2025 SUPPLEMENT

TO

The First Amendment

Cases, Problems, and Materials

Seventh 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

B. Underlying Values

On p. 17, after Note and Question # 5, add the following new Note and Question # 6, and renumber the remaining note and question:

6. *Coronavirus Pandemic*. Justice Holmes, after declaring his support for free speech, famously declared 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 (Covid-19) and the government decides to impose limits freedom of speech and assembly (specifically, temporary numerical limits on attendance at public gatherings that include religious worship)? The limits were imposed in May, 2020, when the virus had killed more than 100,000 people in the U.S., and for which (at the time) there was no known effective cure and no vaccine. *See South Bay Pentecostal United Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) (denying emergency interlocutory application for injunctive relief). Should such restrictions be upheld during a pandemic when they would not otherwise be allowed?

On p. 18, before the problems, add the following:

Food for Thought

There are allegations that President Trump sought to punish his opponents, including law firms who supported or worked for his opponents. For example, Trump took action against a variety of law firms, including WilmerHale, Paul Weiss, and Perkins Coie. Trump's action against WilmerHale seems to have been motivated by the fact that the law firm includes Robert Mueller who prosecuted Trump prior to his second presidency. Trump's actions against another firm seemed to have been motivated by the fact that it represented Democrats in campaign disputes. Trump directed all federal agencies to terminate all contracts with the firms, revoke security clearances for the firms' lawyers, and prohibit them from entering various federal buildings. For law firms who represent clients with interests that implicate national security, the denial of security clearances and access to federal buildings effectively made it impossible for those law firms to provide effective representation to their clients. Some law firms settled with Trump. For example, Paul Weiss agreed to provide $40 million in free representation to conservative groups, made a commitment to merit-based hiring, and agreed to scrap its DEI policies. Some refused to settle. If the allegations regarding Trump's actions are true, did he violate the First Amendment?

Chapter 2
Advocacy of Illegal Action

E. Modern Standards

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

Brandenburg represented the culmination of fifty years of intense debates about the meaning of the "clear and present danger" doctrine's distinction between unprotected "incitement" speech and protected political advocacy of ideas. Notably, the *per curiam* opinion in *Brandenburg* chose not to refer explicitly to the "clear and present danger" concept, declaring instead that the unprotected speech category in question should be defined as "advocacy of the use of force or law violation" when "such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action." *Brandenburg's* focus on imminence and incitement was foreshadowed by the opinions of Justices Brandeis and Holmes in the 1920s. The net result was that *Brandenburg* expanded the scope of constitutional protection for the abstract advocacy of violence, and it did so just two months before the Warren Court era ended.

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

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

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

The founder of the "Oath Keepers" was convicted of seditious conspiracy, along with the Florida chapter leader and four associates. Three associates were acquitted and three pleaded guilty. The sentences ranged from eighteen years for the founder to three years for the associates. Four leaders of the "Proud Boys" were convicted of seditious conspiracy and other serious crimes. President Trump pardoned all of them.

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

2. *January 6 Defendants.*. Members of the Oath Keepers and the Proud Boys were convicted of "seditious conspiracy" for the Jan. 6, 2021, attack on the U.S. Capitol. The statute required the prosecution to prove that two or more people intentionally conspired to use force to oppose the authority of the federal government or to prevent, hinder or delay the execution of any U.S. law. The conviction was based on hundreds of text messages, video footage and call logs discussing or related to the attack. Defendants unsuccessfully argued that they did not engage in a seditious conspiracy, but were simply prepared in case then President Trump invoked the Insurrection Act (something that he did not do), and asked them for help. In that event, they claimed that they would have intervened as peace keepers. President Trump pardoned all participants in the Jan 6th events.

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

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

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

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

Notes

1. *Protected Advocacy Versus Illegal Conspiracy.*

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

> In 1966 the NAACP and local civil rights leaders organized a boycott of white merchants in Port Gibson, Mississippi, and its surrounding county. The boycott lasted seven years and was backed up by both persuasion and intimidation. Enforcers, called "Black Hats," stood outside stores and took down names. Those African-Americans who patronized white merchants had their names published and read aloud during meetings. There was some violence. On two occasions, shots were fired into a house; on another, a

> brick was thrown through a windshield. In a speech, Charles Evers [the Field Director of the NAACP in Mississippi] "stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night." Two days later in another speech he stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck" The Mississippi courts imposed civil liability on the NAACP and Evers, but the Supreme Court reversed, finding the boycott was protected activity. The Court stated, "The emotionally charged rhetoric of Charles Evers'[s] speeches did not transcend the bounds of protected speech set forth in *Brandenburg*." The violence occurred weeks or months after his speeches, and there was no evidence that he "authorized, ratified, or directly threatened acts of violence."

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

On p. 58, after problem # 1, insert the following:

Food for Thought

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

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

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

5. *Riot Compensation Statute*. In response to protests designed to stop the building of a pipeline, South Dakota enacted a statute that provides for the establishment of a "riot compensation fund." The governor described the statute as creating "a legal avenue to pursue

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

6. *Mask Free Zone*. When a public health emergency due to COVID19 was declared by Wisconsin Governor Tony Evers during the summer of 2020, he issued mandates requiring that signs must be posted in public and commercial spaces with the warning that,"Masks Are Required for Entry." The owner of The Café in Madison, who objects to both mandates, posts a sign on his door which states: "This is a Mask Free Zone. Please remove mask before entering." The County Health Department imposes fines on Casey, who argues that his sign was posted as a political protest and constitutes political speech. Is it? *See Helbachs Café, LLC v. Madison*, 571 F. Supp.3d 999 (W.D. Wis., Nov. 16, 2021).

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

On p. 59, change the title **"F. Speech and Terrorism after 9/11"** ***to*** **"F. Speech, Terrorism and National Security"**

On p. 62, before the notes, add the following:

TikTok Inc. v. Garland
604 U.S. ----, 145 S.Ct. 57 (2025).

Per Curiam.

As of January 19, the Protecting Americans from Foreign Adversary Controlled

Applications Act will make it unlawful for companies in the United States to provide services to distribute, maintain, or update the social media platform TikTok, unless U. S. operation of the platform is severed from Chinese control. Petitioners are TikTok operating entities and a group of U. S. TikTok users. We consider whether the Act, as applied, violates the First Amendment.[1]

I

TikTok is a social media platform that allows users to create, publish, view, share, and interact with short videos overlaid with audio and text. Since 2017, the platform has accumulated over 170 million users in the United States and more than one billion worldwide. Those users are prolific content creators and viewers. In 2023, U. S. TikTok users uploaded more than 5.5 billion videos, which were viewed more than 13 trillion times around the world.

Opening the TikTok application brings a user to the "For You" page—a personalized content feed tailored to the user's interests. TikTok generates the feed using a proprietary algorithm that recommends videos to a user based on the user's interactions with the platform. Each interaction a user has on TikTok—watching a video, following an account, leaving a comment—enables the app to further tailor a personalized content feed. A TikTok user's content feed is also shaped by content moderation and filtering decisions. TikTok uses automated and human processes to remove content that violates the platform's community guidelines. TikTok also promotes or demotes certain content to advance its business objectives and other goals.

TikTok is operated in the U.S. by TikTok Inc., an American company incorporated and headquartered in California. TikTok Inc.'s parent company is ByteDance Ltd., a privately held company that has operations in China. ByteDance Ltd. owns TikTok's proprietary algorithm, which is developed and maintained in China. The company is also responsible for developing portions of the source code that runs the TikTok platform. ByteDance Ltd. is subject to Chinese laws that require it to "assist or cooperate" with the Chinese Government's "intelligence work" and to ensure that the Chinese Government has "the power to access and control private data" the company holds.

U. S. government officials have taken repeated actions to address national security concerns regarding the relationship between China and TikTok. In 2020, President Trump issued an Executive Order finding that "the spread in the United States of mobile applications developed and owned by companies in China continues to threaten the national security, foreign policy, and economy of the United States." Exec. Order No. 13942, 3 C.F.R. 412 (2021). President Trump determined that TikTok raised particular concerns, noting that the platform "automatically captures vast swaths of information from its users" and is susceptible to being used to further the interests of the Chinese Government. The President invoked his authority under the International Emergency Economic Powers Act (IEEPA), and the National Emergencies Act, to prohibit certain "transactions" involving ByteDance Ltd. or its subsidiaries, as identified by the Secretary of Commerce. The Secretary published a list of prohibited transactions in September 2020. But federal courts enjoined the prohibitions before they took

[1] Applications for an injunction pending review were filed on December 16, 2024; we construed the applications as petitions for a writ of certiorari and granted them on December 18, 2024; and oral argument was held on January 10, 2025.

effect, finding that they exceeded the Executive Branch's authority under IEEPA.

After issuing his Executive Order, President Trump ordered ByteDance Ltd. to divest all interests and rights in any property "used to enable or support ByteDance's operation of the TikTok application in the United States," along with "any data obtained or derived from" U.S. TikTok users. ByteDance Ltd. and TikTok Inc. filed suit in the D. C. Circuit, challenging the constitutionality of the order. The D. C. Circuit placed the case in abeyance to enable the parties to negotiate. Negotiations stalled, and the parties never finalized an agreement.

Against this backdrop, Congress enacted the Protecting Americans from Foreign Adversary Controlled Applications Act. The Act makes it unlawful for any entity to provide certain services to "distribute, maintain, or update" a "foreign adversary controlled application" in the United States. § 2(a)(1). Entities that violate this prohibition are subject to civil enforcement actions and hefty monetary penalties. The Act provides two means by which an application may be designated a "foreign adversary controlled application." First, the Act expressly designates any application that is "operated, directly or indirectly," by "ByteDance Ltd." or "TikTok," or any subsidiary or successor thereof. Second, the Act establishes a general designation framework for any application that is both (1) operated by a "covered company" that is "controlled by a foreign adversary," and (2) "determined by the President to present a significant threat to the national security of the United States," following a public notice and reporting process. In broad terms, the Act defines "covered company" to include a company that operates an application that enables users to generate, share, and view content and has more than 1,000,000 monthly active users. The Act excludes from that definition a company that operates an application "whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews." The Act's prohibitions take effect 270 days after an application is designated a foreign adversary controlled application. Because the Act designates applications operated by "ByteDance, Ltd." and "TikTok," prohibitions as to those applications take effect 270 days after the Act's enactment—January 19, 2025.

The Act exempts a foreign adversary controlled application from the prohibitions if the application undergoes a "qualified divestiture." § 2(c)(1). A "qualified divestiture" is one that the President determines will result in the application "no longer being controlled by a foreign adversary." § 2(g)(6)(A). The President must further determine that the divestiture "precludes the establishment or maintenance of any operational relationship between the United States operations of the [application] and any formerly affiliated entities that are controlled by a foreign adversary, including any cooperation with respect to the operation of a content recommendation algorithm or an agreement with respect to data sharing." § 2(g)(6)(B). The Act permits the President to grant a one-time extension of no more than 90 days with respect to the prohibitions' 270-day effective date if the President makes certain certifications to Congress regarding progress toward a qualified divestiture. § 2(a)(3). ByteDance Ltd. and TikTok Inc.—along with two sets of TikTok users and creators (creator petitioners)—argued that the Act's prohibitions, TikTok-specific foreign adversary controlled application designation, and divestiture requirement violate the First Amendment. The D. C. Circuit [held] that the Act does not violate petitioners' First Amendment rights. We granted certiorari.

II

A

We have applied First Amendment scrutiny in "cases involving governmental regulation of conduct that has an expressive element," and to "statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 703 (1986). It is not clear that the Act directly regulates protected expressive activity, or conduct with an expressive component. Indeed, the Act does not regulate the creator petitioners at all. It directly regulates ByteDance Ltd. and TikTok Inc. only through the divestiture requirement. Petitioners have not identified any case in which this Court has treated a regulation of corporate control as a *direct* regulation of expressive activity or semi-expressive conduct.

Petitioners claim that the Act's prohibitions, TikTok-specific designation, and divestiture requirement "impose a disproportionate burden upon" their First Amendment activities. Petitioners assert—and the Government does not contest—that, because it is commercially infeasible for TikTok to be divested within the Act's 270-day timeframe, the Act effectively bans TikTok in the U.S. Petitioners argue that such a ban will burden various First Amendment activities, including content moderation, content generation, access to a distinct medium for expression, association with another speaker or preferred editor, and receipt of information and ideas. We have recognized a number of these asserted First Amendment interests. See *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024).[2] An effective ban on a social media platform with 170 million U.S. users certainly burdens those users' expressive activity in a non-trivial way. At the same time, a law targeting a foreign adversary's control over a communications platform is different from the regulations of non-expressive activity that we have subjected to First Amendment scrutiny. Those differences—the Act's focus on a foreign government, the congressionally determined adversary relationship between that foreign government and the United States, and the causal steps between the regulations and the alleged burden on protected speech—may impact whether First Amendment scrutiny applies. This Court has not articulated a framework for determining whether a regulation of non-expressive activity that disproportionately burdens those engaged in expressive activity triggers heightened review. We assume that the challenged provisions are subject to First Amendment scrutiny.

B

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994) (*Turner I*). Government action that suppresses speech because of its message "contravenes this essential right." *Ibid.* "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Content-neutral laws, in contrast, "are subject to an intermediate level of scrutiny because

[2] To the extent that ByteDance Ltd.'s asserted expressive activity occurs abroad, that activity is not protected by the First Amendment. See *Agency for Int'l Development v. Alliance for Open Society Int'l Inc.*, 591 U.S. 430, 436 (2020).

in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner I*, 512 U.S., at 642. We sustain a content-neutral law "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*).

A law is content based on its face if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S., at 163. A facially content-neutral law is nonetheless treated as a content-based regulation of speech if it "cannot be 'justified without reference to the content of the regulated speech'" or was "adopted by the government 'because of disagreement with the message the speech conveys.'" *Id*., at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The challenged provisions are facially content neutral. They impose TikTok-specific prohibitions due to a foreign adversary's control over the platform and make divestiture a prerequisite for the platform's continued operation in the United States. They do not target speech based upon its content, or regulate speech based on its function or purpose. Nor do they impose a "restriction, penalty, or burden" by reason of content on TikTok—petitioners "cannot avoid or mitigate" the effects of the Act by altering their speech. The Act thus does not facially regulate "particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S., at 163.

Petitioners argue that the Act is content based on its face because it excludes from the definition of "covered company" any company that operates an application "whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews." We need not decide whether that exclusion is content based. The question is whether the Act violates the First Amendment *as applied to petitioners*. To answer that question, we look to the provisions of the Act that give rise to the effective TikTok ban that petitioners argue burdens their First Amendment rights. The exclusion for certain review platforms applies only to the general framework for designating applications controlled by "covered companies," not to the TikTok-specific designation. As such, the exclusion is not within the scope of petitioners' as-applied challenge.

The Government also supports the challenged provisions with a content-neutral justification: preventing China from collecting vast amounts of sensitive data from 170 million U. S. TikTok users. That rationale is content agnostic. It neither references the content of speech on TikTok nor reflects disagreement with the message such speech conveys. Because the data collection justification reflects a "purpose unrelated to the content of expression," it is content neutral. *Id*., at 791.

The Act's TikTok-specific distinctions do not trigger strict scrutiny. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010). For that reason, "regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner I*, 512 U.S., at 659. But while "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," such scrutiny "is unwarranted when the differential treatment is 'justified by some special characteristic of ' the particular [speaker] being regulated," *id*., at 660–661 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983)).

Requiring divestiture for the purpose of preventing a foreign adversary from accessing the sensitive data of 170 million U. S. TikTok users is not "a subtle means of exercising a content preference." *Turner I*, 512 U.S., at 645. The prohibitions, TikTok-specific designation, and divestiture requirement regulate TikTok based on a content-neutral data collection interest. And TikTok has special characteristics—a foreign adversary's ability to leverage its control over the platform to collect vast amounts of personal data from 170 million U.S. users—that justify this differential treatment. "Speaker distinctions of this nature are not presumed invalid under the First Amendment." *Ibid.*

While differential treatment was justified, we emphasize the inherent narrowness of our holding. Data collection and analysis is a common practice in this digital age. But TikTok's scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data the platform collects, justify differential treatment to address the Government's national security concerns. A law targeting any other speaker would by necessity entail a distinct inquiry and separate considerations. We cannot accept petitioners' call for strict scrutiny. No more than intermediate scrutiny is in order. As applied to petitioners, the Act satisfies intermediate scrutiny.

The challenged provisions further an important Government interest unrelated to the suppression of free expression and do not burden substantially more speech than necessary to further that interest.[3] The Act's prohibitions and divestiture requirement are designed to prevent China—a designated foreign adversary—from leveraging its control over ByteDance Ltd. to capture the personal data of U. S. TikTok users. This objective qualifies as an important Government interest under intermediate scrutiny.

Petitioners do not dispute that the Government has an important and well-grounded interest in preventing China from collecting the personal data of tens of millions of U.S. TikTok users. Nor could they. The platform collects extensive personal information from and about its users. If a user allows TikTok access to the user's phone contact list to connect with others on the platform, TikTok can access "any data stored in the user's contact list," including names, contact information, contact photos, job titles. Access to such detailed information about U.S. users may enable "China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage." Chinese law enables China to require companies to surrender data to the government, "making companies headquartered there an espionage tool" of China. H. R. Rep., at 4.

Petitioners contest probability, asserting that it is "unlikely" that China would "compel TikTok to turn over user data for intelligence-gathering purposes, since China has more effective and efficient means of obtaining relevant information." We "accord substantial deference to the predictive judgments of Congress." *Turner I*, 512 U.S., at 665 (opinion of KENNEDY, J.). "Sound policymaking requires legislators to forecast future events and anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Ibid.* Here, the Government's TikTok-related data collection concerns do not exist in isolation. China "has engaged in extensive and years-long efforts to accumulate structured datasets, in particular on U. S. persons, to support its intelligence and

[3] Our holding and analysis are based on the public record, without reference to the classified evidence the Government filed below.

counterintelligence operations."

Even if China has not yet leveraged its relationship with ByteDance Ltd. to access U. S. TikTok users' data, petitioners offer no basis for concluding that the Government's determination that China might do so is not at least a "reasonable inference based on substantial evidence." *Turner II*, 520 U.S., at 195. "National security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess." *Humanitarian Law Project*, 561 U.S., at 34. We thus afford the Government's "informed judgment" substantial respect.

Petitioners argue that the Act is underinclusive. The Act's focus on applications with user-generated and user-shared content, along with its exclusion for certain review platforms, exempts from regulation applications that are "as capable as TikTok of collecting Americans' data." But "the First Amendment imposes no freestanding underinclusiveness limitation," and the Government "need not address all aspects of a problem in one fell swoop." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). The Government had good reason to single out TikTok for special treatment. On this record, Congress was justified in specifically addressing its TikTok-related national security concerns.

As applied, the Act is sufficiently tailored to address the Government's interest in preventing a foreign adversary from collecting vast swaths of sensitive data about the 170 million U.S. persons who use TikTok. To survive intermediate scrutiny, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner I*, 512 U.S., at 662. Rather, the standard "is satisfied 'so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' " and does not "burden substantially more speech than is necessary" to further that interest. *Ward*, 491 U.S., at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985).

The challenged provisions clearly serve the Government's data collection interest "in a direct and effective way." *Ward*, 491 U.S., at 800. The prohibitions account for the fact that, absent a qualified divestiture, TikTok's very operation in the United States implicates the Government's data collection concerns, while the requirements that make a divestiture "qualified" ensure that those concerns are addressed before TikTok resumes U.S. operations. Neither the prohibitions nor the divestiture requirement is "substantially broader than necessary to achieve" this national security objective. Rather than ban TikTok outright, the Act imposes a conditional ban. The prohibitions prevent China from gathering data from U.S. TikTok users unless and until a qualified divestiture severs China's control.

Petitioners parade a series of alternatives—disclosure requirements, data sharing restrictions, the proposed national security agreement, the general designation provision—that they assert would address the Government's data collection interest in equal measure to a conditional TikTok ban. Petitioners' proposed alternatives ignore the "latitude" we afford the Government to design regulatory solutions to address content-neutral interests. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S., at 800; *Albertini*, 472 U.S., at 689; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). The challenged provisions are "not substantially broader than necessary" to address the

Government's data collection concerns. *Ward*, 491 U.S., at 800. Nor did the Government ignore less restrictive approaches. "We cannot displace [the Government's] judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *Turner II*, 520 U.S., at 224. Those requirements are met here.

In addition to the data collection concerns, the Government asserts an interest in preventing a foreign adversary from having control over the recommendation algorithm that runs a widely used U.S. communications platform, and from being able to wield that control to alter the content on the platform in an undetectable manner. In petitioners' view, that rationale is a content-based justification that "taints" the Government's data collection interest and triggers strict scrutiny. Petitioners assert that the challenged provisions fail strict scrutiny because Congress would not have passed the provisions absent the foreign adversary control rationale. Petitioners' argument fails. The record before us adequately supports the conclusion that Congress would have passed the challenged provisions based on the data collection justification alone.

The House Report focuses overwhelmingly on the Government's data collection concerns, noting the "breadth" of TikTok's data collection, "the difficulty in assessing precisely which categories of data" the platform collects, the "tight interlinkages" between TikTok and the Chinese Government, and the Chinese Government's ability to "coerce" companies in China to "provide data." H. R. Rep., at 3. It does not appear that any legislator disputed the national security risks associated with TikTok's data collection practices, and nothing in the legislative record suggests that data collection was anything but an overriding congressional concern. We are especially wary of parsing Congress's motives with regard to an Act passed with striking bipartisan support. See 170 Cong. Rec. H1170 (Mar. 13, 2024) (352–65).

Petitioners assert that the text of the Act undermines this conclusion. They argue that the Government's data collection rationale cannot justify the requirement that a qualified divestiture preclude "any operational relationship" that allows for "cooperation with respect to the operation of a content recommendation algorithm or an agreement with respect to data sharing." We disagree. The Government has explained that ByteDance Ltd. uses the data it collects to train the TikTok recommendation algorithm, which is developed and maintained in China. ByteDance Ltd. has previously declined to agree to stop collecting U.S. user data or sending that data to China to train the algorithm. The Government has further noted the difficulties associated with monitoring data sharing between ByteDance Ltd. and TikTok Inc. Under these circumstances, the Government's data collection justification sufficient to sustain the challenged provisions.

For more than 170 million Americans, TikTok offers a distinctive and expansive outlet for expression, means of engagement, and source of community. But Congress has determined that divestiture is necessary to address its well-supported national security concerns regarding TikTok's data collection practices and relationship with a foreign adversary. We conclude that the challenged provisions do not violate petitioners' First Amendment rights.

The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed.

It is so ordered.

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

I join all but Part II.A of the Court's *per curiam* opinion. I agree that the Act survives petitioners' First Amendment challenge.

Justice GORSUCH, concurring in judgment.

"Those who won our independence" knew the vital importance of the "freedom to think as you will and to speak as you think," as well as the dangers that come with repressing the free flow of ideas. *Whitney v. California*, 274 U.S. 357, 375 (1927) (BRANDEIS, J., concurring). Too often in recent years, the government has sought to censor disfavored speech online, as if the internet were somehow exempt from the First Amendment. See, *e.g.*, *Murthy v. Missouri*, 603 U.S. 43 (2024) (ALITO, J., dissenting). But even as times and technologies change, "the principle of the right to free speech is the same." *Abrams v. United States*, 250 U.S. 616, 628 (1919) (HOLMES, J., dissenting).

The law before us seeks to serve a compelling interest: preventing a foreign country, designated by Congress and the President as an adversary of our Nation, from harvesting vast troves of personal information about tens of millions of Americans. TikTok mines data both from TikTok users and millions of others who do not consent to share their information. According to the Federal Bureau of Investigation, TikTok can access "*any data*" stored in a consenting user's "contact list"—including names, photos, and other personal information about unconsenting third parties. Because the People's Republic of China (PRC) can require TikTok's parent company "to cooperate with its efforts to obtain personal data," there is little to stop that information from ending up in the hands of a designated foreign adversary. The PRC may then use that information to "build dossiers for blackmail," "conduct corporate espionage," or advance intelligence operations. The record the government has amassed after years of study supplies compelling reason for concern. Finally, the law appears appropriately tailored to the problem. The remedy Congress and the President chose is dramatic. The law may require TikTok's parent company to divest or (effectively) shutter its U.S. operations. Before seeking to impose that remedy, the coordinate branches spent years in negotiations with TikTok exploring alternatives and found them wanting. That judgment was well founded.

Consider the alternatives. Warning users of the risks associated with giving their data to a foreign-adversary-controlled application would do nothing to protect nonusers' data. Forbidding TikTok's domestic operations from sending sensitive data abroad might seem another option. But even if Congress were to impose serious criminal penalties on domestic TikTok employees who violate a data-sharing ban, that would do little to deter the PRC from exploiting TikTok to steal Americans' data. The "size" and "complexity" of TikTok's "underlying software" may make it impossible for law enforcement to detect violations. Even setting all these challenges aside, any new compliance regime could raise separate constitutional concerns—for instance, by requiring the government to surveil Americans' data to ensure that it isn't illicitly flowing overseas. Whether this law will succeed in achieving its ends, I do not know. Less dramatic and more effective solutions may emerge. But the question today is not the law's wisdom, only its constitutionality. The problem appears real and the response to it not unconstitutional.

Food for Thought

The Trump Administration has aggressively cracked down on non-citizen protestors, some of whom were lawful permanent residents. For example, Immigrations and Customs Enforcement (ICE) arrested Columbia University graduate student Mahmoud Khalil on the ground that his presence in the U.S. harms U.S. foreign policy interests. How would a court go about evaluating the validity of the Trump Administration's claims? Would it matter whether Khalil advocated on behalf of Hamas which has been designated as a terrorist organization? Would mere protesting on behalf of Hama be prohibitable?

Chapter 3

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

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

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

National Rifle Association v. Vullo

602 U.S. 175 (2024).

Justice SOTOMAYOR delivered the opinion of the Court.

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

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

and "insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person."

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

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

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

On April 19, 2018, Vullo issued two virtually identical guidance letters on DFS letterhead entitled, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." Vullo sent one of the letters to insurance companies and the other to financial services institutions. In the letters, Vullo pointed to the "social backlash" against the NRA and other groups "that promote guns that lead to senseless violence" following "several recent horrific shootings, including in Parkland, Florida." Vullo then cited recent instances of businesses severing their ties with the NRA as examples of companies "fulfilling their corporate

social responsibility." In the Guidance Letters' final paragraph, Vullo "encouraged" DFS-regulated entities to: (1) "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations"; (2) "review any relationships they have with the NRA or similar gun promotion organizations"; and (3) "take prompt actions to manage these risks and promote public health and safety."[2] The same day that DFS issued the Guidance Letters, Vullo and Governor Cuomo issued a joint press release that echoed many of the letters' statements. The press release included a quote from Vullo "urging all insurance companies and banks doing business in New York' " to join those "that have already discontinued their arrangements with the NRA." The press release cited Chubb's decision to stop underwriting Carry Guard as an example to emulate. The next day, Cuomo tweeted: "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public."

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

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

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

At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society. The Clause prohibits government entities and actors from "abridging freedom of speech." When government

---

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

officials are "engaging in their own expressive conduct," "the Free Speech Clause has no application." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The government can "say what it wishes" and "select the views that it wants to express." *Id.*, at 467. "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others," and thus does not need to "maintain viewpoint-neutrality when its officers and employees speak about that venture." *Matal v. Tam*, 582 U.S. 218, 234 (2017).

A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do is use the power of the State to punish or suppress disfavored expression. See *Rosenberger*, 515 U.S., at 830. In such cases, it is "the application of state power which we are asked to scrutinize." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). In *Bantam Books*, this Court explored the distinction between permissible attempts to persuade and impermissible attempts to coerce. There, a state commission used its power to investigate and recommend criminal prosecution to censor publications that, in its view, were "objectionable" because they threatened "youthful morals." The commission sent official notices to a distributor for blacklisted publications that highlighted the commission's "duty to recommend to the Attorney General" violations of the State's obscenity laws. The notices also informed the distributor that the lists of blacklisted publications "were circulated to local police departments," and that the distributor's cooperation in removing the publications from the shelves would "eliminate the necessity" of any referral for prosecution. A local police officer also conducted followup visits to ensure compliance. In response, the distributor took "steps to stop further circulation of copies of the listed publications" out of fear of facing "a court action." The publishers of the blacklisted publications sued the commission, alleging that this scheme of informal censorship violated their First Amendment rights. The commission responded that "it did not regulate or suppress obscenity but simply exhorted booksellers and advised them of their legal rights." This Court sided with the publishers, holding that the commission violated their free-speech rights by coercing the distributor to stop selling and displaying the listed publications. The First Amendment prohibits government officials from relying on the "threat of invoking legal sanctions and other means of coercion to achieve the suppression" of disfavored speech. Although the commission lacked the "power to apply formal legal sanctions," the distributor "reasonably understood" the commission to threaten adverse action, and thus the distributor's "compliance with the commission's directives was not voluntary." The Court considered the commission's coordination with law enforcement and its authority to refer matters for prosecution; the notices themselves, which were "phrased virtually as orders" containing "thinly veiled threats to institute criminal proceedings" if the distributor did not come around; and the distributor's reaction to the notices and followup visits.

Since *Bantam Books*, the Courts of Appeals have considered similar factors to determine whether a challenged communication is reasonably understood to be a coercive threat. Take the decision below. The Second Circuit purported to consider: "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences." Other Circuits have taken similarly fact-intensive approaches, utilizing a multifactor test or a

totality-of-the-circumstances analysis. “No one factor is dispositive.” Ultimately, *Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.

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

Consider Vullo's authority. The power that a government official wields, while not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive. Generally speaking, the greater and more direct the government official's authority, the less likely a person will feel to disregard a directive from the official. For example, imagine a local affinity group in New York that receives a strongly worded letter. One would reasonably expect that organization to react differently if the letter came from the U. S. Attorney for the Southern District of New York than if it came from an out-of-state school board.

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

its NRA-related business." Minutes from a subsequent board of directors' meeting reveal that Lloyd's thought "the DFS investigation had transformed the gun issue into 'a regulatory, legal, and compliance matter.' " That reaction is consistent with Lloyd's public announcement that it had directed its syndicates to "terminate all insurance related to the NRA and not to provide any insurance to the NRA in the future."

Other allegations reinforce the NRA's First Amendment claim. Consider the April 2018 Guidance Letters and accompanying press release, which Vullo issued on official letterhead. Just like in her meeting with the Lloyd's executives, Vullo singled out the NRA and other gun-promotion organizations as the targets of her call to action. This time, the Guidance Letters reminded DFS-regulated entities of their obligation to consider their "reputational risks," and then tied that obligation to an encouragement for "prompt action to manage these risks." Evocative of Vullo's private conversation with the Lloyd's executives a few weeks earlier, the press release revealed how to manage the risks by encouraging DFS-regulated entities to "discontinue their arrangements with the NRA," just like Chubb did when it stopped underwriting Carry Guard. A follow-on tweet from Cuomo reaffirmed the message: Businesses in New York should "consider their reputations" and "revisit any ties they have to the NRA," which he called "an extremist organization." In sum, the complaint plausibly alleges that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy. If true, that violates the First Amendment.

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

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

Vullo next argues that this case does not involve unconstitutional coercion because her challenged actions in fact targeted business practices and relationships, which qualify as "nonexpressive activity." That Vullo "regulated" business activities stemming from the NRA's

"relationships with insurers and banks" does not change the allegations that her actions were aimed at punishing or suppressing speech. In *Bantam Books*, the commission interfered with the business relationship between the distributor and the publishers in order to suppress the publishers' disfavored speech. One can reasonably infer from the complaint that Vullo coerced DFS-regulated entities to cut their ties with the NRA in order to stifle the NRA's gun-promotion advocacy and advance her views on gun control. Vullo knew, after all, that the NRA relied on insurance and financing "to disseminate its message."[6]

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

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

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

The judgment of the U. S. Court of Appeals for the Second Circuit is vacated, and the case remanded for further proceedings consistent with this opinion.[7]

It is so ordered.

Justice GORSUCH, concurring.

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

---

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

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

Justice JACKSON, concurring.

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

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

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

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

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

Notes

A. "Fighting Words"

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

5. *Fighting Words and College Students*. A speech code at a college, the Fighting Words Harassment Policy, which bans "terms or gestures widely recognized to be derogatory references to race, ethnicity, religion, gender, sexual orientation disability, and other personal characteristics." Is a speech code with such language permissible under the First Amendment?

B. Hostile Audiences

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

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

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

3. *Imposing Limits on Police Dispersal Orders.* Lower courts have recognized *Feiner*'s flaws and have attempted to define the police power to issue dispersal orders in hostile audience scenarios. Lawful dispersal orders may be issued "when there is 'immediate danger' to speakers and protesters," which make it "necessary" to "prevent a riot or serious bodily injury to those gathered," or when conditions "bespeak dispersal as a necessary means of averting danger and damage." In such circumstances, some courts hold that even people whose speech is protected may be arrested for defying a dispersal order. However, the failure to comply with a dispersal order may be insufficient to justify arrest when speakers are not "inhibiting" the ability of police to "maintain order."

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

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

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

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

C. Defamation

1. The Constitutionalization of Defamation

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

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

2. "Public Figures" and "Private Plaintiffs"

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

Food for Thought

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

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

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

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

Sandy Hook & Alex Jones

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

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

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

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

Defendant takes video at a pro-choice convention and uses it to promote pro-life positions. Does it matter that, when defendant gained entry into the convention, he agreed not to videotape or publicize anything learned there. Does the agreement constitute a waiver of the right to publish? *See National Abortion Federation v. Center for Medical Progress*, 2022 WL 3572943 (9th Cir.).

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

Food for Thought

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

3. Application of the "Actual Malice" Standard

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

Dominion Voting Systems v. Fox News

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

Trump and Punitive Damages

A jury awarded plaintiff E. Jean Carroll three million dollars in her defamation suit against former President Donald Trump, which verdict included $280,000 in punitive damages. Carroll's claim was based on Trump's statements denying that he sexually abused Carroll in the mid-1990s as she described in her memoir published in 2019. Trump's denial included statements that Carroll was a liar who had invented her claim of sexual abuse in order to sell more books. The case was unusual because Trump declined to testify and therefore offered only a truncated defense. The day after the verdict, Trump made additional denials during a CNN town hall meeting on cable television, stating that he had never met Carroll, that her claim of sexual abuse was "a fake story, made up story," and that she was a "whack job." Carroll immediately filed a motion to amend a prior and still pending defamation suit against Trump by adding a claim for $10 million dollars in compensatory damages based on his post-verdict remarks. The trial court granted Carroll's motion. *See* Kelly Garrity, *Judge lets E. Jean Carroll Add Trump's*

post-verdict remarks to original defamation case, POLITICO, June 13, 2013,

Food for Thought

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

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

Food for Thought

The American Civil Liberties Union (ACLU) issued a letter and press release implying that a police detective was a racist and claiming that he tampered with a jury. The evidence showed that the detective had a friend on the jury who complained about the jury and specifically mentioned a fellow juror (who was black). The officer told the juror to go to the bailiff and the judge with any concerns that she might have. When the juror did, the judge declared a mistrial. Before making the allegation, the ACLU had access to (and reviewed) the court transcript which showed that the detective told the juror to do the right thing, to vote her conscience, and to bring any problems to the court. Can the detective satisfy the actual malice standard in a suit against the police officer? *See Zabriskie v. American Civil Liberties Union of Michigan*, 2022 WL 3572105 (Mich. App.).

4. Fact Versus Opinion

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

Food for Thought

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

D. Emotional Distress

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

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

E. Invasion of Privacy

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

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

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

F. Obscenity

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

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

On p. 178, before the problems, insert the following:

Food for Thought

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

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

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

Chapter 4

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

A. "Offensive" Speech

On p. 192, replace problem # 4 with the following new problem:

4. *Requiring Civility*. A school board adopts a policy governing speech at its meetings. The policy prohibits speakers from engaging in abusive or obscene speech, as well as from personally attaching teachers and other board employees. Suppose that Moms for Liberty (MFL) wishes to speak at the board meeting. If its request is granted MFL would criticize individual teachers who invoke "woke ideology" in their classes, and to read passages from books that they wish to have removed from school libraries. MFL believes that the books are "obscene." Is the policy constitutional? *See Moms for Liberty v. Brevard Public Schools*, (M.D., Fl., 2025).

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

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

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

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

Food for Thought

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

B. "Hate" Speech

On p. 210, before the problems, insert the following:

Food for Thought

President Donald Trump issued an executive order targeting "gender ideology extremism." In response, Texas A & M University cancelled an annual drag show (Draggieland) for fear that it will lose federal funding by allowing the use of university facilities for drag show events which "may be considered promotion of gender ideology in violation of the executive order." The university allowed other events to proceed that did not involve "gender ideology." Can it be argued that Texas A & M violated the First Amendment by cancelling the event? *See Texas A&M Queer Empowerment Council v. Mahomes*, --- F.Supp.3d ----2025 WL 895836 (W.D. Tex.).

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

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

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

Food for Thought

The American Bar Association has approved a rule designed to prohibit harassment and discrimination by attorneys. The standard extends beyond workplace settings, like courthouses, and includes law-related events such as association meetings and outings with colleagues. Is the rule consistent with the First Amendment? Connecticut, which rejected the ABA language as too

broad, provides that comments have to be directed at a person and cannot just involve the expression of controversial views at a bar event, In addition, the Connecticut rule explicitly provides that it does not extend to statements protected by the First Amendment.

Food for Thought

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

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

Food for Thought

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

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

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

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

C. True Threats

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

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

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

On p. 229, before note # 3, insert the following new note and renumber the remaining notes:

3. *Planned Parenthood v. ACLA*. *In Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists,* 422 F.3d 949 (9th Cir. 2005), the court applied the so-called "true threat" doctrine (which applies when a reasonable observer would believe that the listener reasonably believes that he will be subjected to physical violence or death) to an attempt to intimidate physicians. The plaintiff physicians, who performed lawful abortions, alleged that the American Coalition of Life Activists (ACLA) engaged in "a campaign of terror and intimidation" by targeting them with specific threats—the "Deadly Dozen GUILTY" poster (which identified Hern and the Newhalls among others), the "Crist" poster (which contained Crist's name, addresses, and photograph), and the "Nuremberg Files" (a compilation of those whom the ACLA members believed might be put on trial for crimes against humanity one day). The posters identifying these physicians were circulated in the wake of a series of "WANTED" and "unWANTED" posters that had identified other doctors who performed abortions and who were murdered after the "WANTED" and "unwanted" posters were circulated. The suit alleged that the ACLA had violated or conspired to violate the Freedom of Access to Clinic Entrances (FACE) Act and the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§1961–1968. Plaintiffs were awarded both compensatory damages and punitive damages. However, the initial award of $108.5 million in punitive damages was remitted to $45,000 to

$75,000 per defendant. Suppose that the ACLA comes to you for advice. What can the ACLA do to publicize its views on abortion without running afoul of the true threat doctrine? Would it ever be permissible for the ACLA to print the names, addresses, and photographs of abortion providers on its website? If so, explain how it could do so despite the "true threat" doctrine.

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

Food for Thought

During the pandemic, during a lock down period, defendant posts on Facebook that he is going to pay someone with Covid-19 to lick groceries at a supermarket. The post was false, and defendant claimed that he was simply trying to encourage the public to observe stay-at-home orders. Defendant is nonetheless charged under the biological weapons statute with making a "true threat." Defendant claims that Covid-19 is not easily spread through licking. Does defendant's post constituted protected speech? *See United States v. Perez*, 43 F.4th 437 (5th Cir. 2022).

D. Child Pornography

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

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

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

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

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

The Fight Online Sex Trafficking Act

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

F. Possible Additional Categories for Exclusion From Speech Protection

On p. 267, at the end of the problem, delete the citations and add the following new citation:

See Chiles v. Salazar, 116 F.4th 1178 (10th Cir. 2024), cert. granted,145 S. Ct. 1328 (2025).

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

See Black Emergency Response Team v. Drummond, 737 F. Supp. 3d 1136 (W.D. Okla. 2024).

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

Food for Thought

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

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

Problem: Prohibiting Race "Guilt" Training

The Florida legislature enacts The Stop WOKE Act which labels as "discrimination" employment training that endorses concepts related to racism, sexism, privilege, and merit-based advancement, and suggests that individuals "must feel guilt, anguish, or other forms of psychological distress" because of the past actions by other people of the same race or sex. Florida views such conduct as discrimination based on race, color, sex, or national origin. Is the law

constitutional? Does it involve a content-based or viewpoint-based restriction on speech? *See Falls v. DeSantis*, 609 F.Supp.3d 1273 (N.D. Fla. 2022); *Honeyfund.com Inc. v. DeSantis*, 622 F.Supp.3d 1159 (N.D. Fla. 2022).

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

Food for Thought

In many states, certification bodies have monopolistic control over credentialing in their respective specialties. The Department of Homeland Security issues a press release that calls on various agencies, including medical certification boards, to "make recommendations that appropriately address disinformation that poses a threat to the homeland." In light of the press release, Plaintiff doctors, who disagree with the government's statements regarding Covid-19 claim that the press release chills their ability to express dissenting views regarding Covid-19 and vaccines. Can the medical boards effectively prohibit physician members from expressing dissenting views about Covid-19? *See Association of American Physicians and Surgeons Educational Foundation v. American Board of Internal Medicine*, 103 F.4th 383 (5th Cir. 2024).

On p. 289, at the end of the problems, insert the following:

Food for Thought

A Michigan law makes it illegal to engage in "intentionally false speech that is related to voting requirements or procedures. The law is designed to deter or influence an elector's vote." Suppose that defendant makes robocalls to local voters stating that the police could use mail-in ballot applications to track down old warrants, that credit card companies could use them to collect debts, and that the Center for Disease Control could use them to track down people to enforce vaccine mandates. Has defendant violated the law? Does he have a constitutional right to engage in such speech? What if it is incorrect and misleading? *See Michigan v. Burkman*, 15 N.W.3d 216 (Mich. App. 2024).

G. Near Obscene

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

Food for Thought

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

H. Commercial Speech

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

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

Food for Thought

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

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

Food for Thought

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

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

I. Copyright and Trademark

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

company's trademark for its intended use. The following case illustrates how free speech law and trademark law can come into conflict.

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

Justice KAGAN delivered the opinion of the Court.

Respondent VIP Products makes a squeaky, chewable dog toy designed to look like a bottle of Jack Daniel's whiskey. The words "Jack Daniel's" become "Bad Spaniels." The descriptive phrase "Old No. 7 Brand Tennessee Sour Mash Whiskey" turns into "The Old No. 2 On Your Tennessee Carpet." The jokes did not impress Jack Daniel's Properties. It owns trademarks in the distinctive Jack Daniel's bottle and in many of the words and graphics on the label. And it believed Bad Spaniels had infringed and diluted those trademarks by leading consumers to think that Jack Daniel's had created, or was otherwise responsible for, the dog toy. Bad Spaniels had diluted the marks, the argument went, by associating the famed whiskey with excrement.

The Lanham Act, the core federal trademark statute, defines a trademark as follows: "Any word, name, symbol, or device, or any combination thereof " that a person uses "to identify and distinguish his or her goods ... from those manufactured or sold by others and to indicate the source of the goods." § 1127. The first part of that definition encompasses words (think "Google"), graphic designs (Nike's swoosh), and so-called trade dress, the overall appearance of a product and its packaging (a Hershey's Kiss, in its silver wrapper). The second part of the definition describes trademark's "primary" function: "to identify the origin or ownership of the article to which it is affixed." *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916). Trademarks can catch a consumer's eye, appeal to his fancies, and convey every manner of message. But a trademark is not a trademark unless it identifies a product's source and distinguishes that source from others. See generally 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 3:1 (5th ed. 2023).

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

The Lanham Act sets up a voluntary registration system. Any mark owner may apply to the Patent and Trademark Office to get its mark placed on a federal register. The lead criterion for registration is that the mark "serve as a 'trademark' to identify and distinguish goods." 3 MCCARTHY § 19:10. If it does, and the statute's other criteria also are met, the registering trademark owner receives certain benefits, useful in infringement litigation. See, *e.g.*, *Iancu* v. *Brunetti*, 139 S.Ct. 2294 (2019) ("registration constitutes '*prima facie* evidence' of the mark's validity"). But the owner of even an unregistered trademark can "use the mark in commerce and

enforce it against infringers." *Ibid.* The Lanham Act also creates a federal cause of action for trademark infringement. In the typical case, the court must decide whether the defendant's use is "likely to cause confusion, or to cause mistake, or to deceive." §§ 1114(1)(A), 1125(a)(1)(A). Confusion as to source is the bête noire of trademark law—the thing that stands directly opposed to the law's twin goals of facilitating consumers' choice and protecting producers' good will.

Finally, the Lanham Act creates a cause of action for the dilution of famous marks, which can succeed without likelihood of confusion. A famous mark is "widely recognized" by the public as "designating the source" of the mark owner's goods. Dilution of such a mark can occur "by tarnishment" (as well as by "blurring").§ 1125(c)(1). An "association arising from the similarity between" two marks—one of them famous—may "harm the reputation of the famous mark," and thus make the other mark's owner liable. § 1125(c)(2)©. But there are "exclusions." One exclusion protects any "noncommercial use of a mark." § 1125(c)(3)©. Another protects a "fair use" of a mark "in connection with parodying, criticizing, or commenting upon the famous mark owner or its goods." § 1125(c)(3)(A)(ii). The fair-use exclusion, though, comes with a caveat. A defendant cannot get its benefit—even if engaging in parody, criticism, or commentary—when using the similar-looking mark "as a designation of source for the defendant's own goods." § 1125(c)(3)(A).

A bottle of Jack Daniel's—no, Jack Daniel's Old No. 7 Tennessee Sour Mash Whiskey—boasts a fair number of trademarks. "Jack Daniel's" is a registered trademark, as is "Old No. 7." So too the arched Jack Daniel's logo. And the stylized label with filigree (*i.e.*, twirling white lines). Finally, what might be thought of as the platform for all those marks—the whiskey's distinctive square bottle—is itself registered. VIP is a dog toy company, making and selling a product line of chewable rubber toys that it calls "Silly Squeakers." Most of the toys are designed to look like—and to parody—popular beverage brands. There are, to take a sampling, Dos Perros (cf. Dos Equis), Smella Arpaw (cf. Stella Artois), and Doggie Walker (cf. Johnnie Walker). VIP has registered trademarks in all those names, as in the umbrella term "Silly Squeakers." In 2014, VIP added the Bad Spaniels toy to the line. Bad Spaniels is about the same size and shape as an ordinary bottle of Jack Daniel's. The faux bottle, like the original, has a black label with stylized white text and a white filigreed border. The words "Bad Spaniels" replace "Jack Daniel's" in a like font and arch. Above the arch is an image of a spaniel. Below the arch, "The Old No. 2 On Your Tennessee Carpet" replaces "Old No. 7 Tennessee Sour Mash Whiskey" in similar graphic form. The small print at the bottom substitutes "43% poo by vol." and "100% smelly" for "40% alc. by vol. (80 proof)." The toy is packaged for sale with a cardboard hangtag. At the bottom is a disclaimer: "This product is not affiliated with Jack Daniel Distillery." And at the top are two product logos—on the left for the Silly Squeakers line, and on the right for the Bad Spaniels toy.

Jack Daniel's sent VIP a letter demanding that it stop selling the product. VIP [sought] a declaratory judgment that Bad Spaniels neither infringed nor diluted Jack Daniel's trademarks. Jack Daniel's counterclaimed under the Lanham Act for both trademark infringement and trademark dilution by tarnishment. VIP argued that Jack Daniel's infringement claim failed under a threshold test derived from the First Amendment to protect "expressive works"—like the Bad Spaniels toy. When those works are involved, VIP contended, the so-called *Rogers* test requires

dismissal of an infringement claim unless the complainant can show one of two things: that the challenged use of a mark "has no artistic relevance to the underlying work" or that it "explicitly misleads as to the source or the content of the work." *Rogers v. Grimaldi*, 875 F.2d 994, 999 (C.A.2 1989). Because Jack Daniel's could make neither showing, VIP argued, the likelihood-of-confusion issue became irrelevant. VIP urged that Jack Daniel's could not succeed on a dilution claim because Bad Spaniels was a "parody" of Jack Daniel's, and therefore made "fair use" of its famous marks. The District Court rejected both contentions.

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

From its definition of "trademark" onward, the Lanham Act views marks as source identifiers—as things that function to "indicate the source" of goods, and so to "distinguish" them from ones "manufactured or sold by others." § 1127. The cardinal sin under the law is to undermine that function. It is to confuse consumers about source—to make (some of) them think that one producer's products are another's. And that kind of confusion is most likely to arise when someone uses another's trademark as a trademark—meaning as a source identifier—rather than for some other expressive function. Nor does that result change because the use of a mark has other expressive content—*i.e.*, because it conveys some message on top of source.

"Trademark law generally prevails over the First Amendment" when "another's trademark (or a confusingly similar mark) is used without permission" as a means of "source identification." *Yankee Publishing Inc. v. News Am. Publishing Inc.*, 809 F.Supp. 267, 276 (S.D.N.Y. 1992) (LEVAL, J.). The District Court correctly held that "VIP uses its Bad Spaniels trademark and trade dress as source identifiers of its dog toy." The company represented in this suit that the mark and dress, although not registered, are used to "identify and distinguish VIP's goods" and to "indicate their source." Because that is so, the only question is whether the Bad Spaniels marks are likely to cause confusion. A trademark's expressive message, particularly a parodic one, may figure in assessing the likelihood of confusion. A parody must "conjure up" "enough of an original to make the object of its critical wit recognizable." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994). To succeed, the parody must also create contrasts, so that its message of ridicule or pointed humor comes clear. Once that is done, a parody is not often likely to create confusion. Self-deprecation is one thing; self-mockery far less ordinary. VIP's effort to ridicule Jack Daniel's may make a difference in the standard trademark analysis. We remand that issue to the courts below.

Our second question concerns Jack Daniel's claim of dilution by tarnishment (for the linkage of its whiskey to less savory substances). The Ninth Circuit dismissed that claim based on one of the Lanham Act's "exclusions" for "any noncommercial use of a mark." § 1125(c)(3)©. On

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

On infringement, we hold only that *Rogers* does not apply when the challenged use of a mark is as a mark. On dilution, we hold only that the noncommercial exclusion does not shield parody or other commentary when its use of a mark is similarly source-identifying.

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

It is so ordered.

Fair Use and Copyright

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

Chapter 5

Content-Neutral Speech Restrictions: Symbolic Speech and Public Fora

A. Symbolic Speech

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

Food for Thought

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

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

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

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

Food for Thought

Plaintiff's application for permission to build a 10,000 square foot mid-century modern style mansion in Palm Beach, Florida, is denied on the basis that it is not "in harmony" with the other mansions in the neighborhood. Plaintiff sues claiming that his modern design constitutes symbolic speech and claims that the denial constitutes an infringement of his First Amendment rights. Should a mansion's style be regarded as symbolic speech that is protected by the First Amendment? If plaintiff's architectural plans show that the mansion will be hidden behind a wall

and landscaping and is not observable from the road, does that undercut the symbolic speech argument? *See Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021).

B. Public Forum Doctrine

1. Foundational Principles

On p. 357, before the notes, add the following:

Take Note!

Public protests have been transformational In U.S. history. During the Vietnam War, students turned out in force to protest the war and the military draft. These protests influenced President Nixon to end the war and ultimately led to the end of the military draft. In 2025, there were extensive campus protests in favor of the Palestinians.

2. Restrictions on Public Forum Use

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

3. *Protests During the Pandemic*. Public forum protests were particularly difficult during the pandemic when governments restricted the ability of people to gather in public fora. *See* Conor Doughtery & John Eligon, *How to Protest When You're Ordered Not to Gather, The New York Times* B3 (Apr. 25, 2020). A silver lining is that some protestors were forced to learn how to access and utilize social media. *Id.*

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

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

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

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

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

4. *Door-to-Door Solicitation*.

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

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

Justice BARRETT delivered the opinion of the Court.

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

While he was a college student, James Freed created a private Facebook profile that he shared only with "friends." In Facebook lingo, "friends" are not necessarily confidants or even real-life acquaintances. Users become "friends" when one accepts a "friend request" from another;

after that, the two can generally see and comment on one another's posts and photos. When Freed, an avid Facebook user, began nearing the platform's 5,000-friend limit, he converted his profile to a public "page." This meant that *anyone* could see and comment on his posts. Freed chose "public figure" for his page's category, "James Freed" for its title, and "JamesRFreed1" as his username. Facebook did not require Freed to satisfy any special criteria to convert his Facebook profile to a public page or to describe himself as a public figure.

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

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

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

comments and blocking the people who made them. The District Court granted summary judgment to Freed. The Sixth Circuit affirmed. We granted certiorari.

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

Our state-action precedents have grappled with whether a nominally private person has engaged in state action for purposes of § 1983. See, *e.g.*, *Marsh v. Alabama*, 326 U.S. 501, 502 (1946) (company town); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). Today's case requires us to analyze whether a *state official* engaged in state action or functioned as a private citizen. The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. By excluding from liability "acts of officers in the ambit of their personal pursuits," the state-action requirement "protects a robust sphere of individual liberty" for those who serve as public officials or employees, *Halleck*, 587 U.S. at 808.

Freed did not relinquish his First Amendment rights when he became city manager. The "First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). This right includes the ability to speak about "information related to or learned through public employment," so long as the speech is not "itself ordinarily within the scope of [the] employee's duties." *Lane v. Franks*, 573 U.S. 228, 236 (2014). Where the right exists, "editorial control over speech and speakers on [the public employee's] properties or platforms" is part and parcel of it. *Halleck*, 587 U.S. at 816. Thus, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own. So Lindke cannot hang his hat on Freed's status as a state employee. The distinction

between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look.

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

Our precedent articulates principles that govern cases analogous to this one. A public official's social-media activity constitutes state action under § 1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first. The first prong of this test is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*." *Lugar*, 457 U.S. at 937. An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how "official" it looks—lacks the necessary lineage. *Griffin* stresses that the security guard was "possessed of state authority" and "purported to act under that authority." 378 U.S. at 135. *West* v. *Atkins* states that the "traditional definition" of state action "requires that the defendant ... have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

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

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

Determining the scope of an official's power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage. In some cases, a grant of authority over particular subject matter may reasonably encompass authority to speak about it officially. For example, state law might grant a high-ranking official like the director of the state department of transportation broad responsibility for the state highway system that, in context, includes authority to make official announcements on that subject. At the same time, courts must not rely on "excessively broad job descriptions" to conclude that a government employee is authorized to speak for the State. The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do. In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action.

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

The context of Freed's speech is hazier than that of the hypothetical school board president. Had Freed's account carried a label (*e.g.*, "this is the personal page of James R. Freed") or a disclaimer (*e.g.*, "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Speech on a "personal" page is personal (absent significant evidence indicating that a post is official).[2] Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (*e.g.*, a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (*e.g.*, an "@PHuronCityMgr" Instagram account). Freed's page, however, was not designated either "personal" or "official," raising the prospect that it was "mixed use"—a place where he made some posts in his personal capacity and others in his capacity as city manager.

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

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

The nature of the technology matters to the state-action analysis. Freed performed two actions to which Lindke objected: He deleted Lindke's comments and blocked him from

---

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

commenting again. So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.[3] A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.

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

It is so ordered.

On p. 375, before note # 7, inserr the following:

Food for Thought

A University of New Mexico policy requires organizations to reimburse the university for security costs associated with events held on campus. In determining the amount of the fee, the university considers the event's "security needs," including the size and location of the venue, the number of expected attendees, the number of entrances and exits, and the time of day and length of the event. The university indicated that if someone wanted to show the "Barbie" movie, there would be no charge as no protests would be expected. However, when Riley Gaines, a former Division 1 swimmer and an employee of the Leadership Institute, who speaks publicly about her experience competing against a transgender athlete, and advocates for the protection of women's opportunities in sports, the university estimated that the security fee would cost $10,202. The charge ended up being set at $5,385. Plaintiffs (who invited Gaines to speak and who would have to pay the fee) seek to challenge the fee on several grounds: 1) the policy does not provide how much security should be provided for different speakers; 2) the policy does not contain a schedule of charges; 3) Although the university may assess the fee, the policy does not provide guidance about when they may or may not be assessed. Does the policy give too much discretion to university administrators? *See Leadership Institute v. Stokes*, 2024 WL 4298898 (D. N.M.).

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

Food for Thought

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

In 2024, there were widespread student protests on university campuses in support of Palestinians caught in the Israel-Hamas war. As a result, many universities decided to adopt speech codes prohibiting certain types of activities: 1) a requirement that students apply for a permit at least three days prior to protesting (if students cannot wait three days, they must still fill out a "notification form" and speak to a faculty member about the proposed protest); 2) a prohibition against all overnight camping as part of permissible protests; 3) a prohibition against holding protests in certain parts of campus (one university prohibited protesting on the campus quadrangle; 4) a prohibition against speech targeting "Zionists" or "Zionism"; 5) a prohibition against protests between the hours of 9 pm and 4 am (a student who wants to silently protest during those hours holding a sign objects). Are the rules permissible under the First Amendment?

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

Food for Thought

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

On p. 377, insert the following new problem # 2, and renumber the remaining problems:

2. *Reasonable Restriction?* An ordinance limits protests at or near a city amphitheater in order to assure the safe flow of pedestrian and vehicular traffic, and thereby ensure public safety. The ordinance does create a protest zone which is in a parking lot near the facility. Protestors claim that the ordinance does not leave them with an adequate opportunity to interact with pedestrians because of its distance. How does a court go about determining whether the ordinance is constitutional and whether it leaves open adequate alternative channels of communication? *See Sides v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024).

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

Food for Thought

Outside the Bronx County Hall of Justice, plaintiff seeks to peacefully hand out pamphlets promoting the idea of jury nullification. Based on a New York law which provides that a person is

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

On p. 378, alter problem # 4 to read as follows:

4. *Funeral Protests*. The Westboro Baptist Church of Topeka, Kansas, protests at military funerals because it believes that the soldier's deaths are a "sign" of God's wrath for America's tolerance of homosexuality. In response, Kentucky adopts a statute which makes it a misdemeanor to "interfere with a funeral." In particular, the law makes it illegal to "block, impede, inhibit or obstruct" access to a building or parking lot in which a funeral, wake, memorial service, or burial is being conducted. The law also imposes a 300 foot setback requirement, and prohibits singing, chanting or whistling within earshot of such locations. The legislative findings state that "people should be allowed to attend funerals without outside stress from protestors," and "virtually every civilized society holds sacred the right to peacefully bury their dead. Does the statute qualify as a content neutral time, place and manner restriction? *See Phelps-Roper v. Ricketts*, 867 FF.3d 883 (8th Cir. 2017).

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

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

8. *Prohibiting Teacher Criticism*. A school board adopts a rule which prohibits the discussion of "personnel matters" at school board meetings. The board interprets this policy to prohibit any and all criticism or praise of teachers. Under the policy, the board refuses to let a community member talk about how particular teachers are handling LGBTQ+ and gender identity

issues. Is the meeting considered to be a "public forum?" Is the restriction considered to be content-based? What standard of review applies? *See McBreairty v. Miller*, 2023 WL 3096787 (Me.).

On p. 379, at the end of the problems, insert the following:

Food for Thought

After President Donald Trump issued an executive order targeting "gender ideology extremism," a Texas A & M University student group applied for a permit to host a drag show (Draggieland) in a university theater. Fearing that it will lose federal funding if it allows the use of university facilities for drag show events, the university rejects the application noting that the show "may be considered promotion of gender ideology in violation of the executive order." Can it be argued that Texas A & M violated the First Amendment by refusing to issue the permit? *See Texas A&M Queer Empowerment Council v. Mahomes*, --- F.Supp.3d ----2025 WL 895836 (W.D. Tex.).

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

Food for Thought

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

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

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

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

FYI

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

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

Food for Thought

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

C. Campaign Finance Laws [Online Material]

1. Modern Foundations

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

In *Thompson v. Hebdon*, 589 U.S. 1 (2019), the Court considered whether the $500 limit in Alaska was too low for individual contributions to a candidate or an "election-oriented group other than a political office." The Court noted that even though the most recent precedent regarding "a non-aggregate contribution limit" was *Randall v. Sorrell*, 548 U.S. 230 (2006), the Ninth Circuit in *Thompson* "declined to apply *Randall*" when evaluating the Alaska contribution limits. In *Randall*, the Court invalidated contribution limits in Vermont because they were too low. The 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 were not adjusted for inflation. Therefore, the Court vacated the judgment and remanded the *Thompson* case to the Ninth Circuit "to revisit" the question whether the Alaska limits are constitutional.

Chapter 6

Vagueness, Overbreadth, and Prior Restraints

A. Overbreadth & Vagueness

On p. 434, before the notes, insert the following new case:

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

Justice BARRETT delivered the opinion of the Court.

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

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

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

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

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

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

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

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

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

The terms "encourage" and "induce" are among the "most common" verbs used to denote solicitation and facilitation. *Id.*, § 13.2(a). In fact, their criminal-law usage dates back hundreds of years. 1 J. BOUVIER, LAW DICTIONARY 30 (1839). This pattern is on display in the federal criminal code, which, for over a century, has punished one who "induces" a crime as a principal. See Act of Mar. 4, 1909, § 332, 35 Stat. 1152; 18 U.S.C. § 2(a) The ban on soliciting a crime of violence penalizes those who "solicit, command, *induce*, or otherwise endeavor to persuade" another person "to engage in the unlawful conduct." § 373(a). Federal law also criminalizes "persuading, *inducing*, enticing, or coercing" one "to engage in prostitution" or other unlawful sexual activity involving interstate commerce. §§ 2422(a), (b). The Model Penal Code echoes these formulations, defining solicitation as, in relevant part, "commanding, *encouraging* or requesting another person to engage in specific unlawful conduct." MPC § 5.02(1), at 364. And the commentary to the Model Penal Code notes that similar prohibitions may employ other verbs, such as "induce." See *id.*, Comment 3, at 372. The use of both verbs to describe solicitation and facilitation is widespread in the States too. In sum, the use of "encourage" and "induce" to describe solicitation and facilitation is both longstanding and pervasive. And if 8 U.S.C. § 1324(a)(1)(A)(iv) refers to solicitation and facilitation as they are typically understood, an overbreadth challenge would be hard to sustain.

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

or speaker knows that, or recklessly disregards whether, any of her readers or listeners are undocumented." If the statute reaches the many examples that Hansen posits, its applications to protected speech might swamp its lawful applications, rendering it vulnerable to an overbreadth challenge.

We hold that clause (iv) uses "encourages or induces" in its specialized, criminal-law sense—that is, as incorporating common-law liability for solicitation and facilitation. "Encourage" and "induce" have well-established legal meanings—and when Congress "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Morissette v. United States*, 342 U.S. 246, 263 (1952). When a criminal-law term is used in a criminal-law statute, that—in and of itself—is a good clue that it takes its criminal-law meaning. And the inference is even stronger here, because clause (iv) prohibits "encouraging" and "inducing" *a violation of law*. See § 1324(a)(1)(A)(iv). That is the focus of criminal solicitation and facilitation too.

In concluding otherwise, the Ninth Circuit stacked the deck in favor of ordinary meaning. When words have several plausible definitions, context differentiates among them. Statutory history is an important part of this context. In 1885, Congress enacted a law that would become the template for clause (iv). That law prohibited "knowingly assisting, *encouraging* or soliciting" immigration under a contract to perform labor. Act of Feb. 26, 1885, ch. 164, § 3, 23 Stat. 333 (1885 Act). Then, as now, "encourage" had a specialized meaning that channeled accomplice liability. See 1 BOUVIER, LAW DICTIONARY 30 ("abet" means "to encourage or set another on to commit a crime"). And the words "assisting" and "soliciting," which appeared alongside "encouraging" in the 1885 Act, reinforce that Congress gave the word "encouraging" its narrower criminal-law meaning. See *Dubin* v. *United States*, 143 S.Ct. 1557 (2023). Unsurprisingly, when this Court upheld the 1885 Act against a constitutional challenge, it explained that Congress "has the power to punish any who *assist*" in introducing noncitizens into the country—without suggesting that the term "encouraging" altered the scope of the prohibition. *Lees v. United States*, 150 U.S. 476, 480 (1893)..

In the ensuing decades, Congress both added to and subtracted from the "encouraging" prohibition in the 1885 Act. Throughout, it continued to place "encouraging" alongside "assisting" and "soliciting." In 1917, Congress added "induce" to the string of verbs. Act of Feb. 5, 1917, § 5, 39 Stat. 879 (1917 Act) (making it a crime "to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer into the United States"). Like "encourage," the word "induce" carried solicitation and facilitation overtones at the time of this enactment. See BLACK'S LAW DICTIONARY 617 (1891). In fact, Congress had just recently used the term in a catchall prohibition on criminal facilitation. And as with "encourage," the meaning of "induce" was clarified and narrowed by its statutory neighbors in the 1917 Act—"assist" and "solicit."

Congress enacted the immediate forerunner of the modern clause (iv) in 1952 and, in doing so, simplified the language from the 1917 Act. Notably, the 1952 version dropped the words "assist" and "solicit," instead making it a crime to "willfully or knowingly encourage or induce, or attempt to encourage or induce, either directly or indirectly, the entry into the United

States of ... any alien ... not lawfully entitled to enter or reside within the United States." Immigration and Nationality Act, § 274(a)(4), 66 Stat. 229. Three decades later, Congress brought 8 U.S.C. § 1324(a)(1)(A)(iv) into its current form—still without the words "assist" or "solicit." Immigration Reform and Control Act of 1986, § 112(a), 100 Stat. 3382 (making it a crime to "encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law").

On Hansen's view, these changes dramatically broadened the scope of clause (iv)'s prohibition on encouragement. Before 1952, he says, the words "assist" and "solicit" may have cabined "encourage" and "induce," but eliminating them severed any connection the prohibition had to solicitation and facilitation. Hansen claims, the 1952 and 1986 revisions show that Congress opted to make "protected speech, not conduct, a crime." We do not agree. Hansen's argument would require us to assume that Congress took a circuitous route to convey a sweeping—and constitutionally dubious—message. In fact, the streamlined formulation mirrors this Court's own description of the 1917 Act, which is further evidence that Congress was engaged in a cleanup project, not a renovation. Critically, the terms that Congress retained ("encourage" and "induce") substantially overlap in meaning with the terms it omitted ("assist" and "solicit"). LAFAVE § 13.2(a). Clause (iv) is best understood as a continuation of the past, not a sharp break from it.

Hansen's primary counterargument is that clause (iv) is missing the necessary *mens rea* for solicitation and facilitation. Both, as traditionally understood, require that the defendant specifically intend that a particular act be carried out. "Encourages or induces," however, is not modified by any express intent requirement. Because the text of clause (iv) lacks that essential element, Hansen protests, it cannot possibly be limited to either solicitation or facilitation. Hansen ignores the longstanding history of these words. When Congress placed "encourages" and "induces" in clause (iv), the traditional intent associated with solicitation and facilitation was part of the package. That is precisely how the federal aiding-and-abetting statute works. If the words "aids or abets" in clause (v)(II) were considered in a vacuum, they could be read to cover a person who inadvertently helps another commit a § 1324(a)(1)(A) offense. But aiding and abetting implicitly carries a *mens rea* requirement—the defendant generally must *intend* to facilitate the commission of a crime. Since "encourages or induces" in clause (iv) draws on the same common-law principles, it too incorporates them implicitly.

"Encourage" and "induce," as terms of art, carry the usual attributes of solicitation and facilitation—including the traditional *mens rea*. Many criminal statutes do not require knowledge of illegality, but rather only "factual knowledge as distinguished from knowledge of the law." *Bryan v. United States*, 524 U.S. 184, 192 (1998). So Congress's choice to specify a mental state for this element tells us something that we might not normally infer, whereas the inclusion of a *mens rea* requirement for "encourages or induces" would add nothing. Section 1324(a)(1)(A)(iv) reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law. So understood, the statute does not "prohibit a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U.S. at 292. The provision encompasses a great deal of nonexpressive conduct—which does not implicate the First

Amendment at all. Consider just a few examples: smuggling noncitizens into the country, providing counterfeit immigration documents, and issuing fraudulent Social Security numbers to noncitizens, These are heartland clause (iv) prosecutions. So the "plainly legitimate sweep" of the provision is extensive. Hansen fails to identify a single prosecution for ostensibly protected expression in the 70 years since Congress enacted clause (iv)'s immediate predecessor. Instead, he offers a string of hypotheticals, all premised on expansive ordinary meanings of "encourage" and "induce." In his view, clause (iv) would punish the author of an op-ed criticizing the immigration system, "a minister who welcomes undocumented people into the congregation and expresses the community's love and support," and a government official who instructs "undocumented members of the community to shelter in place during a natural disaster." Yet none of Hansen's examples are filtered through the elements of solicitation or facilitation—the requirement that a defendant *intend* to bring about a specific result. Clause (iv) does not have the scope Hansen claims, so it does not produce the horribles he parades.

To the extent that clause (iv) reaches *any* speech, it stretches no further than speech integral to unlawful conduct.[4] "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected. We have applied this principle many times, including to the promotion of a particular piece of contraband, solicitation of unlawful employment, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), and picketing with the "sole, unlawful and immediate objective" of "inducing" a target to violate the law, *Giboney*, 336 U.S. at 502. It applies to clause (iv) too.

Hansen [recognizes] that clause (iv) criminalizes speech that solicits or facilitates a *criminal* violation, like crossing the border unlawfully or remaining in the country while subject to a removal order. But he resists the idea that the First Amendment permits Congress to *criminalize* speech that solicits or facilitates a *civil* violation—and some immigration violations are only civil. To succeed, he has to show that clause (iv)'s overbreadth is "*substantial* relative to its plainly legitimate sweep." *Williams*, 553 U.S. at 292. Even assuming that clause (iv) reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify the "strong medicine" of facial invalidation for overbreadth. As-applied challenges can take it from here.

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

It is so ordered.

---

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

Justice JACKSON, with whom Justice SOTOMAYOR joins, dissenting.

The encouragement provision's use of the terms "encourage" and "induce" seems to encompass any and all speech that merely persuades, influences, or inspires a noncitizen to come to, enter, or reside in this country in violation of law. If speech of this nature is sufficient to trigger potential prosecution, the provision would put all manner of protected speech in the Government's prosecutorial crosshairs.

The encouragement provision would punish abstract advocacy of illegal conduct, even though such speech is plainly permissible under the First Amendment. The Government argues that the statute can be saved from today's overbreadth challenge by construing the broad terms of the encouragement provision narrowly—and reading them as authorizing prosecution only for solicitation or facilitation. In the overbreadth context, the Court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." The encouragement provision is *not* susceptible to the solicitation or facilitation construction. The words "solicitation" and "facilitation" appear nowhere in the encouragement provision. The majority explains that the terms that *do* appear in the encouragement provision—"encourage" and "induce"—are often used to define "solicitation" and "facilitation." The fact that a word is used to help define another word does not necessarily mean that the former is synonymous with the latter or incorporates all of its connotations. Solicitation and facilitation require "an *intent* to bring about a particular unlawful act." But the encouragement provision simply prohibits "encouraging or inducing" a noncitizen "to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." § 1324(a)(1)(A)(iv).

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

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

Food for Thought

A public college has a policy that prohibits anyone from posting flyers with "inappropriate" or "offensive" language. Young Americans for Freedom wishes to post a pro-life flyer. Although the college allows others greater freedom to post flyers, Young Americans was allowed to post its poster only on a free speech kiosk and only for a limited time. Does the policy suffer from an unconstitutional level of vagueness? *See Flores v. Bennett*, 635 F.Supp.3d 1020 (E.D. Cal. 2022).

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

3. *President Trump's DEI Order*. In January, 2025, at the start of his second term, President Trump issued an anti-DEI order which required colleges and universities to "terminate ... 'equity-related' grants or contracts," directed all executive agencies to "include in every contract or grant award" a certification, enforceable through the False Claims Act, that the contractor and grantee "does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws," and directed the Attorney General to take "appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI," to "deter" such "programs or principles," and to "identify ... potential civil compliance investigations" to accomplish such "deterrence]." Plaintiffs, who are diversity officers at various colleges and universities, challenge the EO claiming that it is unduly vague. Is it? *See National Association of Diversity Officers in Higher Education v. Trump*, --- F.Supp.3d ----2025 WL 573764 (D. Md.).

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

Food for Thought

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

B. Prior Restraints

1. Licensing

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

Food for Thought

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

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

2. Injunctions

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

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

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

Food for Thought

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

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

Food for Thought

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

Chapter 7

Freedom of Association and Compelled Expression

A. The Right to Associate

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

Food for Thought

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

B. The Right Not to Speak

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

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

Justice Gorsuch delivered the opinion of the Court.

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

Through her business, 303 Creative LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. Her websites will provide couples with text, graphic arts, and videos to "celebrate" and "convey" the "details" of their "unique love story." The websites will discuss how the couple met, explain their backgrounds, families, and future plans, and provide information about their upcoming wedding. All of the text and graphics will be "original," "customized," and "tailored" creations. The

websites will be "expressive in nature," designed "to communicate a particular message." "The websites are Ms. Smith's original artwork," the name of the company she owns and operates by herself will be displayed on every one.

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

Ms. Smith filed a lawsuit in federal district court. She sought an injunction to prevent the State from forcing her to create wedding websites celebrating marriages that defy her beliefs. Ms. Smith first had to establish her standing to sue. That required her to show "a credible threat" existed that Colorado would seek to compel speech from her that she did not wish to produce. *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149 (2014). Ms. Smith [directed] the court to the Colorado Anti-Discrimination Act (CADA). That law defines a "public accommodation broadly to include almost every public-facing business in the State. Colo. Rev. Stat. §24–34–601(1) (2022). In its "Accommodation Clause," the law prohibits a public accommodation from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. Either state officials or private citizens may bring actions to enforce the law. Courts can order fines up to $500 per violation. The Colorado Commission on Civil Rights can issue cease-and-desist orders, and require violators to take various other "affirmative actions." In the past, these have included participation in mandatory educational programs and the submission of ongoing compliance reports to state officials. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___ (2018) (slip op., at 8).[5] Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse. Ms. Smith pointed to Colorado's record of past enforcement actions under CADA, including one that worked its way to this Court five years ago. See *Masterpiece Cakeshop*, 584 U. S., at ___ (slip op., at 9).

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

Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," and she "will gladly create custom graphics and websites" for clients of any sexual orientation. She will not produce content that "contradicts biblical truth" regardless of who orders it. Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction. All of the graphic and website design services Ms. Smith provides are "expressive." The websites and graphics Ms. Smith designs are "original, customized" creations that "contribute] to the overal messages" her business conveys "through the websites" it creates. Just like the other services she provides, the wedding websites Ms. Smith plans to create "will be expressive in nature." Those wedding websites will be "customized and tailored" through close collaboration with individual couples, and they will "express Ms. Smith's and 303 Creative's message celebrating and promoting" her view of marriage. Viewers of Ms. Smith's websites "will know that the websites are Ms. Smith's and 303 Creative's original artwork." To the extent Ms. Smith may not be able to provide certain services to a potential customer, "there are numerous companies in the State of Colorado and across the nation that offer custom website design services." Ultimately, the district court ruled against Ms. Smith. So did the Tenth Circuit.

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

From time to time, governments in this country have sought to test these foundational principles. In *Barnette*, for example, the Court faced an effort by the State of West Virginia to force schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance. If students refused, the State threatened to expel them and fine or jail their parents. Some families objected on the ground that the State sought to compel their children to express views at odds with their faith as Jehovah's Witnesses. In seeking to compel students to salute the flag and recite a pledge, the Court held, state authorities had "transcended constitutional limitations on their powers." Their dictates "invaded the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control." A similar story unfolded in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995). There, veterans organizing a St. Patrick's Day parade in Boston refused to include a group of gay, lesbian, and bisexual individuals. The group argued that Massachusetts's public accommodations statute entitled it to participate in the parade. Lower courts agreed. But this Court reversed. The parade was constitutionally protected speech and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their

parade." The veterans' choice of what to say (and not say) might have been unpopular, but they had a First Amendment right to present their message undiluted by views they did not share. [In] *Boy Scouts of America* v. *Dale*, the Boy Scouts excluded James Dale, an assistant scoutmaster, from membership after learning he was gay. Mr. Dale argued that New Jersey's public accommodations law required the Scouts to reinstate him. The New Jersey Supreme Court sided with Mr. Dale, but again this Court reversed. The decision to exclude Mr. Dale may not have implicated pure speech, but this Court held that the Boy Scouts "is an expressive association" entitled to First Amendment protection. Forcing the Scouts to include Mr. Dale would "interfere with its choice not to propound a point of view contrary to its beliefs."

As these cases illustrate, the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," and likely to cause "anguish" or "incalculable grief," *Snyder* v. *Phelps*, 562 U. S. 443, 456 (2011). Equally, the First Amendment protects acts of expressive association. Generally, the government may not compel a person to speak its own preferred messages. See *Wooley* v. *Maynard*, 430 U. S. 705 (1977); *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ___ (2018) (*NIFLA*) (slip op., at 8). Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. See *Hurley,* 515 U. S., at 568. All that offends the First Amendment just the same.

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

As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide. If Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to "force her to create custom websites" celebrating other marriages she does not. The coercive "elimination" of dissenting "ideas" about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith.

While [the Tenth Circuit] thought Colorado could compel speech from Ms. Smith consistent with the Constitution, our First Amendment precedents teach otherwise. In *Hurley*, the Court found that Massachusetts impermissibly compelled speech in violation of the First Amendment when it sought to force parade organizers to accept participants who would "affect their message." In *Dale*, the Court held that New Jersey intruded on the Boy Scouts' First Amendment rights when it tried to require the group to "propound a point of view contrary to its beliefs" by directing its membership choices. In *Barnette*, this Court found impermissible coercion when West Virginia required schoolchildren to recite a pledge that contravened their convictions on threat of punishment or expulsion. Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in "remedial training," filing periodic compliance reports as officials deem necessary, and paying monetary fines. Under our precedents, that is more than enough to represent an impermissible abridgment of the First Amendment's right to speak freely.

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

This Court has recognized that governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984). Public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 250 (1964). Over time, governments in this country have expanded public accommodations laws. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees. Some States, Colorado included, have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public. States have also expanded their laws to prohibit more forms of discrimination. Today, approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation. This is "unexceptional." States may "protect gay persons, just as they can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and

conditions as are offered to other members of the public. Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses.

Public accommodations statutes can sweep too broadly when deployed to compel speech. In *Hurley*, the Court commented favorably on Massachusetts' public accommodations law, but made plain it could not be "applied to expressive activity" to compel speech. In *Dale*, the Court observed that New Jersey's public accommodations law had many lawful applications but held that it could "not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." When a state public accommodations law and the Constitution collide, there can be no question which must prevail. U. S. Const., Art. VI, cl. 2. Nor is it any answer Ms. Smith's services are "unique." Her voice is unique. But that hardly means a State may coopt an individual's voice for its own purposes. In *Hurley*, the veterans had an "enviable" outlet for speech; their parade was a notable and singular event. In *Dale*, the Boy Scouts offered what some might consider a unique experience. But in both cases the State could not use its public accommodations statute to deny speakers the right "to choose the content of their own messages." Were the rule otherwise, the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government's preferred messages. That would not respect the First Amendment.

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

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

Ms. Smith refuses, the State insists, because she objects to the "protected characteristics" of certain customers. But the parties agree that Ms. Smith "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites" do not violate her beliefs. That is a condition Ms. Smith applies to "all customers." Ms. Smith stresses that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments. Nor do First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive. See *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977); *Snyder*, 562 U. S., at 456.[3]

Much of [the dissent] focuses on the evolution of public accommodations laws, and the strides gay Americans have made towards securing equal justice under law. The dissent claims that Colorado wishes to regulate Ms. Smith's "conduct," not her speech. The dissent suggests that any burden on speech here is "incidental." All despite the Tenth Circuit's finding that Colorado intends to force Ms. Smith to convey a message she does not believe. [The dissent] claims that, "for the first time in its history," the Court "grants a business open to the public" a "right to refuse to serve members of a protected class." We do no such thing and Ms. Smith will (as CADA requires) "work with all people regardless of sexual orientation." The dissent would have this Court do something truly novel by allowing a government to coerce an individual to speak contrary to her beliefs on a significant issue of personal conviction, all in order to eliminate ideas that differ from its own. The dissent even suggests that our decision is akin to endorsing a "separate but equal" regime that would allow law firms to refuse women admission into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a "White Applicants Only" sign. Pure fiction. Instead of addressing the parties' stipulations, the dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment. Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve "pure speech." If anything is truly dispiriting, it is the dissent's failure to take seriously this Court's enduring commitment to protecting the speech rights of all comers, no matter how controversial—or even repugnant—many may find the message at hand.

Eighty years ago in *Barnette*, this Court affirmed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." The Court did so despite the fact that the speech rights it defended were deeply unpopular; at the time, the world was at war and many thought respect for the flag and the pledge "essential for the

[3] The dissent labels ignores a fundamental feature of the Free Speech Clause. While it does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message—even when we may disapprove of the speaker's motive or the message itself.

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

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

Reversed.

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

A public accommodations law regulates only businesses that choose to sell goods or services "to the general public." The law does not compel any business to sell any particular good or service. But if a business chooses to profit from the public market, established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination. The state may ensure that groups historically marked for second-class status are not denied goods or services on equal terms.

Businesses and other commercial entities have claimed constitutional rights to discriminate. Time and again, this Court has courageously stood up to those claims—until today. The business is free to include, or not to include, any lawful message it wants in its wedding websites. The only thing the business may not do is deny whatever websites it offers on the basis of sexual orientation. This Court grants the business a broad exemption from state law and allows the business to post a notice that says: Wedding websites will be refused to gays and lesbians. The First Amendment does not entitle petitioners to an exemption from a state law that simply requires them to serve all members of the public on equal terms.

A public accommodations law like the Accommodation Clause does not "target speech or discriminate on the basis of its content." *Hurley*, 515 U. S., at 572. The law applies only to status-based refusals to provide the full and equal enjoyment of whatever services petitioners choose to sell to the public. Colorado does not require the company to "speak the State's preferred message." Nor does it prohibit the company from speaking the company's preferred message. The company could offer only wedding websites with biblical quotations describing marriage as between one man and one woman. All the company has to do is offer its services without regard to customers' protected characteristics. Any effect on the company's speech is therefore "incidental" to the State's content-neutral regulation of conduct. Petitioners remain free to advocate the idea that same-sex marriage betrays God's laws. All the company may not do is offer wedding websites to the public yet refuse those same websites to gay and lesbian couples.

Because any burden on petitioners' speech is incidental to CADA's neutral regulation of commercial conduct, the regulation is subject to the standard set forth in *O'Brien*. That standard is easily satisfied because the law's application "promotes a substantial government interest that would be achieved less effectively absent the regulation." The State's goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is "unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Roberts*, 468 U. S., at 624. Because Colorado seeks to apply CADA only to the refusal to provide same-sex couples the full and equal enjoyment of the company's publicly available services, so that the company's speech "is only 'compelled' if, and to the extent," the company chooses to offer "such speech" to the public, any burden on speech is "plainly incidental" to a content-neutral regulation of conduct.

Petitioners "cannot define their service as 'opposite-sex wedding websites' any more than a hotel can recast its services as 'whites-only lodgings.' " To allow a business open to the public to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws.

A law requiring public-facing businesses to accept all comers "is textbook viewpoint neutral," contrary to the fact that the Accommodation Clause allows Smith to include in her company's goods and services whatever "dissenting views about marriage" she wants, and contrary to this Court's clear holdings that the purpose of a public accommodations law, as applied to the commercial act of discrimination in the sale of publicly available goods and services, is to ensure equal access to and equal dignity in the public marketplace. Requiring Smith's company to abide by a law against invidious discrimination in commercial sales to the public does not conscript her into espousing the government's message. All it does is require her to stick to her bargain: "The owner who hangs a shingle and offers her services to the public cannot retreat from the promise of open service.

The immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. The decision inflicts a stigmatic harm, on top of any harm caused by denials of service. All members of the public are entitled to inhabit public spaces on equal terms. These are the most profound moments in a human's life. They are the moments that give that life personal and cultural meaning. The lesson of the history of public accommodations laws is that in a free and democratic society, there can be no social castes.

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

2. *DEI Training*. Suppose that a school district issues an official policy requiring all employees to be "equity champions," and to be "anti-racist educators." Under the policy, anyone who believes in "colorblindness" and "equality generally," but who does not subscribe to being an "equity champion" or being "anti-racist" is deemed to be a white supremacist. At the district's DEI training, attendees were warned that they "had to own their privilege if they were white and needed to advocate for political, social, and economic change," and that it was their duty to teach students to vote for socialists because "parent aren't always correct." Would school teachers have standing to challenge the policy if no adverse action has been taken against them? What if the employees are reprimanded or otherwise disciplined for dissenting views? *See Henderson v. School District of Springfield No. 12*, 116 F.4th 804 (8th Cir. 2024).

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

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

Chapter 8

The Government as Employer, Educator, and Source of Funds

A. First Amendment Rights of Public Employees

1. Prohibiting Electioneering

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

Food for Thought

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

2. Other Employee Speech

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

Food for Thought

Suppose that teachers at a high school oppose the school's policies on pronoun use (requiring teachers to refer to students by their preferred pronouns), and its bathroom policy (which allows students to use the bathroom associated with their chosen gender). Do the teachers have a First Amendment right to refuse to refer to students by their preferred pronouns? *See Damiano v. Grants Pass School District*, 2023 WL 2687259 (D. Or.). Would you view the situation differently if the teachers used school resources and work time to create a YouTube video and other social media urging the public to oppose the policies, and the district received 150 complaints regarding the videos? Would it matter that the school allowed other teachers to produce videos expressing their views on matters such as "Black Lives Matter?"

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

4. *The Psychiatrist and Gender-Affirming Care*. A psychiatrist who worked at the University of Louisville School of Medicine gave a speech about gender dysphoria in children at the Heritage Foundation. In that speech, he suggested that the condition is a "socio-cultural, psychological phenomenon that cannot be fully addressed with drugs and surgery. Afterwards, the University demoted him from his position as chair of the psychiatry department and eventually terminated him. The U.S. Court of Appeals for the Sixth Circuit rejected the University's qualified immunity claim, and the University ultimately settled with the psychiatrist for $1.6 million. *See Josphson v. Ganzel*, 114 F.4th 771(6th Cir. 2024).

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

Food for Thought

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

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

Food for Thought

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

On p. 547, replace problem # 5 with the following problem:

5. *Political Statements*. ? A public school teacher posted various pro-Trump political messages on Facebook. Some of the posts attacked opponents of Donald Trump, especially Bernie Sanders, and included a comment about a Sanders essay entitled "Rape Fantasies." He also encouraged incarceration of a Trump opponent, questioned whether bathroom policies should extend to transgender students, and discussed Sanders' discussions of child abuse and sex abuse. However, the posts had no connection to his school and were posted outside of work hours on his own computer. Can the teacher be disciplined for the posts? Can the posts be regarded as relating to a matter of public interest? *See Caggiano v. Duval County School Board*, --- So.3d ----, 2025 WL 568466 (Fl. App. 2025).

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

Food for Thought

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

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

Food for Thought

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

Food for Thought

During an internal investigation of a school district's finances, an employee who managed the district's HVAC systems raised questions regarding whether the superintendent of schools had misused funds. The district had required the employee to cooperate with the investigation. Following the completion of the investigation, the employee's statements were revealed to members of the district's board. Even though the employee had never been disciplined, and had always received positive performance evaluations, he was dismissed from his job. If the employee

made the statements as part of his job responsibilities (e.g., cooperating with the internal investigation as required), was the dismissal constitutionally appropriate? *See Hawkland v. Hall*, 860 Fed.Appx. 326 (5th Cir. 2021).

On p. 559, replace problem # 2 with the following:

2. *The Officer's Facebook Statements*. Following the death of George Floyd in Minneapolis, a Cambridge, Massachusetts, police officer made the following post on his personal Facebook page: "This is what it's come to 'honoring' a career criminal, a thief and druggie ... the future of this country is bleak at best." Was the officer speaking on a matter of public interest? Under *Pickering*, does the department have the right to discipline him? *See Hussey v. City of Cambridge*, 720 F.Supp.3d 41 (1st Cir. 2024).

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

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

9. *The Confederate Flag*. A police officer, who is authorized to take her police car home in the evenings, displays the Confederate Battle Flag outside of her home. When the police chief learns about the display, he fires her. The officer sues, claiming a violation of her First Amendment rights. The chief responds that he has tried hard to foster positive relations with the black community, especially given racial tensions between the community and the police department. Does the display constitute an adequate basis for firing the officer? *See Cortiss v. City of Roswell*, 2022 WL 2345729 (11th Cir. 2022).

3. Associational Rights

B. The First Amendment in the Public Schools

On p. 574, before the notes, add the following:

Food for Thought

A Florida statute defines "sex" to mean "the classification of a person as either female or male based on the organization of his body for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth." The law prohibits teachers from providing their preferred pronouns or titles if they do not correspond to his or her sex (as defined under the Florida law).The state seeks to justify the law on the basis that it has the right to control teacher speech in the presence of children in the classroom. A transgender teacher wants to list female pronouns even though she was born male. Can Florida prohibit her from using her preferred pronouns or from referring to herself as "Ms" or Mrs"? *See Wood v. Florida Department of Education*, 729 F.Supp.3d 1255 (N.D. Fl. 2024).

On p. 578, before the problems, add the following:

Food for Thought

N. Hampshire enacts a law prohibiting the teaching of DEI in public schools. The law prohibits instruction which suggests that any individual, by virtue of their personal characteristics such as race, sex, age, or gender identity, is "inherently racist, sexist, or oppressive, whether consciously or unconsciously." Suppose that a teacher wants to incorporate critical race theory concepts into his courses. Consistently with the First Amendment, can N.H. prohibit the teacher from doing so?

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

2. *Book Bans*. Do school libraries have the authority to remove books from their collections that they deem unsuitable for their school-age patrons? Might school districts have a legitimate interest in restricting access to books depicting sexual activity or that involve pornography? What about books that depict LGBTQ activity? May school boards be involved in reviewing the collections and demanding the removal of particular books? Does the age of the children matter? For example, might the librarians and the school districts have greater authority when the children are in elementary school? What if they are teenagers? *See Crookshanks v. Elizabeth School District*, 2025 WL 1000774 (D. Colo). *GLBT Youth in Iowa Schools v. Reynolds,* 700 F.Supp.3d 664 (8th Cir. 2024); *PEN American Center, Inc. v. Escambia County School District*, 711 F.Supp.3d 1325 (N.D. Fla.).

3. *Sex Ratings for Books*. Could a state require book sellers to assign sex-content ratings for books sold to public schools? Suppose that the state requires sellers to rate the books as "sexually explicit," "sexually relevant" or "no rating." The goal is to provide school districts with information about the books they purchase. Is the law permissible under the First Amendment? Does the law constitute constitutionally impermissible compelled speech? *See Book People Inc. v. Wong*, 91 F.4th 318 (5th Cir. 2024).

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

Food for Thought

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

On p. 580, at the end of current problem # 8, add the following:

During an elementary school's "Wear a Hat Day," a third grader wore an AR-15 hat. May school officials require the student to remove the hat? Does it matter that the school is a "gun free zone?" That a deadly school shooting occurred three months earlier at a nearby school? *See C.S. v. McCrumb*, --- F.4th ---- 2025 WL 1276036 (6th Cir. 2025).

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

Food for Thought

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

C. Government-Financed Speech

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

Food for Thought

The State of Texas allows private entities to erect holiday displays at the state capitol with the permission of a state board. Pursuant to that policy, Texas allows a Christian group to set-up a traditional nativity scene. However, when the Freedom From Religion Foundation seeks to establish a "Bill of Rights manger," the request is refused. The nativity scene would contain cutouts of Benjamin Franklin, Thomas Jefferson, George Washington, and the Statue of Liberty, and would contain the sign "Keep State and Church Separate/On behalf of Texas members of the Freedom from Religion Foundation." Under the First Amendment, could Texas allow the Christian nativity scene but prohibit the Bill of Rights manger? Can the exclusion be justified on the theory that the displays involve government speech? Can it discriminate between religious and non-religious displays? *See Freedom From Religion Foundation v. Abbott,* 58 F.4th 824 (W.D. Tex. 2024).

Chapter 9

The Press

A. Does the Constitution Grant the Press a Privileged Position

On p. 626, before subsection B, insert the following:

Food for Thought

Historically, the White House has given a small rotating pool of media outlets special access to cover the President's day-to-day activities. Purportedly, after the Associated Press (AP) refused to rename the "Gulf of Mexico" as the "Gulf of America," President Trump removed the AP from the rotating pool. Was the President's action consistent with the First Amendment? If, instead of removing the AP because of its refusal to use the President's terminology, President Trump had simply decided to open up access to non-traditional news outlets, such as internet based podcasts and bloggers, would the removal be permissible? *See Associated Press v. Budowich*, -- F.Supp.3d —, 2025 WL 1039572 (D.C. Cir. 2025).

C. Access to Judicial Proceedings

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

Note: Release of Court Records

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

Food for Thought

A Texas law makes it illegal for an individual to solicit information for personal benefit non-public information from a public servant. Suppose that a journalist is conducting an investigation regarding a car crash involving a man who committed suicide. During her investigation, she asks a police officer the names of the people involved in the crash and the suicide. Does the First Amendment protect her request? Can she be prosecuted under the Texas

law for soliciting information that is not yet public? *See Villareal v. City of Laredo*, 44 F.4th 363 (5th Cir. 2022).

E. The Press and Due Process

2. Gag Orders

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

1. *The Trump Gag Orders*. In 2024, as former President Donald Trump was being subjected to multiple civil and criminal prosecutions, courts began issuing gag orders against him. Citing fears of violence, these orders prohibited Trump from making "disparaging and inflammatory or intimidating" public statements about witnesses, the jury pool, the judge, the prosecutors, or court employees and their families. Is the order overbroad? Is it appropriate to limit the speech of a party's presumptive presidential candidate's speech during election season, especially when he is arguing that the prosecution is politically motivated? Is your conclusion affected by the fact that one prosecutor received "intimidating communications" after Trump spoke about him, and a judge received a death threat. Was the order properly tailored? Can the gag order extend to social media communications? The gag order was replaced right before the presidential debate with a revised order that allowed Trump to criticize the criminal proceedings, but prohibited him from revealing the identity of the jurors.

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

Chapter 10

Electronic Media and the First Amendment

B. Post-Broadcasting Technology

On p. 723, at the bottom of the page, insert the following:

Note: Age Verification

In *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. ----, 2025 WL 1773625 (2025), the Court returned to the question of age verification. Texas enacted a law that required commercial websites that publish sexually explicit content to verify the age of their visitors. In upholding the law, the Court noted that the law furthered the lawful end of preventing children from accessing sexually explicit content. Although the law also burdened adults who might want to access some of the content, and who would also have to provide age verification, the Court emphasized that many states require age verification to obtain alcohol, tobacco, a lottery ticket; a tattoo, a body piercing, fireworks, and a driver's license. The Court ultimately held that Texas could require age verification based on its authority to prevent children from accessing sexually explicit content. Although the law might burden the ability of adults to view sexually explicit content, the Court applied intermediate scrutiny and held that the requirement did not unduly burden the ability of adults to visit the websites.

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

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

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

TikTok v. Garland

TikTok Inc. v. Garland, 604 U.S. ----, 145 S.Ct. 57 (2025), involved national security issues. In that case, Congress required that TikTok (an app which allows users to create and post short videos) be severed from the control of ByteDance Ltd., or it would be forced to cease operations in the U.S. At the time, TikTok was an American company that was owned by ByteDance Ltd., a privately held Chinese company. The law was challenged by TikTok as well as by users and content creators on the platform. The government sought to support the law on

national security grounds, claiming that TikTok can access "any data stored in the user's contact list," including names, contact information, contact photos, job titles. Access to such detailed information about U. S. users, the Government worried, may enable "China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage." Moreover, Chinese law required ByteDance to surrender data to the Chinese government, "making companies headquartered there an espionage tool" of China. Since the Act did not limit the free speech rights of those who post videos on TikTok, in that they could post elsewhere, the real impact of the Act was to require ByteDance to divest. The Court treated the law as content-neutral, applied intermediate scrutiny, and upheld the law. The Court applied intermediate scrutiny, and held that the government interest in preventing China—a designated foreign adversary—from leveraging its control over ByteDance Ltd. to capture the personal data of U.S. TikTok users qualified as an important Government interest. In addition, the Court deferred to Congress' conclusion that there was a sufficient probability that China would compel TikTok to turn over user data for intelligence-gathering purposes, and the Court held that the Act was sufficiently tailored to address the Government's interest in preventing a foreign adversary from collecting vast swaths of sensitive data about the 170 million U. S. persons who use TikTok.

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

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

Food for Thought

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

platforms must determine whether their algorithms invade privacy or cause other harms. Are these various laws constitutional?

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

Moody v. Netchoice, LLC
603 U.S. 707 (2024).

Justice Kagan delivered the opinion of the Court.*

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

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

We consider whether two state laws regulating social-media platforms and other websites facially violate the First Amendment. The laws, from Florida and Texas, restrict the ability of social-media platforms to control whether and how third-party posts are presented to users. The laws limit the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post. In addition, the laws require a platform to provide an individualized explanation to a user if it removes or alters her posts. NetChoice, an internet trade association, challenged both laws on their face. The Court of Appeals

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

for the Eleventh Circuit upheld an injunction, finding that the Florida law was not likely to survive First Amendment review. The Court of Appeals for the Fifth Circuit reversed a similar injunction, reasoning that the Texas law does not regulate speech and does not implicate the First Amendment. We vacate both decisions. The parties mainly argued these cases as if the laws applied only to the curated feeds offered by the largest and most paradigmatic social-media platforms—as if, say, each case presented an as-applied challenge brought by Facebook protesting its loss of control over the content of its News Feed. But argument revealed that the laws might apply to, and differently affect, other kinds of websites and apps. In a facial challenge, that could matter. The question is whether a law's unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other. Neither court performed that necessary inquiry.

The record indicates that the Texas law does regulate speech when applied to prevent Facebook (or YouTube) from using its content-moderation standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. The law—in that application—is unlikely to withstand First Amendment scrutiny. Texas justified the law as necessary to balance the mix of speech on Facebook's News Feed and similar platforms; and Texas officials passed it because they thought those feeds skewed against politically conservative voices. But it is no job for government to decide what counts as the right balance of private expression—to "un-bias" what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others. In sum, there is much work to do below on both these cases, given the facial nature of NetChoice's challenges.

I

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

In 2021, Florida and Texas enacted statutes regulating internet platforms, including the large social-media companies. The States' laws differ in the entities they cover and the activities they limit. But both contain content-moderation provisions, restricting covered platforms' choices about whether and how to display usergenerated content to the public. Both include individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices. Florida's law regulates "social media platforms" that have annual gross revenue of over $100 million or more than 100 million monthly active users. Fla. Stat. § 501.2041(1)(g) (2023). The statute restricts varied ways of "censoring" or otherwise disfavoring posts—including deleting, altering, labeling, or deprioritizing them—based on their content or source. For example, the law prohibits a platform from taking those actions against "a journalistic enterprise based on the content of its publication or broadcast." Similarly, the law prevents deprioritizing posts by or about political candidates. And the law requires platforms to apply their content-moderation practices to users "in a consistent manner." In addition, the Florida law mandates that a platform provide an explanation to a user any time it removes or alters any of her posts. The requisite notice must be delivered within seven days, and contain both a "thorough rationale" for the action and an account of how the platform became aware of the targeted material. The Texas law regulates any social-media platform, having over 50 million monthly active users, that allows its users "to communicate with other users for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code Ann. §§ 120.001(1), 120.002(b) (West Cum. Supp. 2023). With several exceptions, the statute prevents platforms from "censoring" a user or a user's expression based on viewpoint. That ban on "censoring" covers any action to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." The statute also requires that "concurrently with the removal" of user content, the platform shall "notify the user" and "explain the reason the content was removed." The user gets a right of appeal, and the platform must address an appeal within 14 days.

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

II

NetChoice chose to litigate these cases as facial challenges. Courts usually handle constitutional claims case by case. See *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442 (2008). "Claims of facial invalidity often rest on speculation" about the law's coverage and its future enforcement. And "facial challenges threaten to short circuit the democratic process" by preventing duly enacted laws from being implemented in constitutional ways. This Court has therefore made facial challenges hard to win. That is true even when a facial suit is based on the First Amendment, although then a different standard applies. In other cases, a plaintiff cannot succeed on a facial challenge unless he "establishes that no set of circumstances exists under which the law would be valid," or he shows that the law lacks a "plainly legitimate sweep."

United States v. *Salerno*, 481 U. S. 739, 745 (1987). In First Amendment cases, this Court has lowered that very high bar. To "provide breathing room for free expression," we have substituted a less demanding though still rigorous standard. *United States* v. *Hansen*, 599 U. S. 762 (2023). The question is whether "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Americans for Prosperity Foundation* v. *Bonta*, 594 U. S. 595, 615 (2021). In this context, even a law with "a plainly legitimate sweep" may be struck down in its entirety. But that is so only if the law's unconstitutional applications substantially outweigh its constitutional ones.

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

The first step in the proper facial analysis is to assess the state laws' scope. The laws differ. But both appear to apply beyond Facebook's News Feed and its ilk. Starting with Facebook and the other giants: To what extent, if at all, do the laws affect their other services, like direct messaging or events management? Beyond those social-media entities, what do the laws have to say about how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends' financial exchanges, or how a ride-sharing service like Uber runs? The online world is variegated and complex, encompassing an ever-growing number of apps, services, functionalities, and methods for communication and connection. Each might have to change because of the provisions, as to either content moderation or individualized explanation, in Florida's or Texas's law. Before a court can do anything with these facial challenges, it must "determine what [the law] covers." *Hansen*, 599 U. S., at 770.

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

Neither the Eleventh Circuit nor the Fifth Circuit performed the facial analysis in the way just described. The parties have not briefed the critical issues, and the record is underdeveloped. So we vacate the decisions below and remand these cases. That will enable the lower courts to consider the scope of the laws' applications, and weigh the unconstitutional as against the constitutional ones.

III

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

A

Despite the novelty of the technology, the problem in this case—and the inquiry it calls for—is not new. Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay. The platforms object that the law thus forces them to alter the content of their expression—a particular edited compilation of third-party speech. We have repeatedly faced the question whether ordering a party to provide a forum for someone else's views implicates the First Amendment. We have repeatedly held that it does so if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. So too we have held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others.

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

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

B

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

Most readers are familiar with Facebook's News Feed or YouTube's homepage. Each of those feeds presents a user with a continually updating stream of other users' posts. For Facebook's News Feed, any user may upload a message, whether verbal or visual, with content running the

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

Beyond rankings lie labels. The platforms may attach "warnings, disclaimers, or general commentary"—for example, informing users that certain content has "not been verified by official sources." Likewise, they may use "information panels" to give users "context on content relating to topics and news prone to misinformation, as well as context about who submitted the content." For example, YouTube identifies content submitted by state-supported media channels, including those funded by the Russian Government. But sometimes, the platforms decide, providing more information is not enough; instead, removing a post is the right course. The platforms' content-moderation policies also say when that is so. Facebook's Standards proscribe posts—with exceptions for "newsworthiness" and other "public interest value"—in categories and subcategories including: Violence and Criminal Behavior (*e.g.*, violence and incitement, coordinating harm and publicizing crime, fraud and deception); Safety (*e.g.*, suicide and self-injury, sexual exploitation, bullying and harassment); Objectionable Content (*e.g.*, hate speech, violent and graphic content); Integrity and Authenticity (*e.g.*, false news, manipulated media). YouTube's Guidelines similarly target videos falling within categories like: hate speech, violent or graphic content, child safety, and misinformation (including about elections and vaccines). The platforms thus unabashedly control the content that will appear to users, exercising authority to remove, label or demote messages they disfavor.[6]

Texas's law limits their power to do so. The law's central provision prohibits the large social-media platforms (and maybe other entities) from "censoring" a "user's expression" based on its "viewpoint." The law defines "expression" broadly, thus including pretty much anything that might be posted. It defines "censor" to mean "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression."

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

§ 143A.001(1).[8] The platforms cannot do any of the things they typically do (on their main feeds) to posts they disapprove—cannot demote, label, or remove them—whenever the action is based on the post's viewpoint.[9] Doubtless some of the platforms' content-moderation practices are based on characteristics of speech other than viewpoint (*e.g.*, subject matter). But if Texas's law is enforced, the platforms could not—as they do now—disfavor posts because they: support Nazi ideology; advocate for terrorism; espouse racism, Islamophobia, or anti-Semitism; glorify rape or other gender-based violence; encourage teenage suicide and self-injury; discourage the use of vaccines; advise phony treatments for diseases; advance false claims of election fraud. Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey.

We have held that type of regulation to interfere with protected speech. Like the editors, cable operators, and parade organizers, the major social-media platforms are in the business, when curating their feeds, of combining "multifarious voices" to create a distinctive expressive offering. The individual messages may originate with third parties, but the larger offering is the platform's. It is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). In the aggregate they give the feed a particular expressive quality. Consider again an opinion page editor, as in *Tornillo*, who wants to publish a variety of views, but thinks some things off-limits (or worth only a couple of column inches). "The choice of material," the "decisions made [as to] content," the "treatment of public issues"—"whether fair or unfair"—all these "constitute the exercise of editorial control and judgment." *Tornillo*, 418 U. S., at 258. For a paper, and for a platform. The Texas law targets those expressive choices—by forcing the major platforms to present and promote content on their feeds that they regard as objectionable.

That those platforms happily convey the lion's share of posts submitted to them makes no significant First Amendment difference. To begin with, Facebook and YouTube exclude (not to mention, label or demote) lots of content from their News Feed and homepage. The Community Standards and Community Guidelines set out in copious detail the varied kinds of speech the platforms want no truck with. In a single quarter of 2021, Facebook removed from its News Feed more than 25 million pieces of "hate speech content" and almost 9 million pieces of "bullying and harassment content." YouTube deleted in one quarter more than 6 million videos violating its Guidelines. Among those are the removals the Texas law targets. This Court has rightly declined to focus on the ratio of rejected to accepted content. That Facebook and YouTube convey a mass of messages does not license Texas to prohibit them from deleting posts with, say, "hate speech"

---

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

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

based on "sexual orientation." It is as much an editorial choice to convey all speech except in select categories as to convey only speech within them.

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

C

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

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

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

actors in order to achieve its own conception of speech nirvana. The government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley* v. *Valeo*, 424 U. S. 1, 48 (1976) (*per curiam*). That interest is not "unrelated to the suppression of free expression," and the government may not pursue it consistent with the First Amendment.

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

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

IV

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

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

20. To give government that power is to enable it to control the expression of ideas, promoting those it favors and suppressing those it does not. That is what the First Amendment protects us from.

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

It is so ordered.

Justice Barrett, concurring.

A function qualifies for First Amendment protection only if it is inherently expressive. Platforms use algorithms to prioritize and remove content on their feeds. Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop. The algorithm would simply implement human beings' inherently expressive choice "to exclude a message [they] did not like from" their speech compilation. But what if a platform's algorithm just presents automatically to each user whatever the algorithm thinks the user will like—*e.g.*, content similar to posts with which the user previously engaged? The First Amendment implications of the Florida and Texas laws might be different for that kind of algorithm. What if a platform's owners hand the reins to an AI tool and ask it simply to remove "hateful" content? If the AI relies on large language models to determine what is "hateful" and should be removed, has a human being with First Amendment rights made an inherently expressive "choice ... not to propound a particular point of view"? In other words, technology may attenuate the connection between content-moderation *actions* (*e.g.*, removing posts) and human beings' constitutionally protected right to "*decide for [themselves]* the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641 (1994). The way platforms use this sort of technology might have constitutional significance. While the governing constitutional principles are straightforward, applying them in one fell swoop to the entire social-media universe is not.

Justice Jackson, concurring.

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

Justice Thomas, concurring in the judgment.

The Court's approach is unwarranted and mistaken. The common-carrier doctrine should continue to guide the lower courts' examination of the trade associations' claims on remand. "Our legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers." *Biden* v. *Knight First Amendment Institute at Columbia Univ.*, 593 U. S. ___ (2021) (Thomas, J., concurring in grant of certiorari) (slip op., at 3). Moreover, "there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers" given their many similarities.

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

NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Given the incompleteness of this record, there is no need and no reason to decide anything other than the facial unconstitutionality question. The famous Oxford Book of English Poetry illustrates why a compilation may constitute expression on the part of the compiler. The editors' selection of the poems included in this volume expresses their view about the poets and poems that most deserve the attention of their anticipated readers. Forcing the editors to exclude or include a poem could alter the expression that the editors wish to convey. Not all compilations have this expressive characteristic. Because not all compilers express a message of their own, not all compilations are protected by the First Amendment. The First Amendment protects only those compilations that are "inherently expressive" in their own right, meaning that they select and present speech created by other persons in order "to spread [the compiler's] own message." *FAIR*, 547 U. S., at 66. A claimant must establish that its practice is to exercise "editorial discretion in the selection and presentation" of the content it hosts. *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666 (1998). The host must use the compilation of speech to express "some sort of collective point"—even if only at a fairly abstract level. Thus, a parade organizer who claims a First Amendment right to exclude certain groups or individuals would need to show at least that the message conveyed by the groups or individuals who are allowed to march comport with the parade's theme. A parade comprising "unrelated segments" that lumber along together willy-nilly would likely not express anything at all.

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

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

Justice Thomas delivered the opinion of the Court.

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

assistance, or who conspires with the person who committed such an act of international terrorism."

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

Plaintiffs' case arises from a 2017 terrorist attack on the Reina nightclub in Istanbul, Turkey. The attack was carried out by Abdulkadir Masharipov on behalf of the Islamic State of Iraq and Syria (ISIS).[10] Born in Uzbekistan, Masharipov received military training with al Qaeda in Afghanistan in 2011 and eventually became affiliated with ISIS. In 2016, he was ordered by ISIS to travel to Turkey and launch an attack in Istanbul on New Year's Eve. After planning and coordinating the attack with ISIS emir Abu Shuhada, Masharipov entered the Reina nightclub in the early hours of January 1, 2017, and fired over 120 rounds into a crowd of more than 700 people. Masharipov killed 39 people and injured 69. ISIS [claimed] responsibility for the attack.

One of Masharipov's victims was Nawras Alassaf, who was killed in the attack. Several members of Alassaf's family brought the present lawsuit under §2333, alleging that they had been injured by the attack. Invoking §2333(d)(2), plaintiffs sued three major social-media companies—Facebook, Inc., Google, Inc., and Twitter, Inc.—claiming that they aided and abetted ISIS and thus were liable for the Reina nightclub attack.[3] These three companies control three of the largest and most ubiquitous platforms on the internet: Facebook, YouTube, and Twitter. At the time of the Reina attack, Facebook had over 2 billion active users each month, YouTube had over 1 billion, and Twitter had around 330 million. For Facebook and YouTube, those numbers are even higher today.

Everyone agrees on the basic aspects of these platforms' business models. People from around the world sign up for the platforms and start posting content free of charge and without much (if any) advance screening by defendants. Users can upload messages, videos, and other types of content, which others on the platform can then view, respond to, and share. Billions of people have done just that. As a result, the amount of content on defendants' platforms is staggering. For *every minute* of the day, approximately 500 hours of video are uploaded to YouTube, 510,000 comments are posted on Facebook, and 347,000 tweets are sent on Twitter. On

---

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

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

YouTube alone, users collectively watch more than 1 billion hours of video *every day*. Defendants profit from this content largely by charging third parties to advertise on their platforms. Those advertisements are placed on or near the billions of videos, posts, comments, and tweets uploaded by the platforms' users. To organize and present all those advertisements and pieces of content, defendants have developed "recommendation" algorithms that automatically match advertisements and content with each user; the algorithms generate those outputs based on a wide range of information about the user, the advertisement, and the content being viewed. So, for example, a person who watches cooking shows on YouTube is more likely to see cooking-based videos and advertisements for cookbooks, whereas someone who likes to watch professorial lectures might see collegiate debates and advertisements for TED Talks.

But not all of the content on defendants' platforms is benign. ISIS and its adherents have used these platforms for years as tools for recruiting, fundraising, and spreading their propaganda. Like many others around the world, ISIS and its supporters opened accounts on Facebook, YouTube, and Twitter and uploaded videos and messages for others to see. Like most other content on those platforms, ISIS' videos and messages were then matched with other users based on those users' information and use history. Like most other content, advertisements were displayed with ISIS' messages, posts, and videos based on information about the viewer and the content being viewed. Unlike most other content, ISIS' videos and messages celebrated terrorism and recruited new terrorists. For example, ISIS uploaded videos that fundraised for weapons of terror and that showed brutal executions of soldiers and civilians alike. Plaintiffs allege that these platforms have been crucial to ISIS' growth, allowing it to reach new audiences, gain new members, and spread its message of terror.

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

Section 2333 was originally enacted as part of the Antiterrorism Act (ATA) in 1990. At that time, Congress authorized United States nationals or their "estate, survivors, or heirs" to bring civil lawsuits when "injured in [their] person, property, or business by reason of an act of international terrorism." Plaintiff could recover treble damages and the cost of the suit, including attorney's fees.

But the ATA did not explicitly impose liability on anyone who only helped the terrorists carry out the attack or conspired with them. Prior to 2016, some courts determined that the ATA did not authorize that sort of secondary civil liability. Then, in 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA) to provide for a form of secondary civil liability. Thus, those injured by an act of international terrorism can sue the relevant terrorists directly under §2333(a)—or they can sue anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism" under §2333(d)(2). For such a secondary-liability claim, the "act of international terrorism" must have been "committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under 8 U. S. C. §1189 as of the date on which such act of international terrorism was committed, planned, or authorized." Plaintiffs seeking secondary liability can recover treble damages and the cost of the suit, including attorney's fees.

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

What exactly does it mean to "aid and abet"? What precisely must defendant have "aided and abetted"? Nothing in the statute defines those critical terms. Yet terms like "aids and abets" are familiar to the common law, which has long held aiders-and-abettors secondarily liable for the wrongful acts of others. In enacting JASTA, Congress provided additional context by pointing to *Halberstam* v. *Welch*, 705 F. 2d 472 (CADC 1983), as "providing the proper legal framework" for "civil aiding and abetting and conspiracy liability." §2(a)(5), 130 Stat. 852.

Bernard Welch was a serial burglar who killed Michael Halberstam during a break-in. Halberstam's estate sued Welch's live-in partner, Linda Hamilton, for aiding and abetting and conspiring with Welch. Hamilton was not present, or even aware of the murder. But "she was a willing partner in Welch's criminal activities." Hamilton had lived with Welch for years, during which time the couple had risen from modest circumstances to a substantial fortune. Welch had no outside employment. He left the house most evenings and returned with antiques, jewelry, and precious metals—some of which he melted down into gold and silver ingots by using a smelting furnace. Hamilton did bookkeeping work for Welch's "business," facilitating the sale of stolen goods. She had Welch's customers make checks payable to her, falsified her tax returns at Welch's direction, and kept records of incoming payments from Welch's customers—with no records of outgoing funds to his "suppliers." To determine Hamilton's liability, the D. C. Circuit synthesized three main elements: First, "the party whom the defendant aids must perform a wrongful act that causes an injury." Second, "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance." And, third, "the defendant must knowingly and substantially assist the principal violation." *Halberstam* articulated six factors to help determine whether a defendant's assistance was "substantial." Those factors are (1) "the nature of the act assisted," (2) the "amount of assistance" provided, (3) whether the defendant was "present at the time" of the principal tort, (4) the defendant's "relation to the tortious actor," (5) the

"defendant's state of mind," and (6) the "duration of the assistance" given. Last, *Halberstam* clarified that those who aid and abet "a tortious act may be liable" not only for the act itself but also "for other reasonably foreseeable acts done in connection with it." Applying that framework, the D. C. Circuit held that Hamilton was liable for aiding and abetting Halberstam's murder. Welch had committed a wrong (in killing Halberstam during the burglary) and Hamilton was generally aware of her role in Welch's criminal enterprise. Hamilton had given knowing and substantial assistance to Welch's activities by helping him turn his "stolen goods into 'legitimate' wealth," thereby intending to help Welch succeed by performing a function crucial to any thief. Hamilton knew Welch was committing some sort of "personal property crime," the "foreseeable risk" of which was "violence and killing." Hamilton substantially helped Welch commit personal property crimes and was liable for Halberstam's death, which was a foreseeable result of such crimes.

The allegations before us are a far cry from *Halberstam*. We are faced with international terrorist networks and world-spanning internet platforms. "Aiding and abetting is an ancient criminal law doctrine" that has substantially influenced its analog in tort. *Central Bank of Denver*, 511 U. S., at 181. William Blackstone explained that those who were "present, aiding and abetting the fact to be done," or "procured, counseled, or commanded another to commit a crime," were guilty and punishable. 4 COMMENTARIES ON THE LAWS OF ENGLAND 34, 36 (1795). The basic "view of culpability" that animates the doctrine is straightforward: "A person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Rosemond* v. *United States*, 572 U. S. 65, 70 (2014).

The concept of "helping" in the commission of a crime—or a tort—has never been boundless. If it were, aiding-and-abetting liability could sweep in innocent bystanders as well as those who gave only tangential assistance. Assume that any assistance of any kind were sufficient to create liability. If that were the case, anyone who passively watched a robbery could be said to commit aiding and abetting by failing to call the police. Our legal system generally does not impose liability for mere omissions, inactions, or nonfeasance; although inaction can be culpable in the face of some independent duty to act, the law does not impose a generalized duty to rescue. See 1 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW §6.1 (3d ed. 2018). Moreover, both criminal and tort law typically sanction only "wrongful conduct," bad acts, and misfeasance. Some level of blameworthiness is ordinarily required. But, if aiding-and-abetting liability were taken too far, ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer. And those who merely deliver mail or transmit emails could be liable for the tortious messages contained therein. See RESTATEMENT (SECOND) OF TORTS §876, Comment *d*, Illus. 9, p. 318 (1979).

For these reasons, courts have long recognized the need to cabin aiding-and-abetting liability to cases of truly culpable conduct. To keep aiding-and-abetting liability grounded in culpable misconduct, criminal law thus requires "that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed' " before he could be held liable. *Id.*, at 619 (quoting *Peoni*, 100 F. 2d, at 402). In other words, defendant has to take some "affirmative act" "with the intent of facilitating the offense's commission." *Rosemond*, 572 U. S., at 71. Such intentional participation

can come in many forms, including abetting, inducing, encouraging, soliciting, or advising the commission of the offense, such as through words of encouragement or driving the getaway car. 2 LAFAVE §13.2(a), at 457. Regardless of the particulars, it is clear that some culpable conduct is needed.[9]

Similar principles and concerns have shaped aiding-and-abetting doctrine in tort law, with numerous cases directly employing them to help articulate the standard for tortious aiding and abetting. As in *Halberstam*, that framework generally required what the text of §2333(d)(2) demands: that the defendant have given knowing and substantial assistance to the primary tortfeasor. Courts often viewed those twin requirements as working in tandem, with a lesser showing of one demanding a greater showing of the other. Less substantial assistance required more scienter before a court could infer conscious and culpable assistance. If the assistance were direct and extraordinary, then a court might more readily infer conscious participation in the underlying tort. The courts thus largely tracked the same distinctions drawn above to ensure that liability fell only on those who had abetted the underlying tort through conscious, "culpable conduct." *Camp*, 948 F. 2d, at 460. Both JASTA and *Halberstam*'s elements and factors rest on the same conceptual core that has animated aiding-and-abetting liability for centuries: that the defendant consciously and culpably "participated" in a wrongful act so as to help "make it succeed." *Nye & Nissen*, 336 U. S., at 619.

The next question is what precisely a defendant must aid and abet. JASTA imposes liability on anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." §2333(d)(2). Plaintiffs contend defendants can be liable if they aided and abetted ISIS generally—there is no need for defendants to have aided and abetted the specific Reina nightclub attack. Conversely, defendants posit that they are liable only if they directly aided and abetted the Reina nightclub attack, with a strict nexus between their assistance and that attack. As *Halberstam* put it, the defendant must aid and abet "a tortious act." 705 F. 2d, at 484.

Tort law imposes liability only when someone commits an actual tort; merely agreeing to commit a tort or suggesting a tortious act is not, without more, tortious. "Enterprises" or "conspiracies" alone are therefore not tortious—the focus must remain on the tort itself. The same is true here: The ATA opens the courthouse doors only if the plaintiff is "injured by reason of an act of international terrorism." §2333(a). JASTA further restricts secondary liability by requiring that the "act of international terrorism" be "committed, planned, or authorized by" a foreign terrorist organization designated as such "as of the date on which such act of international terrorism was committed, planned, or authorized." §2333(d). Thus, it is not enough that a defendant have given substantial assistance to a transcendent "enterprise" separate from and floating above all the actionable wrongs that constitute it. Rather, a defendant must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong—here, an act of international terrorism. See, *e.g.*, Restatement (Second) of Torts

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

§876(b); *Halberstam*, 705 F. 2d, at 488. As *Halberstam* makes clear, people who aid and abet a tort can be held liable for other torts that were "a foreseeable risk" of the intended tort. A close nexus between the assistance and the tort might help establish that the defendant aided and abetted the tort, but even more remote support can still constitute aiding and abetting in the right case.

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

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

Recall the basic ways that defendants allegedly helped ISIS. First, ISIS was active on defendants' social-media platforms, which are generally available to the internet-using public with little to no front-end screening. ISIS was able to upload content to the platforms and connect with third parties, just like everyone else. Second, defendants' recommendation algorithms matched ISIS-related content to users most likely to be interested in that content—just like any other content. And, third, defendants allegedly knew that ISIS was uploading this content to such effect, but took insufficient steps to ensure that ISIS supporters and ISIS-related content were removed from their platforms. Notably, plaintiffs never allege that ISIS used defendants' platforms to plan or coordinate the Reina attack; in fact, they do not allege that Masharipov himself ever used Facebook, YouTube, or Twitter. None of those allegations suggest that defendants culpably "associated themselves with" the Reina attack, "participated in it as something that they wished to bring about," or sought "by their action to make it succeed." *Nye & Nissen*, 336 U. S., at 619. The only affirmative "conduct" defendants allegedly undertook was creating their platforms and setting up their algorithms to display content relevant to user inputs and user history. Plaintiffs never allege that, after defendants established their platforms, they gave ISIS any special treatment or words of encouragement. Nor is there reason to think that defendants selected or took any action at all with respect to ISIS' content (except, perhaps, blocking some of it).[13] Indeed, there is not even reason to think that defendants carefully screened any content before allowing users to upload it

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

onto their platforms. If anything, the opposite is true: By plaintiffs' own allegations, these platforms appear to transmit most content without inspecting it.

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

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

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

Plaintiffs identify no duty that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for

illicit ends.[14] Even if there were such a duty, it would not transform defendants' distant inaction into knowing and substantial assistance that could establish aiding and abetting the Reina attack.

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

There may be situations where the provider of routine services does so in an unusual way or provides such dangerous wares that selling those goods to a terrorist group could constitute aiding and abetting a foreseeable terror attack. Cf. *Direct Sales Co.* v. *United States*, 319 U. S. 703 (1943) (registered morphine distributor could be liable as a co-conspirator of an illicit operation to which it mailed morphine far in excess of normal amounts). If a platform consciously and selectively chose to promote content provided by a particular terrorist group, perhaps it could be said to have culpably assisted the terrorist group. In those cases, the defendants would arguably have offered aid that is more direct, active, and substantial than what we review here; in such cases, plaintiffs might be able to establish liability with a lesser showing of scienter. In this case, it is enough that there is no allegation that the platforms do more than transmit information by billions of people, most of whom use the platforms for interactions that once took place via mail, on the phone, or in public areas. The fact that some bad actors took advantage of these platforms is insufficient to state a claim that defendants knowingly gave substantial assistance and thereby aided and abetted those wrongdoers' acts. A contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That conclusion would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings.

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

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

assistance to the Reina attack, let alone (as their theory of liability requires) every single terrorist act committed by ISIS.

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

We therefore reverse the judgment of the Ninth Circuit.

It is so ordered.

Food for Thought

Do social media platforms constitute public nuisances? In California, multiple schools districts have sued social media platforms seeking to hold them liable as public nuisances. The districts claim that the platforms have caused a youth mental health crisis. In addition, they claim that the platforms are addictive. The end result is that the districts claim that the platforms interfere with their ability to fulfill their educational mission. Are the districts correct? *See In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 754 F.Supp.3d 946 (N.D. Cal. 2024). May social media platforms be sued for not seeking out and removing deceptive advertisements? *See Calise v. Meta Platform, Inc.*, 103 F.4th 742 (9th Cir. 2024).

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

3. *The Media's Role in Disinformation & Political Division*. Many commentators are keen to control disinformation on social media platforms, but they are generally very reluctant to impose controls on newspapers or the broadcast media. In a poll conducted by the Associated Press-NORC Center for Public Affairs Research and the nonprofit, Robert F. Kennedy Human Rights nearly 75% of U.S. residents stated that the media is increasing political polarization in the U.S., and nearly half of the people indicated that they had little or no trust in the media's ability to report the news fairly and accurately. *See* David Kelpper, *Poll: Most fault media for division, The Courier-Journal* 10A (May 2, 2023). Only 16% of respondents to the poll were "very confident" that the

media reports fairly and accurately, and 45% say that they have little or no confidence in the media. As a result, some say that they are more willing to rely on the internet rather than media to inform themselves. 40% of respondents indicated that the media is damaging democracy. 90% of people believe that disinformation is a problem, with nearly two-thirds of people seeing the internet as less trustworthy than the media, but 60% of respondents see the media as at fault as well. If it is necessary to control misinformation or disinformation on the internet, in order to protect democracy, should actions also be taken against the broadcast media? Would such action be consistent with our free speech tradition?

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

Based on allegations of NPR having a left-wing bias, Congress decided to defund the Corporation for Public Broadcasting in 2025. CPB provided 1% of NPR's funding, substantial funding to PBS, and to local public radio stations (which funnel money to NPR – 30% of its budget).

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

Food for Thought

A Florida law prohibits children under the age of 14 from having social media accounts. Those who are 14 or 15 can have social media accounts with their parent's consent. Does the Florida law unduly restrict the First Amendment rights of teenagers? Does it unduly restrict the ability of teenagers to receive information and participate in online communities? Utah adopts a law requiring that parental consent be given for minors to sign up for social media accounts and

requires that platforms verify the age of users younger than 18. The law also gives parents access to their children's posts and messages, and imposes fines of up to $250,000 on social media platforms if they use addictive features on minors. Utah seeks to justify the law because of the impact of social media on teens' mental health. Is the Utah law valid?

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

Food for Thought

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

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

Food for Thought

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

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

Food for Thought

In 2022, during the Biden Administration, the Homeland Security Agency (HSA) decided to create a Disinformation Governance Board to counter the spread of false information. The board would have focused on disinformation coming from Russia as well as misleading messages about the U.S.-Mexico border, the Associated Press reports. The immediate focus was to be on misinformation from human smugglers, who spread false claims about U.S. border policy to

migrants to help drum up business. The Board was met with a firestorm of criticism and HSA ultimately decided to suspend its operations. Is a Disinformation Board a good idea? In a free and democratic society, is it a good idea to allow government to control the flow of information? Does the nature of the information justify the control?

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

Food for Thought

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

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

Food for Thought

Social media platforms have always been regarded as private companies, and therefore it has been assumed that they have the right to control content on their platforms. Thus, they are not prohibited from engaging in content-based or viewpoint-based discrimination. However, during the Biden Administration, it became clear that the U.S. government was aggressively attempting to influence or control content moderation decisions made by social media companies. Congress routinely called the heads of social media platforms before them and pressured them to censor more content. When Elon Musk released the Twitter files, it became clear that the Biden White House and the FBI tried to pressure social media platforms regarding their content decisions. In *Missouri v. Biden*, 680 F. Supp.3d 630 (W.D. La. 2023), a federal district court concluded that government officials had pressured, threatened and tried to coerce social media platforms regarding their censorship decisions, rendering those decisions governmentally-imposed content-based and viewpoint-based restrictions on speech, and therefore the court ordered the government not to contact social media platforms regarding their content decisions. The decision is currently on appeal. In *Murthy v. Missouri*, 144 S.Ct. 1972 (2024), the Court dismissed the case on standing grounds. Is there enough governmental involvement so that the content decisions of social media companies constitute state action, and therefore their decisions should be subject to the strictures of the First Amendment?

Chapter 11

Overview of the Religion Clauses

B. Defining the Subject Matter of the Religion Clauses

On p. 756, at the end of problem # 1, add the following cite:

See In re Church of Jesus Christ of Latter-Day Saints Tithing Litigation, 2025 WL 1135726 (D. Utah).

On p. 756, insert the following new problem # 2 and renumber the remaining problems:

2. *Misrepresentations Regarding Doctrine*. Likewise, suppose that Reverend Doljac makes misrepresentations regarding the history and doctrine of his religious sect. He does so in order to raise money. Will a court be inclined to wade in to a claim of fraud regarding the history and doctrine? *See Gaddy Corp. V. Corporation the President of the Church of Jesus Christ of Latter-Day Saints*, 2023 WL 4763981 (D. Utah). Can a church be sued for defamation? *See Belya v. Kapral*, 45 F.4th 621 (2nd Cir. 2022).

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

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

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

Food for Thought

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

Chapter 12

The Establishment Clause

A. Financial Aid to Religion

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

4. Parental Choice and Financial Support

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

Food for Thought

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

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

B. School Prayer

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

Food for Thought

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

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

Food for Thought

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

C. Curricular Issues

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

Food for Thought

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

On p. 831, near the end of the problem # 2, after "See" in the next-to-last sentence, insert the following cite:

Hilsenrath v. School District of Chathams, --- F.4th ---- 2025 WL 1289146 (3rd Cir. 2025).

D. Official Acknowledgement

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

in 2024, Louisiana's legislature adopted a law requiring that a poster-size version of the Ten Commandments be posted in all public school classrooms. Texas adopted a similar law. The Louisiana law specified the exact language that must be printed on the displays, and provided that the text of Ten Commandments must be the focus of the display. The bill's sponsor stated that the Ten Commandments are rooted in legal history, and that the displays place a moral code in the classroom. In signing the law, Louisiana's governor declared that "If you want to respect the rule of law, you must start from the original law which was given to Moses. He received his commandments from God." Is this law sufficiently distinguishable from the McCreary County displays so that it is constitutional? Alternatively, has the law changed sufficiently so that this new display should be upheld? *See Roake v. Brumley*, --- F.4th, ----2025 WL 1719978 (5th Cir.).

Chapter 13

Free Exercise

A. BURDENS ON RELIGION

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

On p. 922, before the existing Food for Thought, add the following:

Food for Thought: Quakers and ICE

After the Trump Administration took office, ICE (Immigration and Customs Enforcement) announced that it would conduct immigration raids in houses of worship. Quakers believe that the raids would infringe their right to freely exercise their religion. Unlike many religious services, Quaker services are not led by a single person. Instead the congregation sits in silence until someone receives a message from God to share with others. Communal worship is thus "the very process of worship itself, and Quakers believe that including immigrants in the congregation provides unique messages from God. Under the circumstances, do Quakers have a free exercise right to be free of ICE raids?

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

Food for Thought

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

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

Food for Thought

The New York City police department requires people who are arrested to remove their religious head coverings for booking photos. Two Muslim women sue after they were required to remove their hijabs during booking. The police department claims that the policy is reasonably

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

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

Food for Thought

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

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

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

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

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

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 requires employers to accommodate an employee's religious practice unless to do so would impose an "undue hardship" on the employer. In *Groff v.*

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

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

Mahmoud v. Taylor
2025 WL 1773627 (2025)

Justice Alito delivered the opinion of the Court.

The Board of Education of Montgomery County, Maryland, introduced "LGBTQ+-inclusive" storybooks into the elementary school curriculum. These books—and associated educational instructions provided to teachers—are designed to "disrupt" children's thinking about sexuality and gender. The Board told parents that it will not give them notice when the books are going to be used and that their children's attendance during those periods is mandatory. A group of parents from diverse religious backgrounds sued. They assert that the new curriculum, combined with the Board's decision to deny opt outs, impermissibly burdens their religious exercise. The parents are entitled to a preliminary injunction. A government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses "a very real threat of undermining" the religious beliefs and practices that the parents wish to instill. *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). A government cannot condition the benefit of free public education on parents' acceptance of such instruction.

Montgomery County is Maryland's most populous county. It is also the "most religiously diverse county" in the Nation. In addition to a diverse mix of Christian denominations, the county ranks in the top five in the Nation in per-capita population of Jews, Muslims, Hindus, and Buddhists. The county's religious diversity is accompanied by strong cultural diversity. The county is home to notable ethnic communities. The Ethiopian community in Silver Spring is one of the largest in the country. Only 56.8% of county residents speak English at home. Most residents with school age children, by choice or necessity, send them to public school. Maryland law requires that resident children ages 5 to 18 "attend a public school regularly during the entire school year." The State permits parents to send their children to private school or educate them at home if certain

requirements can be met. Parents who cause their children to be absent unlawfully from school face fines, mandatory community service, and even imprisonment.

Public education is provided by Montgomery County Public Schools (MCPS), one of the largest school districts in the Nation. In 2022–2023, MCPS enrolled 160,554 students in its 210 schools and had an operating budget of nearly $3 billion. The district is overseen and managed by the Montgomery County Board of Education, a policymaking body consisting of seven elected residents and one student. In recognition of the county's religious diversity, the Board's "Guidelines for Respecting Religious Diversity" profess a commitment to making "reasonable accommodations" for the religious "beliefs and practices" of MCPS students.[4] For example, the Board "advises principals that schools should avoid scheduling tests or other major events on dozens of 'days of commemoration,' during which MCPS expects that many students may be absent or engaged in religious or cultural observances." This case arises from the Board's refusal to heed widespread and impassioned pleas for accommodation. In the years leading up to 2022, the Board "determined that the books used in its existing [English & Language Arts] curriculum were not representative of many students and families in Montgomery County because they did not include LGBTQ characters." The Board therefore decided to introduce into the curriculum what it described as "LGBTQ+-inclusive texts." The Board selected the books according to a "Critical Selection Repertoire" that required selectors to review potential texts and ask questions such as: "Is heteronormativity reinforced or disrupted?"; "Is cisnormativity reinforced or disrupted?"; and "Are power hierarchies that uphold the dominant culture reinforced or disrupted?" In accordance with this "repertoire" and other criteria, the Board selected 13 "LGBTQ+-inclusive" texts for use in the English and Language Arts curriculum from pre-K through 12th grade.

At issue are five "LGBTQ+-inclusive" storybooks approved for students in Kindergarten through fifth grade—children between 5 and 11 years old. Intersection Allies tells the stories of several children from different backgrounds, including Kate, who is a transgender child. One page shows Kate in a sex-neutral or sex-ambiguous bathroom, and Kate proclaims: "My friends defend my choices and place. A bathroom, like all rooms, should be a safe space." Intersection Allies includes a "Page-By-Page Book Discussion Guide" that asserts: "When we are born, our gender is often decided for us based on our sex. But at any point in our lives, we can choose to identify with one gender, multiple genders, or neither gender." The discussion guide explains that "Kate prefers the pronouns they/their/them" and asks "What pronouns fit you best?" Prince & Knight tells the story of a coming-of-age prince whose parents wish to match him with "a kind and worthy bride." After meeting with "many ladies," the prince tells his parents that he is "looking for something different in a partner." Later, the prince falls into the "embrace" of a knight after the two finish battling a fearsome dragon. After the knight takes off his helmet, the prince and knight "gaze into each other's eyes, and their hearts begin to race." The whole kingdom applauds "on the two men's wedding day." Love Violet follows a young girl named Violet who has a crush on her female classmate, Mira. Mira makes Violet's "heart skip" and "thunder like a hundred galloping horses."

[4] The Board has modified its religious diversity guidelines since the 2022–2023 school year, when many of the events in this lawsuit took place. The most recent version continues to state that "MCPS is committed to making reasonable accommodations" for the religious "beliefs and practices" of its students.

Although Violet is initially too afraid to interact with Mira, the two end up exchanging gifts on Valentine's Day. Afterwards, the girls are seen holding hands and "galloping over snowy drifts." Born Ready: The True Story of a Boy Named Penelope tells the story of Penelope, a child who is initially treated as a girl. Penelope says "If they'd stop and listen, I'd tell them about me. Inside I'm a boy." When Penelope's mother assures her that "If you feel like a boy, that's okay," Penelope responds: "No, Mama, I don't *feel* like a boy. I AM a boy." Penelope tells her mother: "I love you, Mama, but I don't want to *be* you. I want to be Papa. I don't want tomorrow to come because tomorrow I'll look like you. Please help me, Mama. Help me to be a boy." Penelope's mother then agrees that she is a boy, and Penelope says: "For the first time, my insides don't feel like fire. They feel like warm, golden love." Later, after the family starts treating Penelope as a boy, Penelope's brother complains that "You can't *become* a boy. You have to be born one." This comment draws a rebuke from Penelope's mother: "Not everything *needs* to make sense. *This is about love*." Finally, Uncle Bobby's Wedding tells the story of a young girl named Chloe who is informed that her favorite uncle, Bobby, will be getting married to his boyfriend, Jamie. When Bobby and Jamie announce their engagement, everyone is jubilant "except Chloe." Chloe says that she does not "understand" why her uncle is getting married, but her mother responds by explaining: "When grown-up people love each other that much, sometimes they get married."

The Board suggested "that teachers incorporate the new texts into the curriculum in the same way that other books are used" "As with all curriculum resources," the Board voiced its "expectation that teachers use the LGBTQ-Inclusive Books as part of instruction." An MCPS official made clear that "teachers cannot elect not to use the LGBTQ-Inclusive Books at all." The Board contemplated that instruction involving the "LGBTQ+-inclusive" storybooks would include classroom discussion. The Board hosted a "professional development workshop" in the summer of 2022, where it provided teachers with a guidance document suggesting how they might respond to student inquiries regarding the themes presented in the books. If a student asserts that two men cannot get married, the guidance document encouraged teachers to respond by saying: "When people are adults they can get married. Two men who love each other can decide they want to get married." If a student claims that a character "can't be a boy if he was born a girl," teachers were encouraged to respond: "That comment is hurtful." And if a student asks "what's transgender?", it was recommended that teachers explain: "When we're born, people make a guess about our gender and label us 'boy' or 'girl' based on our body parts. Sometimes they're right and sometimes they're wrong." The guidance document encouraged teachers to "disrupt the either/or thinking" of their students. The Board also provided a guidance document that suggested particular responses to inquiries by parents. For example, if a parent were to ask whether the school was attempting to teach a child to "reject" the values taught at home, teachers were encouraged to respond that "teaching about LGBTQ+ is not about making students think a certain way; it is to show that there is no one 'right' or 'normal' way to be." The guidance urged teachers to assure parents that there would not be "explicit instruction" about gender and sexual identity, but that "there may be a need to define words that are new and unfamiliar to students," and that "questions and conversations might organically happen." If parents were not comforted by that information, teachers could tell them that "parents always have the choice to keep their student(s) home while using these texts; however, it will not be an excused absence."

The Board officially launched the "LGBTQ+-inclusive" texts in the 2022–2023 school year. Shortly thereafter, parents "began contacting individual teachers, principals, or MCPS staff" about the storybooks and asking that their children be excused from classroom instruction related to them. Some parents showed up at the Board's public business meetings to express their concerns about the storybooks' content. In an early 2023 meeting, one parent represented herself as "a voice for parents in her community, many of whom are actually working and unable to attend." She said that parents were "frustrated" because "educators and administrators are going behind what parents are teaching their kids at home, and pushing ideas of gender ideology on their kids." The parent felt that the Board was "implying to children that their religion, their belief system, and their family tradition is actually wrong." At the same meeting, one Board member responded by saying that "some of the testimony today was disturbing. Transgender, LGBTQ individuals are not an ideology, they are a reality. There are religions out there that teach that women should only achieve certain subservient roles in life, and MCPS would never think of not having a book in a classroom that showed a woman" in a professional role. The Board's student member agreed and proclaimed that "ignorance and hate does exist within our community, every student has a place in the school."

Initially, the Board compromised with objecting parents by notifying them when the "LGBTQ+-inclusive" storybooks would be taught and permitting their children to be excused from instruction involving the books. That policy was consistent with the Board's general "Guidelines for Respecting Religious Diversity," which at the time provided that "when possible, schools should try to make reasonable and feasible adjustments to the instructional program to accommodate requests from students, or requests from parents/guardians on behalf of their students, to be excused from specific classroom discussions or activities that they believe would impose a substantial burden on their religious beliefs." This compromise did not last. In March 2023, less than a year after the texts were introduced, the Board issued a statement declaring that "students and families may not choose to opt out of engaging" with the storybooks and that "teachers will not inform families when inclusive books are read in the future." According to one official, the Board decided to change its policy because, among other things, "individual principals and teachers could not accommodate the growing number of opt out requests without causing significant disruptions to the classroom environment." The official also stated that permitting some students to exit the classroom while the storybooks were being taught would expose other students "to social stigma and isolation." It was therefore announced that any existing accommodations would expire at the end of the 2022–2023 school year.

After the Board rescinded parental opt outs, more than 1,000 parents signed a petition asking the Board to restore opt out rights. Hundreds of displeased parents, including many Muslim and Ethiopian Orthodox parents, appeared at the Board's public meetings and implored the Board to allow opt outs. At a May 2023 meeting, one community member testified that "thousands" of parents felt "deeply dismayed and betrayed" by the rescission of opt outs from "content that conflicts with their sincerely held religious beliefs." An MCPS student asked the Board "to allow students like me to opt out of content and books that contain sensitive and mature topics that go against my religious beliefs." The Board was unmoved. Several Board members and another MCPS official spoke up to "clarify" that the storybooks would not be used for explicit instruction on sexuality and gender, but rather as part of the "literacy curriculum." According to a news article,

one Board member "felt 'kind of sorry' " for the student who testified in favor of opt outs, "and wondered to what extent she may have been 'parroting dogma' learned from her parents."[7] The Board member also expressed her view that "if parents want their child to receive an education that strictly adheres to their religious dogma, they can send their kid to a private religious school." The Board member went on to suggest that the objecting parents were comparable to "white supremacists" who want to prevent their children from learning about civil rights and "xenophobes" who object to "stories about immigrant families." The Board continues to permit children to opt out of other school activities, including the "family life and human sexuality" unit of instruction, for which opt outs are required under Maryland law. Although the Board has amended its "Guidelines for Respecting Religious Diversity" to narrow the circumstances in which opt outs are permissible, those guidelines still allow opt outs from "noncurricular activities, such as classroom parties or free-time events that involve materials or practices in conflict with a family's religious, and/or other, practices."

Petitioners Tamer Mahmoud and Enas Barakat had three children enrolled in MCPS, including one in elementary school. Mahmoud and Barakat are Muslims who believe "that mankind has been divinely created as male and female" and "that 'gender' cannot be unwoven from biological 'sex'—to the extent the two are even distinct—without rejecting the dignity and direction God bestowed on humanity from the start." [They] believe that it would be "immoral" to expose their "young, impressionable, elementary-aged son" to a curriculum that "undermines Islamic teaching." In their view, "the storybooks directly undermine their efforts to raise" their son in the Islamic faith "because they encourage young children to question their sexuality and gender and to dismiss parental and religious guidance on these issues." Mahmoud and Barakat asked to have their son excused from the classroom when Prince & Knight was read. [The] principal initially permitted the boy to sit outside the classroom during that time. Soon after, the Board announced that opt outs would no longer be available. Mahmoud and Barakat felt "religiously compelled to send their son to private school at significant financial sacrifice."

Petitioners Jeff and Svitlana Roman also had a son enrolled in an MCPS elementary school. Jeff is Catholic, and Svitlana is Ukrainian Orthodox. They believe that "sexuality is expressed only in marriage between a man and a woman for creating life and strengthening the marital union." The Romans further believe "that gender and biological sex are intertwined and inseparable" and that "the young need to be helped to accept their own body as it was created." The Romans' son "loves his teachers and implicitly trusts them," and so they fear that allowing those teachers to "teach principles about sexuality or gender identity that conflict with [their] religious beliefs" would "significantly interfere with their ability to form [their son's] religious faith and religious outlook on life." After the storybooks were introduced, the Romans asked the principal to notify them when the books were being read and to excuse their son. The Romans were initially told that it was their "right" to ask that their son not be present when the books are read, but they were later informed that notice and opt outs would no longer be provided. The Romans, like Mahmoud and Barakat, were "religiously compelled to send their son to private school, at significant expense."

Petitioners Chris and Melissa Persak have two elementary-age daughters who attend public school in Montgomery County. The Persaks are Catholics who believe "that all humans are created as male or female, and that a person's biological sex is a gift bestowed by God that is unchanging

and integral to that person's being." The Persaks believe "that children—particularly those in elementary school—are highly impressionable to ideological instruction presented in children's books or by schoolteachers." They are concerned that the Board's storybooks "are being used to impose an ideological view of family life and sexuality that characterizes any divergent beliefs as 'hurtful.'" They think that such instruction will "undermine their efforts to raise their children in accordance with" their religious faith. The Persaks' daughters were initially permitted to opt out, but they no longer have that option.

The final petitioner, Kids First, is an unincorporated association of parents and teachers that was "formed to advocate for the return of parental notice and opt-out rights in the Montgomery County Public Schools." One of Kids First's board members—Grace Morrison—has a daughter who previously attended an MCPS elementary school. Morrison's daughter has Down syndrome and attention deficit disorder. She previously required special accommodations, including a "full time, one-on-one paraeducator." Morrison's daughter received special services from the school, such as speech and occupational therapy. Morrison and her husband are Catholics who believe that "marriage is the lifelong union of one man and one woman" and that gender is "interwoven" with sex. Due to their daughter's learning challenges, they fear that she "doesn't understand or differentiate instructions from her teachers and parents" and that they "won't be able to contradict what she hears from teachers." Because of the services provided to her disabled daughter in public school, Morrison faced enormous "pressure" to keep her daughter enrolled. She asked that her daughter be excused from "LGBTQ+-inclusive" instruction, even after the Board's decision to rescind opt outs. She was told that opt outs would not be possible. As a result, the Morrisons felt "religiously compelled" to remove their daughter from public school. They anticipate that it will cost at least $25,000 per year to replace the academic and other services.

Petitioners filed this lawsuit in the United States District Court for the District of Maryland. They asserted that the Board's no-opt-out policy infringed their right to the free exercise of their religion. See *Kennedy* v. *Bremerton School Dist.*, 597 U. S. 507 (2022). They sought a preliminary and permanent injunction "prohibiting the School Board from forcing their children and other students—over the objection of their parents—to read, listen to, or discuss" the storybooks. The parents relied heavily on *Wisconsin* v. *Yoder*, 406 U. S. 205. That case concerned Amish parents who wished to withdraw their children from conventional schooling after the eighth grade, in direct contravention of a Wisconsin law requiring children to attend school until the age of 16. In *Yoder*, we recognized that parents have a right "to direct the religious upbringing of their children," and that this right can be infringed by laws that pose "a very real threat of undermining" the religious beliefs and practices that parents wish to instill in their children. Given the substantial burdens that Wisconsin's compulsory-attendance law placed on the religious practices of the Amish, we held that it "carried with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." In the present case, the parents asserted that *Yoder*'s principle applies to their situation, and they asked for a preliminary injunction permitting their children to opt out of the challenged instruction pending the completion of their lawsuit. The District Court denied that relief. A divided panel of the Fourth Circuit affirmed. We granted certiorari.

Our Constitution proclaims that "Congress shall make no law ... prohibiting the free exercise" of religion. Amdt. 1. That restriction applies to the States by way of the Fourteenth Amendment. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). The right to free exercise, like other First Amendment rights, is not "shed at the schoolhouse gate." *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969). Government schools, like all government institutions, may not place unconstitutional burdens on religious exercise. The parents assert that the Board's introduction of the "LGBTQ+-inclusive" storybooks—combined with its decision to withhold notice and opt outs—unconstitutionally burdens their religious exercise. The parents seek a preliminary injunction that would permit them to have their children excused from instruction related to the storybooks while this lawsuit proceeds. To obtain that relief, the parents must show that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction would be in the public interest. *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7 (2008). The parents are likely to succeed on their claim that the Board's policies unconstitutionally burden their religious exercise. "We have long recognized the rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. 464, 486 (2020) (quoting *Yoder*, 406 U. S., at 213). Those rights are violated by government policies that "substantially interfere with the religious development" of children. Such interference "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." Such an "objective danger" is present here.

At its heart, the Free Exercise Clause of the First Amendment protects "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of" religious acts. *Kennedy*, 597 U. S., at 524. For many people of faith, there are few religious acts more important than the religious education of their children. See *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U. S. 732 (2020). For many Christians, Jews, Muslims, and others, the religious education of children is not merely a preferred practice but a religious obligation. Petitioners believe they have a "sacred obligation" or "God-given responsibility" to raise their children in a way that is consistent with their religious beliefs and practices. The practice of educating one's children in one's religious beliefs, like all religious acts and practices, receives generous protection from our Constitution. "Drawing on 'enduring American tradition,' we have long recognized the rights of parents to direct 'the religious upbringing' of their children." *Espinoza*, 591 U. S., at 486. This is not merely a right to teach religion in the confines of one's own home. It extends to the choices that parents make for their children outside the home. It protects a parent's decision to send his or her child to a private religious school instead of a public school. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

Due to financial and other constraints, many parents "have no choice but to send their children to a public school." *Morse* v. *Frederick*, 551 U. S. 393, 424 (2007) (Alito, J., concurring). The right of parents "to direct the religious upbringing of their" children would be an empty promise if it did not follow those children into the public school classroom. We have recognized limits on the government's ability to interfere with a student's religious upbringing in a public school setting. In *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), we considered a resolution adopted by the West Virginia State Board of Education that required students "to participate in the

salute honoring the Nation represented by the flag." If students failed to comply, they faced expulsion and could not be readmitted until they yielded to the State's command. Plaintiffs sued to prevent the enforcement of this policy against Jehovah's Witnesses who considered the flag to be a "graven image" and refused to salute it. The challengers asserted that the policy was, among other things, "an unconstitutional denial of religious freedom." The policy could not be squared with the First Amendment. The effect of the State's policy was to "condition access to public education on making a prescribed sign and profession and to coerce attendance by punishing both parent and child." Although the policy did not clearly require students to "forego any contrary convictions of their own and become unwilling converts," it nonetheless required a particular "affirmation of a belief and an attitude of mind." For a public school to require students to make such an affirmation, in contravention of their beliefs and those of their parents, was to go further than the First Amendment would allow.

Barnette dealt with an especially egregious kind of direct coercion: a requirement that students make an affirmation contrary to their parents' religious beliefs. But that does not mean that the protections of the First Amendment extend only to policies that *compel* children to depart from the religious practices of their parents. In *Yoder*, we held that the Free Exercise Clause protects against policies that impose more subtle forms of interference with the religious upbringing of children. *Yoder* concerned a Wisconsin law that required parents to send their children to public or private school until the age of 16. Respondents were members of Wisconsin's Amish community who refused to send their children to public school after the completion of the eighth grade. In their view, the values taught in high school were "in marked variance with Amish values and the Amish way of life," and would result in an "impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs." This Court observed that formal high school education would "place Amish children in an environment hostile to Amish beliefs with pressure to conform to the styles, manners, and ways of the peer group" and that it would "take them away from their community, physically and emotionally, during the crucial and formative adolescent period of life." "In short, high school attendance ... interposes a serious barrier to the integration of the Amish child into the Amish religious community." In *Yoder*, there was no suggestion that the compulsory-attendance law would *compel* Amish children to make an affirmation that was contrary to their parents' or their own religious beliefs. Nor was there a suggestion that Amish children would be compelled to commit some specific practice forbidden by their religion. Rather, the threat to religious exercise was premised on the fact that high school education would "expose Amish children to worldly influences in terms of attitudes, goals, and values contrary to their beliefs" and would "substantially interfere with the religious development of the Amish child." That interference violated the parents' free exercise rights. The compulsory-education law "carried the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent" because it placed Amish children into "an environment hostile to Amish beliefs," where they would face "pressure to conform" to contrary viewpoints and lifestyles.

As *Yoder* reflects, the question whether a law "substantially interferes with the religious development" of a child will be fact-intensive. It will depend on the specific religious beliefs and practices asserted, as well as the nature of the educational requirement or curricular feature at issue. Educational requirements targeted toward very young children may be analyzed differently from

educational requirements for high school students. A court must consider the specific context in which the instruction or materials are presented. Are they presented in a neutral manner, or are they presented in a manner that is "hostile" to religious viewpoints and designed to impose upon students a "pressure to conform"?

The Board's introduction of the "LGBTQ+-inclusive" storybooks—combined with its decision to withhold notice to parents and to forbid opt outs—substantially interferes with the religious development of their children and imposes the kind of burden on religious exercise that *Yoder* found unacceptable. [The] books are clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected. Take the message sent by the books concerning same-sex marriage. Many Americans "advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell* v. *Hodges*, 576 U. S. 644, 679 (2015). That group includes each of the parents in this case. The storybooks are designed to present the opposite viewpoint to young, impressionable children who are likely to accept without question any moral messages conveyed by their teachers. The book Prince & Knight clearly conveys the message that same-sex marriage should be accepted by all as a cause for celebration. The young reader is guided to feel distressed at the prince's failure to find a princess, and to celebrate when the prince meets his male partner. The book relates that "on the two men's wedding day, the air filled with cheer and laughter, for the prince and his shining knight would live happily ever after." Those celebrating the same-sex wedding are not just family members and close friends, but the entire kingdom. For young children, to whom this and the other storybooks are targeted, such celebration is liable to be processed as having moral connotations. If this same-sex marriage makes everyone happy and leads to joyous celebration, doesn't that mean it is in every respect a good thing? High school students may understand that widespread approval of a practice does not necessarily mean that everyone should accept it, but very young children are most unlikely to appreciate that fine point. Uncle Bobby's Wedding conveys the same message more subtly. The atmosphere is jubilant after Uncle Bobby and his boyfriend announce their engagement. The book presents a specific, if subtle, message about marriage. It asserts that two people can get married, regardless of whether they are of the same or the opposite sex, so long as they "love each other." That view is directly contrary to the religious principles that the parents in this case wish to instill in their children. Many Americans, like the parents in this case, believe that biological sex reflects divine creation, that sex and gender are inseparable, and that children should be encouraged to accept their sex and to live accordingly. But the challenged storybooks encourage children to adopt a contrary viewpoint. Intersection Allies presents a transgender child in a sex-ambiguous bathroom and proclaims that "a bathroom, like all rooms, should be a safe space." The book also includes a discussion guide that asserts that "at any point in our lives, we can choose to identify with one gender, multiple genders, or neither gender" and asks children "What pronouns fit you best?" The book and the accompanying discussion guidance present as a settled matter a hotly contested view of sex and gender that sharply conflicts with the religious beliefs that the parents wish to instill in their children. The book Born Ready presents similar ideas in an even less veiled manner. To young children, the moral implication of the story is that it is seriously harmful to deny a gender transition and that transitioning is a highly positive experience. The book goes so far as to

present a contrary view as something to be reprimanded. The upshot is that it is hurtful, perhaps hateful, to hold the view that gender is inextricably bound with biological sex.

These books carry with them "a very real threat of undermining" the religious beliefs that the parents wish to instill in their children. Like the compulsory high school education in *Yoder*, these books impose upon children a set of values and beliefs that are "hostile" to their parents' religious beliefs. The books exert upon children a psychological "pressure to conform" to their specific viewpoints. The books present the same kind of "objective danger to the free exercise of religion" that we identified in *Yoder*. That "objective danger" is only exacerbated by the fact that the books will be presented to young children by authority figures in elementary school classrooms. As representatives of the Board have admitted, "there is an expectation that teachers use the LGBTQ-Inclusive Books as part of instruction," and "there will be discussion that ensues." The Board has left little mystery as to what that discussion might look like. The Board provided teachers with suggested responses to student questions related to the books, and the responses make clear that instruction related to the storybooks will "substantially interfere" with the parents' ability to direct the "religious development" of their children. *Yoder*, 406 U. S., at 218.

We have recognized the potentially coercive nature of classroom instruction of this kind. "The State exerts great authority and coercive power through" public schools "because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards* v. *Aguillard*, 482 U. S. 578, 584 (1987). Young children are often "impressionable" and "implicitly trust" their teachers. The Board requires teachers to instruct young children using storybooks that explicitly contradict their parents' religious views, and it encourages the teachers to correct the children and accuse them of being "hurtful" when they express a degree of religious confusion. Such instruction "carries precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Yoder*, 406 U. S., at 218. We cannot accept the Board's characterization of the "LGBTQ+-inclusive" instruction as mere "exposure to objectionable ideas" or as lessons in "mutual respect." The storybooks unmistakably convey a particular viewpoint about same-sex marriage and gender. The Board has specifically encouraged teachers to reinforce this viewpoint and to reprimand any children who disagree. That goes far beyond mere "exposure." The dissent ignores the messages that the authors plainly intended to convey.

We are also unpersuaded by the Board's reliance—echoed by the dissent—on our decisions in *Bowen* v. *Roy*, 476 U. S. 693 (1986), and *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439 (1988). In *Bowen*, a father mounted a free exercise challenge to the Government's use of a Social Security number associated with his daughter. In *Lyng*, Native Americans and other plaintiffs raised a free exercise challenge to the construction of a paved road on federal land. The government actions at issue did not "discriminate" against religion or "coerce individuals into acting contrary to their religious beliefs." These cases have no application here.

When a deprivation of First Amendment rights is at stake, a plaintiff need not wait for the damage to occur before filing suit. *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149 (2014). To pursue a pre-enforcement challenge, a plaintiff must show that "the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." 573 U. S., at 158. The Board does not dispute that it is introducing the storybooks into classrooms, that it is requiring teachers to use

them as part of instruction, and that it has encouraged teachers to approach classroom discussions in a certain way. We do not need to "wait and see" how a particular book is used in a particular classroom on a particular day before evaluating the parents' First Amendment claims. We need only decide whether—if teachers act according to the clear and undisputed instructions of the Board—a burden on religious exercise will occur.

Finally, we reject the alternatives offered to parents. The first is to "place their children in private school or educate them at home." Public education is a public benefit, and the government cannot "condition" its "availability" on parents' willingness to accept a burden on their religious exercise. Since education is compulsory in Maryland, the parents have an obligation—enforceable by fine or imprisonment—to send their children to public school unless they find an adequate substitute. Many parents cannot afford such a substitute. The provision of education is an expensive endeavor. To help finance that budget, Montgomery County will levy property taxes and income taxes on all residents, regardless of whether they send their children to a public school. Private elementary schools in Montgomery County are expensive; many cost $10,000 or more per year prior to financial aid. Homeschooling comes with a hefty price as well; it requires at least one parent to stay at home during the normal workday to educate children, thereby forgoing additional income opportunities. It is both insulting and legally unsound to tell parents that they must abstain from public education in order to raise their children in their religious faiths. The dissent suggests that the parents have no legitimate cause for concern because enforcement of the Board's policy would not prevent them from "teaching their religious beliefs and practices to their children at home." The parents in *Barnette* and *Yoder* were similarly capable of teaching their religious values "at home," but that made no difference to the First Amendment analysis. The dissent asserts that the parents would "remain free to raise objections to specific material through the" democratic process. The First Amendment protects the parents' religious liberty, and they had every right to file suit to protect that right.[13] We conclude that the Board's introduction of the "LGBTQ+-inclusive" storybooks, combined with its no-opt-out policy, burdens the parents' right to the free exercise of religion. We now turn to the question whether that burden is constitutionally permitted.

The government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable. *Smith*, 494 U. S., at 878. In most circumstances, two questions remain after a burden on religious exercise is found. First, a court must ask if the burdensome policy is neutral and generally applicable. Second, if the first question can be answered in the negative, a court will proceed to ask whether the policy can survive strict scrutiny. Under that standard, the government must demonstrate that "its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 597 U. S., at 525. When the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law is neutral or generally applicable before proceeding to strict scrutiny. In *Yoder*, the Court rejected the contention that the case could be "disposed of on the grounds that Wisconsin's requirement applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion." Instead, the Court bypassed those issues and

[13] The dissent's argument ignores the extensive efforts already made by parents in Montgomery County. Indeed, hundreds of parents beseeched the Board to allow opt outs, but those pleas fell largely on deaf ears.

proceeded to subject the law to close judicial scrutiny, asking whether the State's interest "in its system of compulsory education was so compelling that even the established religious practices of the Amish must give way." In *Smith*, we recognized *Yoder* as an exception to the general rule that governments may burden religious exercise pursuant to neutral and generally applicable laws. We described *Yoder* as a case "in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action." *Smith*, 494 U. S., at 881. When a law imposes a burden of the same character as in *Yoder*, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable. The burden in this case is of the exact same character as the burden in *Yoder*. The Board's policies, like the compulsory-attendance requirement in *Yoder*, "substantially interfere with the religious development" of the parents' children. Those policies pose "a very real threat of undermining" the religious beliefs and practices that the parents wish to instill in their children. *Ibid.* We therefore proceed to consider whether the policies can survive strict scrutiny.

To survive strict scrutiny, a government must demonstrate that its policy "advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton* v. *Philadelphia,* 593 U. S. 522, 541 (2021). The Board asserts that its curriculum and no-opt-out policy serve its compelling interest in "maintaining a school environment that is safe and conducive to learning for all students." An MCPS official testified that permitting opt outs would result in "significant disruptions to the classroom environment" and would expose certain students to "social stigma and isolation." Schools have a "compelling interest in having an undisrupted school session conducive to the students' learning." *Grayned* v. *City of Rockford*, 408 U. S. 104, 119 (1972). But the Board continues to permit opt outs in a variety of other circumstances, including for "noncurricular" activities and the "Family Life and Human Sexuality" unit of instruction, for which opt outs are required under Maryland law. And the Board goes to great lengths to provide independent, parallel programming for many other students, such as those who [are] multilingual learners or who qualify for an individualized educational program. This robust "system of exceptions" undermines the Board's contention that [providing] opt outs to religious parents would be infeasible or unworkable. The Board asserts that the "Family Life and Human Sexuality" unit of instruction is meaningfully different because it is "discrete" and "predictably timed," and therefore schools can accommodate opt outs without producing the same "absenteeism and administrability concerns." But if the Board can structure the "Family Life and Human Sexuality" curriculum to more easily accommodate opt outs, it could structure instruction concerning the "LGBTQ+-inclusive" storybooks similarly. The Board also suggests that permitting opt outs from the "LGBTQ+-inclusive" storybooks would be unworkable because, when it permitted such opt outs in the past, they resulted in "unsustainably high numbers of absent students." But the Board's concern is self-inflicted. The Board is doubtless aware of the presence in Montgomery County of substantial religious communities whose members hold traditional views on marriage, sex, and gender. The Board cannot escape its obligations under the Free Exercise Clause by crafting a curriculum that is so burdensome that a substantial number of parents elect to opt out. Nor can the Board's policies be justified by its asserted interest in protecting students from "social stigma and isolation." The "Family Life and Human Sexuality" unit of instruction includes discussions about sexuality and gender. Yet the Board has not suggested that the legally-required provision of opt outs

from that curriculum has resulted in stigma or isolation. Even if it did, the Board cannot purport to rescue one group of students from stigma and isolation by stigmatizing and isolating another. A classroom environment that is welcoming to all students is something to be commended, but such an environment cannot be achieved through hostility toward the religious beliefs of students and their parents.

"Courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Yoder*, 406 U. S., at 235. What the parents seek here is not the right to micromanage the public school curriculum, but rather to have their children opt out of a particular educational requirement that burdens their well-established right "to direct 'the religious upbringing' of their children." *Espinoza*, 591 U. S., at 486 (quoting *Yoder*, 406 U. S., at 213). We express no view on the educational value of the Board's proposed curriculum, other than to state that it places an unconstitutional burden on the parents' religious exercise if it is imposed with no opportunity for opt outs. Providing such an opportunity would give the parents no substantive control over the curriculum itself. Prior to the introduction of the "LGBTQ+-inclusive" storybooks, the Board's own "Guidelines for Respecting Religious Diversity" gave parents a broad right to have their children excused from specific aspects of the school curriculum. These facts belie any suggestion that the provision of parental opt outs in circumstances like these "will impose impossible administrative burdens on schools."

The Board's introduction of the "LGBTQ+-inclusive" storybooks, along with its decision to withhold opt outs, places an unconstitutional burden on the parents' rights to the free exercise of their religion. The parents have shown that they are likely to succeed in their free exercise claims. They have likewise shown entitlement to a preliminary injunction pending the completion of this lawsuit. In the absence of an injunction, the parents will continue to be put to a choice: either risk their child's exposure to burdensome instruction, or pay substantial sums for alternative educational services. That choice unconstitutionally burdens the parents' religious exercise, and "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U. S. 14, 19 (2020) (*per curiam*). In light of the strong showing made by the parents, and the lack of a compelling interest supporting the Board's policies, an injunction is both equitable and in the public interest. Petitioners should receive preliminary relief while this lawsuit proceeds. Until all appellate review is completed, the Board should be ordered to notify them in advance whenever one of the books in question or any other similar book is to be used and to allow them to have their children excused from that instruction.

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

It is so ordered.

Justice Thomas, concurring.

The Board's "LGBTQ+-inclusive" curriculum and no-opt-out policy rest on the sort of conformity-driven rationales that this Court rejected in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). The Board has maintained throughout this litigation that the storybooks serve broad interests in "promoting equity, respect, and civility among its diverse community"; "normalizing a

fully inclusive environment"; "encouraging respect for all"; and creating a "safe educational environment." It further determined that allowing opt-outs might "expose" students "who believe that the books represent them or their families" to "social stigma and isolation." But, the Board's response to parents' attempts to opt their children out of the storybook curriculum conveys that parents' religious views are not welcome in the "fully inclusive environment" that the Board purports to foster. At least one Board member suggested that students were "parroting" their parents' "dogma" The Board member analogized the parents to "white supremacists" and "xenophobes." A different Board member suggested that any objection to the "LGBTQ+-inclusive" curriculum stemmed from "ignorance and hate." In the Board's view, for parents to suggest that the storybooks were inappropriate would be "a dehumanizing form of erasure." These statements suggest that "being accepting" has limits—and that parents' sincerely held religious beliefs fall beyond them. Far from promoting "inclusion" and "respect for all," the Board's no-opt-out policy imposes conformity with a view that undermines parents' religious beliefs, and thus interferes with the parents' right to "direct the religious upbringing of their children,"

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

Public schools are "at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Edwards* v. *Aguillard*, 482 U. S. 578, 584 (1987). They offer to children of all faiths and backgrounds an education and an opportunity to practice living in our multicultural society. That experience is critical to our Nation's civic vitality. Yet it will become a mere memory if children must be insulated from exposure to ideas and concepts that may conflict with their parents' religious beliefs.

The Free Exercise Clause commands that the government "shall make no law ... prohibiting the free exercise" of religion. U. S. Const., Amdt. 1. The Clause prohibits government from compelling individuals, directly or indirectly, to give up or violate their religious beliefs. Mere exposure to objectionable ideas does not give rise to a free exercise claim. The majority's novel test imposes no meaningful limits on the types of school decisions subject to strict scrutiny. Today's ruling thus promises to wreak havoc on our Nation's public schools. Given the multiplicity of religious beliefs in this country, innumerable themes may be "contrary to the religious principles" that parents "wish to instill in their children." Books expressing implicit support for patriotism, women's rights, interfaith marriage, consumption of meat, immodest dress, and countless other topics may conflict with sincerely held religious beliefs and thus trigger stringent judicial review. Imagine a children's picture book that celebrates the achievements of women in history, including female scientists, politicians, astronauts, and authors. That message may be "directly contrary to the religious principles that" a parent "wishes to instill in their child." In the majority's view, that is sufficient to trigger strict scrutiny of any school policy not providing notice and opt out to objecting parents. Hard questions might arise, too, from a school's efforts to encourage mutual respect or to prevent bullying. If a student calls a classmate a "sinner" for not wearing a headcovering or coming out as gay, how can a teacher respond without "undermining" that child's religious beliefs? Can parents litigate the content of teacher responses and impose scripts or opt-out policies for everyday interactions designed to foster tolerance and civility? The majority's new rule will have serious chilling effects on public school curricula. Few school districts will be able to afford costly

litigation over opt-out rights or to divert resources to administering impracticable notice and opt-out systems for individual students. The foreseeable result is that some school districts may strip their curricula of content that risks generating religious objections.

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

Food for Thought

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

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

Food for Thought

A catholic high school discharges a teacher of English and drama because he is gay. The teacher challenges the dismissal under a local anti-discrimination law. The school defends against the claim, alleging that teachers play a "vital role as a messenger" of the faith, and that this teacher taught Christian thought" and was required to provide a "classroom environment consistent with Catholicism." In carrying out his duties, the teacher consulted other teachers to make sure that his teachings were consistent with the Catholic faith. However, when he announced on Facebook that he was going to marry his boyfriend, the school discharged him. Does the ministerial exception protect the school's decision against a claim that it violated the anti-discrimination ordinance? *See Billard v. Charlotte Catholic High School*, 101 F.4th 316 (4th Cir. 2024).

B. DISCRIMINATION AGAINST RELIGION

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

Food for Thought

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

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

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

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

Food for Thought

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

On p. 963, before the problems, add the following new case:

Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission
605 U.S., —, 145 S. Ct. 1583 (2025).

Justice SOTOMAYOR delivered the opinion of the Court.

Wisconsin has long operated an unemployment compensation program that seeks to mitigate and "more fairly" distribute the "economic burdens resulting from unemployment." To achieve that goal, Wisconsin requires most employers to make regular contributions to the State's unemployment fund through payroll taxes. Nonprofit employers may choose between contributing to that fund and reimbursing the State for benefits paid to their laid-off employees. Wisconsin's regime contains an exemption for religious employers. The exemption applies to any "church or convention or association of churches," without further qualification, and to services provided "by a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order." The exemption also covers nonprofit organizations "operated, supervised, controlled, or principally supported by a church or convention or association of churches," but only if they are "operated primarily for religious purposes." Wisconsin is not alone. The Federal Unemployment Tax Act contains a textually parallel religious-employer exemption. Since Congress enacted that law, over 40 States have adopted similar exemptions.

Catholic Charities Bureau, Inc. is a nonprofit organization that serves as the social ministry arm of the Roman Catholic Diocese of Superior. The Bureau's mission is to "carry on the redeeming work of our Lord." In aid of that mission, the Bureau "provides services to the poor and disadvantaged" and seeks to "be an effective sign of the charity of Christ." It does not distinguish on the basis of "race, sex, or religion in reference to clients served, staff employed and board members appointed." The Bureau oversees several separately incorporated entities, including four that, together with the Bureau, are the petitioners. These entities provide a range of charitable services to local communities across Wisconsin. Barron County Development Services, for instance, helps individuals with disabilities secure employment. Black River Industries provides daily living services to Wisconsinites with developmental or mental health disabilities, among other charitable services.

The Roman Catholic Diocese of Superior exercises control over both the Bureau and its subentities. The bishop serves as the Bureau's president and appoints its membership, which oversees the Bureau "to ensure" that it fulfills its mission "in compliance with the Principles of Catholic social teaching." The Bureau's executive director, who need not be a Catholic priest, supervises the operations of each subentity. Employees of the Bureau and its subentities are not required to ascribe to any particular religious faith, and the same is true for the recipients of their services. Participants in petitioners' programs do not receive religious training or orientation, and neither the Bureau nor its subentities "tries to 'inculcate' " participants with the Catholic faith. That rule reflects religious doctrine prohibiting Catholic bodies from "misusing works of charity for purposes of proselytism." Catholic teachings distinguish between "evangelization," which involves "sharing one's faith," and "proselytization," which seeks to "influence" or "coerce" others into accepting one's religious views. The former is permitted, the latter is not.

In 2016, petitioners sought from the Wisconsin Department of Workforce Development a determination that they qualified for the religious-employer exemption set forth in Wis. Stat. The department denied their request. It acknowledged that petitioners are "supervised and controlled by the Roman Catholic Church." The department determined, however, that petitioners are not "operated primarily for religious purposes" within the meaning of the statute. Petitioners appealed. The State Court of Appeals reasoned that petitioners are not "operated primarily for religious purposes" because petitioners' "charitable social services are neither inherently or primarily religious activities." The Wisconsin Supreme Court affirmed. The court held that petitioners "are not operated primarily for religious purposes within the meaning of Wis. Stat. § 108.02(15)(h)(2)." We granted certiorari.

"The clearest command of the Establishment Clause" is that the government may not "officially prefer" one religious denomination over another. *Larson* v. *Valente*, 456 U. S. 228 (1982). This principle of denominational neutrality bars States from passing laws that "aid or oppose" particular religions, or interfere in the "competition between sects," *Zorach* v. *Clauson*, 343 U. S. 306 (1952). The Establishment Clause's "prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U. S., at 245. The "fullest realization of true religious liberty requires that government" refrain from "favoritism among sects." *Id*., at 246. Government actions that favor certain religions convey to

members of other faiths that "they are outsiders, not full members of the political community." *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 309 (2000).

To guard against that serious harm, *Larson* v. *Valente*, 456 U. S. 228, set a demanding standard for the government to justify differential treatment across religions on denominational lines. When a state law establishes a denominational preference, courts must "treat the law as suspect" and apply "strict scrutiny in adjudging its constitutionality." The government bears the burden to show that the relevant law, or application thereof, is "closely fitted to further a compelling governmental interest." Id., at 251. A law that differentiates between religions along theological lines is textbook denominational discrimination. For instance, a law that treats "a religious service of Jehovah's Witnesses differently than a religious service of other sects" because the former is "less ritualistic, more unorthodox, and less formal." *Fowler* v. *Rhode Island*, 345 U. S. 67, 69 (1953). Or consider an exemption that applies only to religious organizations that perform baptisms, engage in monotheistic worship, or hold services on Sunday. Such laws establish a preference for certain religions based on the content of their religious doctrine, namely, how they worship, hold services, or initiate members and whether they engage in those practices at all. Such official differentiation on theological lines is fundamentally foreign to our constitutional order, for "the law knows no heresy, and is committed to the support of no dogma." *Watson* v. *Jones*, 13 Wall. 679, 728 (1872).

This case involves that paradigmatic form of denominational discrimination. In determining whether petitioners qualified for the tax exemption, the Wisconsin Supreme Court acknowledged that petitioners are controlled by a church, thereby satisfying one of the exemption's two criteria. The court recognized that petitioners' charitable works are religiously motivated. The court nevertheless deemed petitioners ineligible for the exemption because they do not "attempt to imbue program participants with the Catholic faith," "supply any religious materials to program participants or employees," or limit their charitable services to members of the Catholic Church. Put simply, petitioners could qualify for the exemption while providing their current charitable services if they engaged in proselytization or limited their services to fellow Catholics. Petitioners' Catholic faith, however, bars them from satisfying those criteria. Catholic teaching, petitioners say, forbids "misusing works of charity for purposes of proselytism." It also requires provision of charitable services "without making distinctions 'by race, sex, or religion.' " Many religions apparently impose similar rules prohibiting proselytization or religious differentiation in the provision of charitable services. Others seemingly have adopted a contrary approach.

Wisconsin's exemption thus grants a denominational preference by explicitly differentiating between religions based on theological practices. Petitioners' eligibility for the exemption ultimately turns on inherently religious choices (namely, whether to proselytize or serve only co-religionists), not "secular criteria" that "happen to have a 'disparate impact' upon different religious organizations." *Larson*, 456 U. S., at 247. Much like a law exempting only those religious organizations that perform baptisms or worship on Sundays, an exemption that requires proselytization or exclusive service of co-religionists establishes a preference for certain religions based on the commands of their religious doctrine. As applied to petitioner, Wis. Stat. § 108.02(15)(h)(2) imposes a denominational preference by differentiating between religions based on theological choices.

The State does not dispute that the government may not prefer one religion over another. Instead, the State argues that, when it comes to "religious accommodations" afforded by the government, courts should ask whether the accommodation's eligibility criteria are the product of "invidious discrimination" to determine if strict scrutiny applies. *Gillette* v. *United States*, 401 U. S. 437 (1971). As the State would have it, *Gillette* stands for the premise that whenever a religious "accommodation's line serves 'considerations of a pragmatic nature' having 'nothing to do with a design to foster or favor any sect, religion, or cluster of religions,' the Establishment Clause is not offended." *Gillette* is inapposite. There, this Court rejected an Establishment Clause challenge to a provision of the Military Selective Service Act of 1967, which afforded "conscientious objector" status to any person who, "by reason of religious training and belief," was "conscientiously opposed to participation in war in any form." That exemption "focused on individual conscientious belief, not on sectarian affiliation." Conscientious objector status was thus "available on an equal basis" to members of all religions under the Military Selective Service Act, as explained in *Larson*. The statute "simply did not discriminate on the basis of religious affiliation." *Gillette*, 401 U. S., at 450. The same is not true here. The Wisconsin Supreme Court's interpretation of § 108.02(h)(15)(2) facially differentiates among religions based on theological choices. An exemption provided only to organizations that engage in proselytization or serve only co-religionists is not, on its face, "available on an equal basis" to all denominations. That type of "explicit" distinction between religious practices is what this Court has deemed subject to strict scrutiny, including in the context of religious exemptions.

The State disputes the premise that petitioners were denied coverage "because they do not proselytize or serve only Catholics" in the course of performing charitable work. The State insists that, instead, the Wisconsin Supreme Court excluded petitioners because they had "identified no distinctively religious activity that would create difficulty in resolving unemployment disputes." The State clarified that it meant "activities that express and inculcate religious doctrine: worship, proselytization, religious education." That understanding of the Wisconsin Supreme Court's ruling cannot save the statute from strict scrutiny. Decisions about whether to "express and inculcate religious doctrine" through worship, proselytization, or religious education when performing charitable work are fundamentally theological choices driven by the content of different religious doctrines. A statute that excludes religious organizations from an accommodation on such grounds facially favors some denominations over others. Because § 108.02(15)(h)(2) "grants denominational preferences of the sort consistently and firmly deprecated in our precedents," it "must be invalidated unless it is justified by a compelling governmental interest" and is "closely fitted to further that interest." *Larson*, 456 U. S., at 246. The State bears the burden of clearing that high bar, and it has failed.

Wisconsin justifies its law by reference to two interests. First, it argues that the law serves a compelling state interest in "ensuring unemployment coverage for its citizens." Yet the State fails to explain how the theological lines drawn are narrowly tailored to advance that asserted interest, particularly as applied to petitioners. Petitioners operate their own unemployment compensation system for employees, which provides benefits largely "equivalent" to the state system. Furthermore, Wisconsin does not suggest that organizations like Catholic Charities, which decline to proselytize and choose to serve all-comers, are more likely to leave their employees without

unemployment benefits. The distinctions drawn by Wisconsin's regime, moreover, are vastly underinclusive when it comes to ensuring unemployment coverage for its citizens. Wisconsin exempts over 40 forms of "employment" from its unemployment compensation program. Those exemptions cover religious entities that provide charitable services in a similar manner to petitioners (that is, without proselytizing or denominational differentiation), but are exempt because the work is done directly by the church itself or its ministers, rather than by a separate nonprofit organization controlled by the church. That underinclusiveness belies the State's claim of narrow tailoring. Second, the State argues that the Wisconsin Supreme Court's interpretation is "narrowly tailored to avoid entangling the state with employment decisions touching on religious faith and doctrine." When an organization's employees "express and inculcate religious doctrine through worship, proselytization, and religious education," the State explains, "misconduct disputes could often force the state to decide whether employees complied with religious doctrine." Yet it does not explain why it declined to craft an exemption limited to employees who are in fact tasked with inculcating religious doctrine. Instead, the exemption functions at an organizational level, covering both janitor and priest in equal measure. Wisconsin exempts from its unemployment compensation system all "churches or conventions or associations of churches" without differentiating between employees actually involved in religious works, for whom the anti-entanglement concern is relevant, and other staff. The State concedes that this regime contains "over-inclusivity." The poor fit between the anti-entanglement concern and the line it has drawn among religious organizations cannot be described as narrow tailoring. The State has failed to carry its burden under strict scrutiny.

It is fundamental to our constitutional order that government maintain "neutrality between religion and religion." *Epperson*, 393 U. S., at 104. When the government distinguishes among religions based on theological differences in their provision of services, it imposes a denominational preference that must satisfy the highest level of judicial scrutiny. Because Wisconsin has transgressed that principle without the tailoring necessary to survive such scrutiny, the judgment of the Wisconsin Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

This structure of the Church is a matter of faith, not mere administrative convenience. The Court correctly holds that Catholic Charities and its subentities have suffered unconstitutional religious discrimination. [Also,] the Wisconsin Supreme Court violated the church autonomy doctrine.

Justice JACKSON, concurring.

FUTA's religious-purposes exemption does not distinguish between charitable organizations based on their engagement in proselytization or their service to religious adherents. Nor does that exemption differentiate based on religious motivation. Rather, Congress used the phrase "operated primarily for religious purposes" to refer to the organization's function, not its inspiration. Put differently, § 3309(b)(1)(B) turns on *what* an entity does, not *how* or *why* it does it. As I read § 3309(b)(1)(B), evaluating whether a church-affiliated nonprofit "operate[s] primarily for religious

purposes" is not a matter of assessing the sincerity or primacy of its religious motives. Instead, determining what the religious-purposes exemption means involves attempting to discern what Congress was trying to achieve. Here, Congress sought to extend to most nonprofit workers the stability that unemployment insurance offers, while exempting a narrow category of church-affiliated entities most likely to cause significant entanglement problems for the unemployment system—precisely because their work involves preparing individuals for religious life. It is perfectly consistent with the opinion the Court hands down today for States to align their § 3309(b)(1)(B)-based religious-purposes exemptions with Congress's true focus.

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

Food for Thought

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