Summer 2024 Update to
Abrams, Cahn, McClain, Ross, Matsumura & Weaver
CONTEMPORARY FAMILY LAW
(West Academic, Sixth Edition, 2023)

This Summer 2024 Update to *Contemporary Family Law* (West Academic, 6th ed. 2023) includes some significant developments in family law since the Summer 2023 Update. This Update includes summaries of relevant U.S. Supreme Court actions from the 2023-2024 Term, including: (1) *Food & Drug Admin. v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) (updating Chapter 2, Section 1.D, What Is the Scope of Due Process Liberty After *Dobbs*?); (2) *Moyle v. United States*, 603 U.S. __ (2024) (same); (3) *Department of State v. Muñoz*, 144 S. Ct. 1812 (2024) (updating Chapter 3, Section 5.A, Federal Laws Shaping Marriage and the Family); (4) *United States v. Rahimi*, 602 U.S. __ (2024) (updating Chapter 7, Section 1.C.3, Intimate Partner Violence, Enforcing Civil Protection Orders); and (5) granting the United States's petition for certiorari in *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (updating Chapter 13, Section 3.C, Modification of Custody and Visitation Orders). The 2024 Update also includes selected developments in state law concerning marriage, divorce, parentage, equitable distribution, and post-*Dobbs* state constitutional litigation and ballot initiatives.

The Summer 2023 Update is attached as an Appendix to this document and includes edited versions of two U.S. Supreme Court decisions announced after the Sixth Edition went to press: (1) *303 Creative LLC et al. v. Elenis et al.*, 600 U.S. 570 (2023) (updating Chapter 2, Section C.3, Civil Marriage Equality and Religious Liberty (p. 130)); and (2) *Haaland v. Brackeen et al.*, 599 U.S. 255 (2023) (updating Chapter 6, Section 3.B., Native American Adoption (p. 464)). It also has Notes and Questions for each case. With respect to *303 Creative*, it provides a brief introduction summarizing the majority opinion and the dissenting opinion in the event that instructors do not choose to assign the case.

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Table of Contents

(includes only chapters with updates)

CHAPTER 1

FAMILIES AND FAMILY LAW IN CONTEMPORARY AMERICA

SECTION 3. FAMILIES AND CONSTITUTIONAL LAW

C. THE RIGHT TO INDIVIDUAL AND FAMILY PRIVACY

Insert on page 41, after Note 3:

In the post-*Dobbs* environment, the Comstock Act has been receiving new attention. Congress enacted the Comstock Act in 1873, and it criminalizes mailing or shipping any "lewd, lascivious, indecent, filthy or vile article" and anything that "is advertised or described in a manner … for producing abortion." Some anti-abortion groups have sought to broaden its application, with the potential that "the Comstock Act applies to the distribution of all drugs and medical tools used for abortions," including abortion pills, which are now used in the majority of abortions in the United States.

Naomi Cahn & Sonia Suter, *An Obscure 1800s Law Is Shaping Up to Be the Center of the Next Abortion Battle – Legal Scholars Explain What's Behind the Victorian-era Comstock Act,* The Conversation (May 12, 2023).

Insert on page 41, after Note 4. Privacy guarantees in state constitutions:

After the mandatory retirement (at age 72) of Justice Hearn (the only woman on the high court), the South Carolina legislature replaced her with Judge Gary Hill. Republican leaders in the legislature promptly passed a virtually identical ban, with the same name as the 2021 law, the "Fetal Heartbeat and Protection from Abortion Act." This time, the Supreme Court of South Carolina upheld the law (in a 4-1 decision) as constitutional, allowing it to go into effect. *See* Bracey Harris, *South Carolina's All-Male Supreme Court Upholds 6-week Abortion Ban*, NBC News (Aug. 23, 2023). The majority opinion (written by Justice John Kittredge) stated that, "to be sure, the 2023 Act infringes on a woman's right of privacy and bodily autonomy." *Planned Parenthood South Atlantic et al. v. State of South Carolina*, 892 S.E.2d 121, 131 (S.C. 2023). However, "[t]he legislature has made a policy determination that, at a certain point in the pregnancy, a woman's interest in autonomy and privacy does not outweigh the interest of the unborn child to live." Kittredge continued: "As a Court, unless we can say that the balance struck by the legislature was unreasonable as a matter of law, we must uphold the Act." *Id*. In his dissent, Chief Justice Beatty stated that because the 2023 law was essentially the same as the 2021 law, the Court

should have ruled that the new ban was an unreasonable invasion of privacy, following its earlier decision and respecting the doctrine of stare decisis. *Id*. at 153.

On April 1, 2024, in *Planned Parenthood of Southwest and Central Florida et al. v. State of Florida et al*., 384 So.3d 67, 71 (Fla. 2024), the Supreme Court of Florida held that Article 1, § 23 of the Florida Constitution (the "Privacy Clause"), which guarantees "the right to be let alone and free from governmental intrusion into . . . private life," did not invalidate a Florida law banning abortion after fifteen weeks. The court "recede[d]" from two prior decisions in which it held that "the Privacy Clause guaranteed the right to receive an abortion through the end of the second trimester." *Id*. One justice dissented, arguing that in 1980, when voters approved the Privacy Clause, "a Florida voter would have understood that the proposed privacy amendment 'included broad protections for abortion'" and that the majority ignored "substantial evidence" that "overwhelmingly" supported that conclusion. *Id*. at 94. The court's decision also cleared the way for a six-week ban to take effect.

On the same day, the Supreme Court of Florida issued an advisory opinion that a proposed ballot initiative, "Amendment to Limit Government Interference with Abortion," was valid and could be placed on the ballot in November 2024. Governor DeSantis and the Attorney General Moody opposed the initiative and asked the court for an opinion. *See* Advisory Opinion to the Attorney General Re: Limiting Government Interference with Abortion, No. SC2023-1392 (Fla. Apr. 1, 2024).

In November 2023, Ohio voters approved a ballot initiative amending the Ohio Constitution to include "a right to make and carry out one's own reproductive decisions," including decisions about abortion, contraception, fertility care, miscarriage care, and continuing pregnancy. *See 2023 and 2024 Abortion-Related Ballot Measures,* Ballotpedia, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures. As of July 2024, five states (in addition to Florida) have certified ballot initiatives about abortion for the November 2024 elections: Colorado, Maryland, Nevada, New York, and South Carolina. Efforts in other states are underway. *Id*.

CHAPTER 2

ENTERING MARRIAGE

SECTION 1. SUBSTANTIVE REQUIREMENTS FOR ENTRY INTO MARRIAGE

B. CAN THE RIGHT TO MARRIAGE BE ABRIDGED?

Insert at the end of Problem 2-1 (p. 97):

Arguments that federal assistance programs impose a "marriage penalty" also arise with respect to the Supplemental Security Income (SSI) program, which provides monthly cash assistance to persons with disabilities and older persons with limited income and resources. Persons who receive SSI also qualify for health care through Medicaid. National Public Radio interviewed "dozens of people" who receive SSI and reported that they are "stuck" because of how SSI treats people who marry. SSI puts limits on how much someone receiving SSI can own in savings and assets: $2,000 for an individual and $3,000 for a couple; these amounts that have not changed since 1989. If these levels were adjusted for inflation, they would be $10,000 for an individual and about $17,000 for a couple. Joseph Shapiro, *Couples Say They Can't Get Married Because of This Government Program's Outdated Rules*, NPR (June 20, 2024). Some of the interviewees made "painful decisions" not to marry; some married and lost their SSI benefits; some lived with a partner without marrying, but had to hide it from Social Security employees lest they lose their benefits. *Id*. One featured couple, Amber and Devine Weise, only learned of the limits after they married and Amber lost her monthly income check and health care. In June 2024, Social Security Commissioner Martin O'Malley said that Congress needs to raise SSI's asset limit. *Id*. What type of arguments concerning marriage would support bipartisan legislation to do so? Consider Amber Weiss's statement: "Nobody should be punished for getting married." *Id*.

D. WHAT IS THE SCOPE OF DUE PROCESS LIBERTY AFTER *DOBBS*?

Insert on page 155, after Note 6:

7. *Major updates after* Dobbs. The Supreme Court considered two abortion cases during its October 2023 term, and, in each, the Court did not reach the merits. In *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367 (2024), the Supreme Court unanimously held that anti-abortion groups did not have standing to challenge the FDA's approval of mifepristone, one of the two drugs used in a medication abortion, although the Court did not foreclose challenges by those with

standing. *See* Naomi Cahn & Sonia Suter, *Supreme Court Unanimously Concludes that Anti-Abortion Groups Have no Standing to Challenge Access to Mifepristone – but the Drug Likely Faces More Court Challenges*, The Conversation (June 13, 2024).

In *Moyle v. United States*, 603 U.S. __ (2024), the Supreme Court faced the issue of whether the federal Emergency Medical Treatment and Labor Act (EMTALA) overrides Idaho's strict abortion ban. EMTALA requires that emergency rooms provide stabilizing care, including abortions, for patients experiencing medical emergencies regardless of their ability to pay. Idaho state law is more limited, banning abortions unless they are necessary to save the life of the mother and in some cases of rape and incest. On June 27, 2024, the Supreme Court issued a per curiam opinion, dismissing the writ of certiorari as improvidently granted. Accordingly, the case was returned to the 9th Circuit for further argument.

As discussed above, in the update to Chapter 1, there were numerous actions in states concerning access to abortion, including state ballot initiatives and state court decisions. For a summary of state litigation, see Center for Reproductive Rights, *Post*-Roe *State Abortion Ban Litigation* (2024), https://reproductiverights.org/case/post-roe-state-abortion-ban-litigation/.

In one case, *Allegheny Reproductive Health Center v. PA Department of Human Services,* 309 A.3d 808 (Pa. 2024), the Pennsylvania Supreme Court held that patients and abortion providers could challenge the 1982 Pennsylvania statute that prohibited the use of Medicaid to cover funding for abortions. It overruled an earlier case upholding the restriction and concluded that the funding restriction violated the Equal Rights Amendment of the Pennsylvania Constitution. Among other holdings in the 200-plus page opinion, two of the justices would have reached (without remanding to the lower court) the plaintiffs' argument that the state constitutional right to privacy protected abortion rights: "we conclude that the Pennsylvania Constitution secures the fundamental right to reproductive autonomy, which includes a right to decide whether to have an abortion or to carry a pregnancy to term." *Id*. at 917. Although the case was decided under state constitutional law, one concurring opinion, by Justice Wecht, reached out to critique *Dobbs*'s approach to history and tradition, commenting that, "relying upon particular points of history during which women expressly were precluded from political participation effectively enshrines and perpetuates the legal subjugation of women." On that approach, "[T]here is no opportunity for the status of women to advance and no chance to repudiate the nation's discriminatory history. The nation is locked into the gendered hierarchies of our past." *Id*. at 981.

SECTION 2. BIGAMY LAWS AND PLURAL MARRIAGE

A. Introduction: Polygamy in Historical and Contemporary Context

Insert as new paragraph on page 159, at the end of the carry-over paragraph about polyamory (pp. 158-59):

The term "polycule," as a synthesis of polyamory and molecule, is sometimes used to "suggest an intricate structure formed of people with overlapping deep attachments: romantic, sexual, sensual, platonic." *Lessons from a 20-Person Polycule: How They Set Boundaries, Navigate Jealousy, Wingman Their Spouses and Foster Community,* N.Y. Times (Magazine) (Apr. 15, 2024). In April 2024, the "Modern Love Issue" of the *New York Times Magazine* included a feature with an interview by Daniel Bergner—and photographs by Anne Vetter—of the members of a 20-person polycule in the Boston area. *Id.* Several members of the polycule are married to other members of the polycule. One interviewee (Katie) viewed the polycule as part of a "social movement" that would help people "feel more freedom about how they want to live and about pooling resources and living their best life." Katie commented that "[t]he structure of the nuclear family, the nuclear marriage, needs to shift," observing that sharing a house with others is more economically realistic and fosters community. *Id.*

SECTION 3. INCESTUOUS MARRIAGE

Insert on page 175, at the end of the paragraph, "When it comes to marriage of first cousins , . . . ":

In 2024, the Tennessee legislature voted "overwhelmingly in favor" of a bill that prohibits first cousins from marrying. Rebekah Riess, *Tennessee Legislature Passes Bill Banning Marriages Between First Cousins*, CNN (Apr. 12, 2024). One opponent of the bill, Representative Gino Bulso (a Republican), invoked the example of his grandparents, first cousins who married each other after moving to Tennessee. He unsuccessfully proposed an amendment that would have permitted such marriages if couples received genetic counseling. Aila Slisco, *Tennessee Republicans Fight Ban on Cousins Getting Married*, Newsweek (Apr. 11, 2024). Although he opposes same-sex marriage—and introduced a bill to ban LGBTQ Pride flags—Bulso argued that the first cousin ban "demonstrably violates" *Obergefell v. Hodges* (reprinted in Section 2 of this Chapter.) Governor Bill Lee signed the bill on April 11, 2024. Tenn. Public Chap. No. 806 (S.B. No. 1917) (amending Title 36, Chap. 3). For discussion of the import of *Obergefell* for incest laws, see below at pp. 179-80.

PROBLEM 2-4

Insert at end of Problem 2-4 (p. 182):

As discussed later in the update to Chapter 5, Section 2.A.2 (Statutory Approaches to ART), the Uniform Parentage Act (UPA) of 2017 was amended in

December 2023 to provide (in Article 9) that donor-conceived offspring are able to access identifying information about their donors once the offspring are 18 years old. Would you urge the state legislature you are advising to adopt this new UPA provision?

SECTION 4. MINIMUM AGE AT MARRIAGE

Insert at end of Note 4, pp. 191-92:

In July 2024, President Julius Maada Bio signed a law banning marriages for children under age 18 in Sierra Leone. The penalty for an adult who marries a child is 15 years imprisonment or a fine over $5000. The law goes beyond similar laws in Africa by imposing imprisonment (10 years) and/or fines ($2500) on anyone who "aids or abets" the marriage, such as the parents, the officiant, and wedding guests. *Id.* The law permits those married as children to petition for annulment and to seek financial compensation. The law also applies to adult-child cohabitation in which there is a sexual relationship. Amelia Nierenberg, *How to Stop Child Marriage? Punish Husbands, Parents, and Wedding Guests,* N.Y. Times (July 3, 2024). UNICEF reported in 2020 that approximately 800,000 girls under the age of 18 in Sierra Leone were married, nearly one third of the girls in the country. *Id.* By comparison, about 4 percent of boys in Sierra Leone are married by age 18. After signing the law with his daughter by his side, President Bio posted on social media: "I have always believed that the future of Sierra Leone is female." *Id.* Do you think this law will have a significant impact on the prevalence of child marriage?

SECTION 5. CONSENT TO MARRIAGE

Insert at end of Problem 2-10 (page 200):

In April 2024, Britney Spears and her father settled their legal dispute over his legal fees and his management of her finances during his conservatorship (which ended in 2021). The settlement terms were not disclosed in the court filings. Liz Day & Lauren Herstik, *Britney Spears and Her Father Settle Legal Dispute Over Conservatorship*, N.Y. Times (Apr. 26, 2024).

CHAPTER 3

FAMILY ROLES, RIGHTS, AND OBLIGATIONS

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SECTION 5. FEDERAL LAWS SHAPING MARRIAGE AND THE FAMILY

A. IMMIGRATION

Insert on page 297, after Note 1:

Many married American citizens probably assume that their right to marry encompasses the right to live in a place of their choice together with their spouse. Indeed, the Supreme Court held in *Obergefell v. Hodges*, 576 U.S. 644 (2015), that the right to marry compels states to "recognize same-sex marriages validly performed out of State" because of concerns that any other rule would interfere with the ability of married same-sex couples to travel outside of state lines, thus diluting the value of the right to marry. *Id.* at 680-81.

This reasoning does not extend to marriages between American citizens and non-citizens. In *Department of State v. Muñoz*, 144 S. Ct. 1812 (2024), the Court held that the right to marry does not include the right to bring one's noncitizen spouse to the United States. *Id.* at 1825. Sandra Muñoz, a U.S. citizen, married Luis Asencio-Cordero, a Salvadorian citizen, in the United States. After the marriage, the couple took steps for Asencio-Cordero to apply for a visa as an immediate relative of Muñoz. The application process required Asencio-Cordero to travel to El Salvador to submit his visa application at a consulate there. A consular official interviewed Asencio-Cordero and denied his visa application, citing the statutory provision referring to persons suspected of traveling to the United States to engage in "unlawful activity." *Id.* at 1819. (Muñoz and Asencio-Cordero guessed that the official suspected Asencio-Cordero of being a member of the MS-13 gang based on tattoos visible on his body).

The relevant immigration statute requires only that the government provide written notice of a visa denial as well as the statute under which the alien is inadmissible. Muñoz sued the State Department, arguing that because the denial deprived her of a constitutionally protected liberty interest in her husband's visa application, the State Department was required to provide her with a "facially legitimate and bona fide reason" for the denial. *Id.* The Court disagreed. First, it reiterated that the decision whether to admit "foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely

immune from judicial control." *Id.* at 1820 (internal citation and quotation marks omitted). Second, the Court held that Muñoz could not show that the State Department's actions infringed a liberty interest, specifically, a constitutional right to live with her non-citizen husband in her country of citizenship. *Id.* at 7. Applying the test from *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) [Eds.: see the discussion of the test in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), pp. 131-32], the Court held that history and tradition pointed in the opposite direction: "once Congress began to restrict immigration, 'it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States.'" *Id.* at 1823 (citation omitted).

Dissenting, Justice Sotomayor pointed out the human costs of the Court's decision. Muñoz would face a stark choice: to remain in the U.S. with the couple's child without her husband, or to leave behind her life in the U.S., moving to El Salvador to reunite their family. *Id.* at 1828 (Sotomayor, J., dissenting). Surely, Justice Sotomayor reasoned, "excluding a citizen's spouse burdens her right to marriage, and that burden requires the Government to provide at least a factual basis for its decision[.]" *Id.* at 1829. Justice Sotomayor argued that the Court's precedents, culminating in *Obergefell*, recognized "the right to marry in its comprehensive sense of 'marriage and intimacy.'" *Id.* at 1834. If marriage is about companionship, establishing a home together, and raising one's children, "excluding a citizen's spouse from the country 'burdens' the citizen's right to marriage." *Id.* at 1835.

The dissent also accused the Court of beginning to substantially reshape its substantive due process jurisprudence after its decision in *Dobbs*. [Eds.: refer back to Note 4 on page 154, pointing out Justice Thomas's call to revisit the Court's other substantive due process precedents]. It is perhaps telling that the Court did not even mention *Obergefell* when dismissing Muñoz's argument that she had a liberty interest in living together with her spouse. Justice Sotomayor warned that same-sex couples potentially have the most to lose from the Court's decision, because many countries do not recognize the legality of same-sex marriages and go so far as to criminalize same-sex intimacy. Thus, if same-sex spouses were to find themselves in Muñoz's position, they might not even have the ability to reunite in their spouse's country of origin. *See id*.

The majority has ample support for the assertion that the courts have long granted the political branches plenary control over the border and that immigration laws have restricted entrance based on race, gender, and family status. But are these laws consistent with the Court's marriage jurisprudence? Recall *Zablocki v. Redhail*, where the Court held that laws that interfere "directly and substantially with the right to marry" must be subjected to heightened scrutiny under the Equal Protection Clause. [Eds.: p. 88]. The Court was talking specifically about the right to *enter* into a marriage in that context, but should the same reasoning apply to laws that burden *incidents* of marriage like cohabitation, or, as discussed above, receipt of public

benefits? More broadly, what do you expect the right to marry to entail? Is it merely the right to enter into a status, or does it necessarily encompass something more?

CHAPTER 5

ESTABLISHING PARENTHOOD

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SECTION 1. MARRIAGE AND BIOLOGY

A. THE CONSTITUTIONAL FRAMEWORK

2. The Marital Presumption Today

Insert on p. 393, after Note 3:

4. *Outliving its usefulness?* Are the policy justifications for the marital presumption as compelling as they once were in a world in which genetic testing is widely available, and both nonmarital childbirth and extramarital sexual relations are less stigmatized than they once were? In *Sitler v. Jones*, 312 A.3d 334 (Pa. Superior Ct. 2024), the appellate court affirmed a trial court decision denying a putative biological father's petition for genetic testing of a child born to a married mother. The mother informed the putative biological father that she was pregnant and the child might be his. *Id*. at 336. The record indicated, however, that the mother was also engaged in sexual relations with her husband during the period when the child was conceived, and the spouses "never separated and continue to live together . . . as a family unit." *Id*. at 335. The husband held himself out as the child's father and the putative biological father never met the child. The putative biological father argued that the policy behind the state's common law marital presumption, the preservation of marriage, would not be advanced in this case because the husband already knew of the extramarital affair and the mother's admission that he might not be the father of the child. *Id*. at 337. Thus, there was no indication that paternity testing would jeopardize the marriage. *Id*. The appellate court rejected this argument, pointing to a recent Pennsylvania Supreme Court opinion in which that court held that the marital presumption is irrebuttable "where there is an intact marriage to preserve." *Id*. at 339 (citation and quotation marks omitted). The Pennsylvania Supreme Court recently granted review of this case, certifying the question whether "the Commonwealth's interest in protecting family unity – does not outweigh the child and alleged biological parent's rights and interests[.]"

SECTION 2. BEYOND MARRIAGE AND BIOLOGY

A. ASSISTED REPRODUCTIVE TECHNOLOGY

2. Statutory Approaches to ART

Insert on p. 414, after Note 3:

4. *Donor Anonymity*: The Uniform Parentage Act was amended in December 2023, and now ensures that donor-conceived offspring are able to access identifying information about their donors.

> Article 9 requires gamete banks and fertility clinics to collect and retain both identifying information and nonidentifying medical history about gamete donors. Article 9 provides that gamete banks and fertility centers shall provide non-identifying medical history to parents upon request at any time and upon request by the donor-conceived child who attains 18 years of age. With regard to identifying information, Article 9 provides that a gamete bank or fertility center shall provide this information to the donor conceived child who attains 18 years of age upon their request.

Unif. Parentage Act Prefatory Note (2024).

Do you support this revision, or should donors (or parents) be able to prevent disclosure? Does the ubiquity of direct-to-consumer genetic testing affect your response? For further information, see Problem 2-4, p. 182.

5. *Legal status of embryos*. In *LePage v. Center for Reproductive Medicine*, __ So. 3d __, 2024 WL 656591 (Ala. Feb. 16, 2024),

> . . . the Alabama Supreme Court found that frozen embryos should be treated as children under Alabama's Wrongful Death of a Minor Act. Within three weeks, both houses of the Alabama state legislature passed bills in an attempt to preserve IVF treatment in the state and the governor signed the legislation. The Alabama opinion rested heavily on a 2018 state constitutional amendment, the "Sanctity of Unborn Life," which declares that Alabama's policy is "to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate." Moreover, the state had long treated the death of a fetus at any stage of pregnancy, including well before viability, as wrongful death; this latest decision simply extended that liability to frozen embryos.
>
> But Alabama is not alone. A Louisiana law defines frozen embryos as "juridical persons," and Arkansas's 1988 constitutional amendment declares its state

> policy is "to protect the life of every unborn child from conception until birth." After the *Dobbs* ruling, the state of Georgia allowed a fetus to be declared as a dependent for income tax purposes. In addition, more than half of US states allow wrongful death suits for fetuses—nearly a third at any stage of development (including in utero embryos).
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> . . .
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> The legislation passed in Alabama offers legal protection to providers and users of IVF services, but this legislative response both under and overreacts to the ruling. It under-reacts by failing to tackle the court's central declaration that embryos are people. As a result, it is unclear just how much control the intending parents will have over any excess embryos.

Sonia Suter & Naomi Cahn, *Lawmakers Rushed to Protect IVF in Alabama - Why Wasn't Abortion Afforded the Same Urgency?*, BMJ (2024). What advice would you give a fertility clinic in Alabama?

Although Congress has considered legislation to ensure continuation of IVF nationally, it has not yet been enacted. Can states reconcile abortion bans and IVF protection?

CHAPTER 7

INTIMATE PARTNER VIOLENCE AND FAMILY TORTS

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SECTION 1. INTIMATE PARTNER VIOLENCE

C.3. Enforcing Civil Protection Orders

Note 3. Domestic violence and firearms (pp. 512-13)

Insert at end of discussion of *United State v. Rahimi*, p. 513:

On June 30, 2023, the Supreme Court granted Mr. Rahimi's petition for certiorari. On June 21, 2024, the Court (8-1), in an opinion written by Chief Justice Roberts, reversed the Fifth Circuit. *United States v. Rahimi,* 602 U.S. __ (2024). There were five concurring opinions: by Justice Sotomayor (joined by Justice Kagan), and by Justices Gorsuch, Kavanaugh, Barrett, and Jackson. Justice Thomas dissented.

Writing for the majority, Chief Justice Roberts concluded that the Fifth Circuit erred in ruling that Section 922 (g)(8) conflicted with the Court's test in *New York State Rifle & Pistol Assn., Inc. v. Bruen,* 597 U.S. 1 (2022), because that regulation "does not fit within our tradition of firearm regulation." *Id.* at 5.

Roberts elaborated:

> When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition.

Rahimi, 602 U.S. __, slip op. at 5.

The majority opinion observed that Rahimi had made a facial challenge to Section 922 (g)(8), requiring him to "establish that no set of circumstances exists under which the Act would be valid," and requiring the Government to demonstrate only "that Section 922(g)(8) is constitutional as applied to the facts of Rahimi's own case." *Id.* at 8. Observing that the Section included "two independent bases for

liability," the Court stated that its analysis "starts and stops" with the first basis, Section 922 (g) (8)(C)(ii), which "bars an individual from possessing a firearm if his restraining order includes a finding that he poses 'a credible threat to the physical safety' of a protected person," because "the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others." *Id.* For that reason, the Court did not need to decide whether regulation under Section 922(g)(8) (C)(ii), the other basis for liability, "is also permissible." Section 922(g)(8)(C)(ii) bars an individual from possessing a fire arm if his restraining order "prohibits the use, attempted use, or threatened use of physical force." *Id.* at 8-9.

The Court also observed that "some courts have misunderstood the methodology of our recent Second Amendment cases," which "were not meant to suggest a law trapped in amber." *Id.* at 7. *Bruen,* Roberts explained, directed courts to "examine our 'historical tradition of firearm regulation' to help delineate the contours of the right" to bear arms. Then, "if a challenged regulation fits within that tradition it is lawful under the Second Amendment." *Id.* at 6. Further, "when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'" *Id.* at 7 (citing *Bruen*). While the regulation "must comport with the principles underlying the Second Amendment," it "need not be a 'dead ringer' or a 'historical twin.'" *Id.* at 8 (citing *Bruen*).

The Fifth Circuit panel erred by, "like the dissent" (by Justice Thomas), reading *Bruen "*to require a "historical twin" rather than a "historical analogue." *Id.* at 16. The Fifth Circuit also erred, Roberts wrote, by not correctly applying the Court's precedents "governing facial challenges." Namely, "'[w]hen legislation and the Constitution brush up against each other, [a court's] task is to seek harmony, not to manufacture conflict.'" *Id.* (citation omitted). Instead of considering "the circumstances in which Section 922(g)(8) was most likely to be constitutional, the panel instead focused on hypothetical scenarios where Section 922(g)(8) might raise constitutional concerns" (citing majority opinion and Judge Ho's concurring opinion). That error "left the panel slaying a straw man." *Id.* at 16-17.

Roberts's discussion of history and tradition mentioned two different "legal regimes" that developed by the 1700s and early 1800s to address "firearms violence." The first, surety laws, required individuals "suspected of future misbehavior" to "post a bond," pledging to "keep the peace," and to forfeit the bond for not doing so. This remedy "could be invoked to prevent all forms of violence, including spousal abuse." *Id.* at 11. The second regulatory "regime" for "punishing those who had menaced others with firearms" was "going armed" laws, a subset of the common-law prohibition on "affrays," or arming oneself to terrify people. *Id.* as 12.

Roberts concluded that such historical precedents confirm "what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 13. Section 922(g)(8) is not "identical" to those regimes, but "does not need to be;" its "prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent." *Id.* at 13-14. Further, Section 922(g)(8) fits "our regulatory tradition" because it involves a judicial determination and the restriction was "temporary" as applied to Rahimi; that is, it lasts as long as a defendant is subject to a restraining order. *Id.* at 14. The penalty for violation, imprisonment, is also consistent with the regulatory tradition, since "going armed" laws provided for imprisonment. *Id.*

What follows is a brief summary of some of the concurring opinions and of Justice Thomas's dissent.[1]

In her concurring opinion, **Justice Sotomayor** (joined by Justice Kagan) stated that while she continued to believe that *Bruen* "was wrongly decided,"[2] she wrote to "highlight" why she agreed with the Court's interpretation of *Bruen* (in Chief Justice Roberts's majority opinion) and disagreed with the interpretation given in Justice Thomas's dissent. *Rahimi,* 602 U.S. __, slip op at 1 (Sotomayor, J., concurring). As Sotomayor contrasted those approaches: "In short, the Court's interpretation permits a historical inquiry calibrated to reveal something useful and transferable to the present day, while the dissent would make the historical inquiry so exacting as to be useless, a too-sensitive alarm that sounds whenever a regulation did not exist in an essentially identical form at the founding." *Id.* at 1.

Justice Sotomayor argued that the *Rahimi* case pointed out the "perils" of the dissent's evident approach that the solution to the problem of interpersonal violence cannot be "materially different" than it was in the 18th century—even if (1) society now has a different "perception of the problem" and (2) "it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate." *Id.* at 4. Sotomayor stressed the problem of an overly rigid historical analysis (similar to her dissent in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), excerpted in Chapter 2):

> Given the fact that the law at the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability, see, *e.g.*, R. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105

[1] We omit a summary of Justice Kavanaugh's lengthy concurring opinion, which addressed more general questions about the role of text, history, and precedent in constitutional interpretation.
[2] In *Bruen,* Justices Sotomayor and Kagan joined the dissent written by Justice Breyer.

> Yale L. J. 2117, 2154–2170 (1996), it is no surprise that that generation did not have an equivalent to §922(g)(8). Under the dissent's approach, the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary. History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy.

Id. at 4.

Justice Sotomayor viewed as a "welcome" development that the Court "today clarifies *Bruen*'s historical inquiry" and rejects the dissent's "exacting historical test," but expressed continuing concern over *Bruen*'s "myopic focus on history and tradition," *Id.* at 5. While *Bruen* rejected a means-ends scrutiny as part of Second Amendment analysis, she continued to believe that such an analysis was the correct approach; applying such an analysis of §922(g)(8) made its constitutionality "even more readily apparent." *Id.*

Under such a means-end approach, "the Government has a compelling interest in keeping firearms out of the hands of domestic abusers." *Id.* at 5. Justice Sotomayor cited statistics about the heightened risk that a "woman who lives in a house with a domestic abuser" will be killed "if the abuser has access to a gun" and about risks of violence to others in the household, including a child, family member, or roommate. *Id.* at 6. She also cited a study finding that "domestic disputes were the most dangerous type of call for responding officers, causing more officer deaths with a firearm than any other type of call." *Id.*

Justice Gorsuch's concurring opinion emphasized the narrowness of the Court's ruling. He agreed with the Court that Mr. Rahimi had failed to show that Section 922(g)(8) violates the Second Amendment "in all its applications," as a facial challenge requires. *Rahimi,* 602 U.S. __, slip op at 1 (Gorsuch, J., concurring). Observing that the Court's resolution of Rahimi's facial challenge "necessarily leaves open the question whether the statute might be unconstitutional as applied in 'particular circumstances,'" Gorsuch enumerated several issues that the Court did *not* decide in Rahimi:

> So, for example, we do not decide today whether the government may disarm a person without a judicial finding that he poses a "credible threat" to another's physical safety. §922(g)(8)(C)(i). We do not resolve whether the government may disarm an individual permanently. * * * We do not determine whether §922(g)(8) may be constitutionally enforced against a person who uses a firearm in self-defense. Notably, the surety laws that inform today's decision

> allowed even an individual found to pose a threat to another to "obtain an exception if he needed his arms for self-defense." * * * Nor do we purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, "not 'responsible.'" * * *.

Id. at 6.

Gorsuch's concluding paragraph reiterates the narrowness of the Court's ruling:

> The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*. And after carefully consulting those materials, the Court "conclude[s] *only* this": "An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Ante*, at 17 (emphasis added).

Id. at 7.

Justice Barrett's concurrence commented on the overly narrow approach of the Fifth Circuit to the use of history in *Rahimi*, stating (quoting *Bruen*) that "analogical reasoning is not a "regulatory straightjacket." *Id.* at 3. Reiterating her concerns (voiced in her *Bruen* concurrence) about *Bruen*'s history and tradition test including post-enactment history, she observed that "courts have struggled with this use of history in the wake of *Bruen*," including whether the government must produce a "founding-era relative of the challenged regulation—if not a twin, a cousin." *Rahimi*, 602 U.S. __, slip. op at 2-3 (Barrett, J., concurring). Barrett suggested that the Fifth Circuit and "many courts" have understood *Bruen* to require this narrow approach. Instead:

> To be *consistent* with historical limits, a challenged regulation need not be an updated model of a historical counterpart. Besides, imposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us "a law trapped in amber." And it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a "use it or lose it" view of legislative authority. Such assumptions are flawed, and originalism does not require them.

Id. at 3-4.

Barrett argued that "analogical reasoning" under *Bruen* demanded a "wider lens," through which "historical regulations reveal a principle, not a mold." *Id.* at 4. The Court, she concluded, had settled on just the right level of generality in analyzing

Section 922 (g) (8) (C)(i), which "fits will within that principle." *Id.* at 5.

Justice Jackson, who was not on the Court when *Bruen* was decided, prefaced her concurring opinion by expressing her disagreement with the methodology of *Bruen* and her agreement with the *Bruen* dissent. *Rahimi*, 602 U.S. __, slip op. at 1 (Jackson, J., concurring). Nonetheless, accepting *Bruen* as "binding law," she stated that the *Rahimi* majority opinion "fairly applies" *Bruen. Id.* The purpose of her concurring opinion was to highlight the trouble that courts have had applying *Bruen*'s "history and tradition" test and to argue that "when courts signal they are having trouble with one of our standards, we should pay attention." *Id.* at 1-2. Similar to Justice Sotomayor (above), Justice Jackson welcomed the Court's "clarifying" efforts in *Rahimi,* but observed that many unresolved questions remain. As Jackson bluntly put it: "The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness." *Id.* at 2. Lower courts have been unable to produce "consistent, principled results" applying *Bruen*, and "have come to conflicting conclusions on virtually every consequential Second Amendment issue to come before them." *Id.* at 3 (citing Brief for Second Amendment Law Scholars as *Amici Curiae).*

Jackson elaborated on how the proceedings below in *Rahimi* illustrated this confusion. *Id.* at 4-5. She urged the Court to heed "how its legal standards are actually playing out in real life" and remember that legislatures that seek to "implement meaningful reform for their constituents while simultaneously respecting the Second Amendment, are hobbled without a clear, workable test for assessing the constitutionality of their proposals." *Id.* at 7.

In the sole dissent, **Justice Thomas** (author of the majority opinion in *Bruen*) asserted that, under *Bruen*'s "clear" directive, "[a] firearm regulation that falls within the Second Amendment's plain text is unconstitutional unless it is consistent with the Nation's historical tradition of firearm regulation." *Rahimi*, 602 U.S. __, slip op. at 1 (Thomas, J., concurring). Section 922(g)(8) violates the Second Amendment because it "targets conduct" at the Amendment's "core"—"possessing firearms"—and because "[n]ot a single historical regulation justifies" 18 U. S. C. §922(g)(8). *Id.* at 5. "To the contrary, the founding generation addressed the same societal problem as §922(g)(8) through the 'materially different means' of surety laws." *Id.*

Thomas stated that "surety demands" were "expressly available to prevent domestic violence." However, while such laws and Section 922(g)(8) share a common justification (preventing domestic violence), Section 922(g)(8) is far broader. It "strips an individual of his Second Amendment right," even preventing him from keeping a handgun in his home for self-defense. *Id.* at 17-18.

Finally, Justice Thomas argued that this case "is not about whether states can disarm people who threaten others." States, including Texas, where the case arose,

already "have a ready mechanism for disarming anyone who uses a firearm to threaten physical violence: criminal prosecution." *Id.* at 31. Thus:

> Assuming C. M.'s [Rahimi's former partner] allegations could be proved, Texas could have convicted and imprisoned Rahimi for every one of his alleged acts. Thus, the question before us is not whether Rahimi and others like him can be disarmed consistent with the Second Amendment. Instead, the question is whether the Government can strip the Second Amendment right of anyone subject to a protective order—even if he has never been accused or convicted of a crime. It cannot.

Id. at 31-32.

Commentary on *Rahimi* emphasizes that the narrow way that the Court decided the case—ruling only that 18 U.S.C. § 922 (g) (8) survived a facial challenge based on the "credible threat" prong of that Section, Section 922(g)(8)(C)(i)—may have made the 8-vote majority opinion possible. Fredrick Vars & Ian Ayres, *A Simple Way to Protect Domestic Violence Orders Against the Next Constitutional Challenge*, Harvard Law Review Blog (July 3, 2024). However, that narrow decision leaves at risk Section 922 (g)(8)'s second prong, Section 922(g)(8)(C)(ii), which bans an individual possessing a firearm if the restraining order "prohibits the use, attempted use, or threatened use of physical force." The Court emphasizes that it does not address this prong and Justice Gorsuch's concurring opinion, in effect, provides a roadmap for possible future as applied challenges one *might* bring to Section 922(g)(8) and other civil disarmament laws.

Legal scholars Frederick Vars and Ian Ayres argue that, "in most cases, there is a strong argument that even those falling solely within the second part of [Section 922(g)(8)] have implicitly been found to be dangerous;" unless a court believed that a "real risk exists," why would it enter such an order? Vars and Ayres, *supra*. Do you agree? If that is so, how might judges reflect that in the orders they issue? Vars and Ayres argue that "the easiest way for a judge to protect" a domestic violence order (or civil protection order) from constitutional challenge is to include "an express 'credible threat' finding." *Id.* Some states do not currently require an explicit "credible threat" finding to issue such an order, putting these orders in constitutional peril, and, in turn, putting in peril the lives the orders protect. *Id.* Do you agree with this recommendation?

In light of *Rahimi*, do you think that state legislatures should amend their civil protection order laws to require an express "credible threat" finding with respect to prohibiting gun possession? *See id.*

CHAPTER 8

DIVORCE

▪ ▪ ▪

SECTION 3. CONTEMPORARY GROUNDS FOR DIVORCE

Insert on page 564, after paragraph beginning, "The required period that spouses must live separate and apart . . .":

Effective January 1, 2024, the District of Columbia eliminated the requirement that spouses live separate and apart, either for six months if the separation is mutual and voluntary, or twelve months if it is not (referred to on page 564). Instead, the law now provides: "A divorce from the bonds of marriage may be granted upon the assertion by one or both parties that they no longer wish to be married." D.C. Code § 16-904 (a) (2024). (Spouses may obtain a "legal separation from bed and board" upon "at least one party's assertion that they intend to pursue a separate life without obtaining a divorce." § 16-904 (b).) What is the practical impact of this change for spouses seeking to divorce and for attorneys representing them?

As the update to Chapter 9 discusses, another D.C. law that took effect was that, in undertaking the equitable distribution of spouses' property, a new factor that the court shall consider is "the circumstances that contributed to the estrangement of the parties, including the history of physical, emotional, or financial abuse by one party against the other." D.C. Code § 16-910 (a) (2)(L) (2024).

SECTION 5. NO-FAULT DIVORCE

D. Irretrievable Breakdown

Insert at the end of second paragraph of Note 1, Unilateral Divorce ("As to what constitutes such proof ,. . . " (pp. 607-08):

The District of Columbia's divorce law now provides: "A divorce from the bonds of marriage may be granted upon the assertion by one or both parties that they no longer wish to be married." D.C. Code § 16-904 (a) (2024). Is this, in effect, "divorce on demand"? What role does a family court judge have in such divorce cases? Do you support this reform?

SECTION 6. QUESTIONING NO-FAULT DIVORCE

Insert as new paragraph at end of opening paragraph (before Part A) (p. 612):[3]

In 2024, another wave of attacks on no-fault divorce law seems to be underway. Some conservative commentators and Republican legislators—including Senator J.D. Vance (R-Ohio), the Republican vice presidential candidate for the November 2024 election—have called for ending or restricting no-fault divorce. As of July 2024, bills to end no-fault divorce (e.g., by eliminating "irreconciliable differences" as a ground) are in the early stages in Louisiana and Oklahoma. Critics of no-fault divorce laws argue that they are "unfair to men and hurt society because they lead to more divorces." *Conservative US Lawmakers are Pushing for an End to No-Fault Divorce*, The Guardian (June 25, 2024) (reporting that "Republican lawmakers in Louisiana, Oklahoma, Nebraska and Texas have discussed eliminating or increasing restrictions on no-fault divorce laws"). In response, some legal scholars have argued that no-fault divorce laws are "critical" to helping people (especially women) "exercise autonomy" in their lives and their relationships, including by exiting from marriages with intimate partner violence. *Id.* They also argue that such laws will add "tremendous costs and delays to an average divorce," affecting not only the parties, but also the judges, lawyers, and the "entire court system." *See* Ayesha Rascoe, *Conservatives in Red States Turn Their Attention to Ending No-Fault Divorce Laws*, NPR (July 7, 2023) (interviewing Professor Joanna Grossman). As you read the following materials, consider whether and how these contrasting views of no-fault divorce laws should inform law reform. Problem 8-6 (below at pages 621-23) will present several divorce reform bills for your consideration.

[3] *Note to instructors*: This paragraph is also pertinent to the opening paragraph of Part B, Debates About Legal Reform of No-Fault Divorce Law, p. 614, and could be assigned there instead.

CHAPTER 9

DIVISION OF MARITAL PROPERTY AT DISSOLUTION

SECTION 6. WHAT DISTRIBUTION IS EQUITABLE?

B. UNEVEN DIVISION OF ASSETS.

Insert on p. 720, just before Problem 9-5:

The D.C. Code has allowed judges to consider the factors leading to the parties' estrangement in awarding alimony or dividing property. In late 2023, the legislation was amended to ensure that judges could consider domestic violence in making these awards. D.C. Code §§ 16-910(a)(2)(L) (listing property distribution factors, including "[t]he circumstances that contributed to the estrangement of the parties, including the history of physical, emotional, or financial abuse by one party against the other"); 16-913(d)(5)(listing alimony factors, including "circumstances which contributed to the estrangement of the parties, including the history of physical, emotional or financial abuse by one party against the other"); *see* Brooke Pinto, *Memo to the Members of the Council of the District of Columbia* 5-6 (Sept. 26, 2023), https://lims.dccouncil.gov/downloads/LIMS/52102/Committee_Report/B25-0042-Committee_Report1.pdf?Id=176839.

This could also be added in Chapter 10, at the end of note 3, on p. 753.

CHAPTER 11

CHILD SUPPORT

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SECTION 2. THE NATURE OF THE CHILD SUPPORT OBLIGATION

A. THE SOURCE OF THE OBLIGATION

Replace the first paragraph of Note 4 on p. 792 with the following paragraph:

The commencement of the child support obligation. The biological parent's child support obligation typically begins at the marital or nonmarital child's birth, even if the parent did not know about the birth, or if parenthood was not established until later. *E.g.*, *Shipley v. Smith*, 458 P.3d 852, 854 (Wyo. 2020). A few states have begun to extend the obligation before birth. Georgia, for example, enacted a law authorizing "an expectant mother to seek reimbursement for direct medical and pregnancy-related expenses from her child's father." *Pregnancy-Related Expenses*, GA. DEP'T OF HUM. SERVS., DIV. OF CHILD SUPPORT, https://childsupport.georgia.gov/legal-resources/pregnancy-related-expenses. Kentucky's senate approved a similar bill to cover pregnancy-related expenses with a strict requirement that such claims must be brought within one year of the child's birth. *See* Bruce Schreiner, *Kentucky Senate Passes Bill to Grant the Right to Collect Child Support for Unborn Children*, AP NEWS, Mar. 5, 2024, https://apnews.com/article/kentucky-legislature-child-support-pregnancy-41df8b7202e10fc3821d2df6a7ef5c4a.

CHAPTER 12

CHILD CUSTODY

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SECTION 3. EVOLUTION OF STANDARDS GOVERNING CHILD CUSTODY

Insert at end of Problem 12-3 (pp. 879-880)

For recent legislative developments relating to prohibiting or protecting gender-affirming care for minors, see the update to Chapter 13, below.

CHAPTER 13

VISITATION AND POST-DISSOLUTION CUSTODY DISPUTES

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SECTION 3. MODIFICATION OF CUSTODY AND VISITATION ORDERS

C. Relocation

Insert at end of Problem 13-13 (p. 1017):

On June 24, 2024, the Supreme Court granted the United States's petition for certiorari in *L.W. v. Skrmetti,* 83 F.4th 460 (6th Cir. 2023), in which the Sixth Circuit upheld Kentucky and Tennessee's statutes prohibiting health care providers from offering certain medical treatments to minors with gender dysphoria, including puberty blockers and hormone therapy.

The Supreme Court agreed to hear the following question:

> Whether Tennessee Senate Bill 1 (SB1), which prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity," Tenn. Code. Ann. § 68-33-103 (a) (1), violates the Equal Protection Clause of the Fourteenth Amendment.

Petition for a Writ of Certiorari, *U.S. v. Skrmetti*, No. __, at I. In urging review to resolve a split in the federal appellate courts about whether the Equal Protection Clause applies to laws that "target transgender individuals,"[4] the United States noted the risks to families from such uncertainty, including having to relocate:

[4] In 2022, in *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022), the Eighth Circuit affirmed the federal district court's preliminary injunction of Arkansas's ban on gender affirming care *Id.* (affirming *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021)). The Eighth Circuit held that the ban violated Equal Protection grounds and did not survive heightened scrutiny; it did not reach the other constitutional claims. After an eight-day bench trial, the federal district court issued a permanent injunction, holding that the ban violated Equal Protection, Due Process (parental liberty), and the First Amendment (the prohibition on referring patients for gender-affirming care). *Brandt v. Rutledge*, 677 F. Supp. 3d 877 (E.D. Ark. 2023). On October 6, 2023, however, the Eighth Circuit granted the Arkansas Attorney General's petition for a rehearing en banc. Briefing is underway in that proceeding. In *Eknes-Tucker v. Governor of Alabama,* 80 F.4th 1205 (11th Cir. 2023), the Eleventh Circuit vacated the district court's

> Families in Tennessee and other States where laws like SB1 have taken effect will face the loss of essential medical care. Those with the resources to do so may abandon their homes, jobs, schools, and communities to move to a State where the needed treatment remains available. Others will not have even that option. And families in much of the rest of the Nation will be left in limbo, waiting to see whether their State's ban will be upheld or enjoined.

Id. at 17.

The United States, an intervenor in the proceedings below, argues that Tennessee's law violates the Equal Protection Clause of the Fourteenth Amendment and warrants heightened scrutiny both because it: (1) "relies on sex-based classifications" and (2) discriminates based on transgender status. *Id.* at 17. The Supreme Court has not yet accepted or denied certiorari on the private plaintiffs' petitions, which raise the additional argument that the bans violated fundamental parental liberty under the Due Process liberty.

The Tennessee Act permits the use of puberty blockers and hormone therapy to treat other conditions, such as congenital conditions, precocious puberty, disease, or physical injury. *L.W. v. Skrmetti,* 83 F.4th at 469. The Kentucky Act similarly has an exception for minors with "certain developmental disorders." *Id.* at 470. It also allows minors already receiving treatment for gender dysphoria to continue treatment for a limited period while the drug or hormone is reduced. *Id.*

In *Skrmetti,* the Sixth Circuit concluded that neither the constitutional challenge based on fundamental parental liberty under the Due Process Clause of the Fourteenth Amendment nor Equal Protection arguments (under the Fourteenth Amendment) was likely to succeed on the merits and reversed the federal district courts' injunctions of the bans. On the parental liberty argument, Judge Sutton (author of the Sixth Circuit opinion) concluded—citing *Washington v. Glucksberg,* 521 U.S. 702 (1997), and *Dobbs v. Jackson Women's Health Organization,* 597 U.S. __ (2022)—that only deferential rational basis review was applicable and it was satisfied by a governmental interest in protecting children from harm. Parents challenging the bans appealed to cases such as *Troxel v. Granville*, 530 U.S. 57 (2000) (excerpted in Chapter 13, see page 979) on the substantive due process right of parents to "make decisions

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preliminary injunction of Alabama's ban on gender affirming care, using rational basis review to reject both the fundamental parental liberty and Equal Protection arguments. Subsequently, Judge Robert Hinkle, a federal district court judge in Florida, concluded that Florida's ban on gender affirming care was unconstitutional under a theory not considered by the Eleventh Circuit: that the ban reflected impermissible animus against transgender persons. *Doe v. Lapado*, __ F. Supp. 3d, 2024 WL 2947123 (N.D. Fla. June 11, 2024). The United States also argued that, beyond the context of gender-affirming care bans, the Sixth Circuit's decision created or made worse conflicts on "broader questions about the proper application of the Equal Protection Clause to laws targeting transgender individuals." Petition for a Writ of Certiorari, *U.S. v. Skrmetti*, No. __, at 27.

concerning the care, custody, and control of their children." Judge Sutton countered that while, "at one level of generality they are right," *Glucksberg* requires a "careful description" of the asserted fundamental liberty interest; there is no "deeply rooted" tradition or custom of "permitting parents to obtain banned medical treatments for their children and to override contrary legislative policy judgments in the process." *Id.* at 475.

In her dissent, Judge White argued that Kentucky and Tennessee's bans violated the fundamental rights of parents to make medical decisions for their children. *Id*. at 510. Further, "a state cannot simply deem a treatment harmful to children without support in reality and thereby deprive parents of the right to make medical decisions on their children's behalf;" to do so negates parents' fundamental right. *Id.* at 511.

With respect to the Equal Protection arguments, Judge Sutton concluded that they were unlikely to succeed on the merits because the laws did not classify based on sex, but on age and treatment. Citing dicta in *Dobbs* that abortion bans did not violate Equal Protection, he drew an analogy: "If a law restricting a medical procedure that applies only to women does not trigger heightened scrutiny, as in *Dobbs* and *Geduldig* [cited in *Dobbs*], these laws, which restrict medical procedures unique to each sex, do not require such scrutiny either." *Id.* at 481. Sutton argued that *Bostock v. Clayton County,* 590 U.S. 644 (2020) (discussed in Chapter 3), which construed Title VII, was inapplicable and factually distinguishable. *Id*. at 485. He concluded that that bans satisfy rational basis review.

Judge White disagreed, arguing in dissent that the state bans trigger heightened scrutiny because "they facially discriminate based on a minor's sex as assigned at birth and on a minor's failure to conform with societal expectations concerning that sex." She further concluded that Tennessee and Kentucky did not show "an exceedingly persuasive justification or close means-ends fit for their classifications." *Id.* at 498. She pointed out that whether a minor is permitted to access medical procedures depends on their sex assigned at birth: "a person identified male at birth could receive testosterone therapy to conform to a male identity," but "a person identified female at birth could not." *Id.* at 499.

At this writing, about half the states have adopted laws expressly prohibiting gender-affirming care for minors. *Bans on Best Practice Medical Care for Transgender Youth,* Movement Advancement Project, https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans. Sixteen states and the District of Columbia have adopted laws expressly protecting such care (often called "shield" laws). *Id.*

How, if at all, would these recent developments inform your advice to Keith in Problem 13-13? If the family law section of your state bar association asked you to give

a talk about the issues raised in the *Skrmetti* case, how would the materials in this casebook that you have read concerning parental liberty and Equal Protection shape your remarks?

Summer 2023 Update to
Abrams, Cahn, McClain, Ross, Matsumura & Weaver
CONTEMPORARY FAMILY LAW
(West Academic, Sixth Edition, 2023)

This Summer 2023 Update to *Contemporary Family Law* (West Academic, 6th ed. 2023) includes edited versions of two U.S. Supreme Court decisions announced after the Sixth Edition went to press: (1) *303 Creative LLC et al. v. Elenis et al.*, 600 U.S. __ (2023); and (2) *Haaland v. Brackeen et al.*, 599 U.S. __ (2023). We also include Notes and Questions for each case. For professors who wish to include these cases, *303 Creative* updates Chapter 2, Section C.3, Civil Marriage Equality and Religious Liberty (p. 130), and *Haaland* updates Chapter 6, Section 3.B., Native American Adoption (p. 464).

With respect to *303 Creative*, we have provided a brief introduction summarizing the majority opinion and the dissenting opinion in the event that instructors do not choose to assign the case.

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Table of Contents

(includes only chapters with updates)

CHAPTER 2

ENTERING MARRIAGE

■ ■ ■

SECTION 1. SUBSTANTIVE REQUIREMENTS FOR ENTRY INTO MARRIAGE

C. THE FREEDOM TO MARRY THE PERSON ONE LOVES: GENDER

3. Civil Marriage Equality and Religious Liberty

Insert on page 130, after paragraph about Supreme Court accepting certiorari in *303 Creative LLC. v. Elenis:*

On June 30, 2023, the final day of the Term, the Supreme Court announced its ruling in *303 Creative LLC v. Elenis,* 600 U.S. __ (2023). It reversed the Tenth Circuit (303 Creative LLC. v. Elenis, 6 F.4th 1160 (10th Cir. 2021)) and ruled in favor of Lorie Smith's First Amendment challenge to Colorado's antidiscrimination law (CADA). In the majority opinion, authored by Justice Gorsuch (joined by Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett), the Court agreed with the Tenth Circuit's holding that "the wedding websites Ms. Smith seeks to create qualify as 'pure speech' under this Court's precedents." *303 Creative*, slip op. at p. 9. However, it reversed the Tenth Circuit for its legal conclusion that Colorado "could compel speech from Ms. Smith consistent with the Constitution." *Id.* at 11. Justice Gorsuch concluded that "[i]n 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," in violation of the First Amendment's protection against compelled speech. *Id.* at 25.

Both the majority and the dissent quoted from *Masterpiece Cakeshop, supra,* on the general authority of states to enact public accommodations laws and to include sexual orientation among the protected categories. Both also observed that the Court had recognized that states have a "compelling" interest in eliminating discrimination in places of public accommodation. The majority, however, asserted that Colorado's antidiscrimination law (CADA) went too far because it compelled speech, asserting: "When a state public accommodations law and the Constitution collide, there can be no question which must prevail." *Id.* at 14.

As did Smith in her brief and Chief Judge Tymkovich in his dissent (from the 10th Circuit majority opinion), Justice Gorsuch several times compared Smith's situation to that of the Jehovah's Witness schoolchildren in *West Virginia Bd. of Ed.*

v. Barnette, 319 U. S. 624, 642 (1943), in which the Court concluded that West Virginia's compelling students to salute the flag violated those children's First Amendment rights and declared that that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *See, e.g.*, *303 Creative*, *supra*, slip op. at 7-8, 2.

In response to the dissent (discussed below), Justice Gorsuch observing that "[d]oubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions." *Id.* at 21-22. But, he reasoned, the present case did not include such difficulties because the Tenth Circuit concluded that Ms. Smith's services involved "pure speech" and the parties stipulated that "Ms. Smith seeks to engage in expressive activity." *Id.* at 22. He characterized the issue the Court faced (and answered in the negative) as: "Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?" *Id.* at 19. He also referred at points to how a ruling against Ms. Smith could compel speech from "all manner of artists, speechwriters, and other whose services involve speech." *Id.* at 12.

Justice Sotomayor issued a dissent, joined by Justice Kagan and Justice Jackson. Justice Sotomayor stated: "Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class." Slip op at 1 (Sotomayor, J., dissenting). Justice Sotomayor quoted *Masterpiece Cakeshop's* recognition of the "general rule" that religious and philosophical objections to gay marriage "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.* at 1 (quoting *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. __, __ (2018)). The dissent also quoted *Masterpiece Cakeshop* on the "serious stigma" that would result if "purveyors of goods and services who object to gay marriages for moral and religious reasons" were "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'" *Id.*

Justice Sotomayor's dissent included a lengthy history of federal and state public accommodations laws and their "two core purposes" of (1) ensuring "*equal access* to publicly available goods and services," and (2) ensuring *equal dignity* in the common market. *Id.* at 4-5. The dissent also chronicled resistance to such laws, in which business owners raised a variety of constitutional claims, including the First Amendment. The dissent then reviewed the Court's various precedents in which it rejected First Amendment challenges to public accommodations laws, in the context both of laws prohibiting race and sex discrimination. *Id.* at 17-21.

Justice Sotomayor wrote about the consequences of the Court's issuing a "new license to discriminate," including "stigmatic harm, on top of any harm caused by denial of service," adding: "The opinion of the Court is, quite literally, a notice

that reads: 'Some services may be denied to same-sex couples.' " *Id.* at 35. However, she also cautioned that although the consequences of the decision might be most pressing for the LGBT community, the decision's logic could not be limited to discrimination on the basis of sexual orientation or gender identity: "The decision threatens to balkanize the market and to allow the exclusion of other groups from many services." *Id.* at 37.

Below is an excerpted version of the majority and dissenting opinions.

303 CREATIVE LLC, ET AL., PETITIONERS *v.*
AUBREY ELENIS, ET AL.
Supreme Court of the United States
600 U.S. ___ (June 30, 2023)[5]

JUSTICE GORSUCH delivered the opinion of the Court.

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

I A

Through her business, 303 Creative LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. As she envisions it, her websites will provide couples with text, graphic arts, and videos to "celebrate" and "conve[y]" the "details" of their "unique love story." The websites will discuss how the couple met, explain their backgrounds, families, and future plans, and provide information about their upcoming wedding. All of the text and graphics on these websites will be "original," "customized," and "tailored" creations. The websites will be "expressive in nature," designed "to communicate a particular message." Viewers will know, too, "that the websites are [Ms. Smith's] original artwork," for 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 so, Colorado will force her to express views with which she disagrees. Ms. Smith provides her website and

[5] ***Editors' Note***: As in the casebook, *** in this edited case indicates deleted text. However, we have not indicated deletions by *** when the deletions are statutory cites, internal references to the majority and dissenting opinions, citations to the record—when the majority and dissent quote from party briefs and other pleadings— or parenthetical references stating that internal quotations are omitted.

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 Colorado has different plans. Specifically, 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.

B

[The Court recounts Lorie Smith's lawsuit brought in the lower federal court.] Ms. Smith began by directing 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 what some call 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. §24–34–601(2)(a). Either state officials or private citizens may bring actions to enforce the law. And a variety of penalties can follow. 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 action[s]." §24–34–605; §24–34–306(9). 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).[6]

In her lawsuit, 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. 6 F. 4th 1160, 1173–1174 (CA10 2021). * * *

[6] In addition to the Accommodation Clause, CADA contains a "Communication Clause" that prohibits a public accommodation from "publish[ing] . . . 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, Ms. Smith notes, prohibits any speech inconsistent with the Accommodation Clause. Because Colorado concedes that its authority to apply the Communication Clause to Ms. Smith stands or falls with its authority to apply the Accommodation Clause, we focus our attention on the Accommodation Clause.

To facilitate the district court's resolution of the merits of her case, Ms. Smith and the State stipulated to a number of facts:

- 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 "contribut[e] to the overall 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, "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services."

C

*** [T]he Tenth Circuit held that Ms. Smith was not entitled to the injunction she sought. The court acknowledged that Ms. Smith's planned wedding websites qualify as "pure speech" protected by the First Amendment. As a result, the court reasoned, Colorado had to satisfy "strict scrutiny" before compelling speech from her that she did not wish to create. Under that standard, the court continued, the State had to show both that forcing Ms. Smith to create speech would serve a compelling governmental interest and that no less restrictive alternative exists to secure that interest. Ultimately, a divided panel concluded that the State had carried these burdens. As the majority saw it, Colorado has a compelling interest in ensuring "equal access to publicly available goods and services," and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere."

Chief Judge Tymkovich dissented. He observed that "ensuring access to a *particular* person's" voice, expression, or artistic talent has never qualified as "a compelling state interest" under this Court's precedents. Nor, he submitted, should courts depart from those precedents now. "Taken to its logical end," Chief Judge

Tymkovich warned, his colleagues' approach would permit the government to "regulate the messages communicated by *all* artists"—a result he called "unprecedented." * * *

II

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, 660–661 (2000). They did so because they saw the 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. See, *e.g.*, 4 Annals of Cong. 934 (1794) (Rep. Madison). 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 all these reasons, "[i]f 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 the 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 "transcend[ed] constitutional limitations on their powers." 319 U. S., at 642. Their dictates "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." *Ibid.*

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 in their event. The group argued that Massachusetts's public accommodations statute entitled it to participate in the parade as a matter of law. *Id.*, at 560–561. Lower courts agreed. *Id.*, at 561–566. But this Court reversed. *Id.*, at 581. Whatever state law may demand, this Court explained, 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." *Id.*, at 572–573. 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.

Then there is *Boy Scouts of America* v. *Dale*. In that case, 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. 530 U. S., at 644–645. The New Jersey Supreme Court sided with Mr. Dale, *id.*, at 646–647, but again this Court reversed, *id.*, at 661. 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. *Id.*, at 656. * * * [F]orcing the Scouts to include Mr. Dale would "interfere with [its] choice not to propound a point of view contrary to its beliefs." *Id.*, at 654.

[T]he 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," *Hurley*, 515 U. S., at 574, 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. See, *e.g.*, *Dale*, 530 U. S., at 647–656; *Hurley*, 515 U. S., at 568–570, 579. Generally, too, the government may not compel a person to speak its own preferred messages. See *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506 (1969); * * * *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 568–570, 576; *see also Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U. S. 47, 63–64 (2006) (*FAIR*) (discussing cases). All that offends the First Amendment just the same.

III

Applying these principles to this case, we align ourselves with much of the Tenth Circuit's analysis. The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as "pure speech" under this Court's precedents. 6 F. 4th, at 1176. We agree. It is a conclusion that flows directly from the parties' stipulations. * * *

* * * 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. [citing precedents about flags, video games, parades, music, and movies].

We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech. 6 F. 4th, at 1181, and n. 5. Again, the parties' stipulations lead the way to that conclusion. * * * 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. As the Tenth

Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to "forc[e her] to create custom websites" celebrating other marriages she does not. 6 F. 4th, at 1178. * * * [T]he Tenth Circuit recognized that the coercive "[e]liminati[on]" of dissenting "ideas" about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith. 6 F. 4th, at 1178.

We part ways with the Tenth Circuit only when it comes to the legal conclusions that follow. While that court thought Colorado could compel speech from Ms. Smith consistent with the Constitution, our First Amendment precedents laid out above teach otherwise [recapping *Hurley*, *Dale*, and *Barnette*]. 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 enough," more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely. *Hurley*, 515 U. S., at 574.

Consider what a contrary approach would mean. 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. 6 F. 4th, at 1198 (Tymkovich, C. J., dissenting). * * * [T]he 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. See, *e.g.*, Brief for Creative Professionals et al. as *Amici Curiae* 5–10; Brief for First Amendment Scholars as *Amici Curiae* 19–22. As our precedents recognize, the First Amendment tolerates none of that.

In saying this much, we do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts* v. *United States Jaycees*, 468 U. S. 609, 628 (1984) * * *. This Court has recognized, too, that 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); see also, *e.g.*, *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968) (*per curiam*).

Over time, governments in this country have expanded public accommodations laws in notable ways too. 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. *Dale*, 530 U. S., at 656–657. Often, these enterprises exercised something like monopoly

power or hosted or transported others or their belongings much like bailees. [citing cases] Over time, 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. * * *

Importantly, States have also expanded their laws to prohibit more forms of discrimination. Today, for example, approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation. [Court lists statutes.] And, as we have recognized, this is entirely "unexceptional." *Masterpiece Cakeshop*, 584 U. S., at ___ (slip op., at 10). 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. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment." *Ibid.* * * *. Consistent with all of this, Ms. Smith herself recognizes that 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.

At the same time, this Court has also recognized that no public accommodations law is immune from the demands of the Constitution. [T]his Court has held, 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. 515 U. S., at 571, 578. 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." 530 U. S., at 659. [O]nce more, what was true in those cases must hold true here. When a state public accommodations law and the Constitution collide, there can be no question which must prevail. U. S. Const., Art. VI, cl. 2.

Nor is it any answer, as the Tenth Circuit seemed to suppose, that Ms. Smith's services are "unique." 6 F. 4th, at 1180. In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes. * * * 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; more nearly, it would spell its demise.

IV

* * *

* * * 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. At bottom, Colorado's theory rests on a belief that the Tenth Circuit erred at the outset when it said this case implicates pure speech. Instead, 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, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny. In places, the dissent seems to advance the same line of argument.

This alternative theory, however, is difficult to square with the parties' stipulations. * * * As the case comes to us, then, Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond the reach of its powers.

[A]s 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? * * * Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers. * * *

Colorado next urges us to focus on the *reason* Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the "protected characteristics" of certain customers. * * * But once more, the parties' stipulations speak differently. 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. * * * Ms. Smith stresses, too, 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, in any event, do the 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. * * *

Here, Colorado does not seek to impose an incidental burden on speech. It seeks to force an individual to "utter what is not in [her] mind" about a question of political and religious significance. *Barnette*, 319 U. S., at 634. And that, *FAIR* reaffirmed, is something the First Amendment does not tolerate. * * *

V

It is difficult to read the dissent and conclude we are looking at the same case. Much of it focuses on the evolution of public accommodations laws, and the strides gay Americans have made towards securing equal justice under law. And, no doubt, there is much to applaud here. But none of this answers the question we face today: Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?

* * *

[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." Never mind that we do no such thing and Colorado *itself* has stipulated Ms. Smith will (as CADA requires) "work with all people regardless of . . . sexual orientation." Never mind, too, that it is the dissent that 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 today 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. * * *

* * * [T]he 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. But those cases are not *this* case. 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." Nothing the dissent says can alter this—nor can it displace the First Amendment protections that follow.

The First Amendment protections furnished in *Barnette*, *Hurley*, and *Dale*, the dissent declares, were limited to schoolchildren and "nonprofit[s]," and it is "dispiriting" to think they might also apply to Ms. Smith's "commercial" activity. But our precedents endorse nothing like the limits the dissent would project on them. [T]he First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists, and website designers). If anything is truly dispiriting here, 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.

* * * In a world [where the dissent's reasoning leads], as Chief Judge Tymkovich highlighted, governments could force "an unwilling Muslim movie director to make a film with a Zionist message," they could compel "an atheist muralist to accept a commission celebrating Evangelical zeal," and they could require a gay website designer to create websites for a group advocating against same-sex marriage, so long as these speakers would accept commissions from the public with different messages. 6 F.4th, at 1199 (dissenting opinion). Perhaps the dissent finds these possibilities untroubling because it trusts state governments to coerce only "enlightened" speech. But if that is the calculation, it is a dangerous one indeed.[7]

[7] Perhaps the dissent finds these possibilities untroubling for another reason. It asserts that CADA does not apply to "[m]any filmmakers, visual artists, and writers" because they do not "hold out" their services to the public. But the dissent cites nothing to support its claim and instead, once more,

The dissent is right about one thing—"[w]hat a difference" time can make. 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." 319 U. S., at 642. The Court did so despite the fact that the speech rights it defended were deeply unpopular; at the time, the world was at war and many thought respect for the flag and the pledge "essential for the welfare of the state." *Id.*, at 662–663 (Frankfurter, J., dissenting); see also *id.*, at 636, 640 (majority opinion). 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 43–44; *supra*, at 17–18. Five years ago, in a case the dissenters highlight at the outset of their opinion, 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). * * *

Today, however, 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 "[e]liminat[e]" disfavored "ideas," 6 F. 4th, at 1178, today's dissent is emblematic of an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic. But "[i]f 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).

* * *

[A]s this Court has long held, 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. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider "unattractive," *post*, at 38 (opinion of SOTOMAYOR, J.), "misguided, or even hurtful," *Hurley*, 515 U. S., at 574. 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

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fights the facts. As we have seen, Colorado's law today applies to "*any* place of business engaged in *any* sales to the public." Colo. Rev. Stat. §24–34–601(1) (emphasis added); see also Part III, *supra*. And the dissent can hardly dispute that many artists and writers accept commissions from the public. Brief for Creative Professionals et al. as *Amici Curiae* 5–21. Certainly, Colorado does not advance anything like the dissent's argument; it calls any exemption to its law for "artists" and others who provide "custom" services "unworkable." Brief for Respondents 28–31 (internal quotation marks omitted).

JACKSON join, dissenting.

Five years ago, this Court recognized the "general rule" that religious and philosophical objections to gay marriage "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. __, (2018). The Court also recognized the "serious stigma" that would result if "purveyors of goods and services who object to gay marriages for moral and religious reasons" were "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " *Id.*

Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. Specifically, the Court holds that the First Amendment exempts a website design company from a state law that prohibits the company from denying wedding websites to same-sex couples if the company chooses to sell those websites to the public. The Court also holds that the company has a right to post a notice that says, "'no [wedding websites] will be sold if they will be used for gay marriages.'"

"What a difference five years makes." *Carson* v. *Makin*, 596 U. S. ___, (2022) (SOTOMAYOR, J., dissenting) (slip op., at 5). And not just at the Court. Around the country, there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.

Now the Court faces a similar test. A business open to the public seeks to deny gay and lesbian customers the full and equal enjoyment of its services based on the owner's religious belief that same-sex marriages are "false." The business argues, and a majority of the Court agrees, that because the business offers services that are customized and expressive, the Free Speech Clause of the First Amendment shields the business from a generally applicable law that prohibits discrimination in the sale of publicly available goods and services. That is wrong. Profoundly wrong. As I will explain, the law in question targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group. I dissent.

I A

A "public accommodations law" is a law that guarantees to every person the full and equal enjoyment of places of public accommodation without unjust discrimination. The American people, through their elected representatives, have enacted such laws at all levels of government: The federal Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 prohibit discrimination by places of

public accommodation on the basis of race, color, religion, national origin, or disability. All but five States have analogous laws that prohibit discrimination on the basis of these and other traits, such as age, sex, sexual orientation, and gender identity. And numerous local laws offer similar protections. [Citations omitted.]

The people of Colorado have adopted the Colorado Anti Discrimination Act (CADA) * * *. [Justice Sotomayor summarizes the Act's "Accommodation Clause" and "Communication Clause."] Colo. Rev. Stat. §24–34–601(2)(a).

[The Accommodation Clause] applies to any business engaged in sales "to the public." Colo. Rev. Stat. §24–34–601(1). [I t] does not apply to any "church, synagogue, mosque, or other place that is principally used for religious purposes." *Ibid.*

[T]he Act's "Communication Clause" * * * makes it unlawful to advertise that services "will be refused, withheld from, or denied," or that an individual is "unwelcome" at a place of public accommodation, based on the same protected traits. §24–34–601(2)(a). In other words, just as a business open to the public may not refuse to serve customers based on race, religion, or sexual orientation, so too the business may not hang a sign that says, "No Blacks, No Muslims, No Gays."

A public accommodations law has two core purposes. First, the law ensures "*equal access* to publicly available goods and services." *Roberts* v. *United States Jaycees*, 468 U. S. 609, 624 (1984). For social groups that face discrimination, such access is vital. All the more so if the group is small in number or if discrimination against the group is widespread. Equal access is mutually beneficial: Protected persons receive "equally effective and meaningful opportunity to benefit from all aspects of life in America," 135 Cong. Rec. 8506 (1989) (remarks of Sen. Harkin) (Americans with Disabilities Act), and "society," in return, receives "the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U. S., at 625.

Second, a public accommodations law ensures *equal dignity* in the common market. Indeed, that is the law's "fundamental object": "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 250 (1964) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964)). This purpose does not depend on whether goods or services are otherwise available. "'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.'" 379 U. S., at 292 (Goldberg, J., concurring). When a young Jewish girl and her parents come across a business with a sign out front that says, " 'No dogs or Jews allowed,'"[8] the fact that another business might serve her family does not redress that "stigmatizing injury," *Roberts*, 468 U. S., at 625. Or, put another way, "the hardship Jackie Robinson suffered when on the road" with his baseball team "was

[8] Hearings on the Nomination of Ruth Bader Ginsburg To Be Associate Justice of the Supreme Court of the United States before the Senate Committee on the Judiciary, 103d Cong., 1st Sess., 139 (1993).

not an inability to find *some hotel* that would have him; it was the indignity of not being allowed to stay in the *same hotel* as his white teammates." J. Oleske, The Evolution of Accommodation, 50 Harv. Civ. Rights-Civ. Lib. L. Rev. 99, 138 (2015).

To illustrate, imagine a funeral home in rural Mississippi agrees to transport and cremate the body of an elderly man who has passed away, and to host a memorial lunch. Upon learning that the man's surviving spouse is also a man, however, the funeral home refuses to deal with the family. Grief stricken, and now isolated and humiliated, the family desperately searches for another funeral home that will take the body. They eventually find one more than 70 miles away. See First Amended Complaint in *Zawadski* v. *Brewer Funeral Services, Inc.*, No. 55CI1–17–cv–00019 (C. C. Pearl River Cty., Miss., Mar. 7, 2017), pp. 4–7.[9] This ostracism, this otherness, is among the most distressing feelings that can be felt by our social species. K. Williams, Ostracism, 58 Ann. Rev. Psychology 425, 432–435 (2007).

Preventing the "unique evils" caused by "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" is a compelling state interest "of the highest order." *Roberts*, 468 U. S., at 624, 628; see *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 549 (1987). Moreover, a law that prohibits only such acts by businesses open to the public is narrowly tailored to achieve that compelling interest. The law "responds precisely to the substantive problem which legitimately concerns the State": the harm from status based discrimination in the public marketplace. *Roberts*, 468 U. S., at 629.

This last aspect of a public accommodations law deserves special emphasis: The law regulates only businesses that choose to sell goods or services "to the general public," *e.g.*, Va. Code Ann. §2.2–3904, or "to the public," *e.g.*, Mich. Comp. Laws §37.2301. Some public accommodations laws, such as the federal Civil Rights Act, list establishments that qualify, but these establishments are ones open to the public generally. See, *e.g.*, 42 U. S. C. §2000a(b) (hotels, restaurants, gas stations, movie theaters, concert halls, sports arenas, stadiums). A public accommodations law does not force anyone to start a business, or to hold out the business's goods or services to the public at large. [I t] 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. [T]he state may ensure that groups historically marked for second-class status are not denied goods or services on equal terms.

The concept of a public accommodation thus embodies a simple, but powerful,

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[9] The men in this story are Robert "Bob" Huskey and John "Jack" Zawadski. Bob and Jack were a loving couple of 52 years. They moved from California to Colorado to care for Bob's mother, then to Wisconsin to farm apples and teach special education, and then to Mississippi to retire. Within weeks of this Court's decision in *Obergefell* v. *Hodges*, 576 U. S. 644 (2015), Bob and Jack got married. They were 85 and 81 years old on their wedding day. A few months later, Bob's health took a turn. He died the following spring. When Bob's family was forced to find an alternative funeral home more than an hour from where Bob and Jack lived, the lunch in Bob's memory had to be canceled. Jack died the next year.

social contract: A business that chooses to sell to the public assumes a duty to serve the public without unjust discrimination. * * *

B

The legal duty of a business open to the public to serve the public without unjust discrimination is deeply rooted in our history. The true power of this principle, however, lies in its capacity to evolve, as society comes to understand more forms of unjust discrimination and, hence, to include more persons as full and equal members of "the public."

* * *

[Justice Sotomayor recounts the history of common law duties of innkeepers and others to serve customers and how the majority is "mistaken to suggest that public accommodations or common carriers historically assumed duties to serve all comers because they enjoyed monopolies or otherwise had market power." She also reviews the development of state and federal public accommodations laws, including how "the civil rights movement of the mid-20th century again demanded racial equality in public places, leading to Congress's passage of Title II of the Civil Rights Act of 1964.

Not only have public accommodations laws expanded to recognize more forms of unjust discrimination, such as discrimination based on race, sex, and disability, such laws have also expanded to include more goods and services as "public accommodations." * * * This broader scope, though more inclusive than earlier state public accommodations laws, is in keeping with the fundamental principle—rooted in the common law, but alive and blossoming in statutory law—that the duty to serve without unjust discrimination is owed to everyone, and it extends to any business that holds itself out as ready to serve the public. If you have ever taken advantage of a public business without being denied service because of who you are, then you have come to enjoy the dignity and freedom that this principle protects.

3

Lesbian, gay, bisexual, and transgender (LGBT) people, no less than anyone else, deserve that dignity and freedom. The movement for LGBT rights, and the resulting expansion of state and local laws to secure gender and sexual minorities' full and equal enjoyment of publicly available goods and services, is the latest chapter of this great American story.

LGBT people have existed for all of human history. And as sure as they have existed, others have sought to deny their existence, and to exclude them from public life. Those who would subordinate LGBT people have often done so with the backing of law. [Justice Sotomayor recounts some of that discrimination, quoting from *Obergefell.]*

* * *

A social system of discrimination created an environment in which LGBT

people were unsafe [recounting murder of Matthew Shepard and the Pulse nightclub massacre]. Rates of violent victimization are still significantly higher for LGBT people, with transgender persons particularly vulnerable to attack. See Dept. of Justice, J. Truman & R. Morgan, Violent Victimization by Sexual Orientation and Gender Identity, 2017– 2020 (2022).

Determined not to live as "social outcasts," *Masterpiece Cakeshop*, 584 U. S., at ___ (slip op., at 9), LGBT people have risen up. The social movement for LGBT rights has been long and complex. See L. Faderman, The Gay Revolution (2015) (Faderman).

* * * [C]hange has come * * * in social attitudes, in representation, and in legal institutions. Faderman 535–629.

One significant change has been the addition of sexual orientation and gender identity to public accommodations laws. State and local legislatures took note of the failure of such laws to protect LGBT people and, in response, acted to guarantee them "all the privileges . . . of any other member of society." Hearings on S. B. 200 before the House Judiciary Committee, 66th Gen. Assem., 2d Reg. Sess., 4, 11–12 (Colo. 2008) (remarks of Sen. Judd). Colorado thus amended its antidiscrimination law in 2008 to prohibit the denial of publicly available goods or services on the basis of "sexual orientation." 2008 Colo. Sess. Laws. ch. 341, pp. 1596–1597. About half of the States now provide such protections. [citation omitted] It is "'unexceptional'" that they may do so. *Ante*, at 13 (quoting *Masterpiece Cakeshop*, 584 U. S., at __ (slip op., at 10)). "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer* v. *Evans*, 517 U. S. 620, 631 (1996). LGBT people do not seek any special treatment. All they seek is to exist in public. To inhabit public spaces on the same terms and conditions as everyone else.

C

Yet for as long as public accommodations laws have been around, businesses have sought exemptions from them. The civil rights and women's liberation eras are prominent examples of this. Backlashes to race and sex equality gave rise to legal claims of rights to discriminate, including claims based on First Amendment freedoms of expression and association. This Court was unwavering in its rejection of those claims, as invidious discrimination "has never been accorded affirmative constitutional protections." *Norwood* v. *Harrison*, 413 U. S. 455, 470 (1973). In particular, the refusal to deal with or to serve a class of people is not an expressive interest protected by the First Amendment.

1

[Justice Sotomayor details examples from the Congressional Record of opposition to the Civil Rights Act of 1964 on the ground that it would "force

business owners to defy their beliefs," and deny them "any freedom to speak or to act on the basis of their religious convictions or their deep-rooted preferences for associating or not associating with certain classifications of people."]

Congress rejected those arguments. Title II of the Act, in particular, did not invade "rights of privacy [or] of free association," Congress concluded, because the establishments covered by the law were "those regularly held open to the public in general." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 9 (1963); see also S. Rep. No. 872, at 92.

[Justice Sotomayor reviews the Court's rejection of constitutional challenges brought to Title II.] This Court disagreed, based on "a long line of cases" holding that "prohibition of racial discrimination in public accommodations" did not "interfer[e] with personal liberty." [Heart of Atlanta], 379 U. S., at 260. [Justice Sotomayor summarizes the constitutional claims that the Court rejected in *Katzenbach* v. *McClung*, 379 U. S. 294 (1964) (owner of Ollie's Barbeque sought to offer only take-out service to Black customers), *Newman* v. *Piggie Park Enterprises, Inc.*, 390. S. 400 (1968) (*per curiam*) (restauranteur asserted theological belief in segregation, and *Runyon* v. *McCrary*, 427 U. S. 160 (1976) (commercially operated schools wanted to serve only white students).

2

First Amendment rights of expression and association were also raised to challenge laws against sex discrimination. In *Roberts* v. *United States Jaycees*, the United States Jaycees [a "civic organization, which until then had denied admission to women"] sought an exemption from a Minnesota law that forbids discrimination on the basis of sex in public accommodations. * * *

This Court * * * held that the "application of the Minnesota statute to compel the Jaycees to accept women" did not infringe the organization's First Amendment "freedom of expressive association." *Roberts*, 468 U. S., at 622. * * * "Instead," the law's purpose was "eliminating discrimination and assuring [the State's] citizens equal access to publicly available goods and services." "That goal," the Court reasoned, * * * "plainly serves compelling state interests of the highest order." *Ibid.* Justice O'Connor concurred in part and concurred in the judgment. She stressed that the U. S. Jaycees was a predominantly commercial entity open to the public. * * * "A shopkeeper," Justice O'Connor explained, "has no constitutional right to deal only with persons of one sex." *Id.* at 631.

II

Battling discrimination is like "battling the Hydra." *Shelby County* v. *Holder*, 570 U. S. 529, 560 (2013) (Ginsburg, J., dissenting). Whenever you defeat "one form of . . . discrimination," another "spr[ings] up in its place." *Ibid.* Time and again, businesses and other commercial entities have claimed constitutional rights to discriminate [and] * * * this Court has courageously stood up to those claims—until today. Today, the Court shrinks. A business claims that it would like to sell

wedding websites to the general public, yet deny those same websites to gay and lesbian couples. Under state law, the business is free to include, or not to include, any lawful message it wants in its wedding websites. The only thing the business may not do is deny whatever websites it offers on the basis of sexual orientation. This Court, however, grants the business a broad exemption from state law and allows the business to post a notice that says: Wedding websites will be refused to gays and lesbians. The Court's decision, which conflates denial of service and protected expression, is a grave error.

A

*** [Lorie] Smith * * * believes same-sex marriages are "false" * * *. Same-sex marriage, according to her, "violates God's will" and "harms society and children." * * *.

303 Creative has never sold wedding websites. Smith now believes, however, that "God is calling her 'to explain His true story about marriage.'" * * * For that reason, she says, she wants her for-profit company to enter the wedding website business. There is only one thing: Smith would like her company to sell wedding websites "to the public," but not to same-sex couples. She also wants to post a notice on the company's website announcing this intent to discriminate. In Smith's view, "it would violate [her] sincerely held religious beliefs to create a wedding website for a same-sex wedding because, by doing so, [she] would be expressing a message celebrating and promoting a conception of marriage that [she] believe[s] is contrary to God's design."

* * * According to Smith, the Free Speech Clause of the First Amendment entitles her company to refuse to sell *any* "websites for same-sex weddings," even though the company plans to offer wedding websites to the general public. In other words, the company claims a categorical exemption from a public accommodations law simply because the company sells expressive services. The sweeping nature of this claim should have led this Court to reject it.

B

The First Amendment does not entitle petitioners to a special exemption from a state law that simply requires them to serve all members of the public on equal terms. Such a law does not directly regulate petitioners' speech at all, and petitioners may not escape the law by claiming an expressive interest in discrimination. The First Amendment likewise does not exempt petitioners from the law's prohibition on posting a notice that they will deny goods or services based on sexual orientation.

1

[Justice Sotomayor reviews the Court's precedents establishing that the "First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." She argues that the majority should have applied the intermediate scrutiny test used in *United States* v. *O'Brien*, 391 U.

S. 367 (1968), where "the Court upheld the application of a law against the destruction of draft cards to a defendant who had burned his draft card to protest the Vietnam War." Although the "protester's conduct was indisputably expressive," and was "political expression, which lies at the heart of the First Amendment," the *O'Brien* Court concluded that because " the Government's interest in regulating the conduct" was not "to burden expression," the regulation was "subject to lesser constitutional scrutiny."]

The *O'Brien* standard is satisfied if a regulation is unrelated to the suppression of expression and "'promotes a substantial government interest that would be achieved less effectively. [Justice Sotomayor also discusses *FAIR,* in which law schools unsuccessfully challenged the Solomon Amendment, which prohibits an institution of higher education in receipt of federal funding from denying a military recruiter the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access. The law schools objected " based on their sincere objection to the military's "Don't Ask, Don't Tell" policy" and argued that the Amendment infringed their freedom of speech.] As the Court acknowledged, those services [the schools had to provide] "clearly involve speech." *Id.*, at 60. * * * But that did not transform the equal provision of services into "compelled speech" of the kind barred by the First Amendment, because the school's speech was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.*, at 62. Thus, any speech compulsion was "plainly incidental to the Solomon Amendment's regulation of conduct." *Ibid.*

2

The same principle resolves this case. * * * Recall that Smith wants to post a notice on her company's homepage that the company will refuse to sell any website for a same-sex couple's wedding. This Court, however, has already said that "a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." *Sorrell*, 564 U. S., at 567 (quoting *FAIR*, 547 U. S., at 62) * * *. So petitioners concede that they are not entitled to an exemption from the Communication Clause unless they are also entitled to an exemption from the Accommodation Clause. That concession is all but fatal to their argument, because it shows that even "pure speech" may be burdened incident to a valid regulation of conduct.

* * * It is well settled that a public accommodations law like the Accommodation Clause does not "target speech or discriminate on the basis of its content." *Hurley*, 515 U. S., at 572. Rather, "the focal point of its prohibition" is "on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Ibid.* (emphasis added). The State confirms this reading of CADA. 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.

Crucially, the law "does not dictate the content of speech at all, which is only 'compelled' if, and to the extent," the company offers "such speech" to other customers. *FAIR*, 547 U. S., at 62. 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, for example, offer only wedding websites with biblical quotations describing marriage as between one man and one woman. (Just as it could offer only t-shirts with such quotations.) The company could also refuse to include the words "Love is Love" if it would not provide those words to any customer. All the company has to do is offer its services without regard to customers' protected characteristics. Any effect on the company's speech is therefore "incidental" to the State's content-neutral regulation of conduct. *FAIR*, 547 U. S., at 62; see *Hurley*, 515 U. S., at 572–573.

Once these features of the law are understood, it becomes clear that petitioners' freedom of speech is not abridged in any meaningful sense, factual or legal. Petitioners remain free to advocate the idea that same-sex marriage betrays God's laws. * * * Even if Smith believes God is calling her to do so through her for-profit company, the company need not hold out its goods or services to the public at large. Many filmmakers, visual artists, and writers never do. (That is why the law does not require Steven Spielberg or Banksy to make films or art for anyone who asks.) * * * [E]ven if the company offers its goods or services to the public, it remains free under state law to decide what messages to include or not to include. To repeat (because it escapes the majority): The company can put whatever "harmful" or "low-value" speech it wants on its websites. It can "tell people what they do not want to hear." All the company may not do is offer wedding websites to the public yet refuse those same websites to gay and lesbian couples. See *Runyon* (distinguishing between schools' ability to express their bigoted view "that racial segregation is desirable" and the schools' proscribable "*practice* of excluding racial minorities"). * * *

3

Th[e] [*O'Brien*] standard is easily satisfied here because the law's application "promotes a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*, 547 U. S., at 67. This Court has already held that the State's goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is "unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Roberts*, 468 U. S., at 624. The Court has also held that by prohibiting only "*acts* of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages," the law "responds precisely to the substantive problem which legitimately concerns the State and abridges no more speech . . . than is necessary to accomplish that purpose." *Id.*, at 628–629.

C

The Court reaches the wrong answer in this case because it asks the wrong questions. The question is not whether the company's products include "elements of speech." *FAIR*, 547 U. S., at 61. * * * Instead, the proper focus is on the character of state action and its relationship to expression. 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. *Ibid.*

Second, the majority completely ignores the categorical nature of the exemption claimed by petitioners. Petitioners maintain, as they have throughout this litigation, that they will refuse to create *any* wedding website for a same-sex couple. Even an announcement of the time and place of a wedding (similar to the majority's example from *FAIR*) abridges petitioners' freedom of speech, they claim, because "the announcement of the wedding itself is a concept that [Smith] believes to be false." * * * Indeed, petitioners here concede that if a same-sex couple came across an opposite-sex wedding website created by the company and requested an identical website, with only the names and date of the wedding changed, petitioners would refuse. [10] That is status-based discrimination, plain and simple. Oblivious to this fact, the majority insists that petitioners discriminate based on message, not status. The company, says the majority, will not sell same-sex wedding websites to anyone. It will sell only opposite-sex wedding websites; that is its service. Petitioners, however, "cannot define their service as 'opposite-sex wedding [websites]' any more than a hotel can recast its services as 'whites-only lodgings.'" *Telescope Media Group* v. *Lucero*, 936 F. 3d 740, 769 (CA8 2019) (Kelly, J., concurring in part and dissenting in part). To allow a business open to the public to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws. It would mean that a large retail store could sell "passport photos for white people."

* * * Smith answers that she will sell other websites for gay or lesbian clients. But then she, like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu. This is plain to see, for all who do not look the other way.

The majority, however, analogizes this case to *Hurley* and *Boy Scouts of America* v. *Dale*, 530 U. S. 640 (2000). [Justice Sotomayor argues these are inapt, since they involved "peculiar" applications of public accommodations laws, not to "the act of discriminating . . . in the provision of publicly available goods" by "clearly commercial entities," but rather to private, nonprofit expressive associations in

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[10] Because petitioners have never sold a wedding website to anyone, the record contains only a mockup website. The mockup confirms what you would expect: The website provides details of the event, a form to RSVP, a gift registry, etc. The customization of these elements pursuant to a content-neutral regulation of conduct does not unconstitutionally intrude upon any protected expression of the website designer. Yet Smith claims a First Amendment right to refuse to provide *any* wedding website for a same-sex couple. Her claim therefore rests on the idea that her act of service is itself a form of protected expression. In granting Smith's claim, the majority collapses the distinction between status-based and message-based refusals of service. The history shows just how profoundly wrong that is. See *Runyon* v. *McCrary*, 427 U. S. 160, 176 (1976); *Hishon* v. *King & Spalding*, 467 U. S. 69, 78 (1984); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622–629 (1984).

ways that directly burdened speech."] The Court in *Hurley* and *Dale* stressed that the speech burdens in those cases were not incidental to prohibitions on status-based discrimination. * * *

Here, the opposite is true. 303 Creative LLC is a "clearly commercial entit[y]." *Dale*, 530 U. S., at 657. The company comes under the regulation of CADA only if it sells services to the public, and only if it denies the equal enjoyment of such services because of sexual orientation. * * * [A] ny burden on the company's expression is incidental to the State's content-neutral regulation of commercial conduct. * * *

[I]t is dispiriting to read the majority suggest that this case resembles *Barnette*. A content-neutral equal-access policy is "a far cry" from a mandate to "endorse" a pledge chosen by the Government. *FAIR*, 547 U. S., at 62. This Court has said "it trivializes the freedom protected in *Barnette*" to equate the two. 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. It does not "invad[e]" her "sphere of intellect" or violate her constitutional "right to differ." All it does is require her to stick to her bargain: "The owner who hangs a shingle and offers her services to the public cannot retreat from the promise of open service; * * * It is to convey the promise of a free and open society and then take the prize away from the despised few." J. Singer, We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom, 95 B. U. L. Rev. 929, 949 (2015).

III

Today is a sad day in American constitutional law and in the lives of LGBT people. The Supreme Court of the United States declares that a particular kind of business, though open to the public, has a constitutional right to refuse to serve members of a protected class. The Court does so for the first time in its history. By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service. The opinion of the Court is, quite literally, a notice that reads: "Some services may be denied to same-sex couples."

"The truth is," these "affronts and denials" "are intensely human and personal." S. Rep. No. 872, at 15 (internal quotation marks omitted). Sometimes they may "harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity." *Ibid.* To see how, imagine a same-sex couple browses the public market with their child. The market could be online or in a shopping mall. Some stores sell products that are customized and expressive. The family sees a notice announcing that services will be refused for same-sex weddings. What message does that send? It sends the message that we live in a society with social castes. It says to the child of the same-sex couple that their parents' relationship is not equal to others'. And it reminds LGBT people of a painful feeling

that they know all too well: There are some public places where they can be themselves, and some where they cannot. K. Yoshino, Covering 61–66 (2006). Ask any LGBT person, and you will learn just how often they are forced to navigate life in this way. They must ask themselves: If I reveal my identity to this co-worker, or to this shopkeeper, will they treat me the same way? If I hold the hand of my partner in this setting, will someone stare at me, harass me, or even hurt me? It is an awful way to live. Freedom from this way of life is the very object of a law that declares: All members of the public are entitled to inhabit public spaces on equal terms.

This case cannot be understood outside of the context in which it arises. In that context, the outcome is even more distressing. The LGBT rights movement has made historic strides, and I am proud of the role this Court recently played in that history. Today, however, we are taking steps backward. A slew of anti-LGBT laws have been passed in some parts of the country,[11] raising the specter of a "bare. . . desire to harm a politically unpopular group." *Romer*, 517 U. S., at 634 (internal quotation marks omitted). This is especially unnerving when "for centuries there have been powerful voices to condemn" this small minority. *Lawrence* v. *Texas*, 539 U. S. 558, 571 (2003). In this pivotal moment, the Court had an opportunity to reaffirm its commitment to equality on behalf of all members of society, including LGBT people. It does not do so.

Although the consequences of today's decision might be most pressing for the LGBT community, the decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services. A website designer could equally refuse to create a wedding website for an interracial couple, for example. How quickly we forget that opposition to interracial marriage was often because "'Almighty God. . . did not intend for the races to mix.'" *Loving* v. *Virginia*, 388 U. S. 1, 3 (1967). Yet the reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for "traditional" families. And so on.[12] Wedding websites, birth announcements, family portraits, epitaphs. These are not just words and images. They are the most profound moments in a human's life. They are the moments that give that life personal and cultural meaning. You already heard the story of Bob and Jack, the elderly gay couple forced to find a funeral home more than an hour away.

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[11] These laws variously censor discussion of sexual orientation and gender identity in schools, see, *e.g.*, 2023 Ky. Acts pp. 775–779, and ban drag shows in public, see 2023 Tenn. Pub. Acts ch. 2. Yet we are told that the real threat to free speech is that a commercial business open to the public might have to serve all members of the public.

[12] The potential implications of the Court's logic are deeply troubling. Would *Runyon* v. *McCrary* have come out differently if the schools had argued that accepting Black children would have required them to create original speech, like lessons, report cards, or diplomas, that they deeply objected to? * * * Once you look closely, "compelled speech" (in the majority's facile understanding of that concept) is everywhere.

Now hear the story of Cynthia and Sherry, a lesbian couple of 13 years until Cynthia died from cancer at age 35. When Cynthia was diagnosed, she drew up a will, which authorized Sherry to make burial arrangements. Cynthia had asked Sherry to include an inscription on her headstone, listing the relationships that were important to her, for example, "daughter, granddaughter, sister, and aunt." After Cynthia died, the cemetery was willing to include those words, but not the words that described Cynthia's relationship to Sherry: " 'beloved life partner.' " N. Knauer, Gay and Lesbian Elders 102 (2011). There are many such stories, too many to tell here. And after today, too many to come.

I fear that the symbolic damage of the Court's opinion is done. But that does not mean that we are powerless in the face of the decision. The meaning of our Constitution is found not in any law volume, but in the spirit of the people who live under it. Every business owner in America has a choice whether to live out the values in the Constitution. Make no mistake: Invidious discrimination is not one of them. "[D]iscrimination in any form and in any degree has no justifiable part whatever in our democratic way of life." *Korematsu* v. *United States*, 323 U. S. 214, 242 (1944) (Murphy, J., dissenting). "It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Ibid.*

* * * [I]n a free and democratic society, there can be no social castes. And for that to be true, it must be true in the public market. For the "promise of freedom" is an empty one if the Government is "powerless to assure that a dollar in the hands of [one person] will purchase the same thing as a dollar in the hands of a[nother]." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 443 (1968). Because the Court today retreats from that promise, I dissent.

NOTES AND QUESTIONS

1. *The scope of the majority's ruling?* Why does the majority opinion conclude that Colorado's Anti-Discrimination Act (CADA) violates the Free Speech Clause of the First Amendment? What is the scope of the Court's ruling? Does the majority give guidance on what businesses other than wedding website design involve "expressive activity protected by the First Amendment"? Does Justice Gorsuch sufficiently respond to Justice Sotomayor's argument that the majority's "decision threatens to balkanize the market and to allow the exclusion of other groups"—in addition to "the LGBT community"—"from many services"?

2. *Public accommodations law and the First Amendment.* Do you think the majority or the dissent is more persuasive on whether CADA is unconstitutionally compelling Lorie Smith's speech? Is applying CADA to a business owner like Ms. Smith comparable to compelling school children to salute the flag (as in the statute held unconstitutional in *West Virginia Board of Education v. Barnette)*? How do the majority and dissent understand the implications of *Barnette* for the public marketplace for goods and services?

3. *Analogies to past challenges to anti-discrimination law.* Both the majority and the dissent address the expansion, over time, of state public accommodations

laws and also that the Supreme Court has recognized a "compelling interest" in state governments and the federal government ending discrimination in public accommodations. Both cite to significant precedents in which the Court upheld laws prohibiting race and sex discrimination against First Amendment and other constitutional challenges. Why, then, do they disagree over whether CADA violates the First Amendment? Is Justice Sotomayor correct that the majority's opinion opens the door to a website designer refusing to create a website for "an interracial couple"?

4. *Guidance for state legislatures?* As both the majority and dissent note, nearly all the states have public accommodations laws and nearly half include sexual orientation among the protected categories. Among the latter group, most also include gender identity. If you were advising a state legislature, would you recommend that they amend their antidiscrimination law in light of *303 Creative* to avoid future constitutional challenges? If so, what type of amendment would you recommend? An exemption for goods and services that involve "speech" or, more broadly, "creative expression"? In *303 Creative*, Ms. Smith objected to creating wedding websites because of her religious beliefs about marriage. Justice Gorsuch's opinion refers more broadly to protecting a business owner's "conscience" or their ability to speak—or not speak—on a "significant issue of personal conviction." Thus, as Justice Sotomayor observes, under the Court's reasoning, the reason for refusal "need not even be religious." How would this shape your advice to a state legislature?

CHAPTER 6

ADOPTION

▪ ▪ ▪

SECTION 3. ISSUES IN CONTEMPORARY ADOPTION LAW AND POLICY

B. NATIVE AMERICAN ADOPTION

Insert on page 464, after paragraph about challenging the Indian Child Welfare Act under the Equal Protection Clause.

HAALAND v. BRACKEEN, et al.
Supreme Court of the United States, 2023
__ S. Ct. __, 2023 WL 4002951[13]

BARRETT, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, KAGAN, GORSUCH, KAVANAUGH, and JACKSON, JJ., joined. GORSUCH, J., filed a concurring opinion, in which SOTOMAYOR and JACKSON, JJ., joined as to Parts I and III. KAVANAUGH, J., filed a concurring opinion. THOMAS, J., and ALITO, J., filed dissenting opinions.

Justice BARRETT delivered the opinion of the Court.

This case is about children who are among the most vulnerable: those in the child welfare system. In the usual course, state courts apply state law when placing children in foster or adoptive homes. But when the child is an Indian, a federal statute—the Indian Child Welfare Act—governs. Among other things, this law requires a state court to place an Indian child with an Indian caretaker, if one is available. That is so even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there.

Before us, a birth mother, foster and adoptive parents, and the State of Texas challenge

[13] ***Editors' Note***: As in the casebook, *** in this edited case indicates deleted text. However, we have not indicated deletions by *** when the deletions are internal references to the majority and dissenting opinions, to citations to the record—when the majority and dissent quote from party briefs and other pleadings— or parenthetical references stating that internal quotations are omitted.

the Act on multiple constitutional grounds. They argue that it exceeds federal authority, infringes state sovereignty, and discriminates on the basis of race. The United States, joined by several Indian Tribes, defends the law. The issues are complicated—so for the details, read on. But the bottom line is that we reject all of petitioners' challenges to the statute, some on the merits and others for lack of standing.

I

A

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) out of concern that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 92 Stat. 3069, 25 U.S.C. § 1901(4). Congress found that many of these children were being "placed in non-Indian foster and adoptive homes and institutions," and that the States had contributed to the problem by "fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." §§ 1901(4), (5). This harmed not only Indian parents and children, but also Indian tribes. As Congress put it, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." § 1901(3). Testifying before Congress, the Tribal Chief of the Mississippi Band of Choctaw Indians was blunter: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People." Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 193 (1978).

The Act thus aims to keep Indian children connected to Indian families. "Indian child" is defined broadly to include not only a child who is "a member of an Indian tribe," but also one who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." § 1903(4). If the Indian child lives on a reservation, ICWA grants the tribal court exclusive jurisdiction over all child custody proceedings, including adoptions and foster care proceedings. § 1911(a). For other Indian children, state and tribal courts exercise concurrent jurisdiction, although the state court is sometimes required to transfer the case to tribal court. § 1911(b). When a state court adjudicates the proceeding, ICWA governs from start to finish. That is true regardless of whether the proceeding is "involuntary" (one to which the parents do not consent) or "voluntary" (one to which they do).

Involuntary proceedings are subject to especially stringent safeguards. See 25 C.F.R. § 23.104 (2022); 81 Fed. Reg. 38832–38836 (2016). Any party who initiates an "involuntary proceeding" in state court to place an Indian child in foster care or terminate parental rights must "notify the parent or Indian custodian and the Indian

child's tribe." § 1912(a). The parent or custodian and tribe have the right to intervene in the proceedings; the right to request extra time to prepare for the proceedings; the right to "examine all reports or other documents filed with the court"; and, for indigent parents or custodians, the right to court-appointed counsel. §§ 1912(a), (b), (c). The party attempting to terminate parental rights or remove an Indian child from an unsafe environment must first "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." § 1912(d). Even then, the court cannot order a foster care placement unless it finds "by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912(e). To terminate parental rights, the court must make the same finding "beyond a reasonable doubt." § 1912(f).

The Act applies to voluntary proceedings too. Relinquishing a child temporarily (to foster care) or permanently (to adoption) is a grave act, and a state court must ensure that a consenting parent or custodian knows and understands "the terms and consequences." § 1913(a). Notably, a biological parent who voluntarily gives up an Indian child cannot necessarily choose the child's foster or adoptive parents. The child's tribe has "a right to intervene at any point in [a] proceeding" to place a child in foster care or terminate parental rights, as well as a right to collaterally attack the state court's decree. §§ 1911(c), 1914. As a result, the tribe can sometimes enforce ICWA's placement preferences against the wishes of one or both biological parents, even after the child is living with a new family. * * *

ICWA's placement preferences, which apply to all custody proceedings involving Indian children, are hierarchical: State courts may only place the child with someone in a lower-ranked group when there is no available placement in a higher-ranked group. For adoption, "a preference shall be given" to placements with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." § 1915(a). For foster care, a preference is given to (1) "the Indian child's extended family"; (2) "a foster home licensed, approved, or specified by the Indian child's tribe"; (3) "an Indian foster home licensed or approved by an authorized non-Indian licensing authority"; and then (4) another institution "approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." § 1915(b). * * * Courts must adhere to the placement preferences absent "good cause" to depart from them. §§ 1915(a), (b).

* * *

B

This case arises from three separate child custody proceedings governed by ICWA.

1

A.L.M. was placed in foster care with Chad and Jennifer Brackeen when he was 10 months old. Because his biological mother is a member of the Navajo Nation and his biological father is a member of the Cherokee Nation, he falls within ICWA's definition of an "Indian child." Both the Brackeens and A.L.M.'s biological parents live in Texas.

After A.L.M. had lived with the Brackeens for more than a year, they sought to adopt him. A.L.M.'s biological mother, father, and grandmother all supported the adoption. The Navajo and Cherokee Nations did not. Pursuant to an agreement between the Tribes, the Navajo Nation designated A.L.M. as a member and informed the state court that it had located a potential alternative placement with nonrelative tribal members living in New Mexico. ICWA's placement preferences ranked the proposed Navajo family ahead of non-Indian families like the Brackeens. See § 1915(a).

The Brackeens tried to convince the state court that there was "good cause" to deviate from ICWA's preferences. They presented favorable testimony from A.L.M.'s court-appointed guardian and from a psychological expert who described the strong emotional bond between A.L.M. and his foster parents. A.L.M.'s biological parents and grandmother also testified, urging the court to allow A.L.M. to remain with the Brackeens, " 'the only parents [A.L.M.] knows.' "

The court denied the adoption petition, and the Texas Department of Family and Protective Services announced its intention to move A.L.M. from the Brackeens' home to New Mexico. In response, the Brackeens obtained an emergency stay of the transfer and filed this lawsuit. The Navajo family then withdrew from consideration, and the Brackeens finalized their adoption of A.L.M.

The Brackeens now seek to adopt A.L.M.'s biological sister, Y.R.J., again over the opposition of the Navajo Nation. And while the Brackeens hope to foster and adopt other Indian children in the future, their fraught experience with A.L.M.'s adoption makes them hesitant to do so.[14]

* * *

C

* * *

Petitioners [the Brackeens and the other parties – *Eds.*] challenged ICWA as unconstitutional on multiple grounds. They asserted that Congress lacks authority to enact ICWA and that several of ICWA's requirements violate the anticommandeering principle of the Tenth Amendment. They argued that ICWA employs racial classifications that unlawfully hinder non-Indian families from fostering or adopting Indian children. And they challenged § 1915(c)—the provision that allows tribes to [prioritize Indian families over non-Indian families] * * *.

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[14] ***Editors' Note***: Facts concerning the other plaintiffs, Altagracia Hernandez, Nick and Heather Libretti, and Jason and Danielle Clifford, have been omitted.

* * *

II

A

We begin with petitioners' claim that ICWA exceeds Congress's power under Article I. In a long line of cases, we have characterized Congress's power to legislate with respect to the Indian tribes as " 'plenary and exclusive.' " *United States v. Lara*, 541 U.S. 193, 200 (2004). [Other cases omitted – *Eds.*]

To be clear, however, "plenary" does not mean "free-floating." A power unmoored from the Constitution would lack both justification and limits. So like the rest of its legislative powers, Congress's authority to regulate Indians must derive from the Constitution, not the atmosphere. Our precedent traces that power to multiple sources. [In following paragraphs, the Court referred to the Indian Commerce Clause, Art. I, § 8, cl. 3, the Treaty Clause, Art. II, § 2, cl. 2, "principles inherent in the Constitution's structure," and "trust relationship between the United States and the Indian people" as sources of this authority. – *Eds.*]

* * *

B

Petitioners contend that ICWA exceeds Congress's power. Their principal theory, and the one accepted by both Justice ALITO and the dissenters in the Fifth Circuit, is that ICWA treads on the States' authority over family law. Domestic relations have traditionally been governed by state law; thus, federal power over Indians stops where state power over the family begins. Or so the argument goes.

It is true that Congress lacks a general power over domestic relations, *In re Burrus*, 136 U.S. 586, 593–594 (1890), and, as a result, responsibility for regulating marriage and child custody remains primarily with the States, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). * * * But the Constitution does not erect a firewall around family law. On the contrary, when Congress validly legislates pursuant to its Article I powers, we "ha[ve] not hesitated" to find conflicting state family law preempted, "[n]otwithstanding the limited application of federal law in the field of domestic relations generally." *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981) (federal law providing life insurance preempted state family-property law); [other cases omitted – *Eds.*]. In fact, we have specifically recognized Congress's power to displace the jurisdiction of state courts in adoption proceedings involving Indian children. *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390 (1976) (*per curiam*).

Petitioners are trying to turn a general observation (that Congress's Article I powers rarely touch state family law) into a constitutional carveout (that family law is wholly exempt from federal regulation). That argument is a nonstarter. * * *

* * *

III

We now turn to petitioners' host of anticommandeering arguments [Tenth Amendment-based doctrine that precludes the federal government from requiring states to enforce federal law – *Eds.*], which we will break into three categories. First, petitioners challenge certain requirements that apply in involuntary proceedings to place a child in foster care or terminate parental rights: the requirements that an initiating party demonstrate "active efforts" to keep the Indian family together; serve notice of the proceeding on the parent or Indian custodian and tribe; and demonstrate, by a heightened burden of proof and expert testimony, that the child is likely to suffer "serious emotional or physical damage" if the parent or Indian custodian retains custody. Second, petitioners challenge ICWA's placement preferences. They claim that Congress can neither force state agencies to find preferred placements for Indian children nor require state courts to apply federal standards when making custody determinations. Third, they insist that Congress cannot force state courts to maintain or transmit to the Federal Government records of custody proceedings involving Indian children.

[The Court rejected these claims. – *Eds.*]

* * *

IV

* * *

A

The individual petitioners argue that ICWA injures them [under the Equal Protection Clause of the Fourteenth Amendment – *Eds.*] by placing them on "[un]equal footing" with Indian parents who seek to adopt or foster an Indian child. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993). Under ICWA's hierarchy of preferences, non-Indian parents are generally last in line for potential placements. According to petitioners, this "erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Ibid.*; see also *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (the Equal Protection Clause secures the right of individuals "to be considered" for government positions and benefits "without the burden of invidiously discriminatory disqualifications"). The racial discrimination they allege counts as an Article III injury.

But the individual petitioners have not shown that this injury is "likely" to be "redressed by judicial relief." * * * [S]tate courts apply the placement preferences, and state agencies carry out the court-ordered placements. §§ 1903(1), 1915(a), (b); * * * . The state officials who implement ICWA are "not parties to the suit * * * ."

* * *

For these reasons, we affirm the judgment of the Court of Appeals regarding Congress's constitutional authority to enact ICWA. On the anticommandeering claims, we reverse. On the equal protection and nondelegation claims, we vacate the judgment of the Court of Appeals and remand with instructions to dismiss for lack of jurisdiction.

It is so ordered.

GORSUCH, J., with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join as to Parts I and III, concurring.

When Native American Tribes were forced onto reservations, they understood that life would never again be as it was. * * * So as they ceded their lands, Tribes also negotiated "more than 150" treaties with the United States that included "education-related provisions." Dept. of Interior, B. Newland, Federal Indian Boarding School Initiative Investigative Report 33 (May 2022) (BIA Report). Many tribal leaders hoped these provisions would lead to the creation of "reservation Indian schools that would blend traditional Indian education with the needed non-Indian skills that would allow their members to adapt to the reservation way of life." R. Cross, American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples, 21 U. Ark. Little Rock L. Rev. 941, 950 (1999).

* * *

The federal government had darker designs. By the late 1870s, its goals turned toward destroying tribal identity and assimilating Indians into broader society. * * *

Thus began Indian boarding schools. In 1879, the Carlisle Indian Industrial School opened its doors at the site of an old military base in central Pennsylvania. Carlisle's head, then-Captain Richard Henry Pratt, summarized the school's mission this way: "[A]ll the Indian there is in the race should be dead. Kill the Indian in him, and save the man." The Advantages of Mingling Indians With Whites, in Proceedings of the National Conference of Charities and Correction 46 (I. Barrows ed. 1892). * * *

* * *

Upon the children's arrival, the boarding schools would often seek to strip them of nearly every aspect of their identity. The schools would take away their Indian names and give them English ones. See BIA Report 53. The schools would cut their hair—a point of shame in many native communities, see J. Reyhner & J. Eder, American Indian Education 178 (2004)—and confiscate their traditional clothes. [Annual Report of the Commissioner of Indian Affairs to the Secretary of Interior (1886) (ARCIA 1886)], at 199. * * * After intake, the schools frequently prohibited children from speaking their native language or engaging in customary cultural or religious practices. BIA Report 53. Nor could children freely associate with members of their own Tribe. * * *

Resistance could invite punishments that included "withholding food" and "whipping." BIA Report 54 (internal quotation marks omitted). * * * Even compliant students faced "[r]ampant physical, sexual, and emotional abuse; disease; malnourishment; overcrowding; and lack of health care." BIA Report 56.

* * *

To lower costs further and promote assimilation, some schools created an "outing system," which sent Indian children to live "with white families" and perform "household and farm chores" for them. R. Trennert, From Carlisle to Phoenix: The Rise and Fall of the Indian Outing System, 1878–1930, 52 Pacific Hist. Rev. 267, 273 (1983). * * * Advocates of the outing system hoped it would be "extended until every Indian child was in a white home." D. Otis, The Dawes Act and the Allotment of Indian Lands 68 (1973). In some respects, outing-system advocates were ahead of their time. The program they devised laid the groundwork for the system of mass adoption that, as we shall see, eventually moved Congress to enact ICWA many decades later.

* * *

* * * As federal boarding schools closed their doors and Indian children returned to the reservations, States with significant Native American populations found themselves facing significant new educational and welfare responsibilities. Around this time, as fate would have it, "shifting racial ideologies and changing gender norms [had] led to an increased demand for Indian children" by adoptive couples. M. Jacobs, Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s, 37 Am. Indian Q. 136, 141 (2013). Certain States saw in this shift an opportunity. They could "save ... money" by "promoting the *adoption* of Indian children by private families." *Id.*, at 153.

This restarted a now-familiar nightmare for Indian families. The same assimilationist rhetoric previously invoked by the federal government persisted, "voiced this time by state and county officials." L. George, Why the Need for the Indian Child Welfare Act?, 5 J. of Multicultural Social Work 165, 169 (1997). * * *

* * *

These family separations frequently lacked justification. According to one report, only about "1 per cent" of the separations studied involved alleged physical abuse. [W. Byler, The Destruction of American Indian Families 2 (S. Unger ed. 1977)]. The other 99 percent? "[V]ague grounds" such "as 'neglect' or 'social deprivation.' " These determinations, often "wholly inappropriate in the context of Indian family life," came mainly from non-Indian social workers, many of whom were "ignorant of Indian cultural values and social norms." They routinely penalized Indian parents for conditions of "[p]overty, poor housing, lack of modern plumbing, and overcrowding." One 3-year-old Sioux child, for instance, was removed from her family on the State's "belief that an Indian reservation is an unsuitable environment for a child." So it was that some Indian families, "forced onto reservations at gunpoint," were later "told that

they live[d] in a place unfit for raising their children." *Id.*, at 3–4.

* * *

Like the boarding school system that preceded it, this new program of removal had often-disastrous consequences. * * *

* * *

Eventually, Congress could ignore the problem no longer. In 1978, it responded with the Indian Child Welfare Act.

* * *

Our Constitution reserves for the Tribes a place – an enduring place – in the structure of American life. It promises them sovereignty for as long as they wish to keep it. And it secures that promise by divesting States of authority over Indian affairs and by giving the federal government certain significant (but limited and enumerated) powers aimed at building a lasting peace. In adopting the Indian Child Welfare Act, Congress exercised [its] lawful authority ["over Indian affairs"] to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is in keeping with the Constitution's original design.

Justice KAVANAUGH, concurring.

I join the Court's opinion in full. I write separately to emphasize that the Court today does not address or decide the equal protection issue that can arise when the Indian Child Welfare Act is applied in individual foster care or adoption proceedings. * * *

In my view, the equal protection issue is serious. Under the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child's race—even if the placement is otherwise determined to be in the child's best interests. And a prospective foster or adoptive parent may in some cases be denied the opportunity to foster or adopt a child because of the prospective parent's race. Those scenarios raise significant questions under bedrock equal protection principles and this Court's precedents. See *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).[15] Courts, including ultimately this Court, will be able to address the equal protection issue when it is properly raised by a plaintiff with standing—for example, by a prospective foster or adoptive parent or child in a case arising out of a state-court foster care or adoption proceeding.

Justice THOMAS, dissenting. [In his dissent, omitted here, Justice Thomas argues that ICWA "lacks any foothold in the Constitution's original meaning." – *Eds.*]

Justice ALITO, dissenting.

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[15] ***Editors' Note***: *Palmore* is a principal case in Chapter 12.

The first line in the Court's opinion identifies what is most important about these cases: they are "about children who are among the most vulnerable." But after that opening nod, the Court loses sight of this overriding concern and decides one question after another in a way that disserves the rights and interests of these children and their parents, as well as our Constitution's division of federal and state authority.

Decisions about child custody, foster care, and adoption are core state functions. The paramount concern in these cases has long been the "best interests" of the children involved. See, *e.g.*, 3 T. Zeller, Family Law and Practice §§ 32.06, 32.08 (2022); 6 *id.,* § 64.06. But in many cases, provisions of the Indian Child Welfare Act (ICWA) compel actions that conflict with this fundamental state policy, subordinating what family-court judges—and often biological parents—determine to be in the best interest of a child to what Congress believed is in the best interest of a tribe.

The cases involved in this litigation illustrate the distressing consequences. To its credit, the Court acknowledges what happened to these children, but its decision does nothing to prevent the repetition of similar events. Take A.L.M. His adoption by a loving non-Indian couple, with whom he had lived for over a year and had developed a strong emotional bond, was initially blocked even though it was supported by both of his biological parents, his grandmother, and the testimony of both his court-appointed guardian and a psychological expert. Because a Tribe objected, he would have been sent to an Indian couple that he did not know in another State had the non-Indian couple not sought and obtained an emergency judicial order.

* * *

Does the Constitution give Congress the authority to bring about such results? I would hold that it does not. Whatever authority Congress possesses in the area of Indian affairs, it does not have the power to sacrifice the best interests of vulnerable children to promote the interests of tribes in maintaining membership. Nor does Congress have the power to force state judges to disserve the best interests of children or the power to delegate to tribes the authority to force those judges to abide by the tribes' priorities regarding adoption and foster-care placement.

I

* * *

We need not map the outer bounds of Congress's Indian affairs authority to hold that the challenged provisions of ICWA lie outside it. We need only acknowledge that even so-called plenary powers cannot override foundational constitutional constraints. By attempting to control state judicial proceedings in a field long-recognized to be the virtually exclusive province of the States, ICWA violates the fundamental structure of our constitutional order.

In reaching this conclusion, I do not question the proposition that Congress has broad

power to regulate Indian affairs. * * * Nor do I dispute the notion that Congress has undertaken responsibilities that have been roughly analogized to those of a trustee. * * *

Nevertheless, we have repeatedly cautioned that Congress's Indian affairs power is not unbounded. And while we have articulated few limits, we have acknowledged what should be one obvious constraint: Congress's authority to regulate Indian affairs is limited by other "pertinent constitutional restrictions" that circumscribe the legislative power. * * *

* * *

Congress's power in the area of Indian affairs cannot exceed the limits imposed by the "system of dual sovereignty between the States and the Federal Government" established by the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). * * * The powers retained by the States constitute " 'a residuary and inviolable sovereignty,' " secure against federal intrusion. *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)). This structural principle, reinforced in the Tenth Amendment, "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 505 U.S. at 157. The corollary is also true: in some circumstances, the powers reserved to the States inform the scope of Congress's power. *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. —, —, (2018). This includes in the area of Indian affairs. *Dick v. United States*, 208 U.S. 340, 353 (1908) * * *.

While we have never comprehensively enumerated the States' reserved powers, we have long recognized that governance of family relations—including marriage relationships and child custody—is among them. It is not merely that these matters "have traditionally been governed by state law" or that the responsibility over them "remains primarily with the States," (majority opinion), but that the field of domestic relations "has long been regarded as a *virtually exclusive* province of the States," *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (emphasis added). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593–594 (1890). * * *

This does not mean that federal law may never touch on family matters. * * * But we have never held that Congress under any of its enumerated powers may regulate the very nature of those relations or dictate their creation, dissolution, or modification. Nor could we and remain faithful to our founding. "No one denies that the States, at the time of the adoption of the Constitution, possessed full power over" ordinary family relations; and "the Constitution delegated no authority to the Government of the United States" in this area. *Haddock v. Haddock*, 201 U.S. 562, 575 (1906). It is a "most important aspect of our federalism" that "the domestic relations of husband and wife"—and parent and child—are "matters reserved to the States and do not belong to the United States." *Williams v. North Carolina*, 325 U.S. 226, 233 (1945) (internal

quotation marks and citation omitted).

As part of that reserved power, state courts have resolved child custody matters arising among state citizens since the earliest days of the Nation. See, *e.g.*, *Nickols v. Giles*, 2 Root 461, 461–462 (Conn. Super. Ct. 1796) (declining to remove daughter from mother's care) * * *. Then, as now, state courts' overriding concern was the best interests of the children. See, *e.g.*, *Commonwealth v. Addicks*, 5 Binn. 520, 521 (Pa. 1813) (court's "anxiety is principally directed" to the child's welfare) * * *. By the mid-19th century, States had begun enacting statutory adoption schemes, enforceable through state courts, "to provide for the welfare of dependent children," starting with Massachusetts in 1851. S. Presser, The Historical Background of the American Law of Adoption, 11 J. Fam. L. 443, 453, 465 (1971) (Presser); 1851 Mass. Acts ch. 324. * * * As the cases before us attest, this historic tradition of state oversight of child custody and welfare through state judicial proceedings continues to the present day.

The ICWA provisions challenged here do not simply run up against this traditional state authority, they run roughshod over it when the State seeks to protect one of its young citizens who also happens to be a member of an Indian tribe or who is the biological child of a member and eligible for tribal membership, herself. 25 U.S.C. § 1903(4). In those circumstances, ICWA requires a State to abandon the carefully-considered judicial procedures and standards it has established to provide for a child's welfare and instead apply a scheme devised by Congress that focuses not solely on the best interest of the child, but also on "the stability and security of Indian tribes." § 1902. That scheme requires States to invite tribal authorities with no existing relationship to a child to intervene in judicial custody proceedings, §§ 1911(c), 1912(a), 1914. It requires States to replace their reasoned standards for termination of parental rights and placement in foster care with standards that favor the interests of an Indian custodian over those of the child. §§ 1912(e), (f). It forces state courts to give Indian couples (even those of different tribes) priority in adoption and foster-care placements, even over a non-Indian couple who would better serve a child's emotional and other needs. §§ 1915(a), (b). And it requires state judges to subordinate the State's typical custodial considerations to a tribe's alternative preference. § 1915(c).

It is worth underscoring that ICWA's directives apply even when the child is not a member of a tribe and has never been involved in tribal life, and even when a child's biological parents object. As seen in the cases before us, the sad consequence is that ICWA's provisions may delay or prevent a child's adoption by a family ready to provide her a permanent home.

ICWA's mandates do not simply touch on family matters. They override States' authority to determine—and implement through their courts—the child custody and welfare policies they deem most appropriate for their citizens. And in doing so, the mandates harm vulnerable children and their parents. In my view, the Constitution cannot countenance this result. * * *

* * *

I am sympathetic to the challenges that tribes face in maintaining membership and preserving their cultures. And I do not question the idea that the best interests of children may in some circumstances take into account a desire to enable children to maintain a connection with the culture of their ancestors. The Constitution provides Congress with many means for promoting such interests. But the Constitution does not permit Congress to displace long-exercised state authority over child custody proceedings to advance those interests at the expense of vulnerable children and their families.

Because I would hold that Congress lacked authority to enact the challenged ICWA provisions, I respectfully dissent.

NOTES AND QUESTIONS

1. *The history of ICWA*. The majority opinion provides a relatively terse summary of the legislative purposes behind ICWA. Justice Gorsuch's concurring opinion, even in its edited form here, provides significantly more detail. What are those additional details, and how do they affect your understanding of the law? Why do you suppose Justice Gorsuch included them? Do the provisions of ICWA referenced in the opinion seem to be an appropriate response to the problems that prompted it?

2. *Treatment of American Indian children*. Justice Gorsuch's opinion details the abusive treatment of Native American children in the boarding schools that predated the placement of Native American children in the homes of white families. Some of these children were killed in the boarding schools and never made it back to their communities. The Federal Indian Boarding School Initiative, begun by the first American Indian Secretary of Interior, examines the enduring trauma from boarding schools and seeks to "repatriate the remains of children buried at these schools." Neoshia R. Roemer, *Un-Erasing American Indians and the Indian Child Welfare Act*, 56 Fam. L.Q. 31, 51 (2022).

3. *Family law as a matter for the states*. Even though ICWA applies to members of federally recognized tribes, and American Indians have a recognized political status, Justice Alito's dissent focuses on states' rights or sovereignty. Justice Alito argues that ICWA is unconstitutional because, as federal legislation, it interferes with a "core state function": the resolution of child custody, foster care, and adoption issues. The justices in the majority disagree. They note that federal law sometimes preempts state family law. Can you think of any other federal laws that currently (or historically) regulate marriage, custody, and the like? How is ICWA analogous to or distinguishable from those laws?

4. *ICWA as reproductive justice*. Professor Neoshia Roemer argues that "ICWA is a tool of reproductive justice. Beyond the right to abortion, reproductive justice includes the right to have a child, the right not to have a child, and the right to raise a child in a safe and healthy environment. By implementing procedural guidelines to

protect Indian family decision-making and childrearing from state agencies that were, and are, often too eager to promote the settler colonial project, ICWA is a positive disruption of the settler colonial project that defends the reproductive autonomy of American Indian people." Neoshia R. Roemer, *The Indian Child Welfare Act as Reproductive Justice*, 103 B.U. L. Rev. 101, 101 (2023). She argues that there is an ongoing need to protect tribal sovereignty and reproductive rights for American Indian people. How might the challenge to ICWA in *Haaland v. Brackeen* imperil reproductive justice?

5. *The equal protection issue.* Justice Kavanaugh writes separately to emphasize his view that the argument that ICWA discriminates on the basis of race, although unresolved, "is serious." Professor Addie Rolnick argues in her article, *Indigenous Subjects*, 131 Yale L.J. 2652, 2654-57 (2022), that various cases, including *Haaland v. Brackeen,* are part of a project to retract the rights of American Indian people by equating ancestry to race. Although ICWA has been upheld for now, new challenges to the law (as described on pages 463–64) are surely forthcoming.