when he announced on Facebook that he was going to marry his boyfriend, the school discharged him. Does the ministerial exception protect the school's decision against a claim that it violated the

anti-discrimination ordinance? *See Billard v. Charlotte Catholic High School,* 101 F.4th 316 (4th Cir. 2024).

B. DISCRIMINATION AGAINST RELIGION

On p. 951, before problem # 4, insert the following:

Food for Thought

In an area that has been zoned for agricultural use, Honig seeks an exemption that would allow him to build the Spirit of Aloha Temple. The city code allows for exemptions to the zoning rules, but explicitly requires a "special use permit" for religious activities. Under the code, an exemption may not be granted if it would "adversely affect surrounding property." Is the code unconstitutional because it specifically singles out religious activities for different treatment? *See Spirit of Aloha Temple v. City of Maui*, 49 F.4th 1180 (9th Cir. 2022).

On p. 951, insert the following new problem # 5, and renumber the remaining problems:

5. *Chanukah on Ice*. A local transit authority has a policy prohibiting advertisements on its buses and property that promote a religious faith or organization. An Orthodox Jewish synagogue wishes to advertise its annual "Chanukah on Ice" which involves a sculpted Grand Ice Menorah, and ice skating to Jewish music around the flaming Menorah. The city refused the application unless the synagogue agreed to de-emphasize the Menorah which the city described as a "religious-based icon." Is the denial permissible? *See Young Israel of Tampa, Inc. v. Hillsborough Area Regional Transit Authority,* 89 F.4th 1337 (11th Cir. 2024).

On p. 951, at the end of the problems, insert the following:

Food for Thought

A church opens its parking lot to members of the public who wish to go to the beach, and proselytizes and prays over the visitors. Responding to complaints from neighbors, the city adopts a rule prohibiting non-patrons from parking at the church. Does the rule involve discrimination against religion? Does it unduly burden the congregant's free exercise rights? *See Pass-a-Grille Beach Community Church, Inc. v. City of St. Pete Beach*, 515 F.Supp.3d 1226 (M.D. Fla. 2021).

On p. 963, following problem # 1, insert the following:

Food for Thought

A public school revokes the Fellowship of Christian Athletes status as a "club" because it imposes a religious pledge requirement which includes a statement that homosexuality and sex outside marriage are not acceptable to God. The school claims that the pledge violates the school's nondiscrimination policy. However, the school has not revoked the charters of other student groups whose constitutions prohibit membership based on gender identity or ethnicity. Can FCA make out a discrimination claim? *See Fellowship of Christian Athletes v. San Jose Unified School District*, 46 F.4th 1075 (9th Cir. 2022), *vacated*, 59 F.4th 967 (9th Cir. 2023).