# 2021 SUPPLEMENT

# TO

# The First Amendment

## *Cases, Problems, and Materials*

Sixth Edition

RUSSELL L. WEAVER
Professor of Law and Distinguished University Scholar
University of Louisville Louis D. Brandeis School of Law

CATHERINE HANCOCK
Geoffrey C. Bible & Murray H. Bring Professor of Constitutional Law
Tulane University School of Law

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

# Chapter 1
# Historical Intentions and Underlying Values

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

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

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

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

Chapter 2
# Advocacy of Illegal Action

## E. Modern Standards

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

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

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

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

***On p. 50, change the heading "Notes" to "Notes and Questions"***

***On p. 51, at the end of the notes, create a new note # 3 with existing problem # 1 (from p. 51).***

***On p. 51, at the beginning of the problems, insert the following new problems and renumber the remaining problems:***

1. *The Assault on the Capitol Building*. In a speech delivered before the Jan. 6, 2021, assault on the U.S. Capitol Building, President Trump claimed to have won the 2020 election and

alleged that it had been stolen by "radical-left Democrats" and the "fake news media." He went on to state that the "country has had enough" and "will not take it anymore," and he emphasized the need to "stop the steal." Trump went on to state that "We will not let them silence your voices. We're not going to let it happen, I'm not going to let it happen." He concluded by stating that:

> Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down . . .to the Capitol, and we're going to cheer on our brave senators and congressmen and women, and we're probably not going to be cheering so much for some of them. Because you'll never take back our country with weakness. You have to show strength and you have to be strong. We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.

Members of the crowd then assaulted the Capitol Building. Under the *Brandenburg* test, can Trump be charged with criminal advocacy? Is your position affected by the fact that Trump concluded by talking about the fact that people would act "peacefully and patriotically?"

2. *Maxine Waters' Comments*. Right before jury deliberations began in the Derek Chauvin trial, U.S. Congresswoman Maxine Waters went to Minneapolis (the site of the trial), and spoke to protestors, encouraging them to "stay on the street" and "get more confrontational" if the jury doesn't return a guilty verdict in the trial regarding the death of George Floyd. House Minority Leader Kevin McCarthy Tuesday to censure Waters, calling her comments "beneath the dignity" of the House and characterizing them as having "raised the potential for violence, directed lawlessness, and may have interfered with a co-equal branch of government." Do Waters' comments satisfy the *Brandenburg* test? Had Chauvin be found not guilty, and had the crowd violently rioted, could Waters have been regarded as an "inciter" of the unlawful action.

3. *The Pandemic Protest*. An Orthodox Jewish leader, a vocal opponent of various coronavirus pandemic restrictions, is upset about limits on the number of worshipers allowed into synagogues. When a journalist is spotted, the leader and members of his congregation surround and scream at him. One member of the congregation kicked the journalist. Can the leader be convicted of inciting a riot?

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

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

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

9. *Liability for Violent Protester*. When a Black Lives Matter demonstration blocked a public highway in front of the Police Department, police officers were ordered to make arrests.

Some protesters started throwing rocks at the police and one unidentified protester threw a rock that hit an officer in the head. The injured officer brought a tort negligence suit against Mckesson, one of the organizers of the demonstration, alleging that he was liable for the protester's conduct. The officer's complaint alleges that Mckesson led the demonstrators to block the highway, then "did nothing to prevent the violence or to calm the crowd," and negligently allowed the violence to occur. Does *Claiborne Hardware* create a First Amendment shield for Mckesson from tort liability for the rock thrower's criminal act? *See Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019), *judgment vacated and remanded*, *McKesson v. Doe*, 141 S. Ct. 48 (2020).

10. *Riot Boosting Statute*. The South Dakota legislature enacted a statute in 2019 that provided for the establishment of a "riot boosting recovery fund" which "may be used to pay any claim for damages arising out of or in connection with a riot," and "any civil recoveries shall be deposited in the fund," which shall be "continuously appropriated to the Department of Public Safety, which shall administer the fund." The governor described 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," and as allowing the State "to follow the money for riots and cut it off at the source." There are three bases for tort liability under the riot boosting statute: (1) 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." Do the two new riot statutes unduly burden expressive activity or freedom of association? In a pre-enforcement challenge to these statutes, how can plaintiffs argue that the statutes fail the requirements of *Brandenburg* and *Claiborne Hardware*? *See Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874 (D.S.D. 2019).

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

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

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

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

, *rev'd* 140 S. Ct. 157 (2020).

***On p. 59, after the problems, add the following new problem:***

11. *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. 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

## A. "Fighting Words"

***On p. 79, after problem # 8, add the following new problem # 9, and renumber the remaining problem***:

9. *"Why Don't We Settle It."* When Jay was stopped at a traffic signal, his vehicle was struck by Bob's vehicle. Jay stopped his car immediately, as did Bob. When Jay got out to examine the damage, Bob exited his car also and offered Jay $200 to forget about the collision. Jay rejected that offer. Then Bob said, "why don't we pull our cars over the side of the road and settle this like men?"Jay ignored Bob, returned to his vehicle, and called the police to report the accident. Given Jay's reaction, did Bob's speech constitute unprotected fighting words? *See Davis v. Commissioner of Corrections*, 198 Conn. App. 345, 233 A.3d 1106 (App. Ct. 2020).

## B. Hostile Audiences

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

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

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

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

***On p. 87, after the problems, add the following new problem:***

8. *More on the "Heckler's Veto."* For more than fifty years, a city has maintained a content-neutral permit system for displays in Palisades Park, California. Every year, a religious group has applied for an obtained a permit to establish a display. Recently, a group of atheists decided to flood the city's first come, first served, system with applications to establish displays at the same time, hoping to crowd out the religious display. In response, the Park decided to ban all such displays. Does the flood of atheist applications involve an inappropriate "heckler's veto?" Is there a basis for challenging the city's decision to ban all such displays? *See Santa*

*Monica Nativity Scenes Commission v. City of Santa Monica*, 784 F.3d 1286 (9th Cir. 2015).

## C. Defamation

***[1] The Constitutionalization of Defamation***

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

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

***On p. 100, insert new problems # 7, and renumber the remaining problems:***

7. *What Standard of Proof Should Apply?* When the plaintiff is a company, who claims to have been defamed, but does not involve a public officials, but does involve the "public interest," what standard of proof should apply? For example, during the 2020 Presidential election campaign, and the challenges that came afterward, Donald Trump's lawyer, Rudy Giuliani, allegedly pushed false election fraud claims related to voting machine irregularities. DominionVoting Systems claimed that Giuliani's claims damaged his business. Should a reviewing court apply the "actual malice" standard or a lower standard? If so, which one? *See Dominion v. Giuliani*, (D.D.C. 2021).

***On p. 110, at the end of note # 4, add the following:***

Nick Sandmann, the teenager, ultimately entered into a confidential settlement with the *Washington Post*.

***On p. 111, insert a new note # 7, and renumber the remaining notes:***

7. *Trump & Stormy Daniels*. Adult film star "Stormy Daniels" claimed that then President Donald Trump defamed her in a 2018 Tweet. She claimed that a man threatened her in a Las Vegas parking lot after she agreed to sell her story regarding an alleged affair with Trump. Trump tweeted a photo of the sketch that was produced of her description of the man, commenting that the depicted strongman was "nonexistent," that Daniels' story was a "total con job," and that she was "playing the Fake News Media for fools." Daniels law suit was ultimately dismissed on the basis that Trump's later Tweet involved a statement of opinion rather than

assertion of fact. *See Clifford v. Trump*, 818 Fed. Appx. 746 (9th Cir. 2020).

***On p. 112, insert the following new note # 9 and renumber the following note:***

9. *The Gibson's Bakery Case*. When a clerk at the bakery believed that two students had stolen bottles of wine, the clerk chased and tackled them. Following the incident, the college allowed students to use school computers and printers to print fliers, and the Dean of Students helped pass out the fliers, which alleged that Gibson's was a "RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." Gibson's Bakery won a defamation judgment against Oberlin College's Vice President and Dean of Students at the trial court level. The bakery initially won a $44 million judgment which was reduced to $25 million. Both sides appealed the decision.

***On p. 112, replace problem # 2 with the following problems and renumber the remaining problems:***

2. *Defining the term "Public Figure."* In 2012, children were murdered at school in Newton, Connecticut. Afterwards, Alex Jones used his Infowars website, speculated that the attack had been staged, and that crisis actors had been used to make it appear real. Plaintiff, a father of one of the murdered children, was alleged to have lied about the death of his son in order to promote stronger gun laws. Is the father a "public figure?" In deciding whether he is a public figure, should it matter that he gave media interviews regarding the Newton incident? What if he actively campaigned for stricter gun controls, including testifying before the legislature and pushing the White House for reform? *See Jones v. Heslin*, 2020 WL 1452025 (Tex.App. 2020).

3. *More on the Public Figure Standard*. A music producer sues a singer for defamation, claiming that she made false allegations of sexual assault. The producer admits that he is an acclaimed producer," but is not a "household name." Should he be treated as a "public figure" and required to satisfy the "actual malice" standard? *See Gottwald v. Sebert*, — N.Y.S.3d — 2021 WL 1567070 (2021).

***[3] Application of the "Actual Malice" Standard***

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

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

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

5. *Remove the Section 230 Shield?* President Trump, upset that certain social media

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

***[4] Fact versus Opinion***

***On p. 127, after the notes, add the following new note:***

3. *Implying First-Hand Knowledge*. In *NetScout Systems, Inc. v. Gartner, Inc.*, 334 Conn. 396, 414, 223 A.3d 37 (2020), emphasized that defamation liability may attach "when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, [firsthand] knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact." By contrast, the court noted that "an opinion that is based on the opinions of others does not imply defamatory facts and, therefore, is not actionable." In *Rockoff v. Annulli*, 2020 WL 4333864 (Conn. Super. Ct., July 2, 2020), the plaintiff real estate agent brought a defamation claim against the defendant home buyer. The plaintiff represented the seller. The defendant posted the following review on www.yelp.com: "He's "a train wreck ... disorganized and lacks the knowledge required for a real estate transaction[,] did not uphold his fiduciary obligation to his client by making many careless mistakes ... and claimed to be more of a hobbies realtor. [I later] "learned that he had given our deposit checks to his client and did not hold them in escrow. That is illegal!" Under the *Gartner* standard, the *Rockoff* Court held that the defendant's statement contained both non-actionable opinion and actionable false fact based on the implication of first-hand knowledge.

## D. Emotional Distress

***On p. 145, 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).

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

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

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

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

***On p. 156, at the end of note #3, add the following new note #4, and renumber the remaining notes:***

5. *Public versus Private Concerns*. Some state have codified the right of publicity tort, as exemplified in the Illinois Right of Publicity Act, which prohibits "using an individual's identity for commercial purposes without having obtained previous written consent." In *Lukis v. Whitepages, Inc*., 2020 WL 6287369 (N.D. Ill., October 27, 2020), plaintiffs sued Whitepages based on its ownership and operation of websites that sell "background reports" about people, alleging that "the websites violate the IRPA by using Plaintiffs' identities to promote the sale of Defendant's background report services." Whitepages supplies "free previews" to "promote" its

"products" and "services," particularly it "paywalled background reports." A search for plaintiff Lukis in the free previews revealed "her name, age range, phone number, current and previous addresses, and relatives," allowing her to be uniquely identified. The *Lukis* Court found that the use of the plaintiffs' identities by Whitepages satisfied the "commercial purposes" definition of the IRPA – and did not fit the statutory exemption for "core First Amendment speech," covering the "use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign." This exemption incorporates the First Amendment "distinction between speech on matters of public concern and speech of solely private concern." the *Lukis* Court relied on the definitions of this distinction in *Snyder v. Phelps*, 562 U.S. 443 (2011) and *Dunn & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985). The court concluded that the background reports "are properly characterized as private concern, not public concern, speech."

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

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

## E. Invasion of Privacy

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

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

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

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

they keep legitimate information from the public? Are there situations when catch and kill agreements might have legitimate purposes?

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

*See Foster v. Svenson*, 128 A.D.3d 150, 7 N.Y.S.3d 96 (2015).

## F. Obscenity

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

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

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

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

Chapter 4

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

## A. "Offensive" Speech

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

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

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

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

***On p. 196, after the problems, add the following new problems:***

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

7. *Flicking Off an Officer*. Assume that after Al dropped off his kids at school, Officer Baker was outside the school and shouted at him to slow down. Al shouted back that he was going five miles under the speed limit, which he was. When Al drove back to the school in the afternoon, he saw Officer Baker parked in her squad car. This time, Al stuck his hand out the window, extended his middle finger, and pointed it at Officer Baker as he drove past her. She followed Al's car, pulled Al over, approached Al, and said, "You drove by and you flicked me off and I'm curious as to why you did that." When Al asked whether his conduct was illegal, Officer Baker stated that, "There was a woman with her children at the school gate who may have seen you. When you flicked me off, that constituted disorderly conduct, so you are under arrest." When the charge is dismissed, Al brings a §1983 suit with a First Amendment retaliation claim against Officer Baker. What result? *See Garcia v. City of New Hope*, 984 F.3d 655 (8th Cir. 2021).

***On p. 198, insert new problems ## 7 & 8, and renumber the remaining problem:***

7. *The Comedian's Insult*. In Canada, a comedian by the name of Mike Ward mocked a disabled teenage singer in a standup comedy routine. In addition to calling the singer "ugly," Ward claimed that he sang off-key and made fun of his hearing aid. When the boy didn't die of an illness, as expected, Ward joked that he tried to drown him. The comedian was charged with having discriminated against the singer because of his disability. Ward lost before a human rights tribunal, and the case ultimately made its way to Canada's Supreme Court. Had the case been brought in the U.S., could Ward have been sanctioned for purportedly discriminating against the singer?

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

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

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

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

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

## B. "Hate" Speech

***On p. 213, at the end of the notes, add the following new note:***

4. *Princeton and Free Speech.* A survey of students at Princeton University found that 76% of Princeton students would be uncomfortable with the idea of expressing unpopular views on social media, and that 52% would be uncomfortable with the idea of disagreeing with a professor. Students were particularly reluctant to discuss such issues as Israel/Palesinte and transgender issues, but that they were also reluctant to discuss race and affirmative action.

***On p. 213, delete "3. "Other Grounds for Prosecution" from problem # 3, and place the beginning of the next sentence at the end of the prior problem and renumber the remaining problems.***

***On p. 214, at the end of problem # 6, add the following new citation:***

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

***On p. 214, problem # 8, change the title to the problem to :Striking a Balance" and then delete the first paragraph of the problem.***

***On p. 214, at the end of problem # 8, add the following:***

May a university prohibits students engaging in speech that involves "harassment, intimidation, rudeness, incivility or bias?" May the university invoke such a policy to prohibit students from taking pro-life positions, questioning affirmative action, or suggesting that Justice Kavanaugh was treated unfairly during his confirmation hearings? *See Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020).

***On p. 221, change the heading "Notes" to "Notes and Questions.***

***On p. 221, move problem # 1 above the heading "Problems" (so that it becomes a "note") and change it's number from 1 to 3, and then renumber the remaining problems. In the new note, delete the citation and substitute the following new citation:***

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

***On p. 221, replace problem # 2 (now problem # 1) with the following new problem:***

1. *Anti-Harassment Laws*. A federal statute makes it a crime to use any telecommunications device anonymously "with the intent to abuse, threaten, or harass any specific person." Weiss, who lives in California, sent emails to Senator Mitch McConnell through his Senate website which referred to McConnell as a "motherf*cker" and a Russian asset, disparaged his wife's ethnicity, and claimed that the resistance should have put a bullet in his head. Is Weiss' speech constitutionally protected or can he be successfully prosecuted for harassment? Does it constitute a true threat? Suppose that a separate law makes it a crime to "harass" someone else that makes the other feel "oppressed, persecuted or intimidated." Suppose that defendant yells the following at an annual gay rights celebration: "You're giving use AIDS" and "There are no

homosexuals in heaven." Can defendant be convicted? *See United States v. Weiss,* 475 F.3d 1015 (N.D. Cal. 2020).

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

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

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

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

***On p. 223, at the end of the problems, add the following new problem:***

14. *Ethnic Intimidation Ordinance*. The Columbus City Council enacted the following ordinance: Section 1: "No person shall violate [one of 14 sections] of the city code when done by reason of or where one of the motives, reasons or purposes for the commission of the offense is the victim's race, sex, sexual orientation, gender identity or expression, color, religion, national origin, ancestry, age, disability, familial status or military status." Section 2: "In a prosecution under this [ordinance] the offender's motive, reason or purpose for the commission of the offense may be shown by the offenders temporarily related conduct or statements before, during or after the offense, including ethnic, sexual orientation, religious or racial slurs, and by the totality of the facts, circumstances and conduct surrounding the commission of the offense." Are these provisions valid according to *R.A.V.* and *Mitchell? See City of Columbus v. Fabich*, 2020 WL 3488568 (Ohio App., January 27, 2020).

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

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

## C. True Threats

***On p. 232, replace existing note # 2 with the following:***

2. *Mental State for "True Threats."* There continues to be a controversy regarding the mental state for "true threats." In *United States v. Elonis*, 575 U.S. 723 (2015), the Court refused to definitively state the mental state required for a true threat under the First Amendment. The

governing statute, 18 U.S.C. § 875 makes no reference to a mental state and simply prohibits "any communication containing any threat . . . to injure the person of another." In *Elonis*, defendant posted rap lyrics on his Facebook which contained violent language and imagery along with disclaimers that his lyrics referred to real person, and he claimed that he was simply exercising his First Amendment rights. However, his estranged wife, his co-workers, and the FBI agents did view it as threatening. As a result, Elonis was charged with making a true threat against his wife.

At trial, Elonis argued that he could not be convicted unless he had the "intent to communicate a true threat," but the trial court rejected that argument and Elonis was convicted. The U.S. Supreme Court overturned the conviction, holding that a court must imply a mental state sufficient to separate "wrongful conduct from otherwise innocent conduct."In the Court's view, a true threat prosecution must be focused on the "threatening nature of the communication." Thus, a "reasonable person" or "negligence" standard ("whether a reasonable person would foresee that the statement would be interpreted as a threat") is inadequate, but that a conviction could be based on either the purpose to communicate a threat, or knowledge that the statement would be regarded as such. On remand, Elonis' conviction was affirmed on the basis that he knew that his statement would be regarded as a threat. *See United States v. Elonis*, 841 F.3d 589 (3d Cir. 2016).

In Elonis, the Court refused to decide whether a conviction could be based on the mental state of "recklessness" because that issue was no brief or argued. That issue has been decided by some lower courts. For example, in *Kansas v. Boettger*, 450 P.3d 805 (Kan. 2016), *cert. denied*, 140 S.Ct. 1956 (2020), the Kansas Supreme Court held that a conviction could not be based on the mental state of "recklessness." The Court referenced language from *Black* which provided that: " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." As a result, a conviction "requires more than a purpose to communicate just the threatening words. It is requiring that the speaker want the recipient to believe that the speaker intends to act violently." If a conviction is based simply on "an awareness that words may be seen as a threat" creates a risk "that one is merely uttering protected political speech, even though aware some might hear a threat."

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

***On p. 235, after the notes, add the following new note:***

7. *Disinformation Campaigns*. Jack boasted to journalists about his plan to influence the November 2020 election through disinformation campaigns. Jack's organization was the source of robocall messages with these false statements: (1) that police will use vote-by-mail information to track persons with outstanding warrants; (2) that vote-by-mail information will be used by debt collectors; and (3) that the Centers for Disease Control and Prevention ("CDC") is seeking access to vote-by-mail information to conduct mandatory vaccination efforts. Approximately 85,000 robocalls conveyed this message to the telephone numbers of people in urban areas with significant populations of Black voters. Voters who received these robocalls filed suit for an

injunction to stop the robocalls under the Voting Rights Act. That statute prohibits "threats and intimidation" to deter individuals "from exercising their voting rights," including not only threats of bodily harm but also "threats of economic harm, legal action, dissemination of personal information, and surveillance can qualify depending on the circumstances." Jack's counsel argued that the robocall messages were protected speech and not "true threats" under the First Amendment. The court observed that the *Black* opinion did not "suggest that the government can ban only threats of physical harm." Therefore, the court found that the messages were true threats and violated the Voting Rights Act, reasoning that "the threat of severe non-bodily harm can engender as much fear and disruption as the threat of violence." *See National Coalition on Black Civil Participation*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020)

***On p. 235, at the beginning of problem # 3, delete "3. Other Comparable Symbols?", attach the remainder of the paragraph to the end of problem # 2, and renumber the remaining problems***

***On p. 238, problem # 11, delete "11. More on Bagdasarian.", add the remainder of the paragraph to the end of the prior problem and renumber the remaining problem.***

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

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

***On p. 239, after existing problem #15 (now problem # 13), insert the following new problems and renumber the remaining problem:***

14. *Mother's Threat*. After her son died during a traffic stop, McGuire blamed Officer Dodd, who was present during the stop, even though her son was on meth. She was charged with harassment based on several statements that she posted on Facebook. McGuire posted the following on Facebook (fyi, McGuire was not one of her Facebook friends): "He set my son up to die and y'all better watch out cuz I'm coming for all of you. I'm comn for u to u better watch out this mother is on a rampage and ready to shoot to kill." At the end of one post, McGuire wrote: "FUCK KPD OFFICER JERemy DODD yes I said it loud and proud." McGuire argues that her speech is protected under the First Amendment and the prosecutor argues that it was an unprotected "true threat." What result? *See McGuire v. State*, 132 N.E.3d 438 (Ind. App. 2019).

15. *Prohibiting Harassment*. Suppose that a federal statute makes it a crime to "make a telephone call with the intent to harass or embarrass another person using lewd, lascivious or indecent language." A veteran, upset by the Veterans Affairs' handling of his reimbursement for

medical bills, uses profanity in discussions regarding his claim. Would it violate the First Amendment to convict the veteran of harassment under this law? *See United States v. Waggy*, 936 F.3d 1014 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 138 (2020).

## D. Child Pornography

***On p. 247, replace the heading with the Problems heading, renumber the existing problem as problem #1, then add the following new problem #2:***

***Problems***

1. *Photographing the Child*.

*2. Expanding Definitions of Ferber Crime*. The Texas legislature has enacted a definition of unprotected "*Ferber* speech" that is more broad than the New York statute in the *Ferber* case, as may be seen by the text of the Texas Penal Code crime:

"(1) the person knowingly or intentionally possesses, or knowingly or intentionally accesses with intent to view, visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct, including a child who engages in *sexual conduct* as a victim of an offense under [four specified sections] and

(2) the person knows that the material depicts the child as described by section (1).

(3) "*Sexual conduct*" is defined as: "Sexual contact, actual or *simulated* sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola."

(4) "*Simulated*" is defined as: "The explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks."

Assume that defendant is charged under the Texas statute with knowingly possessing material that visually depicts children of 17 years of age who are engaging in sexual conduct as defined in the Texas statute but not as defined in the New York statute upheld in *Ferber*. The defendant argues that the Texas statute is substantially overbroad based on two arguments. First, "the Supreme Court has never included in its definition of 'child pornography' anything resembling the Texas statute's prohibition of the lewd exhibition of body parts other than genitalia." Second, the Supreme Court has not endorsed the expansion of the statute to children under 18 – the *Ferber* case involved only children under 16. How will the Texas court respond to these overbreadth arguments? *See Ex parte Dehnert*, 605 S.W.3d 885 (Tex. App. 2020).

## E. Pornography as Discrimination Against Women

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

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

## F. Possible Additional Categories for Exclusion From Speech Protection

***On p. 273, delete the existing problem and title and replace them with the following:***

### ***Problem*: Prohibiting Gay Conversion Therapy**

Suppose that a state passes a law prohibiting mental health providers (including physicians, psychologists and psychotherapists) from engaging in efforts to change the sexual orientation of gays and lesbians, and providing that any provider who engages in such conduct with a person under the age of eighteen years is deemed to have engaged in unprofessional conduct. The law defines such therapy as a "harmful practice." The law does not prohibit providers from providing acceptance, support and understanding for a client's sexual orientation. Suppose that a licensed therapist and family counselor, who is an ordained minister, and who operates a non-profit counseling center, seeks to challenge the law. He strongly believes that "human sexuality is to be expressed only in a monogamous lifelong relationship between one man and one woman within the framework of marriage." As a result, he has historically provided "gay conversion" therapy of a kind that would violate the new law. Does the law constitute a content-based restriction on speech? Can it survive a First Amendment challenge? *See Otto v. City of Boca Raton*, 981 F.3d 854 (2020); *Welch v. Brown*, 834 F.3d 1031 (9th Cir. 2016); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013).

***On p. 284, before the Alvarez case, insert the following new problem:***

### **Problem: *Prohibiting the Teaching of Critical Race Theory***

Believing that it tends to promote leftist ideology, a state legislature decides to ban the teaching of critical race theory, an academic framework created by law scholars in the 1970s which argues that racism persists through seemingly race-neutral American laws, policies, and institutions. As the governor of one state said: "The woke class wants to teach kids to hate each other, rather than teaching them how to read, but we will not let them bring nonsense ideology into Florida's schools." Can a state legislature ban the teaching of critical race theory? Would the analysis be different for elementary schools than for colleges? What about middle schools and high schools?

***On p. 299, after problem # 4, add the following new problems # 5 and # 6, and renumber the remaining problems:***

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

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

6. *The Newton Tragedy*. In 2012, children were murdered at school in Newton, Connecticut. Afterwards, Alex Jones used his Infowars website speculated that the attack had been staged, and that crisis actors had been used to make it appear real. Plaintiff, a father of one of the murdered children, was alleged to have lied about the death of his son in order to promote stronger gun laws. Can plaintiff recover for defamation against Jones and Infowars? *See Jones v. Heslin*, 2020 WL 4742834 (Tex. App., August 14, 2020).

## G. Near Obscene

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

2. *Dissemination Statute*. Almost every state has enacted a statute that criminalizes the

nonconsensual dissemination of private sexual images. The Illinois legislature enacted a "dissemination" in 2015, which provides as follows"

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

The Illinois Supreme Court upheld the statute under an intermediate level of scrutiny, based on the view that it is a content-neutral time, place, and manner restriction that regulates a purely private matter." Should the Court reverse the Illinois Supreme Court's decision? On what theory? *See People v. Austin*, 2019 IL 123910, 155 N.E.3d 439 (2019). *See also State v. Casillas,* 952 N.W.2d 629 (Minn. 2020); *State v. VanBuren*, 214 A.3d 791 (Vt. 2018).

## H. Commercial Speech

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

### Barr v. American Association of Political Consultants, Inc.

140 S.Ct. 2335 (2020).

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

The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019. The States likewise field a constant barrage of complaints. For nearly 30 years, the people's representatives in Congress have been fighting back. As relevant here, the

Telephone Consumer Protection Act of 1991, known as the TCPA, generally prohibits robocalls to cell phones and home phones. But a 2015 amendment to the TCPA allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts. This case concerns robocalls to cell phones. Plaintiffs are political and nonprofit organizations that want to make political robocalls to cell phones. Invoking the First Amendment, they argue that the 2015 government-debt exception unconstitutionally favors debt-collection speech over political and other speech. They urge us to invalidate the entire 1991 robocall restriction.

I

In 1991, Congress passed and President George H. W. Bush signed the Telephone Consumer Protection Act. The Act responded to a torrent of vociferous consumer complaints about intrusive robocalls. A growing number of telemarketers were using equipment that could automatically dial a telephone number and deliver an artificial or prerecorded voice message. At the time, more than 300,000 solicitors called more than 18 million Americans every day. Consumers were "outraged" and considered robocalls an invasion of privacy "regardless of the content or the initiator of the message." In enacting the TCPA, Congress found that banning robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." The TCPA imposed various restrictions on the use of automated telephone equipment. One restriction prohibited "any call (other than a call made for emergency purposes or with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to "any telephone number assigned to a paging service, *cellular telephone service*, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." The TCPA prohibited almost all robocalls to cell phones. In 2015, Congress passed and President Obama signed the Bipartisan Budget Act. In addition to making other changes, that Act amended the TCPA's restriction on robocalls to cell phones. It stated: "(a) In General.—Section 227(b) of the Communications Act of 1934 is amended—(1) in paragraph (1)—(A) in subparagraph (A)(iii), by inserting 'unless such call is made solely to collect a debt owed to or guaranteed by the United States' after 'charged for the call.' " In other words, Congress carved out a new government-debt exception to the general robocall restriction. The TCPA imposes tough penalties for violating the robocall restriction. Private parties can sue to recover up to $1,500 per violation or three times their actual monetary losses, which can add up quickly in a class action. States may bring civil actions against robocallers on behalf of their citizens. And the Federal Communications Commission can seek forfeiture penalties for willful or repeated violations of the statute.

Plaintiffs are the American Association of Political Consultants and three other organizations that participate in the political system. Plaintiffs and their members make calls to citizens to discuss candidates and issues, solicit donations, conduct polls, and get out the vote. Plaintiffs believe that their political outreach would be more effective and efficient if they could make robocalls to cell phones. But because plaintiffs are not in the business of collecting government debt, § 227(b)(1)(A)(iii) prohibits them from making those robocalls. The U. S. District Court for the Eastern District of North Carolina determined that the robocall restriction

with the government-debt exception was a content-based speech regulation, thereby triggering strict scrutiny. But the court concluded that the law survived strict scrutiny. The U. S. Court of Appeals for the Fourth Circuit vacated the judgment. We granted certiorari.

II

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

The Government advances three main arguments for deeming the statute content-neutral, but none is persuasive. *First*, the Government suggests that § 227(b)(1)(A)(iii) draws distinctions based on speakers (authorized debt collectors), not based on content. But this statute singles out calls "made solely to collect a debt owed to or guaranteed by the United States," not all calls from authorized debt collectors. Indeed, the Court has held that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U. S., at 170. *Second*, the Government argues that the legality of a robocall under the statute depends simply on whether the caller is engaged in a particular economic activity, not on the content of speech. We disagree. The law here focuses on whether the caller is *speaking* about a particular topic. *Third*, according to the Government, if this statute is content-based because it singles out debt-collection speech, then so are statutes that *regulate* debt collection, like the Fair Debt Collection Practices Act. That argument is unpersuasive. As we explained in *Sorrell*, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." The courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech. The issue before us concerns only robocalls to cell phones. Our decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity.

In short, the robocall restriction with the government-debt exception is content-based.

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

III

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

*It is so ordered*.

Justice Sotomayor, concurring in the judgment.

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

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

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

From a democratic perspective, it is equally important that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse. The strictest scrutiny should not apply indiscriminately to the very "political and social changes desired by the

people." *Meyer*, 486 U. S., at 421. Otherwise, our democratic system would fail, not through the inability of the people to speak or to transmit their views to government, but because of an elected government's inability to translate those views into action. Thus, it is not surprising that this Court has applied less strict standards when reviewing speech restrictions embodied in government regulatory programs. This Court, for example, has applied a "rational basis" standard for reviewing those restrictions when they have only indirect impacts on speech. And it has applied a mid-level standard of review—often termed "intermediate scrutiny"—when the government directly restricts protected commercial speech. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980).

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

The Court has held that entire categories of speech—for example, obscenity, fraud, and speech integral to criminal conduct—are generally unprotected by the First Amendment entirely because of their content. See *Miller* v. *California*, 413 U. S. 15, 23 (1973). As Justice Stevens pointed out, "our entire First Amendment jurisprudence creates a regime based on the content of speech." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 420 (1992) (concurring). Given that this Court looks to the nature and content of speech to determine whether, or to what extent, the First Amendment protects it, it makes little sense to treat *every* content-based distinction Congress has made as presumptively unconstitutional. Our First Amendment jurisprudence has always been contextual and has defied straightforward reduction to unyielding categorical rules. That said, I am not arguing for the abolition of the concept of "content discrimination." There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate. Neither of those situations is present here. Outside of these circumstances, content discrimination can at times help determine the strength of a government justification or identify a potential interference with the free marketplace of ideas.

Given that the government-debt exception does directly impact a means of communication, a proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so. Narrow tailoring in this context does not necessarily require the use of the least-restrictive means of furthering those objectives. We have called this approach "intermediate scrutiny." As Justice Kavanaugh notes,

the government-debt exception provides no basis for undermining the general cell phone robocall restriction. Indeed, looking at the government-debt exception in context, we see that the practical effect of the exception, taken together with the rest of the statute, is to put *non*-government debt collectors at a disadvantage. Their speech operates in the same sphere as government-debt collection speech, communicates comparable messages, and yet does not have the benefit of a particular instrument of communication (robocalls). While this is a speech-related harm, debt-collection speech is both commercial and highly regulated. The speech-related harm at issue here—and any related effect on the marketplace of ideas—is modest. The purpose of the exception is to further the protection of the public fisc. That protection is an important governmental interest. Private debt typically involves private funds; public debt typically involves funds that, in principle, belong to all of us, and help to implement numerous governmental policies that the people support. Congress has minimized any speech-related harm by tying the exception directly to the Government's interest in preserving the public fisc. Calls will only fall within the bounds of that exception if they are "made *solely* to collect" Government debt. Thus, the exception cannot be used to permit communications unrelated or less directly related to that public fiscal interest.

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

II

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

***On p. 332, insert the following new problem # 3, and renumber the remaining problems:***

3. *Regulating Fake Meats*. A Missouri statute makes it a crime for any seller of food to engage in deceptive practices. In particular, the law makes it a crime to misrepresent a product as "meat" when it is not derive from poultry, livestock, or captive cervid carcass or part thereof. Violations of the law are considered misdemeanors and are punishable by up to one year in jail and a fine of up to $1,000. The state justifies the law on the basis that it is designed to prevent consumer deception, and the law specifically prohibits the use of terms like "burger" or "sausage" in reference to plant-based products. The law is challenged by a company that markets a product called "Tofurky" – a tofu-based dish that is designed to be like a turkey – in packages that use labels and marketing that clearly indicate the product is made of plants, is meatless, and is either vegetarian or vegan. It also markets "veggie burgers." The company claims that it's products are not "deceptive." Under the *Central Hudson* test, is the law valid? Does the name "Tofurky," or the use of the words "veggie burger," create consumer confusion about whether the product is plant-based or meat-based? *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir.

2021).

***On p. 333, at the end of problem # 6, add the following citation:***

*See First Choice Chiropractic LLC v. DeWine*, 979 F.3d 675 (6th Cir. 2020), *cert. denied*, --- S.Ct. ----2021 WL 666473 (2021).

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

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

***On p. 337, after the problems, add the following new problems:***

19. *The False Advertising Litigation*. Ariix, a nutritional supplement maker, claims that NutriSearch Corp., publisher of the Nutrisearch Comparative Guide to Nutritional Supplements, is publishing rigged ratings that favor Ariix's competitor, Usana Health Sciences. Indeed, Ariix claims that NutriSearch created the guide simply to increase sales of Usana's products, and that Usana pays it hundreds of thousands of dollars a year in promotional fees. Ariix also claims that NutriSearch adjusts it criteria to favor Usana and to prevent Ariix from receiving its top rating. Should the guide be regarded as commercial speech, and should NutriSearch be liable for damages if its results are rigged in favor of Usana? *See Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107 (9th Cir. 2021).

20. *Ads on Taxi TV*. In 2001, a New York City ordinance was enacted that bans advertisements in both for-hire vehicles (FHVs) and taxi cabs. The city originally enacted the ban because passengers tended to be annoyed by video ads. However, the city amended the law to authorize a limited category of ads to appear on the screens of "Taxi TV"; equipment that was installed in taxis to allow passengers to pay by credit card. The ads were justified as a way to allow taxi drivers to install the newly mandated Taxi TV equipment. Vugo, Inc., wants to sell an advertising software platform, but the ban on ads in FHVs prevents it from doing so. Vugo files suit to challenge the ban on the ground that it violates the *Central Hudson* test. What result and why? *See Vugo, Inc. v. City of New York*, 931 F.3d 42 (2019).

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

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

When the court applies the *Central Hudson* test to the regulation, what result and why? *See ACA International v. Healey*, 457 F. Supp. 3d 17 (D. Mass. 2020).

22. *Enrolling in Horseshoing Course*. Esteban would like to enroll in Judy's private postsecondary school to take courses in horseshoing so that he can become a professional farrier. Because Esteban does not have a high school diploma or GED, California's Private Postsecondary Education Act of 2009 prohibits him from signing an enrollment agreement with Judy's school without passing an exam that is entirely unrelated to Esteban's experience with horses or aptitude for a career as a farrier. Esteban and Judy challenge the Act's testing requirement and argue that the Act burdens their free speech under *National Institute of Family and Life Advocates*. The testing requirement was established because of the State's concern that private postsecondary schools might provide substandard educational programs. Notably, the Act exempts numerous courses and programs from the testing requirement, including "flight schools" and "courses offering avocational or recreational education." The state defendants argue that the the Act "is a consumer-protection provision that regulates only non-expressive conduct. Therefore, "the Act does not restrain" Esteban and Judy's school from "'imparting information,' 'disseminating opinions,' or 'communicating a message.'" Instead, the Act should be upheld under "rational basis review" because it regulates only "economic activity" that is "speech-adjacent" and imposes "only" an "incidental burden on speech." What result under *National Institute of Family and Life Advocates*? *See Pacific Coast Horseshoing School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020).

Chapter 5

# Content-Neutral Speech Restrictions: Symbolic Speech and Public Fora

## A. Symbolic Speech

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

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

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

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

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

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

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

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

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

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

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

***On p. 355, after the problems, add the following new problem:***

4. *Homeless Encampment.* Assume that a city has a policy of evicting people who are living in tents or homemade shelters on public property, which policy authorizes police to arrest anyone in a homeless encampment and remove their belongings after giving them 72-hours notice. The city also obtained an injunction declaring that the police must clear illegal encampments "through any lawful means, including arrest" during "all times when space is available in shelters for the homeless," and the city's position is that there is always space available. Plaintiffs who reside in homeless encampments bring suit to challenge the city's policy and injunction as a violation of their First Amendment rights. The plaintiffs' complaint alleges that "by living in groups of 40 people in tents or makeshift shelters for 24 hours a day, on Third Street, along Fort Washington Way, including downtown locations, or anywhere open and obvious to other

members of the public, plaintiffs are engaged in symbolic political speech calling attention to the City's affordable housing crisis." Should the court find that the plaintiffs' conduct meets the Spence test? If so, are the city's policy and injunction content-neutral? Are they "justified without reference to the content of the regulated speech" or "were they adopted by the government 'because of disagreement with the message [the speech] conveys?" Does the policy satisfy the intermediate scrutiny test of *O'Brien*? Do the terms of the city's injunction satisfy the heightened scrutiny test of *Madsen*? *See Phillips v. Cincinnati*, 479 F. Supp. 3d 611 (S.D. Ohio 2020).

***On p. 364, after the problems, add the following new problems:***

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

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

9. *Wearing Guy Fawkes Mask*. Don was arrested in the summer of 2019 for wearing the Guy Fawkes mask like those worn in the 2005 movie, *V for Vendetta*. The mask is white with a thin black mustache and a black goatee; it covers the entire face except for two cut-outs for the eyes. Don was charged with violating this Louisiana statute: "No person shall use or wear in any public place of any character whatsoever, or in any open place in view thereof, a hood or mask, or anything in the nature of either, or any facial disguise of any kind or description, calculated to conceal or hide the identity of the person or to prevent his being readily recognized." Don's conduct did not qualify for any of the statutory exceptions that relate to holidays or parades. Don

testified at trial about his purpose for wearing the mask as follows: "I basically set myself out to be a martyr -- to show why we cannot give up our – civil rights. Everybody knows what is going on in the world, the terrorists and all these other -- ... crazy things. And, so – so, if we – if we give up our essential liberties for a little bit of safety, it doesn't keep us safe. Our constitutional rights are like a spare tire, if you will. You don't know you need them until you need them. And that's essentially what this is about." Should the court find that Don's wearing of the mask satisfies the *Spence* test for symbolic speech? What if Don wore the mask at a demonstration in the summer of 2020? *See State v. McGough*, 309 So. 3d 1006 (La. App. 2021).

## B. Public Forum Doctrine

### [1] Foundational Principles

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

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

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

***On p. 371, insert the following new problem # 1, and renumber the remaining problems:***

1. *Roadway Mediams*. A city ordinance makes it illegal to sit or stand on certain unpaved medians, or any median which is less than 36 inches wide, for any period of time. The city seeks to justify the prohibition on public safety grounds, and claims that it is a content-neutral time, place and manner restriction. Evans wants to engage in First Amendment activities on the median, and he claims that the median is an effective way to reach people. Is the prohibition valid? *See Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019).

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

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

***On p. 372, at the end of the problems, insert the following new problem:***

7. *Prohibiting Panhandling in Public Places*. An Indiana law makes it illegal to solicit donations within 50 feet of an automatic teller machine, or any location where a "financial transaction occurs." Since no solicitations can take place near where "financial transactions occur," would prohibit panhandling near such places as restaurants, businesses, parking meters and public monuments, and in virtually all of downtown Indianapolis. As a result, groups like the ACLU cannot solicit memberships or contributions on public streets on Constitution Day. Should panhandling be regarded as protected speech? Is the law valid? *See Civil Liberties Foundation, Inc. v. Superintendent*, 470 F. Supp.3d 888 (S.D. Ind. 2020).

***On p. 378, at the end of note # 1, add the following:***

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

***On p. 381, at the end of the problems, insert the following new problems:***

3. *More on Bus Advertisements*. As noted in *Lehman v. Shaker Heights*, *supra*, public bus systems generally have the authority to prohibit political messages in the "card space" on buses. But, if they allow political messages, can they prohibit messages that are "scornful" or that subject anyone to "ridicule?" A group wants to run an advertisement which reads as follows: "Fatwa on your head? Is your family or community threatening you? Leaving Islam?" Can the bus company reject the advertisement because it is scornful or ridiculing regarding Islam? *See American Freedom Defense Initiative v. Suburban Mobility Authority*, 978 F.3d 481 (6th Cir. 2020).

2. *Graduation Dress Code*. Students who choose to participate in a high school's graduation must abide by a dress code that requires them "to wear a cap and gown with tassel without adornment or alteration." The purposes of this prohibition are: 1) to preserve the "tradition of honoring the academic achievements of all students equally and thereby demonstrating class unity"; and 2) to maintain the "serenity and sanctity of a ceremony that is conducted without any disruption that might occur if students could alter their graduation caps." One graduating student, a member of the Sioux tribe, requests an exemption from the dress code so that she can wear a beaded cap adorned with an eagle plume designed to symbolize the passage into adulthood as per the cultural and religious practice of the Sioux. When the school denies the request, the student and her parents sue. Is the high school graduation ceremony a "limited public forum?" *See Waln v. Dysart School District*, 2021 WL 1255521 (D. Ariz., February 28, 2021).

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

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

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

2. *Custom Stamps with Political Content*. The U.S. Postal Service allows individuals to create customized stamps, but prohibited (at one time) all "controversial" content. The rule was amended to prohibit all political content on custom stamps. An art gallery operator wishes to have custom stamps that are critical of the Court's decision in *Citizens United* (a campaign finance case). In particular, he wants to promote a gallery exhibit with a stamp which states that "Democracy is Not for Sale." The USPS refuses to print the stamp because it contains political content. Is the prohibition on political content valid? *See Zukerman v. U.S.P.S.*, 961 F.3d 431 (D.C. Cir. 2020).

***[2] Restrictions on Public Forum Use***

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

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

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

***On p. 396, at the end of newly numbered problem # 6, add the following new citation:***

*See Pen American Center, Inc. v. Trump*, 448 F. Supp. 3d 309 (S.D.N.Y., 2020).

***On p. 397, at the end of newly numbered problem # 8, after the text and before the citation, add the following new citation:***

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

***On p. 403, insert the following new problem # 1 and renumber the remaining problems:***

1. *Anti-Abortion Slogans*. Washington D.C. has passed the Defacing of Public or Private Property Criminal Penalty Act which prohibits people from writing, marking, drawing or painting on public or private property, including streets and sidewalks. D.C. allowed a "Black Lives Mural" to be pained on a public street, and a "Defund the Police" message beside it. However, when an anti-abortion group asked for permission to paint a "Black Pre-Born Lives Matter" slogan on the sidewalk, the request was denied. Was the denial permissible or appropriate? *See Frederick Douglass Foundation, Inc. v. District of Columbia*, — F. Supp.3d —, 2021 WL 1166841 (D.D.C. 2021).

***On p. 403, delete problem ## 2 and 3, and replace them with the following:***

2. *Covid-19 Size Limits*. In response to the pandemic, Illinois enacts a law limiting the size of public gatherings to 50 people. However, Illinois makes an exception for religious gatherings which are not subject to any size limits. Does the Illinois law involve a content-based restriction on speech? Can the distinction between religious gathering, and non-religious gatherings, be justified as an accommodation of religion? *See Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

3. *Noise Ordinances*. A Maine law makes it a crime to "make noise that can be heard within a building where health services are being delivered." The ordinance is enacted to protect the health and well being of those receiving health services inside the facility. When abortion providers complain about the noise being created by a protestor, a police officer does not ask him to stop protesting, but does ask him to "tone it down." When he refuses to do so, the officer arrests him. Is a noise ordinance a permissible content-neutral time, place and manner restriction on speech? Is the law unduly vague? *See March v. Frey*, 458 F. Supp.3d 16 (D. Maine 2020); *see also Harmon v. City of Norman*, 981 F.3d 1141 (10th Cir. 2020).

***On p. 404, replace problems ## 4 & 5 with the following, and then renumber the remaining problems:***

4. *Occupy Columbia and the Emergency Regulation*. *See Occupy Columbia v. Haley*, 738 F.3d 107 (4th Cir. 2013);

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

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

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

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

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

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

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

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

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

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

***On p. 430, at the end of the problems, add the following new problem:***

3. *Courthouse Buffer Zone*. A state statute creates a 200 foot buffer zone around courthouses, prohibiting protests relating to ongoing trials. The state seeks to justify the law as a way of shielding trial participants from suffering undue influence while entering or exiting the courthouse. Should the law be regarded as a content-based restriction on speech and therefore subject to strict scrutiny? Does it matter that the law prohibits all protest activities within the buffer zone, and not just those activities that are disruptive of court proceedings? Does the fact

that the state already has laws prohibiting anyone from obstructing public sidewalks? Is the law valid? *See Picard v. Clark*, 475 F. Supp.3d 198 (S.D.N.Y. 2020).

### *[3] Content-Based Restrictions*

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

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

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

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

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

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

12. *Altering the Protest Zone During the Pandemic*. Kentucky allows protestors to come quite near the state capitol building. During the coronavirus pandemic, Kentucky's Governor does a daily newsbriefing regarding the impact of the virus on the Commonwealth. The briefing airs on radio stations and on television. One day, during the briefing, it is possible to hear protestors in the background (protesting the fact that the Governor has closed their businesses and is therefore preventing them from working). The next day, the Governor creates a no-protest zone in the area closest to the capitol building, thereby forcing protestors to remain so far away from the building

that they cannot be heard during his news conference. Was it permissible for the Governor to move the protest zone so far away? Was his decision content-based?

13. *Stay-at-Home Orders*. In *Yang v. Powers*, 1:20-cv-00760 (E.D. Wisc., May 20, 2020), plaintiffs filed suit to challenge "Safer at Home" restrictions imposed in some counties after the Wisconsin Supreme Court invalidated the State's similar stay-at-home order one week earlier. Plaintiffs included "salon owners, a pastor, a protest organizer and a candidate for Congress, all of whom argue that the local orders infringe in some way on their First Amendment rights." Assume that the plaintiffs object to the violations of the freedom of assembly and the freedom of speech. Do plaintiffs have a right to protest that overcomes the orders? *Compare Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418 (E.D. Va. 2020); *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100 (D.N.M. 2020); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214 (D. Md. 2020). *See* Shawn Johnson, *Federal Lawsuit Challenges Local Stay-at-Home Orders*, WPR, May 21, 2020, https://www.wpr.org/federal-lawsuit-challenges-local-stay-home-orders

14. *Portable Signs*. Lon is a street preacher who distributes free literature and carries portable signs. However, the *Town code prohibits portable signs, which are defined as "any movable sign not* permanently attached to the ground." When Lon files suit to challenge this prohibition under the First Amendment, his counsel argues that Lon is being denied the right to carry portable signs because of a regulation that is "content-based" and requires strict scrutiny under *Reed*. His counsel argues that signs that are "*temporarily placed* in the ground" should be interpreted as "portable signs," which category would encompass "for sale" real estate signs and campaign signs." Since there is no prohibition in the code against such signs, Lon's similarly portable signs are being treated differently in a way that amounts to a content-based regulation. What result? *See Lacroix v. Town of Fort Myers Beach*, 2021 WL 1087217 (M.D. Fla. March 22, 2021).

## C. Campaign Finance Laws [Online Material]

### *[1] Modern Foundations*

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

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

adjusted for inflation. Therefore, the Court vacated the judgment and remanded the *Thompson* case to the Ninth Circuit "to revisit" the question whether the Alaska limits are constitutional.

Chapter 6

# Vagueness, Overbreadth, and Prior Restraints

## A. Overbreadth & Vagueness

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

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

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

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

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

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

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

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

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

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

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

14. *"Divisive Concepts."* Less than two months before the November 2020 election, President Trump signed Executive Order 13950, which prohibited federal agencies and contractors, as well as the U. S. Uniformed Services, from promoting a list of nine "divisive concepts" in workplace diversity trainings. These "divisive concepts" included, for example, the concept that "the United States is fundamentally racist or sexist"; that "an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive"; and that "an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex." The executive order also directed agency heads to "identify grant programs for which grants may be conditioned" based on the certification by the recipient "that it will not use federal funds to promote" the "divisive concepts." The plaintiffs who filed suit to challenge the executive order included "non-profit community organizations and consultants" serving the LGBT community and people living with HIV. What vagueness arguments could be presented by the plaintiffs? *See Santa Cruz Lesbian & Gay Community Center v. Trump*, 2020 WL 7640460 (N.D. Cal. December 22, 2020).

## B. Prior Restraints

### *[1] Licensing*

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

2. *National Security and Intelligence Agency Pre-Publication Review*. The federal government requires pre-publication review of books or articles that national security or intelligence officials wish to publish. As part of that process, the government reserves the right to require redaction or modification of information that might damage national security or intelligence interests. Despite the general prohibition against pre-publication review systems, courts have upheld restrictions in these areas provided that they are reasonable. *See Edgar v. Coats*, 454 F. Supp. 3d 502 (D. Md. 2020).

3. *Injunction Not a Remedy*. The Department of Justice failed to obtain an injunction against Simon & Schuster to block the publication of THE ROOM WHERE IT HAPPENED, a memoir by former National Security Advisor John Bolton about his eighteen months working for the

Trump administration. The DOJ argued that the content of the book includes classified information that would harm national security, and that Bolton violated non-disclosure agreements that failing to obtain final approval from the National Security Counsel before publication. The federal district court judge found that since the book had been printed and shipped to a national audience, with advance copies in the possession of reviewers, it was too late to stop the publication and an injunction was no longer an appropriate remedy. However, the judge noted that the release of Bolton's book "may indeed have caused the country irreparable harm," that if the book does contain classified information, Bolton "stands to lose his profits from the book deal, exposes himself to criminal liability, and imperils national security." Harper Neidig & Jesse Byrnes, *Judge Denies Request to Block Bolton Book*, THE HILL, June 20, 2010, https://thehill.com/regulation/court-battles/503695-judge-denies-request-to-block-bolton-book

***On p.480, at the end of the problems, insert the following new problems:***

5. *Licensing for Adult Entertainers*. In an effort to stop human trafficking, the City of Jacksonsville adopts a licensing scheme for adult entertainers. The law provides that "Any person desiring to perform in an adult entertainment establishment licensed under this Chapter must obtain a Work Identification Card from the Sheriff. No person shall act as a performer in an adult entertainment establishment without having previously obtained said Work Identification Card, except as permitted during the Grace Period as set forth in this section. Additionally, no license holder or establishment manager shall employ, contract with or otherwise allow any performer to perform in an adult entertainment establishment who does not possess a valid and effective Work Identification Card except as permitted during the Grace Period as set forth in this section." Is the licensing scheme constitutional? *See Wacko's Too, Inc. v. City of Jacksonville*, — S.Ct. —, 2021 WL 777885 (M.D. Fla. 2021).

6. *National Park Permitting Scheme*. The Department of the Interior has established a permitting scheme for commercial filming in national parks. In order to "protect the national parks," the scheme requires anyone who creates a commercial film in national parks to obtain a permit and pay a fee. News gatherers are exempt from the permit requirement, but it applies to feature films, videography, television shows, documentaries and "other similar projects." Is the permit requirement valid? Does it discriminate based on content? Does the distinction between "newsgatherers" and other produces make sense in light of the Department's goal to protecting the national parks? *See Price v. Barr*, — F.Supp.3d — 2021 WL 230135 (D.D.C. 2021).

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

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

***[2] Injunctions***

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

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

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

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

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

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

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

***On p. 503, insert the following new problems # 2 & 3and renumber the remaining problem***

2. *The John Bolton "Tell All" Book*. The Department of Justice failed to obtain an injunction against Simon & Schuster to block the publication of THE ROOM WHERE IT HAPPENED, a memoir by former National Security Advisor John Bolton about his eighteen months working for the Trump administration. The DOJ argued that the content of the book includes classified information that would harm national security, and that Bolton violated non-disclosure agreements that failing to obtain final approval from the National Security Counsel before publication. The federal district court judge found that since the book had been printed and

shipped to a national audience, with advance copies in the possession of reviewers, it was too late to stop the publication and an injunction was no longer an appropriate remedy. However, might DOJ be entitled to recover all of the profits that Bolton made from the book? Could he be criminally prosecuted for illegal publication of national security information? *See Snepp v. United States*, 444 U.S. 507 (1980).

3. *Injunctions and Confidentiality Agreements*. Should a court be more inclined to grant an injunction when information is published in violation of a confidentiality agreement? Then President Donald Trump's niece (Mary Trump) wanted to publish a book entitled TOO MUCH AND NEVER ENOUGH, HOW MY FAMILY CREATED THE WORLD'S MOST DANGEROUS MAN. Donald's brother sued sues, claiming that publication would violate a non-disclosure agreement (NDA) that Mary signed as part of a 2001 settlement agreement concerning the assets of President Trump's father's estate. That NDA provided that neither Mary Trump nor "her agents" could publish anything about the settlement or her relationship with family members, including President Trump. Should the existence of the confidentiality agreement override the usual presumption against the constitutionality of prior restraints? Mary claims that her book involves "core political speech" relating to Donald's upcoming (2020) reelection campaign? Would the NDA bind Mary's publisher, Simon and Schuster? If the book is published, and the niece receives royalties, may her uncles recover those royalties from her on a restitution theory? *See* Josh Gerstein, *Court narrows restraining order against Mary Trump book*, Politico.com, July 1, 2020, https://www.politico.com/news/2020/07/01/book-mary-trump-restraining-order-347769

***Delete existing problem # 3.***

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

*See*

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

*Washington v. U.S. Department of State*, 443 F. Supp. 3d 1245 (W.D. Wash.).

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

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

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

8. *Nondisparagement Orders*. When the mother of a six-year-old filed for divorce, she also obtained an emergency order removing the father from the marital home and giving her sole custody of the child. The mother then sought an order prohibiting the father from posting disparaging remarks on social media. The judge issued the following nondisparagement orders against both the father and the mother: "Neither party shall disparage the other – nor permit any third party to do so – especially when within hearing range of the child. Neither party shall post any comments, solicitations, references or other information regarding this litigation on social media." The judge's order stated that, "These orders are a means to protect the psychological well-being of the child and are justified given the demonstrated breakdown in the relationship between the mother and father." Is the order a permissible prior restraint? *See Shak v. Shak*, 484 Mass. 658, 144 N.E.3d 274 (2020); *S.B. v. S.S.*, 243 A.3d 90 (Pa. 2020).

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

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

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

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

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

4. *Prohibiting Sidewalk Counseling*. A Pittsburgh ordinance creates a fifteen-foot buffer zone around the entrances to hospitals and healthcare facilities, providing in relevant part that "no person or persons shall knowingly congregate, patrol, picker or demonstrate" in the buffer zone. Plaintiffs seek to engage peaceful one-on-one conversations ("sidewalk conversations") conducted "at a normal conversational level and distance," but designed to discourage women entering the clinic from obtaining abortions. Is the ordinance valid? *See Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2019).

Chapter 7

# Freedom of Association and Compelled Expression

## A. The Right to Associate

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

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

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

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

***On p. 523, delete problem # 6 and insert the following case in its place:***

### Americans for Prosperity Foundation v. Bonta

— S.Ct. —, 2021 WL 2690268 (2021)

Chief Justice Roberts delivered the opinion of the Court, except as to Part II–B–1.

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

I

The California Attorney General's Office is responsible for statewide law enforcement, including the supervision and regulation of charitable fundraising. Under state law, the Attorney

General is authorized to "establish and maintain a register" of charitable organizations and to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." Cal. Govt. Code Ann. § 12584 (West 2018). In order to operate and raise funds in California, charities generally must register with the Attorney General and renew their registrations annually. Over 100,000 charities are currently registered in the State. The Attorney General requires charities renewing their registrations to file copies of their Internal Revenue Service Form 990, along with any attachments and schedules. Form 990 contains information regarding tax-exempt organizations' mission, leadership, and finances. Schedule B to Form 990—the document that gives rise to the present dispute—requires organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year (or, in some cases, who have given more than 2 percent of an organization's total contributions). See 26 CFR §§ 1.6033–2(a)(2)(ii)(f ), (iii) (2020).

The petitioners are tax-exempt charities that solicit contributions in California and are subject to the Attorney General's registration and renewal requirements. Americans for Prosperity Foundation is a public charity that is "devoted to education and training about the principles of a free and open society, including free markets, civil liberties, immigration reform, and constitutionally limited government." Thomas More Law Center is a public interest law firm whose "mission is to protect religious freedom, free speech, family values, and the sanctity of human life." Since 2001, each petitioner has renewed its registration and has filed a copy of its Form 990 with the Attorney General, as required. Out of concern for their donors' anonymity, however, the petitioners have declined to file their Schedule Bs (or have filed only redacted versions) with the State. For many years, the petitioners' reluctance to turn over donor information presented no problem because the Attorney General was not particularly zealous about collecting Schedule Bs. That changed in 2010, when the California Department of Justice "ramped up its efforts to enforce charities' Schedule B obligations, sending thousands of deficiency letters to charities that had not complied with the Schedule B requirement." The Law Center and the Foundation received deficiency letters in 2012 and 2013, respectively. When they continued to resist disclosing their contributors' identities, the Attorney General threatened to suspend their registrations and fine their directors and officers. Petitioners responded by filing suit. They alleged that the Attorney General had violated their First Amendment rights and the rights of their donors. Petitioners alleged that disclosure of their Schedule Bs would make their donors less likely to contribute and would subject them to the risk of reprisals. Both organizations challenged the disclosure requirement on its face and as applied to them. In each case, the District Court granted preliminary injunctive relief prohibiting the Attorney General from collecting their Schedule B information. The Ninth Circuit vacated and remanded. On remand, the District Court entered judgment for the petitioners and permanently enjoined the Attorney General from collecting their Schedule Bs. The Ninth Circuit again vacated the District Court's injunctions, and this time reversed and remanded for entry of judgment in favor of the Attorney General. We granted certiorari.

II

A

The First Amendment prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984). Protected association furthers "a wide variety of political, social, economic, educational, religious, and cultural ends," and "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Ibid*. Government infringement of this freedom "can take a number of forms." For example, freedom of association may be violated where a group is required to take in members it does not want, where individuals are punished for their political affiliation, or where members of an organization are denied benefits based on the organization's message, see *Healy* v. *James*, 408 U. S. 169, 181 (1972).

"Compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as other forms of governmental action." *NAACP* v. *Alabama ex rel*. *Patterson*, 357 U. S. 449, 462 (1958). *NAACP* v. *Alabama* involved this chilling effect in its starkest form. The NAACP opened an Alabama office that supported racial integration in higher education and public transportation. In response, NAACP members were threatened with economic reprisals and violence. As part of an effort to oust the organization from the State, the Alabama Attorney General sought the group's membership lists. We held that the First Amendment prohibited such compelled disclosure. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and we noted "the vital relationship between freedom to associate and privacy in one's associations." Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest "sufficient to justify the deterrent effect" of disclosure, we concluded that the State's demand violated the First Amendment.

B

1

*NAACP* v. *Alabama* did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure. We have since settled on a standard referred to as "exacting scrutiny." *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*). Under that standard, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe* v. *Reed*, 561 U. S. 186, 196 (2010). "To withstand scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ibid*. Such scrutiny is appropriate given the "deterrent effect on the exercise of First Amendment rights" that arises as an "inevitable result of the government's conduct in requiring disclosure." *Buckley*, 424 U. S., at 65. The Law Center argues that we should apply strict scrutiny. Under strict scrutiny, the government must adopt "the least restrictive means of achieving a compelling state interest," *McCullen* v. *Coakley*, 573 U. S. 464, 478 (2014), rather than a means substantially related to a sufficiently important interest. We first enunciated the exacting scrutiny standard in a campaign finance case. We have since invoked it in other

election-related settings. *Buckley* derived the test from *NAACP* v. *Alabama* itself. Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.

2

While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest. *Shelton* v. *Tucker* considered an Arkansas statute that required teachers to disclose every organization to which they belonged or contributed. 364 U. S., at 480. *Shelton* stands for the proposition that a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. Narrow tailoring is crucial where First Amendment activity is chilled—even indirectly—"because First Amendment freedoms need breathing space to survive." *Button*, 371 U. S., at 433. A substantial relation is not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters. Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end. When it comes to "a person's beliefs and associations," "broad and sweeping state inquiries into these protected areas discourage citizens from exercising rights protected by the Constitution." *Baird* v. *State Bar of Ariz*., 401 U. S. 1, 6 (1971) (plurality opinion). Nor does *Reed* suggest that narrow tailoring is required only for laws that impose severe burdens. A reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.

III

A

The Foundation and the Law Center renew their facial challenge, and they argue in the alternative that they are entitled to as-applied relief. We conclude that California's blanket demand for Schedule Bs is facially unconstitutional. Exacting scrutiny requires that there be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," *Reed*, 561 U. S., at 196, and that the disclosure requirement be narrowly tailored to the interest it promotes. We do not doubt that California has an important interest in preventing wrongdoing by charitable organizations. There is a "substantial governmental interest in protecting the public from fraud." *Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620, 636 (1980). The Attorney General receives complaints each month that identify a range of misconduct, from "misuse, misappropriation, and diversion of charitable assets," to "false and misleading charitable solicitations," to other "improper activities by charities soliciting charitable donations." Such offenses cause serious social harms. There is a dramatic mismatch, however, between the interest that the Attorney General seeks to promote and the disclosure regime. 60,000 charities renew their registrations each year, and nearly all are required to file a Schedule B. Each Schedule B contains information about a charity's top donors. This information includes donors' names and the total contributions they have made to the charity, as well as their addresses. Given the amount and sensitivity of this information, one would expect Schedule B collection to form an integral part of

California's fraud detection efforts. To the contrary, that there was not "a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." Even if the State relied on up-front collection in some cases, its showing falls far short of satisfying the means-end fit that exacting scrutiny requires. California is not free to enforce *any* disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives.

The Attorney General and the dissent contend that alternative means of obtaining Schedule B information—such as a subpoena or audit letter—are inefficient and ineffective compared to up-front collection. It became clear at trial that the Office had not even considered alternatives to the current disclosure requirement. The Attorney General and the dissent also argue that a targeted request for Schedule B information could tip a charity off, causing it to "hide or tamper with evidence." But the States' witnesses failed to substantiate that concern. Nor do the actions of investigators suggest a risk of tipping off charities under suspicion, as the standard practice is to send audit letters asking for a wide range of information early in the investigative process. Even if tipoff were a concern, the State's indiscriminate collection of Schedule Bs in all cases would not be justified. The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints. California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation. The need for up-front collection is particularly dubious given that California—one of only three States to impose such a requirement, did not rigorously enforce the disclosure obligation until 2010. This is not a regime "whose scope is in proportion to the interest served." *McCutcheon*, 572 U. S., at 218. In reality, California's interest is less in investigating fraud and more in ease of administration. This interest cannot justify the disclosure requirement. The Attorney General may prefer to have every charity's information close at hand, just in case. But administrative convenience does not remotely "reflect the seriousness of the actual burden" that the demand for Schedule Bs imposes on donors' association rights. *Reed*, 561 U. S., at 196.

B

Normally, a plaintiff bringing a facial challenge must "establish that no set of circumstances exists under which the law would be valid," *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), or show that the law lacks "a plainly legitimate sweep," *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449 (2008). In the First Amendment context, however, we have recognized "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U. S. 460, 473 (2010). The Attorney General's disclosure requirement is overbroad. The lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny.

The Attorney General tries to downplay the burden on donors, arguing that "there is no basis on which to conclude that California's requirement results in any broad-based chill." He emphasizes that "California's Schedule B requirement is confidential," and he suggests that certain donors—like those who give to noncontroversial charities—are unlikely to be deterred from contributing. He also contends that disclosure to his office imposes no added burdens on donors because tax-exempt charities already provide their Schedule Bs to the IRS. We are unpersuaded. Disclosure requirements can chill association "even if there is no disclosure to the general public." *Shelton*, 364 U. S., at 486. In *Shelton*, we noted the "constant and heavy" pressure teachers would experience simply by disclosing their associational ties to their schools. Exacting scrutiny is triggered by "state action which *may* have the effect of curtailing the freedom to associate," and by the "*possible* deterrent effect" of disclosure. *NAACP* v. *Alabama*, 357 U. S., at 460.

The disclosure requirement "creates an unnecessary risk of chilling" in violation of the First Amendment indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous. The petitioners here, for example, introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence. Such risks seem to grow with each passing year, as "anyone with access to a computer can compile a wealth of information about" anyone else, including such sensitive details as a person's home address or the school attended by his children. The gravity of the privacy concerns is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California. The dissent argues that a facial challenge cannot succeed unless a plaintiff shows that donors to a substantial number of organizations will be subjected to harassment and reprisals. Plaintiffs may be required to bear this evidentiary burden where the challenged regime is narrowly tailored to an important government interest. Such a demanding showing is not required, however, where—as here—the disclosure law fails to satisfy these criteria.

Finally, California's demand for Schedule Bs cannot be saved by the fact that donor information is already disclosed to the IRS as a condition of federal tax-exempt status. For one thing, each governmental demand for disclosure brings with it an additional risk of chill. For another, revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California's disclosure requirement, which can prevent charities from operating in the State altogether. We are left to conclude that the Attorney General's disclosure requirement imposes a widespread burden on donors' associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important. We therefore hold that the up-front collection of Schedule Bs is facially unconstitutional, because it fails exacting scrutiny in "a substantial number of its applications judged in relation to it] plainly legitimate

sweep." *Stevens*, 559 U. S., at 473.

The dissent concludes by saying that it would be "sympathetic" if we "had simply granted as-applied relief to petitioners based on our reading of the facts." But the facts are the same across the board: Schedule Bs are not used to initiate investigations. California has not considered alternatives to indiscriminate up-front disclosure. And the State's interest in amassing sensitive information for its own convenience is weak. When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, "because First Amendment freedoms need breathing space to survive." *Button*, 371 U. S., at 433. The District Court correctly entered judgment in favor of the petitioners and permanently enjoined the Attorney General from collecting Schedule Bs. The judgment of the Ninth Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice Thomas, concurring in Parts I, II–A, II–B–2, and III–A, and concurring in the judgment.

I would approach three issues differently. First, the bulk of "our precedents require application of strict scrutiny to laws that compel disclosure of protected First Amendment association." *Doe* v. *Reed*, 561 U. S. 186, 232 (2010) (Thomas, J., dissenting). Laws directly burdening the right to associate anonymously, including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights. Second, I continue to have "doubts about" our "overbreadth doctrine." The Court has no power to enjoin the *lawful* application of a statute just because that statute might be unlawful as-applied in other circumstances. Third, a declaration that the law is "facially" unconstitutional "seems to me no more than an advisory opinion—which a federal court should never issue." 593 U. S., at ___ (Thomas, J., concurring). I join Part III–A, which finds that California's law fails exacting scrutiny, because the Court simply (and correctly) holds that the District Court properly enjoined the law *as applied* to petitioners. I join Parts I, II–A, II–B–2, and III–A of the majority's opinion and concur in the judgment.

Justice Alito, with whom Justice Gorsuch joins, concurring in Parts I, II–A, II–B–2, and III, and concurring in the judgment.

The exacting scrutiny standard requires both narrow tailoring and consideration of alternative means of obtaining the sought-after information. California's blunderbuss approach to charitable disclosures fails exacting scrutiny. For the same reasons, California's approach necessarily fails strict scrutiny. This Court decided its seminal compelled disclosure cases before it developed modern strict scrutiny doctrine. Because the choice between exacting and strict scrutiny has no effect on these cases, I see no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment.

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

Exacting scrutiny requires [that] there must be "a 'substantial relation' between the

disclosure requirement and a 'sufficiently important' government interest," and "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Reed*, 561 U. S., at 196. Petitioners have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are made public. California's Schedule B regulation, however, is a nonpublic reporting requirement, and California has implemented security measures to ensure that Schedule B information remains confidential. Nor have petitioners shown that their donors, or any organization's donors, will face threats, harassment, or reprisals if their names remain in the hands of a few California state officials.

Given the modesty of the First Amendment burden, California may justify its Schedule B requirement with a correspondingly modest showing that the means achieve its ends. California easily meets this standard. California collects Schedule Bs to facilitate supervision of charities that operate in the State. Schedule B and other parts of Form 990 help attorneys in the Charitable Trusts Section of the California Department of Justice uncover whether an officer or director of a charity is engaged in self-dealing, or whether a charity has diverted donors' charitable contributions for improper use. It helps them identify red flags, such as discrepancies in reporting contributions across different schedules. And it helps them determine whether a charity has inflated the value of a donor's in-kind contribution in order, for instance, to overstate how efficiently the charity expends resources. In sum, California's confidential reporting requirement imposes trivial burdens on petitioners' associational rights and plays a meaningful role in Section attorneys' ability to identify and prosecute charities engaged in malfeasance. Disclosure assists California in its decisions whether to advance or end an investigation. The Court insists that California can rely on alternative mechanisms, such as audit letters or subpoenas, to obtain information. But it is not feasible for the Section, which has limited staff and resources, to conduct that many audits. The subpoena process is time consuming. Audit letters and subpoenas can [alert] an organization to the existence of an investigation, giving it a chance to hide assets or tamper with evidence.

The Court concludes that California's reporting requirement is unconstitutional on its face. "In the First Amendment context," such broad relief requires proof that the requirement is unconstitutional in "a substantial number of applications judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U. S. 460, 473 (2010). The Court points to not a single piece of evidence showing that California's reporting requirement will chill "a substantial number" of top donors from giving to their charities of choice. A significant number of the charities registered in California engage in uncontroversial pursuits. Research shows that the vast majority of donors prefer to publicize their charitable contributions. It is always possible that an organization is inherently controversial or for an apparently innocuous organization to explode into controversy. The answer is to ensure that confidentiality measures are sound or, in the case of public disclosures, to require a procedure for governments to address requests for exemptions in a timely manner. It is not to hamper all government law enforcement efforts by forbidding confidential disclosures en masse. Just over a decade ago, in *Reed*, petitioners demonstrated that their own supporters would face reprisal if their opposition to expanding domestic partnership laws became public. That evidence did not support a facial challenge because the "typical

referendum petition concerned tax policy, revenue, budget, or other state law issues," and "there was no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case." Petitioners' "facial challenge therefore must fail."

Today's decision discards decades of First Amendment jurisprudence recognizing that reporting and disclosure requirements do not directly burden associational rights. *Reed* did the opposite of what the Court does today. First, it demanded objective evidence that disclosure risked exposing supporters to threats and reprisals; second, it required only a loose means-end fit in light of the "modest" burden it found; and third, it rejected a facial challenge given petitioners' failure to establish that signatories to the "typical" referendum had any reason to fear disclosure. Petitioners have shown that their donors reasonably fear reprisals if their identities are publicly exposed. If the Court had granted as-applied relief to petitioners based on its reading of the facts, I would be sympathetic, although my own views diverge. But the Court's decision jettisons completely the longstanding requirement that plaintiffs demonstrate an actual First Amendment burden before the Court will subject government action to close scrutiny. It then invalidates a regulation in its entirety, even though it can point to no evidence demonstrating that the regulation is likely to chill a substantial proportion of donors.

***On p. 538, following the note, insert the following:***

***Problem: Leadership in Christian Organizations***

The University of Iowa prohibits student groups from limiting access to leadership or membership based on race, creed, color, religion, sex and other characteristics protected by the University's human rights policy. However, the evidence shows that the University had enforced its non-discrimination selectively. If so, can it sanction a Christian group for its failure to allow an openly gay student to assume a leadership role? *See Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021).

## B. The Right Not to Speak

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

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

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

9. *Farenheit 9/11*. A college student objects to watching the movie Farenheit 9/11 in one of his classes. The student complains that his teacher has a strong left-wing bias, that he is not

allowed to articulate conservative views in class, and that he receives bad grades on papers and projects unless he articulates liberal/progressive ideas regarding helping the poor or advancing social justice. If the student's claims can be validated, may he prevail on a claim that his teacher retaliated against him for expressing conservative views and for his failure to watch the movie? *See Felkner v. Rhode Island College,* 203 A.3d 433 (R.I. 2019).

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

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

***Problems***

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

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

3. *Objecting to Mandatory Bar Membership.* A lawyer objects to a state law requiring membership in the state bar association as a requirement for practicing law in the state. Can lawyers be required to join their state bar associations as a condition of practicing law? *See Fleck v. Wetch*, 937 F.3d 1112 (8th Cir. 2019), *cert. denied*, 140 S.Ct. 1294 (2020).

4. *More on Mandatory Bar Memberships*. Suppose that the bar makes political statements (e.g., giving its own perspectives on racism, racist violence and discrimination), but some bar members consider those perspectives to be unduly political and wish to disassociate themselves. Can bar dues be used to force to pay for such statements or can they object? Can they refuse to join (or remain a member of) a bar that makes statements to which they object? *See Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021).

***On p. 559, replace problem # 1 with the following new problem:***

1. *Provost's Decision*. A University of Minnesota program charges students $443 a semester student service fee. Student groups can apply for funding from those fees. However, all applications must be made to the Vice Provost for Student Affairs who has exclusive authority to determine who receives funding. There are no guidelines for making decisions, no time frame, public deliberations aren't required, and all decisions are final. Is the University of Minnesota program distinguishable from the one at issue in Southworth? *See Viewpoint Neutrality Now! v.*

*Regents of the University of Minnesota,* — F.Supp.3d —, 2021 WL 354130 (D. Minn. 2021).

Chapter 8

# The Government as Employer, Educator, and Source of Funds

## A. First Amendment Rights of Public Employees

### *[1] Prohibiting Electioneering*

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

**Problem:** ***Additional Restrictions***

The Administrative Office of the U.S. Courts (AO) provides financial, technological, managerial and other support to the federal courts. The AO decided to impose additional restrictions on its employees (beyond the restrictions already imposed by the Hatch Act), including prohibiting donations to political campaigns, attendance at partisan rallies, driving voters to the polls, organizing political events for candidates, and expressing political views on social media. The AO seeks to justify the restrictions as necessary to preserve the public's confidence in the integrity and impartiality of the judicial branch, and to ensure that the other branches of government do not view AO employees as politically motivated in their actions related to the court system. Does the AO's asserted interests justify these registrations? Are some of these activities more objectionable than other of the listed activities? Should a distinction be made between low-level AO employees and high-level employees? *See Guffey v. Duff*, 459 F. Supp. 3d 227 (D.D.C. 2020).

### *[2] Other Employee Speech*

***On p. 581, at the end of note # 2, insert the following new paragraph:***

Should the same rule apply when a superintendent of schools discovers corruption by prior school officials, and reports it to governmental authorities. By law, the report was required. When the school board learns about the report, it terminates the superintendent. Was the superintendent's speech protected by the First Amendment? *See Waronker v. Hempstead Union Free School District*, 788 Fed.Appx. 788 (2d Cir. 2019), *cert. denied*, 140 S.Ct. 2669 (2020).

***On p. 585, problem # 1, delete the sub-problems (b), (d), and (f), and re-letter the remaining***

***sub-problems:***

***On p. 585, delete problem # 2, and renumber the remaining problems.***

***On p. 585, problem # 3, after the colon, delete the last sentence before the colon, and the remainder of the problem, and replace it with the following:***

Advise the Governor regarding whether he can prohibit state employees from accessing internet websites, especially political blogs, during work hours.

***On pp. 586-587, delete problems # 4, 5 & 6, and replace them with the following:***

4. *Covid-19 and Co-Workers*. When a co-worker's wife was diagnosed with Covid-19, and the co-worker went into quarantine, Woolslayer felt this he should notify his university co-workers. He talked to his supervisor and the university's human resources department, and both recommended that he not advise his co-workers. When Woolslayer went forward with the notification, he was dismissed from his job. Does *Garcetti* mandate that Woolslayer's communication should be regarded as unprotected private speech? *See Woolslayer v. Driscoll*, 2020 WL 5983078 (W.D. Pa.).

5. *The School Odor*. An English teacher claims that there is a "terrible chemical odor" at her school that is making kids and staff members sick. To alert parents, she posts information about the odor on her Facebook page. The school board decided to suspend and then transfer the teacher to another school. Under *Garcetti*, is her speech protected? *See Trinidad v. City of East Chicago*, — F. Supp.3rd —, 2021 WL 534802 (N.D. Ind. 2021).

6. *Anti-Muslim Tweets*. An attorney (Morgan), who works for the Tennessee Supreme Court's Board of Responsibility, was fired for Tweeting anti-Islamic statements (e.g., "the # 1 issue of our time—stopping Muslims"). The Tweets came to the Board's attention when an Islamic attorney, who was being subjected to discipline, moved to disqualify Morgan for anti-Islamic bias. Is the Board justified in dismissing a Board member who has an anti-Islamist bias? *See Morgan v. Board of Professional Responsibility*, (M.D. Tenn. 2021).

***On pp. 587, delete problem # 8, and replace it with the following problem.***

8. *The Officer's Facebook Post*. Moser, a sniper on the police department's SWAT team, was upset after a police officer was ambushed by a citizen. On a friend's Facebook page, Moser posted that it was a "shame" that the suspect didn't have any holes in him. Does the post constitute protected free speech? Was he speaking as a private citizen? Can the post be regarded as disrupting the department, interfering with discipline, or as simply inappropriate for a police

officer? *See Moser v. Las Vegas Metro Police Department*, 984 F.3d 900 (9th Cir. 2021).

***On pp. 587-589, delete problems # 14, and replace it with the following:***

14. *The Requirement to Recant*. A fireman publicly expressed concerns (in a newspaper article) regarding problems with the New York Fire Department's attempts to diversify. Essentially, he argued that promotions should be based on merit rather than on race and gender. Over the following ten years, the fireman was steadily promoted until he reached the position of deputy assistant chief. When he was nominated for assistant chief, he was instructed to withdraw his prior comments or he would be denied the promotion. Consistently with the First Amendment, can he be denied the promotion if he refuses to recant? *See Gala v. City of New York*, — F.3d —, 2021 WL 930252 (2021).

***On pp. 587-589, replace problems # 16 with the following problem:***

5. *Failure to Disclose*. Does a university have a legitimate interest in requiring a professor to reveal all of his blogs and outside social media accounts, or does the required disclosure involve an infringement on the professor's First Amendment rights? *See Tracy v. Florida Atlantic University Board of Trustees*, 980 F.3d 799 (11th Cir. 2020).

***On pp. 587-589, delete problem # 17, and renumber the remaining problems.***

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

18. *Pandemic Whistleblower*. Dr. Rick Bright was demoted from his post as director of the Biomedical Advanced Research and Development Authority (BARDA) after testifying before Congress. In that testimony, he pushed for coronavirus funding to go only for 'safe and scientifically vetted solutions, and not for drugs, vaccines and other technologies that lack scientific merit, and was reluctant to promote use of the anti-malarial drug hydroxychloroquine to treat patients with COVID-19, which had been touted by Trump and others. What protections under the First Amendment may be claimed by Dr. Bright? *See* Brian Naylor, *Ousted Scientist Says His Pandemic Warnings Were Dismissed as 'Commotion*,' NPR, May 14, 2020, https://www.npr.org/2020/05/14/855254610/ousted-scientist-says-window-of-opportunity-to-fight-coronavirus-is-closing

***On p. 594, delete problem # 2 and renumber the remaining problems.***

***On p. 595, delete problem # 6 and renumber the remaining problems.***

***On p. 596, delete problem # 9 and renumber the remaining problems.***

***[3] Associational Rights***

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

3. *Deputy Sheriffs*. A sheriff, who was a Republican, seeks to dismiss two deputy sheriffs for backing his opponent, an independent. Should a deputy sheriff be regarded as a "policymaker" so that political loyalty is an important criteria for retention? Does it matter that the sheriff is an elected official, that deputies are "at will" officials who serve at the sheriff's pleasure, and that they are sworn to "engage in law enforcement activities on behalf of the sheriff?" *See Curtis v. Christian County*, 963 F.3d 777 (2020).

## B. The First Amendment in the Public Schools

***On p. 611, insert the heading "Notes & Questions" after the case, and then place the first two problems under that heading (rather than under the "Problems" heading, and then renumber the remaining problems.***

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

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

***On p. 613, insert a new problem # 9 that reads as follows, and then renumber the remaining problem:***

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

***On p. 623, insert the following new problem # 2, and renumber the remaining problems:***

2. *The Gay Rights Essay*. A fourth grader wrote an essay about LGBTQ rights. The principal decided that it was not age-appropriate and therefore decided not to include it in a class booklet. Did the principal act consistently with the First Amendment? *See Robertson v. Anderson Mill Elementary School*, 989 F.3d 282 (4th Cir. 2021).

***On p. 613, insert problem # 1 from p. 630, but insert it as problem # 10.***

***On p. 613, insert problems ## 7, 9 & 11 after the new problem # 10, but label them as problems ## 11, 12 & 13.***

***On p. 623, insert the following new problems # 3-4 and renumber the remaining problems:***

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

4. *The Student Petition*. In the same school district, a second student wanted to submit a report to the school board on behalf of her fellow students. Among other things, the report expressed displeasure with the board's decision to change the graduation date. The superintendent required that all references to the graduation date be deleted from the report. Did the superintendent have "legitimate pedagogical reasons" for deleting all references to the graduation date? *See Hutton v. Blaine County School District # 61,* — F. Supp.3d —, 2020 WL 1339120 (D. Idaho 2020).

***On p. 630, before the note, add the following new case:***

**Mahanoy Area School District v. B.L.**
141 S.Ct. 2038 (2021).

Justice Breyer delivered the opinion of the Court.

B. L. (who, together with her parents, is a respondent) was a student at Mahanoy Area High School, a public school in Pennsylvania. At the end of her freshman year, B. L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but

she was offered a spot on the cheerleading squad's junior varsity team. B. L. did not accept the coach's decision with grace, particularly because the squad coaches had placed an entering freshman on the varsity team. That weekend, B. L. and a friend visited a local convenience store. There, B. L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B. L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group (B. L. had about 250 "friends") to view the images for a 24 hour period. The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." The second image was blank but for a caption, which read: "Love how me and another student get told we need a year of jv before we make varsity but that doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji. B.L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B. L.'s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about B. L.'s posts. Questions about the posts persisted during an Algebra class taught by one of the two coaches.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year. B. L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B. L.'s suspension from the team. In response, B. L., together with her parents, filed this lawsuit. The District Court found in B. L.'s favor. It granted a temporary restraining order and a preliminary injunction ordering the school to reinstate B. L. to the cheerleading team. The District Court found that B. L.'s Snapchats had not caused substantial disruption at the school. Cf. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969). Consequently, the District Court declared that B. L.'s punishment violated the First Amendment, and it awarded B. L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record. A panel of the Third Circuit affirmed. The school district filed a petition for certiorari, asking us to decide "whether *Tinker*, which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." We granted the petition.

Students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." *Tinker*, 393 U. S., at 506. But we have made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 266 (1988). One such characteristic is the fact that schools at times stand *in loco parentis*, *i.e.*, in the place of parents. See *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 684 (1986). This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds; (2)

speech, uttered during a class trip, that promotes "illegal drug use," see *Morse* v. *Frederick*, 551 U. S. 393, 409 (2007); and (3) speech that others may reasonably perceive as "bearing the imprimatur of the school," such as that appearing in a school-sponsored newspaper. Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

We do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. Several types of off-campus behavior may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Even B. L. herself would redefine the Third Circuit's off-campus/on-campus distinction, treating as on campus: all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones. And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B. L.'s proposed rule. We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts. Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

We can mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway. *First*, the doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility. *Second*, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. Courts must be skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention. *Third*, the school has an interest in protecting a student's unpopular

expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.

Consider B. L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B. L.'s posts, while crude, did not amount to fighting words. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). And while B. L. used vulgarity, her speech was not obscene as this Court has understood that term. See *Cohen* v. *California*, 403 U. S. 15, 19 (1971). To the contrary, B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. See *id.*, at 24; cf. *Snyder* v. *Phelps*, 562 U. S. 443, 461 (2011). Consider too when, where, and how B. L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless diminish the school's interest in punishing B. L.'s utterance.

But what about the school's interest, here an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that interest into three parts. *First*, the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. The strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time. See *Morse*, 551 U. S., at 405. B. L. spoke under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B. L.'s parents had delegated to school officials their control of B. L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B. L.'s posts encompassed a message, an expression of B. L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts

convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B. L.'s interest in free expression. *Second*, we find no evidence of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. *Tinker*, 393 U. S., at 514. Discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats. When one of B. L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking about it," she responded simply, "No." As we said in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The alleged disturbance here does not meet *Tinker*'s demanding standard. *Third,* one of the coaches testified that the school decided to suspend B. L., not because of any specific negative impact upon a particular member of the school community, but "based on the fact that there was negativity that could impact students in the school." There is little that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have said, simple "undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression." *Tinker*, 393 U. S., at 508.

It might be tempting to dismiss B. L.'s words as unworthy of robust First Amendment protections. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." *Cohen*, 403 U. S., at 25. We agree that the school violated B. L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed.

*It is so ordered*.

Justice Alito, with whom Justice Gorsuch joins, concurring.

It is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom. In a math class, for example, the teacher can insist that students talk about math, not some other subject. Practical necessity dictates that teachers and school administrators have related authority with respect to other in-school activities like auditorium programs attended by a large audience. By enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights. Courts have analyzed the issue by adapting the common-law doctrine of *in loco parentis*. Parents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their statemandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree—for example, by giving permission for a child to participate in an extracurricular activity or to go on a school trip. During the entire school day, a school must have the authority to protect everyone on its premises, and therefore schools must be able to prohibit threatening and harassing speech. But even when students are on school premises

during regular school hours, they are not stripped of their free-speech rights. *Tinker* teaches that expression that does not interfere with a class cannot be suppressed unless it "involves substantial disorder or invasion of the rights of others."

The decision to enroll a student in a public school cannot be treated as a complete transfer of parental authority over a student's speech. Parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). It would be far-fetched to suggest that enrollment implicitly confers the right to regulate what a child says or writes at all times of day and throughout the calendar year. The question that courts must ask is whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question. One category of off-premises student speech falls easily within the scope of the authority that parents implicitly or explicitly provide. This category includes speech that takes place during or as part of what amounts to a temporal or spatial extension of the regular school program, *e.g.,* online instruction at home, assigned essays or other homework, and transportation to and from school. Also included are statements made during other school activities in which students participate with their parents' consent, such as school trips, school sports and other extracurricular activities that may take place after regular school hours or off school premises, and after-school programs for students who would otherwise be without adult supervision during that time. Abusive speech that occurs while students are walking to and from school may also fall into this category on the theory that it is school attendance that puts students on that route and in the company of the fellow students who engage in the abuse. The imperatives that justify the regulation of student speech while in school—the need for orderly and effective instruction and student protection—apply more or less equally to these off-premises activities.

There is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection, see *Lane* v. *Franks*, 573 U. S. 228, 235 (2014); *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997). If a school tried to regulate such speech, the most that it could claim is that offensive off-premises speech on important matters may cause controversy and recriminations among students and may thus disrupt instruction and good order on school premises. But it is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas that are "offensive or disagreeable." *Texas* v. *Johnson*, 491 U. S. 397 (1989). It is unreasonable to infer that parents who send a child to a public school thereby authorize the school to take away such a critical right. Even if such speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out; "that would be a heckler's veto." When a student engages in oral or written communication of this nature, the student is subject to whatever restraints the student's parents impose, but the student enjoys the same First Amendment protection against government regulation as all other members of the public. And these rights extend to speech that is couched in vulgar and offensive terms. See, *e.g.*, *Iancu* v. *Brunetti*, 588 U. S. ___ (2019); *Matal*, 582 U. S. ___. Between these two extremes lie the categories of

off-premises student speech that appear to have given rise to the most litigation. One group of cases involves perceived threats to school administrators, teachers, other staff members, or students. Laws that apply to everyone prohibit defined categories of threats, but schools have claimed that their duties demand broader authority. Another common category involves speech that criticizes or derides school administrators, teachers, or other staff members. Schools may assert that parents who send their children to a public school implicitly authorize the school to demand that the child exhibit the respect that is required for orderly and effective instruction, but parents surely do not relinquish their children's ability to complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence. Perhaps the most difficult category involves criticism or hurtful remarks about other students. Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech.

The present case does not fall into any of these categories. Instead, it simply involves criticism (albeit in a crude manner) of the school and an extracurricular activity. Unflattering speech about a school or one of its programs is different from speech that criticizes or derides particular individuals, and the school's justifications for punishing B. L.'s speech were weak. She sent the messages and image in question on her own time while at a local convenience store. They were transmitted via a medium that preserved the communication for only 24 hours, and sent to a select group of "friends." She did not send the messages to the school or to any administrator, teacher, or coach, and no member of the school staff would have even known about the messages if some of B. L.'s "friends" had not taken it upon themselves to spread the word. The school did not claim that the messages caused any significant disruption of classes. They "upset" some students (including members of the cheerleading squad), caused students to ask some questions about the matter during an algebra class taught by a cheerleading coach, and put out "negativity that could impact students in the school." The freedom of students to speak off-campus would not be worth much if it gave way in the face of such relatively minor complaints. Speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting, and the algebra teacher had the authority to quell in-class discussion of B. L.'s messages and demand that the students concentrate on the work of the class.

As for the messages' effect on the morale of the cheerleading squad, the coach of a team sport may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time, but this authority has limits. Here, the school did not simply take B. L.'s messages into account in deciding whether her attitude would make her effective in doing what cheerleaders are primarily expected to do: encouraging vocal fan support at the events where they appear. Instead, the school imposed punishment: suspension for a year from the cheerleading squad despite B. L.'s apologies. There are parents who would not have been pleased with B. L.'s language and gesture, but whatever B. L.'s parents thought, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity. Many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.

Justice Thomas, dissenting.

Unlike *Tinker*, this case involves speech made in one location but capable of being received in countless others. Because off-campus speech made through social media can be received on campus (and can spread rapidly), it often will have a greater proximate tendency to harm the school environment than will an off-campus in-person conversation. Where it is foreseeable and likely that speech will travel onto campus, a school has a stronger claim to treating the speech as on-campus speech. Here, it makes sense to treat B. L.'s speech as off-campus speech. There is little evidence that B. L.'s speech was received on campus.

***On pp. 630-631, renumber problems ## 2-5 as problems ## 1-4, and problems ## 8 & 10 (p. 632) as problems ## 5 & 6.***

***On p. 632, before current problem # 6 (which should be renumbered problem # 9) insert the following new problems ## 7 & 8:***

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

8. *Blocking Parents from Social Media*. When parents were blocked from commenting on the Facebook and Twitter pages of the school district where their children attended school, the school district justified the blocking as necessary because the parents' comments "disrupted" the original posts. The parents claimed that this reason was pretextual and that the blocking was impermissibly content-based because the prior comments of the parents criticized the school district. The school district argued that the blocking was content-neutral and narrowly tailored to achieve a significant government interest, and that the blocking left open ample alternative channels of communication. Assume that the court found that the school district's Facebook and Twitter pages are public fora and that the initial blocking was justified based on the arguments made by the school district. Should the court also find that the *continued* blocking satisfied First Amendment doctrine? *See Garnier v. O'Connor-Ratcliff*, 2021 WL 129823 (S.D. Cal. January 14, 2021).

## C. Government Financed Speech

***On p. 645, at the beginning of the problems, insert the following new problem and then renumber the remaining problems:***

1. *Anti-Abortion Slogans*. Washington D.C. has passed the Defacing of Public or Private Property Criminal Penalty Act which prohibits people from writing, marking, drawing or painting on public or private property, including streets and sidewalks. D.C. allowed a "Black Lives Mural" to be pained on a public street, and a "Defund the Police" message beside it. However, when an anti-abortion group asked for permission to paint a "Black Pre-Born Lives Matter" slogan on the sidewalk, the request was denied. Was the denial permissible or appropriate? *See Women for America First v. DeBlasio,* — F.Supp.3d —, 2021 WL 634695 (S.D.N.Y. 2021); *Frederick Douglass Foundation, Inc. v. District of Columbia,* — F. Supp.3d —, 2021 WL 1166841 (D.D.C. 2021).

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

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

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

1. *Post-Decision Developments*. Following the holding in the prior case, the Court was confronted by follow-up litigation in *Agency for International Development v. Alliance for Open Society International, Inc.*, 140 S.Ct. 2082 (2020). That case dealt with the issue of whether participating foreign organizations were also exemption from the "policy explicitly opposing prostitution and sex trafficking." § 7631(f ). Foreign organizations, that were linked to U.S. organizations, sought to claim an exemption as well. The Court held that foreign organizations could be subjected to the requirement:

> Plaintiffs' position runs headlong into two bedrock principles of American law.

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

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

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

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

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

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

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

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

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

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

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

Chapter 9

# The Press

***On p. 694, change the title "C. Access to Judicial Proceedings" to "C. Access to Governmental Proceedings and Information."***

## C. Access to Judicial Proceedings

***On p. 696, before the problems, add the following:***

***Notes***

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

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

> According to press reports, the White House began requiring CDC experts to coordinate with the Office of Vice President Mike Pence before speaking with members of the press or public about the pandemic. This policy was put into place after public health officials publicly contradicted the administration's messaging, which has included inaccurate and misleading information. In addition, the CDC has imposed its own

> restrictions on the ability of its employees to speak publicly in the past. To the extent that these policies prevent CDC employees from speaking out as private citizens, they raise serious First Amendment concerns.

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

***On p. 697, in problem # 2, following the Milligan article, start a new paragraph, and insert the following at the beginning of the paragraph:***

3. *Other Ground for Denying Access*.

***On p. 697, new problem # 3, add the following to the end of the problem:***

*See John K. MacIver Institute for Public Policy, Inc. v. Evers*, 994 F.3d 602 (7th Cir. 2021). May a White House press pass be revoked because a journalist is involved in a dispute with another person at a social media summit at the White House? *See Karem v. Trump*, 960 F.3d 656 (D.C. Cir. 2020).

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

3. *Access to Legislative Chambers*. The Texas Legislature has erected a brass railing between to separate the legislators from the general public. However, Texas admits duly accredited media members inside the railing. Empower Texans creates an annual scorecard for Texas Legislators, and it has routinely given one legislator (the head of the Committee on House Administration) an "F." Thereafter, Empower Texas reporters were denied legislative press credentials. Empower Texans believes that the denial was based on its rating of the committee head. If so, is the denial actionable? *See Empower Texans Inc. v. Geren*, 977 F.3d 367 (5th Cir. 2020).

4. *Police Recording Bans*. A state statute makes it a crime to secretly record another person without his/her consent? Consistently with the First Amendment, can the statute be applied to the actions of a citizen or a journalist who records police conduct that occurs in a public setting? In the Derek Chauvin trial relating to the murder of George Floyd, a citizen recording provided a pivotal piece of evidence. Should citizens have the to record police actions, especially when they see what they regard as police misconduct? *See Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020).

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

press access rules articulated in the *Globe Newspaper* case?

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

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

***On p. 703, at the end of the problems, add the following new problem:***

8. *Foreign Intelligence Surveillance Court*. Citizens and the media have struggled unsuccessfully to gain access to decisions of the Foreign Intelligence Surveillance Court (FISC). Congress created the court in 1978 and gave it the authority to approve surveillance conducted for foreign intelligence purposes. In addition, it's decisions are rarely published even though they can involve emails, phone records and online browsing data. Should FISC records be subject to public disclosure just like other court records? Or is their a compelling governmental interest in maintaining secrecy?

## D. Access to Prisons

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

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

## E. The Press and Due Process

### *[3] Electronic Media in the Courtroom*

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

***Notes***

1. *Courtroom Cameras*.

2. *Remote Oral Arguments at the Supreme Court*. After the closure of the Supreme Court's building to the public during the covid19 pandemic, the Court heard oral arguments "via telephone hookup" and allowed livestreaming of its audio online and on C-Span. The rules for

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

Chapter 10

# Electronic Media and the First Amendment

## B. Post-Broadcasting Technology

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

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

***On p. 776, change the heading "Notes" to "Notes and Questions"***

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

5. *The Section 230 Shield*. Section 230 of the Communications Decency Act draws a distinction between "publishers" (who are aware of the content that they are distributing and therefore potentially liable for that content) and "platforms" (which distribute information created by others). Section 230 was designed to insulate platforms from liability for defamatory content posted by others even if they engage in some content moderation on their websites. After Twitter flagged some of President Trump's tweets for fact-checking, he issued an executive order questioning whether they were engaged in good faith moderation of content. As a result, he took the position that social media platforms should be denied Section 230 protection if they censor content. *See* Donald Trump, Executive Order on Preventing Online Censorship (May 28, 2020). If platforms are going to aggressively censor content, is it appropriate to give them an exemption from liability?

***On p. 783, insert the following new problem # 5and renumber the remaining problems:***

5. *The Pandemic and the EU.* Article 10, paragraph 2, of the European Convention on Human Rights allows governments to restrict speech when necessary for "public safety" and the "protection of health." Suppose that a European government concludes that individuals are circulating false information over the internet regarding Covid-19. In particular, they are alleging that governmental warnings regarding Covid-19 are all a "hoax," and that Covid-19 vaccines are both unnecessary and dangerous. Would it be consistent with the right to free speech to allow European governments to ban false information relating to the pandemic and to prohibit such

statements regarding vaccines?

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

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

***On p. 784, in problem # 7, at the end of the second full sentence, insert the following:***

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

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

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

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

***On p. 791, before the problems, add the following new note:***

***Note***

In *United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2021), the court struck down courts orders barring a convicted sex offender, on supervised release, from possessing legal pornography as well as from accessing the internet. The court concluded that the prohibitions were "overly restrictive" and not reasonably related to his past wrongdoing or his rehabilitation. Likewise, in *United States v. Abbate*, 970 F.3d 601 (5th Cir. 2020), the court dealt with restrictions on an individual convicted of possession of child pornography. The court upheld a ban on possession of pornography, legal or illegal, but struck down a ban on possession of all game consoles, including those not connected to the internet.

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

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

Chapter 11

# Overview of the Religion Clauses

## B. Defining the Subject Matter of the Religion Clauses

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

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

Chapter 12

# The Establishment Clause

## A. Financial Aid to Religion

### *[3]* Agostini v. Felton

***On p. 840, at the end of problem # 5 after the case, insert the following:***

Would it be permissible for a religious group to require those who take advantage of its services to adhere to its religious beliefs? *See Maddonna v. U.S. Department of Health & Human Services*, (D. S.C. 2020).

### *[4] School Vouchers*

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

3. *Scholarship Program*. In *Espinoza v. Montana Department of Revenue,* 140 S.Ct. 2246 (2020), the Court broke new ground. *Espinoza* involved a Montana which sought to create parental and student choice through the creation of a scholarship program for students attending private schools. The program created a tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship organization" which, in turn, passed the money on as scholarships to students who attended private schools. However, the legislature directed that the aid program be administered consistently with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision that bars direct or indirect governmental aid to sectarian schools. In order to comply with the no aid provision, the Montana Supreme Court terminated the aid program for all students whether is sectarian or secular schools. The Court held that Montana acted improperly in terminating the program and in denying aid to sectarian schools:

> The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran*, 137 S. Ct. 2012, 2019 (2017). Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious

character. The provision plainly excludes schools from government aid solely because of religious status.

The Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. So applied, the provision "imposes special disabilities on the basis of religious status" and "conditions the availability of benefits upon a recipient's willingness to surrender its religiously impelled status." *Trinity Lutheran*,137 S. Ct. at 2022 (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993), and *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978) (plurality opinion)). To be eligible for government aid, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 137 S. Ct. at 2022. The Free Exercise Clause protects against even "indirect coercion," and a State "punishes the free exercise of religion" by disqualifying the religious from government aid as Montana did here. Such status-based discrimination is subject to "the strictest scrutiny." *Id.* It is enough to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

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

## B. School Prayer

***On p. 859, at the end of the problems, add the following new problem:***

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

***On p. 869, insert the following new problem # 6 and renumber the remaining problem:***

6. *The Coach's Post-Game Prayer.* A football coach wishes to pray at the 50-yard line following games in order to give thanks to God for "player safety, sportsmanship, and spirited competition." For a while, the coach prayed alone. However, when some of his players, as well as members of the community, sought to join him, he told them that "this is a free country." Over time, a majority of the team participated. The coach was then instructed that his post-game

gatherings had to be entirely secular, or they could not involve students. When the coach continued to pray at mid-field, he was given the option of waiting until all of the stands had emptied, or praying at a private location within the school. Does the coach's conduct create an establishment of religion? Can the school district discipline the coach if he continues to pray at mid-field without violating the Free Exercise Clause? *See Kennedy v. Bremerton School District*, 991 F.3d 1004 (9th Cir. 2021).

### *D. OFFICIAL ACKNOWLEDGEMENT*

***On p. 937, at the end of the case, insert the following new problem:***

#### *Problem: The Courthouse Nativity Scene*

An Indiana county has a Christmas tradition of allowing private groups to place a nativity scene on its courthouse lawn along with Santa Claus in his sleigh, a reindeer, carolers, and large candy-striped poles..In light of Allegheny County, is the scene constitutional? How does *American Legion* affect the analysis? Does it matter that there is a "long national tradition of using the nativity scene in broader holiday displays to celebrate the origins of Christmas – a public holiday?" *See Woodring v. Jackson County*, 986 F.3d 979 (7th Cir. 2021).

**Chapter 13**

# Free Exercise

## A. BURDENS ON RELIGION

### *[3] Modern Cases*

***On p, 952, replace the heading with the Problems heading, followed by the existing notes # 1 and # 2:***

***Problems***

1. *The Amish and Social Security.*
2. *Fluorescent Triangles*.

***On p. 960, in note # 6, delete the final paragraph and replace it with the following***:

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020), relying on RFRA, the Court held that the Government had created lawful exemptions from a regulatory requirement implementing the Patient Protection and Affordable Care Act of 2010 (ACA). The requirement at issue obligated certain employers to provide contraceptive coverage to their employees through their group health plans. Though contraceptive coverage was not required by (or even mentioned in) the ACA, the Government mandated such coverage by promulgating interim final rules (IFRs) shortly after the ACA's passage. After six years of protracted litigation, the Departments of Health and Human Services, Labor, and the Treasury (Departments)—which jointly administer the relevant ACA provision—exempted certain employers who have religious and conscientious objections from this agency-created mandate. The Court held that the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections.

***On p. 958, change the heading "Notes" to "Notes and Questions" and move problem # 2 here as note & question # 2, and then renumber the remaining notes.***

***On p. 958, note # 1, on the 4th line, following the period, add the following:***

Trump also provided broad exemptions for exemptions from the Obamacare birth control

coverage rule requiring employees to provide health plans that pay in full for employees' birth control.

***On p. 958, at the end of note # 1, add the following:***

Do the exemptions transgress the Establishment Clause? *See Massachusetts v. U.S. Department of Health & Human Services*, (D. Mass. 2021); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020).

***On p. 960, at the end of note # 2, add the following:***

In *Mast v. Fillmore County*, 2020 WL 3042114 (Minn. App.), *judgment vacated*, — S.Ct. —, 2021 WL 2742817 (2021), the Court used RLUIPA to overturn a state court decision requiring the Amish to install septic tanks on their property. The Amish claimed that the use of septic tanks would violate their religious commitment to a "traditional and simple way of life," and claimed that they had a right to continue using "mulch basins" instead. The lower court decision claimed that the state had a compelling governmental interest (related to health) for requiring the installation of septic tanks. The Court vacated the judgment and remanded for a rexamination of whether an exception to the septic tank requirement was required by RLUIPA.

***On p. 961, replace problem # 2, which has been moved, with the following:***

2. *Spiritual Advisers & Executions*. A prison rule prohibits the presence of spiritual advisers in the immediate presence of someone who is being executed. The rule is neutral in the sense that it applies to all spiritual advisers, including Muslim, Buddhist and Christian. The prison seeks to justify the rule on the grounds of "security." Does a person who is being executed have a Free Exercise right to have a spiritual adviser present at his execution? *See Gutierrez v. Saenz*, 141 S.Ct. 127 (2020).

***On p. 962, at the end of existing problem # 3, add the following cite:***

*See C.F. v. New York State Department of Health and Mental Hygiene*, 191 A.D.3d 52139 N.Y.S.3d 273 (2021).

***On p. 962, problem # 4, delete the Elaine Photography citation.***

***On p. 962, problem # 4, delete the cite at the end of the problem and replace it with:***

*Compare Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government*, 479 F. Supp.3d 543 (W.D. Ky. 2020), *with State v. Arlene's Flowers, Inc.,* 193 Wash.2d 469, 441 P.3d 1203 (Wash. 2020), *cert. denied*, — S.Ct. —, 2021 WL 2742795 (20210, and *Elanie Photography LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

On p. 962, problem # 5, delete "5. More on the Collision" and place the remainder of the paragraph at the end of the prior problem.

***On p. 974, replace the heading with the Notes heading, renumber the existing note as new note # 1, and add the following new note # 2:***

***Notes***

1. *More on the Ministerial Exception.*

2. *The Ministerial Exception and Lay Teachers*. In *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S.Ct. 2049 (2020), the Court extended the ministerial exception to lay teachers entrusted with responsibility for instructing their students in the faith: "Morrissey-Berru and Biel both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." Justice Thomas concurred: "To avoid disadvantaging these minority faiths and interfering in 'a religious group's right to shape its own faith and mission,' courts should defer to a religious organization's sincere determination that a position is 'ministerial.' " Justice Sotomayor dissented: "Neither school publicly represented that either teacher was a Catholic spiritual leader or "minister." Rather, the schools referred to both as "lay" teachers. Neither teacher had a "significant degree of religious training" or underwent a "formal process of commissioning." Nor did either school require such training or commissioning as a prerequisite to gaining (or keeping) employment. Neither held herself out as having a leadership role in the faith community. Neither claimed any benefits (tax, governmental, ceremonial, or administrative) available only to spiritual leaders. Both Biel and Morrissey-Berru had almost exclusively secular duties, making it especially improper to deprive them of all legal protection when their employers have not offered any religious reason for the alleged discrimination. Morrissey-Berru did lead classroom prayers, bring her students to a cathedral once a year, direct the school Easter play, and sign a contract directing her to 'assist with

Liturgy Planning.' But these occasional tasks should not trigger as a matter of law the ministerial exception. Morrissey-Berru did not lead mass, deliver sermons, or select hymns. And there is no evidence that Morrissey-Berru led devotional exercises."

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

3. *Scope of the Ministerial Exception*. Would/should the ministerial exception apply to a gay staff attorney who works for an evangelical organization that serves the homeless? What about a professor at a Christian college who was outspoken about LGBTQ issues in contravention of church teachings? What if the professor was not involved in chapel or religious services, did not lead students in prayer or deliver sermons or select liturgy, but was asked to integrate "Christian faith into her teaching and scholarship as a professor of social work?" *See Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021); *DeWeese-Boyd v. Gordon College*, 487 Mass. 311, 63 N.E.3d 1000 (2021).

3. *The Prisoner's Meals*. A Muslim prisoner has religious objections to eating pork. By and large, the prison serves porkless meals to the prisoner, but occasionally serves pork. Does it violate the prisoner's free exercise rights to occasionally serve him pork? Would you view the situation differently if pork was a staple of the prison menu and the prison made no accommodations for a Muslim prisoner? *See Mbonyunkiza v. Beasley*, 956 F.3d 1048 (8th Cir. 2020).

***On p. 979, insert the following new problems, and renumber the remaining problems:***

2. *Church Services During the Coronavirus Pandemic*. In early 2020, as the Covid-19 pandemic settled in, the Commonwealth of Kentucky imposed a "Healthy at Home" order which required most businesses to close, and also prohibited mass gatherings. The objective of these restrictions was to limit transmission of the virus, and to "flatten the curve" of infections so that hospitals could handle the demand for their services. The order also sought to prohibit in-person church services for fear that they would bring people together and therefore could result in additional infections. Suppose that the On Fire church wishes to continue having services, and commits to maintaining "social distancing" by keeping all worshipers at least six feet apart from each other, and requiring everyone to wear a face mask. Must the prohibition against mass gatherings give way to the religious right of free exercise in this context? Should it matter that Kentucky allows other businesses to operate provided that they maintain adequate social distancing? Does the fact that church goers sing and talk during the services enhance the risk that droplets will infect others? Should that matter? *See Roman Catholic Archbishop of Washington v. Bowser*, 2021 WL 1146399 (D.D.C.) (Striking down a 250 person limit for church services, including at Washington's National Basilica); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020).

2. *Executive Order with Exemption for Religious Organizations*. The Illinois governor

issued executive orders that attempted to limit the transmission of COVID19 by "stay-at-home directives; flat prohibitions of public gatherings; caps on the number of people who may congregate; masking requirements; and strict limitations on bars, restaurants, cultural venues, and the like." However, the governor also issued an executive order (EO43) with an exemption for the "free exercise of religion," which eschewed mandatory limitations and stated instead that "religious organizations are *encouraged* to take steps to ensure social distancing, the use of face coverings, and implementation of other public health measures," and also "*encouraged* to provide services online, in a drive-in format, or outdoors, and to limit indoor services to 10 people." Under EO43, religious organizations also were exempt from the 50-person cap on gatherings that was mandated for other groups. The Illinois Republican Party filed suit to enjoin the exemption on the grounds that it violated the Free Speech Clause of the First Amendment, arguing that "preferential treatment for religious exercise" requires strict scrutiny because it is content-based discrimination against non-religious speech.. What precedents support the contrary argument that "the speech that accompanies religious exercise has a privileged position under the First Amendment," so that the governor's executive order EO 43 is constitutional? *See Illinois Republican Party v, Pritzker*, 973 F.3d 760 (7th Cir. 2020).

## B. DISCRIMINATION AGAINST RELIGION

***On p. 990, change the heading "Note: The Buddhist Execution" to "Notes" then insert the following new note # 1, and place the following heading at the beginning of the existing paragraph :***

1. *Covid-19 Orders and Religious Services*. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), the Court granted an application for injunctive relief against New York Governor Mario Cuomo's order limiting attendance at religious services held in "red" zones to 10 people, and in "orange" zones to 25 people. Under the order, in red zones, so-called "essential" businesses (which included things such as acupuncture facilities, camp grounds, garages, as well as all plants manufacturing chemicals and microelectronics and all transportation facilities) were not subject to occupancy limits. In orange zones, while attendance at houses of worship was limited to 25 persons, even non-essential businesses could decide for themselves how many persons to admit. The Court concluded that the Governor's order was not neutral towards religion because it targeted the "ultra-Orthodox Jewish community" and in any event discriminated against houses of worship. The Court noted that a nearby store could "literally have hundreds of people shopping there on any given day" whereas attendance at church or synagogue services were dramatically limited. And, although "factories and schools have contributed to the spread of COVID–19, they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records." The Court found irreparable harm because "remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance." *See also Tandon v. Newsom*, — S.Ct. —, 2021 WL

1328507 (2021) (striking down an executive order limiting attendance at in-home religious services while permitting secular activities under similar circumstances); *Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021); *but see Calvary Chapel v. Sisolak*, 140 S.Ct. 2603 (2020).

2. *The Buddhist Execution*.

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

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

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

***On p. 1001, in the Masterpiece Cakeshop, Ltd. case, in the sixth line, replace the citation for Matal v. Tam with the following citation:***

137 S. Ct. 1744, 1765, 1767 (2017) (Kennedy, J., concurring).

***On p. 1002, before the problems, add the following new case:***

## Fulton v. City of Philadelphia

141 S.Ct. 1868 (2021).

Chief Justice Roberts delivered the opinion of the Court.

The Catholic Church has served the needy children of Philadelphia for over two centuries. During the 19th century, nuns ran asylums for orphaned and destitute youth. Petitioner CSS (Catholic Social Services) continues that mission today.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families. The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify

foster families to state-licensed foster agencies like CSS. Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "existing family relationships," and ability "to work in partnership" with a foster agency. The agency must decide whether to "approve, disapprove or provisionally approve the foster family." When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work. CSS believes that "marriage is a sacred bond between a man and a woman." Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs. But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not consider prospective foster parents in same-sex marriages. Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the Fair Practices Ordinance. The City stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples. CSS and three foster parents filed suit. The District Court denied preliminary relief. It concluded that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U. S. 872 (1990). The Court of Appeals for the Third Circuit affirmed. We granted certiorari.

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise" of religion. It is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 714 (1981). Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

*Smith* held that laws incidentally burdening religion are ordinarily not subject to strict

scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. CSS urges us to overrule *Smith*. But this case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable. Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___(2018). A law is not generally applicable if it "invites" the government to consider the particular reasons for a person's conduct by providing "a mechanism for individualized exemptions." *Smith*, 494 U. S., at 884. A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. In *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. The City claimed that the ordinances were necessary to protect public health, which was "threatened by the disposal of animal carcasses in open public places." But the ordinances did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard.

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. This provision is not generally applicable as required by *Smith*. Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available at the "sole discretion" of the Commissioner. The Commissioner "has no intention of granting an exception" to CSS. But the City "may not refuse to extend that exemption system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U. S., at 884. The City and intervenor-respondents argue that governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public. When individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal. We have never suggested that the government may discriminate against religion when acting in its managerial role. *Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs. The inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.

The City and intervenor-respondents add that, notwithstanding the system of exceptions in section 3.21, a separate provision in the contract independently prohibits discrimination in the certification of foster parents. That provision, section 15.1, bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions. But state law makes clear that "one part of a contract cannot be so interpreted as to annul another part." Applying that "fundamental" rule, an exception from section 3.21 also must govern the prohibition in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity. As a result, the contract as a whole contains no generally applicable non-discrimination requirement.

Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it "invites" the government to decide which reasons for not complying with the policy are worthy of

solicitude at the Commissioner's "sole discretion."

In addition to relying on the contract, the City argues that CSS's refusal to certify same-sex couples constitutes an "Unlawful Public Accommodations Practice" in violation of the Fair Practices Ordinance. That ordinance forbids "denying or interfering with the public accommodations opportunities of an individual or otherwise discriminating based on his or her race, ethnicity, color, sex, sexual orientation, disability, marital status, familial status," or several other protected categories. Phila. Code § 9–1106(1) (2016). The City contends that foster care agencies are public accommodations and therefore forbidden from discriminating on the basis of sexual orientation when certifying foster parents. A public accommodation must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire." *Blizzard* v. *Floyd*, 613 A. 2d 619, 621 (1992). Certification as a foster parent is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. We therefore have no need to assess whether the ordinance is generally applicable.

The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. Because the City's actions are examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision. A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U. S., at 546. So long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. Rather than rely on "broadly formulated interests," courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U. S., at 431. The question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny because the authority to certify foster families is delegated to agencies by the State, not the City.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop*, 584 U. S., at ___ (slip op., at 9). However, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others. CSS has "long been a point of light in the City's foster-care system." CSS seeks only an

accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment. The actions of the City violate the Free Exercise Clause.

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

*It is so ordered*.

Justice Barrett, with whom Justice Kavanaugh joins, and with whom Justice Breyer joins as to all but the first paragraph, concurring.

A longstanding tenet of our free exercise jurisprudence is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. I therefore see no reason to decide whether *Smith* should be overruled.

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

In *Smith*, the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution provides no protection. It is high time for us to take a fresh look at what the Free Exercise Clause demands. RFRA and RLUIPA have restored part of the protection that *Smith* withdrew, but they are limited in scope and can be weakened or repealed by Congress at any time. They are no substitute for a proper interpretation of the Free Exercise Clause.

The text of the Free Exercise Clause gives those who wish to engage in the "exercise of religion" the right to do so without hindrance. The language of the Clause does not tie this right to the treatment of persons not in this group. One of *Smith*'s supposed virtues was ease of application, but things have not turned out that way. Problems continue to plague courts when called upon to apply *Smith*. Laws involving rules designed to slow the spread of COVID–19 have driven that point home. State and local rules adopted for this purpose have typically imposed different restrictions for different categories of activities. Sometimes religious services have been placed in a category with certain secular activities, and sometimes religious services have been given a separate category of their own. To determine whether COVID–19 rules provided neutral treatment for religious and secular conduct, it has been necessary to compare the restrictions on religious services with the restrictions on secular activities that present a comparable risk of spreading the virus, and identifying the secular activities that should be used for comparison has been hotly contested. *Smith* seemed to offer a relatively simple and clear-cut rule that would be easy to apply. Experience has shown otherwise. The *Smith* majority thought that adherence to *Sherbert* would invite "anarchy," but experience has shown that this fear was not well founded. Both RFRA and RLUIPA impose essentially the same requirements as *Sherbert*, and courts are well "up to the task" of applying that test.

*Smith* was wrongly decided. As long as it remains on the books, it threatens a fundamental

freedom. And while precedent should not lightly be cast aside, the Court's error in *Smith* should now be corrected. A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest. In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle.

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

The Court granted certiorari to decide whether to overrule *Smith* which failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. CSS' litigation has already lasted years—and today's (ir)resolution promises more of the same. The Pennsylvania Supreme Court can effectively overrule the majority's reading of the public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or municipal lawyers may rewrite the City's contract to close the § 3.21 loophole. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. It makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children.

Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties. Consider Jack Phillips, the baker whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings. After being forced to litigate all the way to the Supreme Court, we ruled for him on narrow grounds similar to those the majority invokes today. All that victory assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives. A nine-year odyssey thus barrels on. No doubt those who cannot afford such endless litigation under *Smith*'s regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects. The costs of today's indecision fall on lower courts too. As recent cases involving COVID–19 regulations highlight, judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced. In the last nine months alone, this Court has had to intervene at least half a dozen times. Rather than adhere to *Smith* until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases, the Court should overrule it now, set us back on the correct course, and address each case as it comes. *Smith* committed a constitutional error. Dodging the question today guarantees it will recur tomorrow.

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

Could the anti-bias ordinance be invoked to prevent a pastor from making an LGBT person feel

"unwelcome?" Could the ordinance be applied to a pastor's sermon? Could it also be applied to the church's other activities? *See Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776 (S.D. Iowa 2016).

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

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

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

, *aff'd.*, 897 F.3d 314 (D.C. Cir. 2018), *cert. denied*, 140 S.Ct. 1198 (2020).

# Chapter 14
# Establishment versus Free Exercise and Free Speech Concerns

***On p. 1025, replace the heading with the Notes heading, add the following new note #1, and renumber the existing note as note # 2:***

***Notes***

In *Espinoza v. Montana Department of Revenue,* 140 S.Ct. 2246 (2020), the Court extended the *Trinity Lutheran* decision. *Espinoza* involved a Montana which sought to create parental and student choice through the creation of a scholarship program for students attending private schools. The program created a tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship organization" which, in turn, passed the money on as scholarships to students who attended private schools. However, the legislature directed that the aid program be administered consistently with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring direct or indirect governmental aid to sectarian schools. In order to comply with the no aid provision, the Montana Supreme Court terminated the aid program for all students whether is sectarian or secular schools. The Court held that Montana acted improperly in terminating the program and in denying aid to sectarian schools:

> The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran*,137 S. Ct. 2012, 2019 (2017). Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. The provision plainly excludes schools from government aid solely because of religious status.
>
> The Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. So applied, the provision "imposes special disabilities on the basis of religious status" and "conditions the availability of benefits upon a recipient's willingness to surrender its religiously impelled status." *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993), and *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978) (plurality opinion)). To be eligible for government aid, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights." *Trinity*

> *Lutheran*, 137 S. Ct. at 2022. The Free Exercise Clause protects against even "indirect coercion," and a State "punishes the free exercise of religion" by disqualifying the religious from government aid as Montana did here. *Id.* Such status-based discrimination is subject to "the strictest scrutiny." *Id.* It is enough to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

The Court distinguished *Locke v. Davey*:

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

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

2. *State Regulatory Requirements.*

***On p. 1025, insert a new problem # 3, that reads as follows, and renumber the following problems:***

3. *The Christian Flag*. Boston's city hall has three flags, and it usually flies the U.S., Massachusetts, and city flags on its poles. However, sometimes, the city accepts requests to replace its own flag with another, such as banners associated with events in the city hall plaza, foreign flags, or celebration of causes such as Gay Pride. When a group asked for permission to substitute a Christian flag, as a way to celebrate the country's Judeo-Christian moral heritage, and to help celebrate an event where local clergy planned to give speeches on the plaza regarding Boston's history. The city denied the request, expressing concern that the city would be in violation of the Establishment Clause if it granted the request. After *Espinoza*, is it permissible for the City to refuse to fly a Christian flag? *See Shurtleff v. Boston*, 986 F.3d 78 (1st Cir. 2021).

***On p. 1013, at the end of the problems, add the following new problem:***

3. *The "Winged Goat" Monument*. The Satanic Temple, which is recognized by the IRS as an "aethiest church," wants to erect a monument to a mystical winged goat named Baphomet at the Arkansas State Capitol. The only other display at the Capitol is a Ten Commandments monument. The Temple believes that the context surrounding the Ten Commandments display suggests that its existence constitutes an establishment of religion. When the Temple's display is rejected, it sues claiming discrimination against religion. Should the Temple prevail?