THE FIRST AMENDMENT AND RELATED STATUTES

PROBLEMS, CASES AND POLICY ARGUMENTS

2025 SUPPLEMENT

by

EUGENE VOLOKH
Gary T. Schwartz Distinguished Professor of Law Emeritus
UCLA School of Law
Thomas M. Siebel Senior Fellow
Hoover Institution, Stanford University

FOUNDATION PRESS
NEW YORK, NEW YORK
July 2025

TABLE OF CONTENTS

TABLE OF CONTENTS ..... **I**

II. EXCEPTIONS FROM FULL PROTECTION **1**
A. Incitement **1**
2. The Overbreadth Doctrine 1

IV. CONTENT-NEUTRAL RESTRICTIONS **2**
B. Analyzing Content-Neutral Restrictions **2**
j2. Tiktok Inc. v. Garland, 145 S. Ct. 57 (2025) 2
C. Content-Based Restrictions Aimed at Enforcing Exceptions **7**
a. Free Speech Coalition v. Paxton, 145 S. Ct. 2291 (2025) 7

V. SPECIAL BURDENS ON FREE SPEECH **14**
E. Speech Compulsions **14**
j. Moody v. Netchoice, Inc., 603 U.S. 707 (2024) 14
i. Generally 14
ii. Should the use of AI change the analysis? 28
iii. Should foreign control change the analysis? 29
ii. Individualized explanation requirements 29

VI. GOVERNMENT ACTING IN SPECIAL CAPACITIES **32**
E. Government as Landlord/Subsidizer/Speaker **32**
2. Speech Using Government Property or Benefits 32
kk. Vidal v. Elster, 602 U.S. 286 (2024) 32

VII. PRIOR RESTRAINTS **41**
B. Content-Based **41**
m. NRA v. Vullo, 602 U.S. 175 (2024) 41

XI. COMPELLED DISREGARD OF RELIGION? **46**
A. The Non-Discrimination Principle **46**

XIII. EXEMPTIONS FOR RELIGIOUS BELIEVERS **47**
A. Required Exemptions **47**
4. The Post-2020 Cases: Returning to Strict Scrutiny? 47
c. Mahmoud v. Taylor, 145 S. Ct. 2332 (2025) 47

II. EXCEPTIONS FROM FULL PROTECTION

A. INCITEMENT

2. THE OVERBREADTH DOCTRINE

[Please correct item a.ii on p. 12 to:]

ii. the law is *viewpoint-based, Iancu v. Brunetti* (2019) (p. 671).

IV. CONTENT-NEUTRAL RESTRICTIONS

B. ANALYZING CONTENT-NEUTRAL RESTRICTIONS

j2. Tiktok Inc. v. Garland, 145 S. Ct. 57 (2025)

Per Curiam.

[A.] TikTok is a social media platform that allows users to create, publish, view, share, and interact with short videos overlaid with audio and text. Since its launch in 2017, the platform has accumulated over 170 million users in the United States and more than one billion worldwide....

Opening the TikTok application brings a user to the "For You" page—a personalized content feed tailored to the user's interests. TikTok generates the feed using a proprietary algorithm that recommends videos to a user based on the user's interactions with the platform. Each interaction a user has on TikTok—watching a video, following an account, leaving a comment—enables the recommendation system to further tailor a personalized content feed.

A TikTok user's content feed is also shaped by content moderation and filtering decisions. TikTok uses automated and human processes to remove content that violates the platform's community guidelines. TikTok also promotes or demotes certain content to advance its business objectives and other goals.

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

In recent years, U.S. government officials have taken repeated actions to address national security concerns regarding the relationship between China and TikTok.... [After several other attempts,] Congress enacted the Protecting Americans from Foreign Adversary Controlled Applications Act. The Act makes it unlawful for any entity to provide certain services to "distribute, maintain, or update" a "foreign adversary controlled application" in the United States [which is expressly defined to include TikTok]....

The Act exempts a foreign adversary controlled application from the prohibitions if the application undergoes a "qualified divestiture." A "qualified divestiture" is one that the President determines will result in the application "no longer being controlled by a foreign adversary." ...

[B.] [T]he Act does not regulate the creator petitioners at all. And it directly regulates ByteDance Ltd. and TikTok Inc. only through the divestiture requirement.... [We hesitate to decide in this unique case whether to treat] a regulation of corporate control as a *direct* regulation of expressive activity or semi-expressive conduct....

In any event, petitioners' arguments more closely approximate a claim that the [Act] ... "impose[s] a disproportionate burden upon" their First Amendment activities ... [by] effectively ban[ning] TikTok in the United States. Petitioners argue that such a ban will burden various First Amendment activities, including content moderation, content generation, access to a distinct medium for expression, association with another speaker or preferred editor, and receipt of information and ideas.... [A]n effective ban on a social media platform with 170 million U.S. users certainly burdens those users' expressive activity in a non-trivial way.

At the same time, ... the Act's focus on a foreign government, the congressionally determined adversary relationship between that foreign government and the United States, and the causal steps between the regulations and the alleged burden on protected speech ... may impact whether First Amendment scrutiny applies.... [We need not now decide when] a regulation of non-expressive activity that disproportionately burdens those engaged in expressive activity triggers heightened review.... We assume without deciding that the challenged provisions ... are subject to First Amendment scrutiny.

{To the extent that ByteDance Ltd.'s asserted expressive activity occurs abroad, that activity is not protected by the First Amendment. *See Agency for Int'l Development v. Alliance for Open Society Int'l Inc.*, 591 U.S. 430 (2020) ("[F]oreign organizations operating abroad have no First Amendment rights.").} ...

[C.] [1.] The challenged provisions are facially content neutral. They impose TikTok-specific prohibitions due to a foreign adversary's control over the platform and make divestiture a prerequisite for the platform's continued operation in the United States. They do not target particular speech based upon its content....

[2.] The Government also supports the challenged provisions with a content-neutral justification: preventing China from collecting vast amounts of sensitive data from 170 million U.S. TikTok users. That rationale ... neither references the content of speech on TikTok nor reflects disagreement with the message such speech conveys....

[3.] The Act's TikTok-specific distinctions, moreover, do not trigger strict scrutiny.... [W]hile "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," such scrutiny "is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular [speaker] being regulated.'" ... The prohibitions, TikTok-specific designation, and divestiture requirement regulate TikTok based on a content-neutral data collection interest. And TikTok has special characteristics—a foreign ad-

versary's ability to leverage its control over the platform to collect vast amounts of personal data from 170 million U.S. users—that justify this differential treatment {to address ... national security concerns}....

Data collection and analysis is a common practice in this digital age.... A law targeting any other speaker would by necessity entail a distinct inquiry and separate considerations.

[4.] {In addition to the data collection concerns addressed above, the Government asserts an interest in preventing a foreign adversary from having control over the recommendation algorithm that runs a widely used U.S. communications platform, and from being able to wield that control to alter the content on the platform in an undetectable manner....

We need not determine the proper standard for mixed-justification cases or decide whether the Government's foreign adversary control justification is content neutral. Even assuming that rationale turns on content, ... [t]he record before us adequately supports the conclusion that Congress would have passed the challenged provisions based on the data collection justification alone. [Historical details omitted.—ed.]} ...

[D.] As applied to petitioners, the Act satisfies intermediate scrutiny. The challenged provisions further an important Government interest unrelated to the suppression of free expression and do not burden substantially more speech than necessary to further that interest.

[1.] The Act's prohibitions and divestiture requirement are designed to prevent China—a designated foreign adversary—from leveraging its control over ByteDance Ltd. to capture the personal data of U.S. TikTok users. This objective qualifies as an important Government interest under intermediate scrutiny....

The platform collects extensive personal information from and about its users. If, for example, a user allows TikTok access to the user's phone contact list to connect with others on the platform, TikTok can access "any data stored in the user's contact list," including names, contact information, contact photos, job titles, and notes.

Access to such detailed information about U.S. users, the Government worries, may enable "China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage." And Chinese law enables China to require companies to surrender data to the government, "making companies headquartered there an espionage tool" of China....

[2.] [Petitioners assert] that it is "unlikely" that China would "compel TikTok to turn over user data for intelligence-gathering purposes, since China has more effective and efficient means of obtaining relevant information." In reviewing the constitutionality of the Act, however, we "must accord substantial deference to the predictive judgments of Congress." "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." ...

[T]he record reflects that China "has engaged in extensive and years-long efforts to accumulate structured datasets, in particular on U.S. persons, to support its intelligence and counterintelligence operations."

Even if China has not yet leveraged its relationship with ByteDance Ltd. to access U.S. TikTok users' data, petitioners offer no basis for concluding that the Government's determination that China might do so is not at least a "reasonable inferenc[e] based on substantial evidence." We are mindful that this law arises in a context in which "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess." *Humanitarian Law Project v. Holder*. We thus afford the Government's "informed judgment" substantial respect here.

[3.] Petitioners further argue that the Act is underinclusive as to the Government's data protection concern .... [by failing to regulate other] applications that are "as capable as TikTok of collecting Americans' data." But "the First Amendment imposes no freestanding underinclusiveness limitation," and the Government "need not address all aspects of a problem in one fell swoop." *Williams-Yulee v. Florida Bar*. Furthermore, ... the Government had good {national security} reason to single out TikTok for special treatment. Contrast *Brown v. Entertainment Merchants Assn.* (singling out purveyors of video games for disfavored treatment without a persuasive reason "raise[d] serious doubts about whether the government [wa]s in fact pursuing the interest it invoke[d], rather than disfavoring a particular speaker or viewpoint")....

[4.] To survive intermediate scrutiny, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." Rather, the standard "is satisfied 'so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'" and does not "burden substantially more speech than is necessary" to further that interest.

The challenged provisions meet this standard. The provisions clearly serve the Government's data collection interest "in a direct and effective way." ... Neither the prohibitions nor the divestiture requirement, moreover, is "substantially broader than necessary to achieve" this national security objective. Rather than ban TikTok outright, ... [t]he prohibitions prevent China from gathering data from U.S. TikTok users unless and until a qualified divestiture severs China's control.

Petitioners parade a series of alternatives—disclosure requirements, data sharing restrictions, the proposed national security agreement, the general designation provision—that they assert would address the Government's data collection interest in equal measure to a conditional TikTok ban.... [But] we afford the Government [latitude] to design regulatory solutions to address content-neutral interests.... [T]he challenged provisions are "not substantially broader than necessary" to address the Government's data collection concerns. Nor did the Government ignore less re-

strictive approaches already proven effective....

[E.] There is no doubt that, for more than 170 million Americans, TikTok offers a distinctive and expansive outlet for expression, means of engagement, and source of community. But Congress has determined that divestiture is necessary to address its well-supported national security concerns regarding TikTok's data collection practices and relationship with a foreign adversary. For the foregoing reasons, we conclude that the challenged provisions do not violate petitioners' First Amendment rights....

Justice Sotomayor, concurring in [all but Part B] and concurring in the judgment....

I see no reason to assume without deciding that the Act implicates the First Amendment because our precedent leaves no doubt that it does....

Justice Gorsuch, concurring in the judgment....

[A.] [T]he Court rightly refrains from endorsing the government's asserted interest in preventing "the covert manipulation of content" as a justification for the law before us. One man's "covert content manipulation" is another's "editorial discretion." Journalists, publishers, and speakers of all kinds routinely make less-than-transparent judgments about what stories to tell and how to tell them. Without question, the First Amendment has much to say about the right to make those choices. It makes no difference that Americans (like TikTok Inc. and many of its users) may wish to make decisions about what they say in concert with a foreign adversary....

[B.] I harbor serious reservations about whether the law before us is "content neutral" and thus escapes "strict scrutiny." ... [But] whatever the appropriate tier of scrutiny, ... the law before us seeks to serve a compelling interest: preventing a foreign country, designated by Congress and the President as an adversary of our Nation, from harvesting vast troves of personal information about tens of millions of Americans....

[And] the law before us also appears appropriately tailored to the problem it seeks to address.... [W]arning users of the risks associated with giving their data to a foreign-adversary-controlled application would do nothing to protect nonusers' data.... [Even] serious criminal penalties on domestic TikTok employees who violate a data-sharing ban ... would do little to deter the PRC from exploiting TikTok to steal Americans' data[, *e.g.*, via] "malicious code, backdoor vulnerabilities, surreptitious surveillance, and other problematic activities tied to source code development" in the PRC .... [T]he "size" and "complexity" of TikTok's "underlying software" may make it impossible for law enforcement to detect violations.... [And] any new compliance regime could raise separate constitutional concerns—for instance, by requiring the government to surveil Americans' data to ensure that it isn't illicitly flowing overseas.

Whether this law will succeed in achieving its ends, I do not know. A determined foreign adversary may just seek to replace one lost surveillance application with another.... But the question we face today is not the law's wisdom, only its constitutionality.... [And] the problem appears real

and the response to it not unconstitutional.

As persuaded as I am of the wisdom of Justice Brandeis in *Whitney v. California* and Justice Holmes in *Abrams v. U.S.*, their cases are not ours. Speaking with and in favor of a foreign adversary is one thing. Allowing a foreign adversary to spy on Americans is another.

C. CONTENT-BASED RESTRICTIONS AIMED AT ENFORCING EXCEPTIONS

a. Free Speech Coalition v. Paxton, 145 S. Ct. 2291 (2025)

Justice Thomas delivered the opinion of the Court....

[A.] In 2023, Texas enacted H.B. 1181, a law requiring pornographic websites ... to "use reasonable age verification methods ... to verify that an individual attempting to access the material is 18 years of age or older." To verify age, a covered entity must require visitors to "comply with a commercial age verification system" that uses "government-issued identification" or "a commercially reasonable method that relies on public or private transactional data." The entity may perform verification itself or through a third-party service....

{The statute applies to any "commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, ... more than one-third of which is sexual material [obscene as] to minors."} At least 21 other States have imposed materially similar [rules] ....

[B.] History, tradition, and precedent recognize that States have two distinct powers to address obscenity: They may proscribe outright speech that is obscene to the public at large, [*Miller v. California*,] and they may prevent children from accessing speech that is obscene to children ...[—] works that (a) taken as a whole, and under contemporary community standards, appeal to the prurient interest *of minors*; (b) depict or describe specifically defined sexual conduct in a way that is patently offensive *for minors*; and (c) taken as a whole, lack serious literary, artistic, political, or scientific value *for minors*. *Ginsberg v. New York*, 390 U.S. 629 (1968)....

[C.] The power to verify age is a necessary component of the power to prevent children's access to content that is obscene from their perspective. "... [W]herever a general power to do a thing is given, every particular power necessary for doing it is included." The Federalist No. 44. Hence, where the Constitution reserves a power to the States, it also reserves "the ordinary and appropriate means" of exercising that power....

Requiring age verification is common when a law draws lines based on age. For example, Texas, like many States, requires proof of age to obtain alcohol, tobacco, a lottery ticket, a tattoo, a body piercing, fireworks, and a driver's license. Federal law similarly mandates age verification to obtain certain medications from a pharmacist, or to obtain employment as a minor. Fundamental rights that turn on age are no different. Texas, again like many States, requires proof of age to obtain a handgun license, to reg-

ister to vote, and to marry. In none of these contexts is the constitutionality of a reasonable, bona fide age-verification requirement disputed.

Obscenity is no exception to the widespread practice of requiring proof of age to exercise age-restricted rights. The New York statute upheld in *Ginsberg* required age verification [for sales of pornography in physical stores—ed.]: It permitted a seller who sold sexual material to a minor to raise "'honest mistake'" as to age as an affirmative defense, but only if the seller had made "'a reasonable bona fide attempt to ascertain the true age of [the] minor.'" Most States to this day also require age verification for in-person purchases of sexual material. And, petitioners concede that an in-person age verification requirement is a "traditional sort of law" that is "almost surely" constitutional....

The need for age verification online is even greater. Unlike a store clerk, a website operator cannot look at its visitors and estimate their ages.... "'[T]he basic principles of freedom of speech ... do not vary' when a new and different medium for communication appears." Because proof of age performs the same critical function online that it does in person, requiring age verification remains an ordinary and appropriate means of shielding minors in the digital age from material that is obscene to them....

[D.] Because H.B. 1181 simply requires proof of age to access content that is obscene to minors, it does not directly regulate the protected speech of adults. A law can regulate the content of protected speech, and thereby trigger strict scrutiny, either "on its face" or in its justification. H.B. 1181 does not regulate the content of protected speech in either sense. On its face, the statute regulates only speech that is obscene to minors. That speech is unprotected to the extent the State seeks only to verify age.

And, the statute can easily "be justified without reference to the [protected] content of the regulated speech," because its apparent purpose is simply to prevent *minors*, who have no First Amendment right to access speech that is obscene to them, from doing so.... Adults have the right to access speech that is obscene only to minors. And, submitting to age verification is a burden on the exercise of that right. But, adults have no First Amendment right to avoid age verification .... Any burden experienced by adults is therefore only incidental to the statute's regulation of activity that is not protected by the First Amendment.

That fact makes intermediate scrutiny the appropriate standard under our precedents. In this respect, H.B. 1181 is analogous to the prohibition against destroying draft cards that this Court upheld in *United States v. O'Brien*. The prohibition may have had the effect of making it unlawful to protest the draft by burning one's draft card. But, the "destruction" of a draft card is not itself "constitutionally protected activity," because the card is a Government document that, among other functions, serves as proof of registration. The prohibition on destroying draft cards thus placed only an incidental burden on First Amendment expression, making it subject to intermediate scrutiny. So too here, because accessing material obscene to minors *without verifying one's age* is not constitutionally protect-

ed, any burden H.B. 1181 imposes on protected activity is only incidental, and the statute triggers only intermediate scrutiny.

{We agree that H.B. 1181 targets speech that is obscene for minors based on its communicative content. But, where the speech in question is *unprotected*, States may impose "restrictions" based on "content" without triggering strict scrutiny.... [S]peech that is obscene to minors is unprotected to the extent that the State imposes only an age-verification requirement .... The law is content based in the same way that prohibitions of "defamation," "fraud," and "incitement" are....

When speech has both protected and unprotected features, ... "the unprotected features of the [speech] are, despite their [communicative] character, essentially a 'nonspeech' element" for purposes of the First Amendment. *R.A.V. v. St. Paul*. With that principle in hand, H.B. 1181 fits comfortably within the *O'Brien* framework: The law directly regulates unprotected activity (accessing material that is obscene to minors *without submitting to age verification*) while only incidentally burdening protected activity (ultimately accessing that material).} ...

[E.] Applying the more demanding strict-scrutiny standard would call into question the validity of *all* age-verification requirements, even longstanding requirements for brick-and-mortar stores. But, as petitioners acknowledge, after *Ginsberg*, no serious question about the constitutionality of in-person age-verification requirements for obscenity to minors has arisen. Petitioners insist that their proposed rule would not call into question these "traditional" requirements, because such requirements would "almost surely satisfy" strict scrutiny. They also contend that a sufficiently tailored online age-verification requirement (although not Texas's) could satisfy strict scrutiny too. But, if we are not to compromise "'[t]he "starch" in our constitutional standards,'" we cannot share petitioners' confidence.

Strict scrutiny is unforgiving because it is the standard for reviewing the direct targeting of fully protected speech. Strict scrutiny is designed to enforce "the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." It succeeds in that purpose if and only if, as a practical matter, it is fatal in fact absent truly extraordinary circumstances.

{In the First Amendment context, we have held only once that a law triggered but satisfied strict scrutiny—to uphold a federal statute that prohibited knowingly providing material support to a foreign terrorist organization. See *Holder v. Humanitarian Law Project*. That case involved an unusual application of strict scrutiny, since our analysis relied on the "deference" due to the Executive's "evaluation of the facts" in the context of "national security and foreign affairs."} {In *Williams-Yulee v. Florida Bar*, a bare majority held that a ban on the personal solicitation of campaign donations by candidates for judicial office survived strict scrutiny. But, only four Members of the majority thought that the statute triggered strict scrutiny to begin with. The fifth Member, Justice Ginsburg, concluded that strict scrutiny did not apply and that States enjoy "substantial latitude ...

to enact campaign-finance rules geared to judicial elections."}

Strict scrutiny therefore cannot apply to laws, such as in-person age-verification requirements, which are traditional, widespread, and not thought to raise a significant First Amendment issue. Once again, we need look no further than *Ginsberg*. There, this Court observed that it "is very doubtful" that New York's "legislative finding" about the harmful effects of the speech its statute restricted "expresses an accepted scientific fact." Nonetheless, because obscenity to minors is not fully protected speech, this Court readily upheld the statute. Had the Court applied strict scrutiny, it could not have so easily cast that doubt aside. Cf. *Brown v. Entertainment Merchants Ass'n* (declining to defer to a legislature's view of "competing psychological studies" when applying strict scrutiny to a law restricting minors from purchasing violent video games)....

[F.] A statute survives intermediate scrutiny if it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." ... Texas's interest in shielding children from sexual content is important, even "compelling." H.B. 1181 furthers that interest by preventing minors from easily circumventing a prohibition on their accessing sexual content.

H.B. 1181 is also sufficiently tailored to Texas's interest. Under intermediate scrutiny, a regulation is adequately tailored so long as the government's interest "would be achieved less effectively absent the regulation" and the regulation "does not burden substantially more speech than is necessary to further that interest." The regulation "need not be the least restrictive ... means of" serving the State's interest. And, the regulation's validity "'does not turn on [our] agreement with the [legislature] concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted."

Under this standard, requiring age verification online is plainly a legitimate legislative choice. Since at least the days of *Ginsberg*, States have commonly used age-verification requirements, in the case of in-person access to sexual materials, to reconcile their interest in protecting children with adults' right to avail themselves of such materials.... H.B. 1181 simply adapts this traditional approach to the digital age.

The specific verification methods that H.B. 1181 permits are also plainly legitimate. At present, H.B. 1181 allows for verification using government-issued identification or transactional data. Verification can take place on the covered website itself or through a third-party service. Other age-restricted services, such as online gambling, alcohol and tobacco sales, and car rentals, rely on the same methods. And, much of the online pornography industry has used analogous methods for decades.... H.B. 1181 simply requires established verification methods already in use by pornographic sites and other industries. That choice is well within the State's discretion under intermediate scrutiny.

{Petitioners ... assert that privacy concerns and the unique stigma sur-

rounding pornography will make age verification too chilling for adults. But, users only have to submit verification to the covered website itself or the third-party service with which the website contracts. Both those entities have every incentive to assure users of their privacy. In any event, the use of pornography has always been the subject of social stigma. This social reality has never been a reason to exempt the pornography industry from otherwise valid regulation. And, the decades-long history of some pornographic websites requiring age verification refutes any argument that the chill of verification is an insurmountable obstacle for users.} ...

[G.] Petitioners contend that Texas could adopt less restrictive means of protecting children, such as encouraging parents to install content-filtering software on their children's devices or requiring internet service providers to block adult content unless a household opts in to receiving it. But, even assuming these approaches are equally or more effective, under intermediate scrutiny a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Texas's interest in shielding children from sexual content "'would be achieved less effectively absent'" H.B. 1181, and it cannot be said that "a substantial portion of the burden" that H.B. 1181 imposes fails "to advance [Texas's] goals." That is enough to show that the Texas Legislature adequately tailored H.B. 1181, regardless of whether some other approach might be superior.

Petitioners further argue that H.B. 1181 is not appropriately tailored, because it does not require age verification on other sites, such as search engines and social-media websites, where children are likely to find sexually explicit content. But, under intermediate scrutiny, "the First Amendment imposes no freestanding underinclusiveness limitation," and Texas "need not address all aspects of a problem in one fell swoop."

Further, Texas has a reasonable basis for excluding these sites from H.B. 1181's coverage.... [Social media] sites fall outside the statute to the extent that less than a third of their content is obscene to minors.... [I]t is reasonable for Texas to conclude that websites with a higher proportion of sexual content are more inappropriate for children to visit than those with a lower proportion.... [And] search engines do not exercise the same degree of control over the websites to which they link, so the State could reasonably conclude that it makes less sense to regulate them....

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

[A.] Speech that is obscene for minors is often not so for adults.... [A]dults have a constitutional right to view the very same speech that a State may prohibit for children....

Under [general free speech] principles, we apply strict scrutiny, a highly rigorous but not fatal form of constitutional review, to laws regulating protected speech based on its content. And laws like H.B. 1181 fit that description: They impede adults from viewing a class of speech protected for them (even though not for children) and defined by its content....

{[W]hether expression qualifies as ["sexual material"] depends entirely on what it depicts....}

[B.] {To enter a covered website—[which will often contain] {much sexually explicit speech that adults have every right to view} ...—an individual must verify his age by using either a "government-issued identification" like a driver's license or "transactional data" associated with things like a job or mortgage. For the would-be consumer of sexually explicit materials, that requirement is a deterrent ....

It is not ... like having to flash ID to enter a club. It is turning over information about yourself and your viewing habits—respecting speech many find repulsive—to a website operator, and then to ... who knows? The operator might sell the information; the operator might be hacked or subpoenaed....

And the Texas law imposes costs not just on potential users, but on website operators too. They must ... implement a system costing (the District Court found) at least $40,000 for every 100,000 verifications .... Those expenses, Texas boasts, have already caused one major operator to exit the State's market. So in multiple ways, H.B. 1181 burdens expression.} ...

[C.] A law like H.B. 1181 might well pass the strict-scrutiny test, hard as it usually is to do so. {The majority is right that a State has a compelling interest in shielding children from the obscene-for-children materials that H.B. 1181 covers.... And a State is entitled to think that the need has become only more urgent over the years, given the time children now spend online and the materials they can find there.}

The critical question, then, is whether the State can show that it has limited no more adult speech than is necessary to achieve its goal. Or said another way ..., whether the State can show that "the proposed alternatives will not be as effective as the challenged statute." ...

[A] State that has closely attended to the speech consequences of its regulation might well make the required showing in this sphere.... [A] law effectively shielding children from sexually explicit [online] expression ... will almost necessarily impose corollary burdens [on adults]. And Texas may be right that the commonly proposed alternatives to laws like H.B. 1181—such as content filtering technology—cannot equal, or even approach, age verification systems in effectiveness. In that event, ... a court will explore only whether another, equally effective age verification mechanism will place a lesser burden on protected speech. Review of that kind should not be the horror show for Texas and other States that the majority maintains. It is just what they should have to pass before implementing a content-based burden on protected expression.} ...

But ... what if Texas could achieve its interest without so interfering with adults' constitutionally protected rights in viewing the speech H.B. 1181 covers? ... The majority says that Texas may enforce its statute regardless, because only intermediate scrutiny applies and that test does not ask whether a State has adopted the least speech-restrictive means available. I disagree, based on conventional First Amendment [strict scrutiny]

rules .... The State should be foreclosed from restricting adults' access to protected speech if that is not in fact necessary....

[D.] The usual way constitutional review works is to figure out the right standard (here, strict scrutiny because H.B. 1181 is content-based), and let that standard work to a conclusion. It is not to assume the conclusion (approve H.B. 1181 and similar age verification laws) and pick the standard sure to arrive there. But that is what the majority does....

As discussed earlier, speech that is obscene for children is often not obscene for adults. When that is so, the First Amendment protects adults' access to obscene-for-children speech (unlike to liquor, lottery tickets, or fireworks). Or otherwise said, the First Amendment gives them a right in that expression. And because of that protected right, different rules apply. Without a special justification, a State cannot prohibit, tax, impede, or otherwise burden an adult's access to obscene-for-children speech. And an age verification requirement is a kind of burden....

So a State's power to prohibit that speech for minors does not "necessarily include[ ]," as the majority contends, the power to mandate age verification. It might or might not, depending on whether the mandate satisfies the constitutional scrutiny that its burden on protected speech requires....

The majority tries to escape that conclusion ... [by arguing] that the First Amendment only "partially protects" the speech in question: The "speech is unprotected to the extent the State seeks only to verify age." ... In the end, the majority's analysis reduces to this: Requiring age verification does not directly burden adults' speech rights because adults have no right to be free from the burden of age verification. Gerrymander the right to incorporate the burden, and the critical conclusion follows....

[To justify applying intermediate scrutiny,] the majority relies on a well-known distinction in First Amendment law between direct and incidental restrictions on speech ...[, relying] (exclusively) on *United States v. O'Brien*.... [But] the law O'Brien broke was not about speech; it was about conduct. That law, the Court explained, prohibited *all* alterations of draft cards, indifferent to whether they were "public [or] private," expressive or non-expressive....

[H.B. 1181] is not a regulation of conduct that just so happens, on occasion, to impinge on expressive activity. It is instead a direct regulation of speech, triggered by the amount of sexually explicit expression on a commercial website.... H.B. 1181 regulates (and regulates only) what no one here disputes are communicative messages.... [T]he regulation is of speech, and the burden on that speech the very thing the statute does. See *Holder v. Humanitarian Law Project* (noting that *O'Brien* applies only when the "thing actually at issue" is "conduct").

The burden H.B. 1181 imposes, of course, raises constitutional concerns only for adults. But that fact does not make the law any less a direct, not incidental, restriction on protected expression....

V. SPECIAL BURDENS ON FREE SPEECH

E. SPEECH COMPULSIONS

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

i. Generally

Justice Kagan delivered the opinion of the Court....

[A.] [Two] laws, from Florida and Texas, restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users. Or otherwise put, the laws limit the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post....

{The Texas law regulates any social-media platform having over 50 million monthly active users .... With several exceptions, the statute prevents platforms from "censor[ing]" a user or a user's expression based on viewpoint. That ban on "censor[ing]" covers any action to "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." [The Florida law is similar, but only covers posts by "journalistic enterprise[s]" or political candidates; because the opinions chiefly discussed the Texas law, the excerpts below will likewise be limited to the Texas law.—ed.]}

[B.] NetChoice, an internet trade association, challenged both laws on their face—as a whole, rather than as to particular applications.... The Court of Appeals for the Eleventh Circuit ... [held] that the Florida law was not likely to survive First Amendment review. The Court of Appeals for the Fifth Circuit ... [concluded that] the Texas law does not regulate any speech and so does not implicate the First Amendment.

Today, we vacate both decisions for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice's challenge.... For a host of good reasons, courts usually handle constitutional claims case by case, not en masse.

"Claims of facial invalidity often rest on speculation" about the law's coverage and its future enforcement. And "facial challenges threaten to short circuit the democratic process" by preventing duly enacted laws from being implemented in constitutional ways.... [In First Amendment facial challenges, ... even a law with "a plainly legitimate sweep" may be struck down in its entirety. But that is so only if the law's unconstitutional applications substantially outweigh its constitutional ones.

So far in these cases, no one has paid much attention to that issue. In the lower courts, NetChoice and the States ... focus[ed] on how the laws applied to the content-moderation practices that giant social-media platforms use on their best-known services to filter, alter, or label their users' posts. Or more specifically still, the focus was on how the laws applied to

Facebook's News Feed and YouTube's homepage....

[Yet both laws], at least on their face, appear to apply beyond Facebook's News Feed and its ilk. Members of this Court asked some of the relevant questions at oral argument. Starting with Facebook and the other giants: To what extent, if at all, do the laws affect their other services, like direct messaging or events management? And beyond those social-media entities, what do the laws have to say, if anything, about how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends' financial exchanges, or how a ride-sharing service like Uber runs?

Those are examples only. The online world is variegated and complex, encompassing an ever-growing number of apps, services, functionalities, and methods for communication and connection.... Before a court can do anything else with these facial challenges, it must address that set of issues—in short, must "determine what [the law] covers."

The next order of business is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest. For the content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion....

Even on a preliminary record, it is not hard to see how the answers might differ as between regulation of Facebook's News Feed (considered in the courts below) and, say, its direct messaging service (not so considered). Curating a feed and transmitting direct messages, one might think, involve different levels of editorial choice, so that the one creates an expressive product and the other does not. If so, regulation of those diverse activities could well fall on different sides of the constitutional line....

So we vacate the decisions below and remand these cases. That will enable the lower courts to consider the scope of the laws' applications, and weigh the unconstitutional as against the constitutional ones.

[C.] But [to guide the lower courts,] it is necessary to say more about how the First Amendment relates to the laws' content-moderation provisions .... [We therefore explain that t]he Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression.... But a caveat: Nothing said here addresses any of the laws' other applications [besides] {Facebook's and YouTube's main feeds}, which may or may not share the First Amendment problems described below....

Despite the relative novelty of the technology before us, the main problem in this case—and the inquiry it calls for—is not new. At bottom, Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay. The platforms object that the law thus forces them to alter the content of their expression—a particular edited compilation of third-party speech....

We have repeatedly ... [held that] ordering a party to provide a forum for someone else's views implicates the First Amendment ... if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. So too we have held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others....

The seminal case is *Miami Herald Publishing Co. v. Tornillo*. There, a Florida law required a newspaper to give a political candidate a right to reply when it published "criticism and attacks on his record." The Court held the law to violate the First Amendment because it interfered with the newspaper's "exercise of editorial control and judgment." Forcing the paper to print what "it would not otherwise print," the Court explained, "intru[ded] into the function of editors." For that function was, first and foremost, to make decisions about the "content of the paper" and "[t]he choice of material to go into" it....

Next up was *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.* (*PG&E*), which the Court thought to follow naturally from *Tornillo*. A private utility in California regularly put a newsletter in its billing envelopes expressing its views of energy policy. The State directed it to include as well material from a consumer-advocacy group giving a different perspective. The utility objected, and the Court held again that the interest in "offer[ing] the public a greater variety of views" could not justify the regulation. California was compelling the utility (as Florida had compelled a newspaper) "to carry speech with which it disagreed" and thus to "alter its own message."

In *Turner Broadcasting System, Inc. v. FCC* (*Turner I*), the Court further underscored the constitutional protection given to editorial choice. At issue were federal "must-carry" rules, requiring cable operators to allocate some of their channels to local broadcast stations. The Court had no doubt that the First Amendment was implicated, because the operators were engaging in expressive activity. They were, the Court explained, "exercising editorial discretion over which stations or programs to include in [their] repertoire." And the rules "interfere[d]" with that discretion by forcing the operators to carry stations they would not otherwise have chosen.

In a later decision, the Court ruled that the regulation survived First Amendment review because it was necessary to prevent the demise of local broadcasting. See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*). But for purposes of today's cases, the takeaway of *Turner* is this holding: A private party's collection of third-party content into a single speech product (the operators' "repertoire" of programming) is itself expressive, and intrusion into that activity must be specially justified under the First Amendment.

The capstone of those precedents came in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, when the Court considered (of all things) a parade. The question was whether Massachusetts could require the organizers of a St. Patrick's Day parade to admit as a

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

On two other occasions, the Court distinguished *Tornillo* and its progeny for the flip-side reason—because in those cases the compelled access did *not* affect the complaining party's own expression. First, in *PruneYard Shopping Center v. Robins*, the Court rejected a shopping mall's First Amendment challenge to a California law requiring it to allow members of the public to distribute handbills on its property. The mall owner did not claim that he (or the mall) was engaged in any expressive activity. Indeed, as the *PG&E* Court later noted, he "did not even allege that he objected to the content of the pamphlets" passed out at the mall.

Similarly, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), the Court reiterated that a First Amendment claim will not succeed when the entity objecting to hosting third-party speech is not itself engaged in expression. The statute at issue required law schools to allow the military to participate in on-campus recruiting. The Court held that the schools had no First Amendment right to exclude the military based on its hiring policies, because the schools "are not speaking when they host interviews." Or stated again, with reference to the just-described precedents: Because a "law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper," the required "accommodation of a military recruiter[ ]" did not "interfere with any message of the school." ...

[To summarize:] First, the First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude. "[T]he editorial function itself is an aspect of speech." Or said just a bit differently: An entity "exercis[ing] editorial discretion in the selection and presentation" of content is "engage[d] in speech activity."

And that is as true when the content comes from third parties as when it does not. (Again, think of a newspaper opinion page or, if you prefer, a parade.) Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own. And that activity results in a distinctive expressive product. When the government interferes with such editorial choices—say, by ordering the excluded to be included—it alters the content of the compilation. (It creates a different opinion page or parade, bearing a different message.) And in so doing—in overriding a pri-

vate party's expressive choices—the government confronts the First Amendment.

{Of course, an entity engaged in expressive activity when performing one function may not be when carrying out another. That is one lesson of *FAIR*. The Court ruled as it did because the law schools' recruiting services were not engaged in expression. The case could not have been resolved on that ground if the regulation had affected what happened in law school classes instead.}

Second, none of that changes just because a compiler includes most items and excludes just a few. That was the situation in *Hurley*. The St. Patrick's Day parade at issue there was "eclectic": It included a "wide variety of patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes, as well as conflicting messages." Or otherwise said, the organizers were "rather lenient in admitting participants."

No matter. A "narrow, succinctly articulable message is not a condition of constitutional protection." It "is enough" for a compiler to exclude the handful of messages it most "disfavor[s]." Suppose, for example, that the newspaper in *Tornillo* had granted a right of reply to all but one candidate. It would have made no difference; the Florida statute still could not have altered the paper's policy. Indeed, that kind of focused editorial choice packs a peculiarly powerful expressive punch.

Third, the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas. Of course, it is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. That is the whole project of the First Amendment. And the government can take varied measures, like enforcing competition laws, to protect that access. But in case after case [citing *Tornillo*, *PG&E*, and *Hurley*], the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm....

Indeed, the *Tornillo* Court devoted six pages of its opinion to recounting a critique of the then-current media environment—in particular, the disproportionate "influen[ce]" of a few speakers—similar to one heard today (except about different entities). It made no difference. However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others....

[F.] "[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles" of the First Amendment "do not vary." New communications media differ from old ones in a host of ways: No one thinks Facebook's News Feed much resembles an insert put in a billing envelope. And similarly, today's social media pose dangers not seen earlier: No one ever feared the effects of newspaper opinion pages on adolescents' mental health.

But analogies to old media, even if imperfect, can be useful. And better

still as guides to decision are settled principles about freedom of expression, including the ones just described. Those principles have served the Nation well over many years, even as one communications method has given way to another. And they have much to say about the laws at issue here....

Facebook's News Feed [and] YouTube's homepage ... present[] a user with a continually updating stream of other users' posts.... The key to the scheme is prioritization of content, achieved through the use of algorithms. Of the billions of posts or videos (plus advertisements) that could wind up on a user's customized feed or recommendations list, only the tiniest fraction do.

The selection and ranking is most often based on a user's expressed interests and past activities. But it may also be based on more general features of the communication or its creator. Facebook's Community Standards and YouTube's Community Guidelines detail the messages and videos that the platforms disfavor. The platforms write algorithms to implement those standards—for example, to prefer content deemed particularly trustworthy or to suppress content viewed as deceptive (like videos promoting "conspiracy theor[ies]").

Beyond rankings lie labels. The platforms may attach "warning[s], disclaimers, or general commentary"—for example, informing users that certain content has "not been verified by official sources." Likewise, they may use "information panels" to give users "context on content relating to topics and news prone to misinformation, as well as context about who submitted the content." So, for example, YouTube identifies content submitted by state-supported media channels, including those funded by the Russian Government.

But sometimes, the platforms decide, providing more information is not enough; instead, removing a post is the right course. The platforms' content-moderation policies also say when that is so. Facebook's Standards, for example, proscribe posts—with exceptions for "newsworth[iness]" and other "public interest value"—in categories and subcategories including: Violence and Criminal Behavior (*e.g.*, violence and incitement, coordinating harm and publicizing crime, fraud and deception); Safety (*e.g.*, suicide and self-injury, sexual exploitation, bullying and harassment); Objectionable Content (*e.g.*, hate speech, violent and graphic content); Integrity and Authenticity (*e.g.*, false news, manipulated media).

YouTube's Guidelines similarly target videos falling within categories like: hate speech, violent or graphic content, child safety, and misinformation (including about elections and vaccines). The platforms thus unabashedly control the content that will appear to users, exercising authority to remove, label or demote messages they disfavor. {We therefore do not deal here with feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards.}

Except that Texas's law limits their power to do so. As noted earlier,

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

That is a long list of verbs, but it comes down to this: The platforms cannot do any of the things they typically do (on their main feeds) to posts they disapprove—cannot demote, label, or remove them—whenever the action is based on the post's viewpoint.... [I]f Texas's law is enforced, the platforms could not—as they in fact do now—disfavor posts because they:

- support Nazi ideology;
- advocate for terrorism;
- espouse racism, Islamophobia, or anti-Semitism;
- glorify rape or other gender-based violence;
- encourage teenage suicide and self-injury;
- discourage the use of vaccines;
- advise phony treatments for diseases;
- advance false claims of election fraud.

The list could continue for a while. The point of it is not that the speech environment created by Texas's law is worse than the ones to which the major platforms aspire on their main feeds. The point is just that Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey.

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

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

[G.] That those platforms happily convey the lion's share of posts submitted to them makes no significant First Amendment difference.... It is as

much an editorial choice to convey all speech except in select categories as to convey only speech within them.

Similarly, the major social-media platforms do not lose their First Amendment protection just because no one will wrongly attribute to them the views in an individual post. For starters, users may well attribute to the platforms the messages that the posts convey *in toto*.... In any event, this Court has never hinged a compiler's First Amendment protection on the risk of misattribution....

To be sure, the Court noted in *PruneYard* and *FAIR*, when denying such protection, that there was little prospect of misattribution. But the key fact in those cases, as noted above, was that the host of the third-party speech was not itself engaged in expression. The current record suggests the opposite as to Facebook's News Feed and YouTube's homepage....

[H.] And once that much is decided, ... [e]ven assuming that [intermediate scrutiny] applies, Texas's law does not pass. Under that standard, a law must further a "substantial governmental interest" that is "unrelated to the suppression of free expression." Many possible interests relating to social media can meet that test; nothing said here puts regulation of NetChoice's members off-limits as to a whole array of subjects. But the interest Texas has asserted ... is very much related to the suppression of free expression, and it is not valid, let alone substantial....

[Texas's] objective is to correct the mix of speech that the major social-media platforms present.... Texas described its law as "respond[ing]" to the platforms' practice of "favoring certain viewpoints." The large social-media platforms throw out (or encumber) certain messages; Texas wants them kept in (and free from encumbrances), because it thinks that would create a better speech balance.... The law's main sponsor explained that the "West Coast oligarchs" who ran social-media companies were "silenc[ing] conservative viewpoints and ideas." ...

But a State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from "tilt[ing] public debate in a preferred direction." It is not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over others. And that is so even when those actors possess "enviable vehicle[s]" for expression.

In a better world, there would be fewer inequities in speech opportunities; and the government can take many steps to bring that world closer. But it cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana.

That is why we have said in so many contexts that the government may not "restrict the speech of some elements of our society in order to en-

hance the relative voice of others." *Buckley v. Valeo*. That unadorned interest is not "unrelated to the suppression of free expression," and the government may not pursue it consistent with the First Amendment.

The Court's decisions about editorial control, as discussed earlier, make that point repeatedly. [*Tornillo*; *PG&E*; *Hurley*].... {*Turner* did indeed hold that the FCC's must-carry provisions, requiring cable operators to give some of their channel space to local broadcast stations, passed First Amendment muster. But the interest there advanced was not to balance expressive content; rather, the interest was to save the local-broadcast industry, so that it could continue to serve households without cable. That interest, the Court explained, was "unrelated to the content of expression" disseminated by either cable or broadcast speakers.

And later, the *Hurley* Court again noted the difference. It understood the Government interest in *Turner* as one relating to competition policy: The FCC needed to limit the cable operators' "monopolistic," gatekeeping position "in order to allow for the survival of broadcasters." Unlike in regulating the parade—or here in regulating Facebook's News Feed or YouTube's homepage—the Government's interest was "not the alteration of speech." And when that is so, the prospects of permissible regulation are entirely different.} ...

[T]he State borrows language from this Court's First Amendment cases, maintaining that [its goal] is preventing "viewpoint discrimination." But the Court uses that language to say what governments cannot do: They cannot prohibit private actors from expressing certain views. When Texas uses that language, it is to say what private actors cannot do: They cannot decide for themselves what views to convey.

The innocent-sounding phrase does not redeem the prohibited goal. The reason Texas is regulating the content-moderation policies that the major platforms use for their feeds is to change the speech that will be displayed there. Texas does not like the way those platforms are selecting and moderating content, and wants them to create a different expressive product, communicating different values and priorities. But under the First Amendment, that is a preference Texas may not impose....

Justice Jackson, concurring in [Parts A-E] and concurring in the judgment.

These cases present a complex clash between two novel state laws and the alleged First Amendment rights of several of the largest social media platforms. Some things are already clear. Not every potential action taken by a social media company will qualify as expression protected under the First Amendment. But not every hypothesized regulation of such a company's operations will necessarily be able to withstand the force of the First Amendment's protections either.

Beyond those broadest of statements, it is difficult to say much more at this time.... In light of the high bar for facial challenges and the state of these cases as they come to us, I would not go on to treat either like an as-applied challenge and preview our potential ruling on the merits. Faced

with difficult constitutional issues arising in new contexts on undeveloped records, this Court should strive to avoid deciding more than is necessary....

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

[A.] The holding in these cases[, with which I agree,] is narrow: NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Everything else in the opinion of the Court is nonbinding dicta.... Nevertheless, the majority is undeterred.... [Among other things,] it unreflectively assumes the truth of NetChoice's unsupported assertion that social-media platforms—which use secret algorithms to review and moderate an almost unimaginable quantity of data today—are just as expressive as the newspaper editors who marked up typescripts in blue pencil 50 years ago.... I am therefore compelled to provide a more complete discussion of those matters than is customary in an opinion that concurs only in the judgment....

[B.] As the Court has recognized, social-media platforms have become the "modern public square." *Packingham v. North Carolina*, 582 U.S. 98 (2017).... The vast majority of Americans use social media, and the average person spends more than two hours a day on various platforms. Young people now turn primarily to social media to get the news, and for many of them, life without social media is unimaginable. Social media may provide many benefits—but not without drawbacks. For example, some research suggests that social media are having a devastating effect on many young people, leading to depression, isolation, bullying, and intense pressure to endorse the trend or cause of the day....

Restricting access to social media can impair users' ability to speak to, learn from, and do business with others. Deleting the account of an elected official or candidate for public office may seriously impair that individual's efforts to reach constituents or voters, as well as the ability of voters to make a fully informed electoral choice. And what platforms call "content moderation" of the news or user comments on public affairs can have a substantial effect on popular views. Concerned that social-media platforms could abuse their enormous power, Florida and Texas enacted laws that prohibit them from disfavoring particular viewpoints and speakers....

[C.] [T]he free speech right[includes] the right to "presen[t] ... an edited compilation of speech generated by other persons" for the purpose of expressing a particular message. As used in this context, the term "compilation" means any effort to present the expression of others in some sort of organized package.

An example such as the famous Oxford Book of English Poetry illustrates why a compilation may constitute expression on the part of the compiler. The editors' selection of the poems included in this volume expresses their view about the poets and poems that most deserve the attention of their anticipated readers. Forcing the editors to exclude or include a poem could alter the expression that the editors wish to convey.

Not all compilations, however, have this expressive characteristic. Suppose that the head of a neighborhood group prepares a directory consisting of contact information submitted by all the residents who want to be listed. This directory would not include any meaningful expression on the part of the compiler.

Because not all compilers express a message of their own, not all compilations are protected by the First Amendment. Instead, the First Amendment protects only those compilations that are "inherently expressive" in their own right, meaning that they select and present speech created by other persons in order "to spread [the compiler's] own message." If a compilation is inherently expressive, then the compiler may have the right to refuse to accommodate a particular speaker or message. But if a compilation is not inherently expressive, then the government can require the compiler to host a message or speaker because the accommodation does not amount to compelled speech.

To show that a hosting requirement would compel speech and thereby trigger First Amendment scrutiny, a claimant must generally show three things.

[1.] First, a claimant must establish that its practice is to exercise "editorial discretion in the selection and presentation" of the content it hosts.... [N]ot all compilers do this, at least in a way that is inherently expressive. Some may serve as "passive receptacle[s]" of third-party speech or as "dumb pipes" that merely emit what they are fed. Such entities communicate no message of their own, and accordingly, their conduct does not merit First Amendment protection.

{The majority states that it is irrelevant whether "a compiler includes most items and excludes just a few." That may be true if the compiler carefully reviews, edits, and selects a large proportion of the items it receives. But if an entity, like some "sort of community billboard, regularly carr[ies] the messages of third parties," *PG&E* (Marshall, J., concurring in the judgment), instead of selecting only those that contribute to a common theme, then this information becomes highly relevant. Entities that have assumed the role of common carriers fall into this category, for example. And the States defend portions of their laws on the ground that at least some social-media platforms have taken on that role.}

Determining whether an entity should be viewed as a "curator" or a "dumb pipe" may not always be easy because different aspects of an entity's operations may take different approaches with respect to hosting third-party speech. The typical newspaper regulates the content and presentation of articles authored by its employees or others, but that same paper might also run nearly all the classified advertisements it receives, regardless of their content and without adding any expression of its own. These differences may be significant for First Amendment purposes.

The same may be true for a parade organizer. For example, the practice of a parade organizer may be to select the *groups* that are admitted, but not the *individuals* who are allowed to march as members of admitted

groups. *Hurley*. In such a case, each of these practices would have to be analyzed separately.

[2.] Second, the host must use the compilation of speech to express "some sort of collective point"—even if only at a fairly abstract level. Thus, a parade organizer who claims a First Amendment right to exclude certain groups or individuals would need to show at least that the message conveyed by the groups or individuals who are allowed to march comport with the parade's theme. A parade comprising "unrelated segments" that lumber along together willy-nilly would likely not express anything at all. And although "a narrow, succinctly articulable message is not a condition of constitutional protection," compilations that organize the speech of others in a non-expressive way (*e.g.,* chronologically) fall "beyond the realm of expressi[on]."

Our decision in *PruneYard* illustrates this point. In that case, the Court held that a mall could be required to host third-party speech (*i.e.*, to admit individuals who wanted to distribute handbills or solicit signatures on petitions) because the mall's admission policy did not express any message, and because the mall was "open to the public at large." In such circumstances, we held that the First Amendment is not implicated merely because a host objects to a particular message or viewpoint.

[3.] Finally, a compiler must show that its "own message [is] affected by the speech it [is] forced to accommodate." In core examples of expressive compilations, such as a book containing selected articles, chapters, stories, or poems, this requirement is easily satisfied. But in other situations, it may be hard to identify any message that would be affected by the inclusion of particular third-party speech....

[Thus, t]he *PruneYard* Court rejected the mall's First Amendment claim because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition [were] not likely [to] be identified with those of the owner." And if those who perused the handbills or petitions were not likely to make that connection, any message that the mall owner intended to convey would not be affected.

The decision in *FAIR* rested on similar reasoning. In that case, the Court did not dispute the proposition that the law schools' refusal to host military recruiters expressed the message that the military should admit and retain gays and lesbians. But the Court found no First Amendment violation because, as in *PruneYard*, it was unlikely that the views of the military recruiters "would be identified with" those of the schools themselves, and consequently, hosting the military recruiters did not "sufficiently interfere with any message of the school." Contra [majority opinion above] ("[T]his Court has *never* hinged a compiler's First Amendment protection on the risk of misattribution.").

{To be sure, in *Turner I*, we held that the First Amendment applied even though there was "little risk" of misattribution in that case. But that is only because the claimants in that case had already shown that the Cable Act affected the quantity or reach of the messages that they communi-

cated through "original programming" or television programs produced by others [since the Act reduced the number of channels the claimants had available to them—ed.]. In cases not involving core examples of expressive compilations, such as in *PruneYard* and *FAIR*, a compiler's First Amendment protection has very much turned on the risk of misattribution.}

[D.] [Moreover, a] party that challenges government interference with its curation of content ... must go on and show that the challenged regulation of its curation practices violates the applicable level of First Amendment scrutiny.

Our decision in *Turner* makes that clear. Although the television cable operators in that case made the showing needed to trigger First Amendment scrutiny, they did not ultimately prevail on their facial challenge to the Cable Act. After a remand and more than 18 months of additional factual development, the Court held that the law was adequately tailored to serve legitimate and important government interests, including "promoting the widespread dissemination of information from a multiplicity of sources." Here, the States assert a similar interest in fostering a free and open marketplace of ideas.

[E.] With these standards in mind, I proceed to the question whether the content-moderation provisions are facially valid. For the following three reasons, NetChoice failed to meet its burden....

[1.] First, NetChoice did not establish *which entities* the statutes cover.... For example, among other things, NetChoice has not stated whether the challenged laws reach websites like WhatsApp and Gmail, which *carry* messages instead of *curating* them to create an independent speech product. Both laws also appear to cover Reddit {describe[d by its own policies] as a platform that is run and moderated by its users}[;] BeReal {which ... allows users to share a photo with their friends once during a randomly selected 2-minute window each day ... [so] posts thus appear and disappear "*randomly*," ... [and thus likely do not form] an expressive compilation}[;] and websites like Parler which claim to engage in little or no content moderation at all {[citing Parler's statement that] "[w]e honor the ability of all users to freely express themselves without interference from oppressive censorship or manipulation"}....

[T]his means that these laws—in at least some of their applications—appear to regulate the kind of "passive receptacle[s]" of third-party speech that receive no First Amendment protection....

[2.] Second, NetChoice has not established *what* kinds of content appear on all the regulated platforms, and we cannot determine whether these platforms create an "inherently expressive" compilation of third-party speech until we know what is being compiled....

For one thing, the ways in which users post, send direct messages, or interact with content may differ in meaningful ways from platform to platform.... [For instance,] X's content is more political than Yelp's, and Yelp's content is more commercial than X's [citing each platform's policies]. That difference may be significant for First Amendment purposes....

On the present record, we are ill-equipped to account for the many platform-specific features that allow users to do things like sell or purchase goods, live-stream events, request a ride, arrange a date, create a discussion forum, wire money to friends, play a video game, hire an employee, log a run, or agree to watch a dog. The challenged laws may apply differently to these different functions, which may present different First Amendment issues. A court cannot invalidate the challenged laws if it has to speculate about their applications....

[3.] Third, NetChoice has not established *how* websites moderate content. NetChoice alleges that "[c]overed websites" generally use algorithms to organize and censor content appearing in "search results, comments, or in feeds." But at this stage and on this record, we have no way of confirming whether all of the regulated platforms use algorithms to organize all of their content, much less whether these algorithms are expressive.

Facebook and Reddit, for instance, both allow their users to post about a wide range of topics. But while Facebook uses algorithms to arrange and moderate its users' posts, Reddit asserts that its content is moderated by Reddit users, "not by centralized algorithms." If Reddit and other platforms entirely outsource curation to others, they can hardly claim that their compilations express their own views....

For all these reasons, NetChoice failed to establish whether the content-moderation provisions violate the First Amendment on their face....

[F.] [T]he majority [also] fails to give any serious consideration to key arguments pressed by the States. Most notable is the majority's conspicuous failure to address the States' contention that platforms like YouTube and Facebook—which constitute the 21st century equivalent of the old "public square"—should be viewed as common carriers. Whether or not the Court ultimately accepts that argument, it deserves serious treatment.

Instead of seriously engaging with this and other arguments, the majority rests on NetChoice's dubious assertion that there is no constitutionally significant difference between what newspaper editors did more than a half-century ago at the time of *Tornillo* and what Facebook and YouTube do today. Maybe that is right—but maybe it is not. Before mechanically accepting this analogy, perhaps we should take a closer look.

Let's start with size. Currently, Facebook and YouTube each produced—on a daily basis—more than four petabytes (4,000,000,000,000,000 bytes) of data. By my calculation, that is roughly 1.3 billion times as many bytes as there are in an issue of the New York Times.

No human being could possibly review even a tiny fraction of this gigantic outpouring of speech, and it is therefore hard to see how any shared message could be discerned. And even if someone could view all this data and find such a message, how likely is it that the addition of a small amount of discordant speech would change the overall message? ...

Other questions abound. Maybe we should think about the enormous power exercised by platforms like Facebook and YouTube as a result of

"network effects." And maybe we should think about the unique ways in which social-media platforms influence public thought.

[G.] To be sure, I do not suggest that we should decide at this time whether the Florida and Texas laws are constitutional as applied to Facebook's News Feed or YouTube's homepage. My argument is just the opposite. Such questions should be resolved in the context of an as-applied challenge. But no as-applied question is before us, and we do not have all the facts that we need to tackle the extraneous matters reached by the majority.

Instead, when confronted with the application of a constitutional requirement to new technology, we should proceed with caution. While the meaning of the Constitution remains constant, the application of enduring principles to new technology requires an understanding of that technology and its effects. Premature resolution of such questions creates the risk of decisions that will quickly turn into embarrassments....

ii. Should the use of AI change the analysis?

Justice Barrett, concurring. [This concurrence further criticizes facial challenges, and also notes the following without resolving it:—ed.]

[D]ealing with a broad swath of varied platforms and functions in a facial challenge strikes me as a daunting, if not impossible, task. A function qualifies for First Amendment protection only if it is inherently expressive.... [Yet c]onsider, for instance, how platforms use algorithms to prioritize and remove content on their feeds.

Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop. In that event, the algorithm would simply implement human beings' inherently expressive choice "to exclude a message [they] did not like from" their speech compilation.

But ... [w]hat if a platform's owners hand the reins to an AI tool and ask it simply to remove "hateful" content? If the AI relies on large language models to determine what is "hateful" and should be removed, has a human being with First Amendment rights made an inherently expressive "choice ... not to propound a particular point of view"? In other words, technology may attenuate the connection between content-moderation *actions* (*e.g.*, removing posts) and human beings' constitutionally protected right to "*decide for [themselves]* the ideas and beliefs deserving of expression, consideration, and adherence." ...

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

[C]onsider how newspapers and social-media platforms edit content. Newspaper editors are real human beings, and when the Court decided *Tornillo* (the case that the majority finds most instructive), editors as-

signed articles to particular reporters, and copyeditors went over typescript with a blue pencil. The platforms, by contrast, play no role in selecting the billions of texts and videos that users try to convey to each other.

And the vast bulk of the "curation" and "content moderation" carried out by platforms is not done by human beings. Instead, algorithms remove a small fraction of nonconforming posts *post hoc* and prioritize content based on factors that the platforms have not revealed and may not even know. After all, many of the biggest platforms are beginning to use AI algorithms to help them moderate content. And when AI algorithms make a decision, "even the researchers and programmers creating them don't really understand why the models they have built make the decisions they make." Are such decisions equally expressive as the decisions made by humans? Should we at least think about this?

iii. Should foreign control change the analysis?

Justice Barrett, concurring. [This concurrence also flags the following question, again without resolving it:—ed.]

Corporations, which are composed of human beings with First Amendment rights, possess First Amendment rights themselves. See *Citizens United v. FEC*. But foreign persons and corporations located abroad do not. *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc. [II]*, 591 U.S. 430 (2020). So a social-media platform's foreign ownership and control over its content-moderation decisions might affect whether laws overriding those decisions trigger First Amendment scrutiny.

What if the platform's corporate leadership abroad makes the policy decisions about the viewpoints and content the platform will disseminate? Would it matter that the corporation employs Americans to develop and implement content-moderation algorithms if they do so at the direction of foreign executives? Courts may need to confront such questions when applying the First Amendment to certain platforms....

ii. Individualized explanation requirements

Justice Kagan delivered the opinion of the Court....

In addition [to the content moderation restrictions], though far less addressed in this Court, the laws require a platform to provide an individualized explanation to a user if it removes or alters her posts.... The [Texas law] requires that "concurrently with the removal" of user content, the platform shall "notify the user" and "explain the reason the content was removed." The user gets a right of appeal, and the platform must address an appeal within 14 days....

{[T]he discussion ... [of] content-moderation provisions ... also bears on how the lower courts should address the individualized-explanation provisions in the upcoming facial inquiry.... [R]equirements of that kind violate the First Amendment if they unduly burden expressive activity. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). So our explanation of why Facebook and YouTube are engaged in expression when they make content-moderation choices in their main

feeds should inform the courts' further consideration of that issue.}

Justice Thomas, concurring in the judgment. [Justice Thomas mostly argued that the Court should overrule its overbreadth caselaw altogether but also added:—ed.]

Because the trade associations did not contest *Zauderer*'s applicability before the Eleventh Circuit and both lower courts applied its framework, I agree with the Court's decision to rely upon *Zauderer* at this stage.

However, I think we should reconsider *Zauderer* and its progeny. "I am skeptical of the premise on which *Zauderer* rests—that, in the commercial-speech context, the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." ...

Justice Alito, joined by Justices Thomas and Gorsuch, concurring in the judgment....

[T]he individual-disclosure provisions ... require platforms to explain to affected users the basis of each content-censorship decision. Because these regulations provide for the disclosure of "purely factual and uncontroversial information," they must be reviewed under *Zauderer*'s framework, which requires only that such laws be "reasonably related to the State's interest in preventing deception of consumers" and not "unduly burde[n]" speech. For *Zauderer* purposes, a law is "unduly burdensome" if it threatens to "chil[l] protected commercial speech." Here, NetChoice claims that these disclosures have that effect and lead platforms to "conclude that the safe course is to ... not exercis[e] editorial discretion at all" rather than explain why they remove "millions of posts per day." ...

In the lower courts, NetChoice did not even try to show how these disclosure provisions chill each platform's speech. Instead, NetChoice merely identified one subset of one platform's content that would be affected by these laws: billions of nonconforming comments that YouTube removes each year. But if YouTube uses automated processes to flag and remove these comments, it is not clear why having to disclose the bases of those processes would chill YouTube's speech. And even if having to explain each removal decision would unduly burden YouTube's First Amendment rights, the same does not necessarily follow with regard to all of NetChoice's members.

NetChoice's failure to make this broader showing is especially problematic since NetChoice does not dispute the States' assertion that many platforms already provide a notice-and-appeal process for their removal decisions. In fact, some have even *advocated* for such disclosure requirements. Before its change in ownership, the previous Chief Executive Officer of the platform now known as X went as far as to say that "all companies" should be required to explain censorship decisions and "provide a straightforward process to appeal decisions made by humans or algorithms." Moreover, ... many platforms are already providing similar disclosures pursuant to the European Union's Digital Services Act. Yet complying with that law does not appear to have unduly burdened each plat-

form's speech in those countries. On remand, the courts might consider whether compliance with EU law chilled the platforms' speech....

VI. GOVERNMENT ACTING IN SPECIAL CAPACITIES

E. GOVERNMENT AS LANDLORD/SUBSIDIZER/SPEAKER

2. SPEECH USING GOVERNMENT PROPERTY OR BENEFITS

kk. Vidal v. Elster, 602 U.S. 286 (2024)

Justice Thomas ... delivered the opinion of the Court [in relevant part] ....

[A.] Steve Elster sought to register the trademark "Trump too small." But, the Patent and Trademark Office (PTO) refused to register the mark because the Lanham Act prohibits registration of a trademark that "[c]onsists of or comprises a name ... identifying a particular living individual except by his written consent" [which {we will call the "names clause"}] ... This prohibition [does not violate Elster's] First Amendment right to free speech....

[B.] The names clause does not facially discriminate against any viewpoint.... It does not matter "whether the use of [the] name is flattering, critical or neutral." The Government is thus not singling out a trademark "based on the specific motivating ideology or the opinion or perspective of the speaker." ...

According to Elster, it is easier to obtain consent for a trademark that flatters a person rather than mocks him. This Court has found that a law can discriminate based on viewpoint in its practical operation. But, here, there are many reasons why a person may be unable to secure another's consent to register a trademark bearing his name. Even when the trademark's message is neutral or complimentary, a person may withhold consent to avoid any association with the goods, or to prevent his name from being exploited for another's gain.

{It is also hard to see the viewpoint discrimination that Elster alleges in practice. The PTO has refused registration of trademarks such as "Welcome President Biden," "I Stump for Trump," and "Obama Pajama"—all because they contained another's name without his consent, not because of the viewpoint conveyed.}

Although the names clause is not viewpoint based, it is content based. As we have explained, a restriction on speech is content based if the "law applies to particular speech because of the topic discussed or the idea or message expressed." The names clause turns on the content of the proposed trademark—whether it contains a person's name....

[C.] The Lanham Act's names clause has deep roots in our legal tradition. Our courts have long recognized that trademarks containing names may be restricted. And, these name restrictions served established principles. This history and tradition is sufficient to conclude that the names clause—a content-based, but viewpoint-neutral, trademark restriction—is

compatible with the First Amendment. We need look no further in this case....

[1.] Several features of trademark counsel against a *per se* rule of applying heightened scrutiny to viewpoint-neutral, but content-based trademark regulations. Most importantly, trademark rights have always coexisted with the First Amendment, despite the fact that trademark protection necessarily requires content-based distinctions. [Discussion of the general history of early American trademark law, which was borrowed from English law, omitted.—ed.] ...

The content-based nature of trademark protection is compelled by the historical rationales of trademark law. A trademark has generally served two functions: "indicating ownership of the goods to which it [is] affixed" and "indicating the source or origin of manufacture." Indicating ownership of a good was needed in part to "fi[x] responsibility for defective merchandise." And, indicating the source of the good helped "prospective purchasers ... make their selections based upon the reputation, not merely of the immediate vendor, but also of the manufacturer." ...

In that vein, a basic function of trademark law has always been to "prohibi[t] confusion as to the source of good or services." Indicating ownership and the manufacturing source touch on the content of the mark—*i.e.*, from whom the product came.... [P]olicing trademarks so as to prevent confusion over the source of goods [thus] requires looking to the mark's content....

[2.] [The majority went on to conclude that the particular restriction on registering other living people's names as trademarks is also historically supported:—ed.]

Restrictions on trademarking names have a long history. Such restrictions have historically been grounded in the notion that a person has ownership over his own name, and that he may not be excluded from using that name by another's trademark. As the Court has explained, "[a] man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property." *Brown Chemical Co. v. Meyer*, 139 U.S. 540 (1891). It is therefore "an elementary principle that every man is entitled to the use of his own name in his own business." F. Treadway, Personal Trade-Names, 6 Yale L.J. 141 (1897). "The notion that people should be able to use their own name to identify their goods or business is deeply rooted in American mores."

Recognizing a person's ownership over his name, the common law restricted the trademarking of names. It prevented a person from trademarking any name—even his own—by itself. In "the early years of trademark law," courts recognized that "there can be no trade-mark in the name of a person, because ... every person has the right to use his own name for the purposes of trade." See *McLean v. Fleming*, 96 U.S. 245 (1878) (explaining that a person cannot obtain "the exclusive use of a name, merely as such, without more").

The common law did, however, allow a person to obtain a trademark

containing his own name—with a caveat: A person could not use a mark containing his name to the exclusion of a person with the *same* name.... See *McLean* ("[H]e cannot have such a right, even in his own name, as against another person of the same name, unless such other person uses a form of stamp or label so like that used by the complaining party as to represent that the goods of the former are of the latter's manufacture"); accord, *Brown Chemical*; *Meneely v. Meneely*, 62 N.Y. 427, 432 (Ct. App. 1875). Consider the case of John L. Faber and John H. Faber, two men who independently manufactured lead pencils near Nuremberg, Germany. Both men stamped the pencils they manufactured with their shared surname. After recognizing that each man "had the right to put his own name on his own pencils," the New York Supreme Court declined to allow one man to effectively trademark the other man's name. *Faber v. Faber*, 3 Abb. Pr. (N.S.) 115 (1867).

We see no evidence that the common law afforded protection to a person seeking a trademark of another living person's name. To the contrary, English courts recognized that selling a product under another person's name could be actionable fraud. See, *e.g.*, *Singleton v. Bolton*, 99 Eng. Rep. 661 (1783); *Croft* v. *Day*, 49 Eng. Rep. 994 (1843) ("[N]o man has a right to sell his goods as the goods of another"). This recognition carried over to our country. See *McLean* ("[I]t is doubtless correct to say that a person may have a right in his own name as a trade-mark as against a trader or dealer of a different name"); see also *Faber*. Even in the absence of fraud, it would be difficult, if not impossible, to square such a right to trademark another person's name with our established understanding that "[a] person may have a right in his own name as a trade-mark, as against a person of a different name." *Gilman v. Hunnewell*, 122 Mass. 139 (1877); see also *Thaddeus Davids Co. v. Davids Mfg. Co.*, 233 U.S. 461 (1914) (highlighting persons' "right to use their own name in trade"); *Faber* ("[T]he maker had the right to put his own name on his own pencils").

Relatedly, one could contract for the use of another person's name in his business. See, *e.g.*, *McLean* (explaining that a "physician whose name the pills bear ... sold the right to use the same" to another); see also *L. E. Waterman Co. v. Modern Pen Co.*, 235 U.S. 88 (1914); *Meriden Britannia Co. v. Parker*, 39 Conn. 450 (1872) ("[T]hey made a contract with the petitioners, by which, and by subsequent contracts, the petitioners acquired the right ... to manufacture and sell plated spoons and forks with the name 'Rogers' stamped thereon as a component part of a trade mark"). Such contracts would make little sense if one could use another living person's name in business at will. The common-law approach to trademarking names thus protected only a person's right to use his *own* name.

This common-law understanding carried over into federal statutory law. The first federal trademark law contained a requirement that a trademark contain more than merely a name. That requirement remains largely intact. A few decades later, [in 1911,] federal trademark law emphasized "'[t]hat nothing herein shall prevent the registration of a trademark otherwise registerable because of its being the name *of the appli-*

cant.'" And, the Lanham Act later "incorporat[ed] the principal features of common law trademark protection," thereby "declar[ing] ... existing law" rather than writing trademark law from scratch. It is thus unsurprising that the Lanham Act included the names clause, prohibiting the registration of a mark containing "a name ... identifying a particular living individual except by his written consent." The names clause reflects the common law's careful treatment of names when it comes to trademarks.

[3.] The restriction on trademarking names also reflects trademark law's historical rationale of identifying the source of goods. Trademark protection ensures that consumers know the source of a product and can thus evaluate it based upon the manufacturer's reputation and goodwill. By barring a person from using another's name, the names clause reflects the traditional rationale of ensuring that consumers make no mistake about who is responsible for a product.

Moreover, the names clause respects the established connection between a trademark and its protection of the markholder's reputation.... "[I]s not a man's name as strong an instance of trade-mark as can be suggested?" *Ainsworth* v. *Walmsley*, 1 L.R., Eq. 518 (1866). In fact, the English common law of trademarks arose from the fact that "those who sold goods ... that were the fruit of their own labor or craftsmanship [began to] identif[y] those products ... with their own names." As we have explained, virtually up until the Fourteenth Amendment's adoption, a trademark "really denoted only the name of the manufacturer." And, this Court has long associated names with the good will they may bear. The names clause thus protects "the reputation of the named individual" by preventing another person from using his name....

We conclude that a tradition of restricting the trademarking of names has coexisted with the First Amendment, and the names clause fits within that tradition. Though the particulars of the doctrine have shifted over time, the consistent through line is that a person generally had a claim only to his own name. The names clause reflects this common-law tradition by prohibiting a person from obtaining a trademark of another living person's name without consent, thereby protecting the other's reputation and goodwill.

{Justice Barrett takes a different approach, suggesting that a historical rule that mirrors the names clause is required. But, history-focused approaches to constitutional scrutiny do not typically require a historical twin. Nor do Justice Barrett's examples undercut the names clause's historical grounding, as they raise different aspects of trademarking names. For example, she relies upon cases that concern trademarks containing "the name of a famous person [Roger Williams], long since dead." *Barrows v. Knight*, 6 R.I. 434 (1860); see also *Stephano Bros., Inc. v. Stamatopoulos*, 238 F. 89 (CA2 1916) ("In this case the name adopted is a famous Egyptian historical character [Rameses], who lived at least 1,000 years before the Christian era"). The part of the names clause that we address concerns only "a particular *living* individual['s]" name. And, her other examples concern names that had become generic or descriptive words. See *Messerole v.*

Tynberg, 4 Abb. Pr. (N.S.) 410 (NY Ct. Com. Pl. 1868) (treating "the word 'Bismarck'" as "a popular term and one in general use"); *Medlar & Holmes Shoe Co. v. Delsarte Mfg. Co.*, 68 N.J.Eq. 706 (CC NJ 1900) (treating the name of the deceased French artist Delsarte as "a generic or descriptive term").}

[D.] None of this is to say that the Government cannot innovate when it comes to trademark law. A firm grounding in traditional trademark law is sufficient to justify the content-based trademark restriction before us, but we do not opine on what may be required or sufficient in other cases. To be sure, as Justice Barrett observes, a case presenting a content-based trademark restriction without a historical analogue may require a different approach. But, we need not develop such a comprehensive theory to address the relatively simple case before us today....

[Justice Thomas, joined by Justices Alito and Gorsuch, went on to briefly argue that the government benefits and "limited public forum" cases, on which Justice Barrett's and Justice Sotomayor's opinions relied, were too distant from trademark registration to be analogous.—ed.]

Justice Barrett, with whom Justice Kagan joins [and with whom Justices Sotomayor and Jackson join in relevant part], concurring in part and concurring in the judgment....

[This part of Justice Barrett's opinion generally agreed with the majority's view that trademark law was historically content-based, and that therefore its content-based nature should not generally be viewed as unconstitutional. She then went on to offer an analysis based more on modern First Amendment precedents:—ed.]

[A.] When the government opens its property to speech for a particular purpose, creating a limited public forum, it necessarily must "reserv[e the property] for certain groups or for the discussion of certain topics." Content-based restrictions are "inherent and inescapable" in maintaining a forum for speech "compatible with the intended purpose of the property." It is therefore inappropriate to view these restrictions as presumptively unconstitutional and apply strict scrutiny. Still, not every restriction is permissible. To evaluate these rules, we ask "whether they are reasonable in light of the purpose which the forum at issue serves." This ensures that the government "respect[s] the lawful boundaries it has itself set."

Though I would not shoehorn the trademark registration system into the definition of a "limited public forum," the ... analogy is apt. Content discrimination is "[i]mplicit in the concept of" the trademark registration system much like it is in a limited public forum. Federal registration "help[s] protect marks" by conferring strong legal rights on markowners who register them. Congress provided for "national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers," matching trademark's historical goals. A mark can only fulfill those goals to the extent that it "tells the public who is responsible for [the] product." This is a content-based requirement. Content-

based criteria for trademark registration do not abridge the right to free speech so long as they reasonably relate to the preservation of the markowner's goodwill and the prevention of consumer confusion....

[B.] The names clause passes muster under this test. A trademark that includes another living person's name without her consent has the obvious potential to create source confusion. Further, the clause helps protect producer goodwill. By freely using another person's name in her mark, the markowner can unfairly capitalize on the reputation of the named individual, who may be a producer in her own right. Conversely, if the markowner's goods or services are shoddy, she might jeopardize the named individual's reputation.

Elster protests that consumers would not assume that Donald Trump is responsible for the mark "'Trump too small.'" Thus, he argues that even if the names clause generally guards against source confusion, refusing to register his proposed mark does not. But Congress is entitled to make categorical judgments, particularly where heightened scrutiny does not apply. The Government can reasonably determine that, on the whole, protecting marks that include another living person's name without consent risks undermining the goals of trademark. The names clause is therefore constitutional, both facially and as applied to Elster's mark....

Justice Barrett, joined by Justice Kagan, ... concurring in the judgment [in relevant part].

[This part of Justice Barrett's opinion, signed just by her and Justice Kagan, deals squarely with the majority's historical analysis:—ed.]

[A.] Rather than adopt a generally applicable principle, the Court assesses the names clause in isolation, treating the supposed history and tradition of the clause as determinative.... [But] the record does not support the Court's conclusion....

It is true that "a tradition of restricting the trademarking of names" arose in the late 19th century. As the Court says, a personal name by itself, without any accompanying words or symbols, did not typically qualify as a trademark. See *McLean*. And a person could not always enforce a trademark including her own name against another with the same name. See *Brown Chemical*. The first federal trademark statute reflected these principles, prohibiting the registration of a mark that was "merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons." Today, the Lanham Act continues to bar the registration of a mark that is "primarily merely a surname."

But the Court also claims that the common law did not afford protection to a person seeking a trademark including *another* living person's name (in other words, a rule akin to the names clause). I am less sure. In *Thaddeus Davids Co. v. Davids Mfg. Co.*, 233 U.S. 461 (1914), this Court explained that the 1905 federal trademark statute contained "a fairly complete list of the marks used by dealers in selling their goods, which are not valid trademarks at common law." Notably, this statute did not in-

clude the names clause or any rough equivalent. {The *Thaddeus* Court referred specifically to the statute's prohibition on the registration of marks that "consis[t] merely of individual, firm or corporate names, not written or printed in a distinctive manner, or of designations descriptive of the character or quality of the goods with which they are used, or of geographical names or terms."} And if such a common-law rule existed, the majority opinion does not identify it.

Instead, the Court draws from sources suggesting that a person could not enforce a trademark with another individual's name *against that individual*. Nor could she fraudulently attempt to pass off her goods as those of another person, using that person's name. So far, so good. Yet the names clause prevents other uses of someone else's name that the common law may have allowed. And on that score, the Court does not fully grapple with countervailing evidence.

In 1860, the Supreme Court of Rhode Island concluded that the phrase "'Roger Williams Long Cloth'" was "capable of distinguishing" the manufacturer's goods and thus qualified as a trademark. *Barrows*. "'Roger Williams,' though the name of a famous person," the Court explained, was, "as applied to cotton cloth, a fancy name," as would be the case with "any other her[o], *living* or dead." Likewise, a New York court upheld the plaintiffs' exclusive right to use the name "Bismarck" to designate their paper collars, as they were the first to "appropriate" the name for that purpose. *Messerole*. The court thus rejected the defendant's argument that the plaintiffs could not adopt "the name of a distinguished German citizen" as a trademark. Summarizing, the Second Circuit explained that "[t]he law permits the adoption as a trade-mark of the name of a person who has achieved fame and distinction, provided the name is not descriptive of the quality or the character of the article or a geographical name." *Stephano Bros.* See also *Medlar & Holmes Shoe* ("The name of a famous person, used merely as a fancy name, may become an exclusive trade-mark"); W. Browne, Law of Trade-Marks (2d ed. 1885) (same).

{The Court dismisses my examples as irrelevant because several involve the names of dead individuals. But "[t]he exclusive right to grace paper collars with Bismarck's name was granted while he was still alive." And the other authorities either expressly recognized that the names of famous living persons could be trademarked, see *Barrows*, or did not indicate whether the rule differed for dead versus living individuals, see *Stephano Bros.* Indeed, "[t]he authorities [were] somewhat meagre" as to "the rule .... where the notable person [was] still alive," undercutting the notion that the common law contained a clear rule one way or the other.}

The legislative history of the Lanham Act also undercuts the Court's conclusion. If the names clause codified an existing common-law tradition, one might expect to see some reference to that tradition when the names clause was adopted. But proponents of the clause offered a different justification. Discussing a predecessor version of the clause, Edward Rogers, the Lanham Act's primary drafter, remarked that "[t]he idea of prostituting great names by sticking them on all kinds of goods is very distasteful

to me." The Commissioner of the Patent Office agreed, noting the "shock to [his] sense of propriety to see liberty taken ... with the names of celebrities of private life." He then referred to the attempted registration of "the name of the Duchess of Windsor for brassieres and ladies' underwear." They did not suggest that the common law would already prevent those uses of another's name as a trademark. On the contrary, they seemed most concerned about the types of marks that the common law appeared to allow.

It is thus difficult to say that the names clause is constitutional solely because of its historical pedigree. Perhaps recognizing that reality, the Court relies not only on the purported common-law tradition restricting the trademarking of names, but also points to the names clause's relation to trademark's historical purposes. The latter argument is quite similar to my own—I agree that the names clause helps to ensure that the proposed mark functions as a source identifier and to guard against reputational consequences, serving trademark's historical goals....

{The Court characterizes my critique as a demand for a "historical twin." On the contrary, my point is that the Court has not cleared the "historical analogue" bar it sets for itself. The existence of closely analogous historical counterexamples surely complicates the argument that "history and tradition" alone establish the clause's constitutionality. By presenting its evidence as conclusive, "the Court overclaims."}

[B.] [But e]ven if the Court's evidence were rock solid, I still would not adopt [its history and tradition] approach. To be sure, tradition has a legitimate role to play in constitutional adjudication. For instance, the longstanding practice of the political branches can reinforce our understanding of the Constitution's original meaning. A course of deliberate practice might liquidate ambiguous constitutional provisions. The views of preceding generations can persuade, and, in the realm of *stare decisis*, even bind. But tradition is not an end in itself—and I fear that the Court uses it that way here.

The Court does not (and could not) argue that the late-19th and early-20th century names-restriction tradition serves as evidence of the original meaning of the Free Speech Clause. Nor does it treat the history it recites as a persuasive data point. Instead, it presents tradition itself as the constitutional argument; the late-19th and early-20th century evidence is dispositive of the First Amendment issue. Yet what is the theoretical justification for using tradition that way?

Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is *itself* a judge-made test. And I do not see a good reason to resolve this case using that approach rather than by adopting a generally applicable principle. (After all, there is a tradition of the latter approach too.)

In the course of applying broadly worded text like the Free Speech Clause, courts must inevitably articulate principles to resolve individual cases. I do not think we can or should avoid doing so here.... [T]he takeaway from history is that content-based trademark restrictions have long

been central to trademark's purpose of facilitating source identification, and they have not posed a serious risk of censorship. This principle offers a generally applicable way to think about whether registration restrictions "'play well with the First Amendment.'" We should bring clarity to the law by adopting it.

In my view, the Court's laser-like focus on the history of this single restriction misses the forest for the trees. It gives secondary billing to what I think is the central point: that the names clause "reflects trademark law's historical rationale of identifying the source of goods." I see no reason to proceed based on pedigree rather than principle. Besides, as the Court admits, its approach merely delays the inevitable: Eventually, the Court will encounter a restriction without a historical analogue and be forced to articulate a test for analyzing it.

Justice Sotomayor, joined by Justices Kagan and Jackson, concurring in the judgment....

[This opinion sets aside the historical debate and instead argues that viewpoint-neutral restrictions should be constitutional in this area:—ed.]

[V]iewpoint-neutral trademark registration criteria ... do not burden expression. Instead, a denial of registration withholds ancillary benefits that might bolster someone's expression. When a government confers a benefit that supports some forms of expressive activity, the decision to withhold that benefit on viewpoint-neutral grounds "cannot be equated with the imposition of a 'penalty' on that activity," which would trigger heightened scrutiny....

Because trademark registration criteria limit statutory benefits in a necessarily content-based scheme, the First Amendment requires the criteria to be viewpoint neutral and reasonable. From this Court's analogous nonpublic-forum and limited-public-forum cases, it is clear that "reasonable" means that the challenged provision must reasonably serve the purpose of the content-based scheme. On this point, I agree with Justice Barrett that the challenged trademark registration criteria must be "reasonable in light of the trademark system's purpose of facilitating source identification." ...

Justice Kavanaugh, with whom Chief Justice Roberts joins, concurring in part.... I agree with the Court that the names clause is constitutional, particularly in light of the long history of restricting the use of another's name in a trademark. In my view, a viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such a historical pedigree. We can address that distinct question as appropriate in a future case.

VII. PRIOR RESTRAINTS

B. CONTENT-BASED

m. NRA v. Vullo, 602 U.S. 175 (2024)

Justice Sotomayor delivered the opinion for a unanimous Court.

[A.] Six decades ago, this Court held that a government entity's "threat of invoking legal sanctions and other means of coercion" against a third party "to achieve the suppression" of disfavored speech violates the First Amendment. *Bantam Books, Inc. v. Sullivan*. Today, the Court reaffirms what it said then: Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.

Petitioner National Rifle Association (NRA) plausibly alleges that respondent Maria Vullo did just that. As superintendent of the New York Department of Financial Services [DFS], Vullo allegedly pressured regulated entities [banks and insurance companies] to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups. Those allegations, if true, state a First Amendment claim. [For more details on the factual allegations, see the discussion below, in Parts C.2 and C.3.—ed.] ...

[B.] When government officials are "engaging in their own expressive conduct," ... "the Free Speech Clause has no application." The government can "'say what it wishes'" and "select the views that it wants to express." That makes sense; the government could barely function otherwise. "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others," and thus does not need to "maintain viewpoint-neutrality when its officers and employees speak about that venture." ... {[N]othing [in this case] prevents government officials from forcefully condemning views with which they disagree. For those permissible actions, the Constitution "relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks."}

{Yet where ... a government official makes coercive threats in a private meeting behind closed doors, the "ballot box" is an especially poor check on that official's authority. Ultimately, the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.} {[A] government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.} ...

In *Bantam Books*, this Court explored the distinction between permis-

sible attempts to persuade and impermissible attempts to coerce. There, a state commission used its power to investigate and recommend criminal prosecution to censor publications that, in its view, were "'objectionable'" because they threatened "youthful morals." The commission sent official notices to a distributor for blacklisted publications that highlighted the commission's "duty to recommend to the Attorney General" violations of the State's obscenity laws. The notices also informed the distributor that the lists of blacklisted publications "were circulated to local police departments," and that the distributor's cooperation in removing the publications from the shelves would "'eliminate the necessity'" of any referral for prosecution. A local police officer also conducted followup visits to ensure compliance. In response, the distributor took "steps to stop further circulation of copies of the listed publications" out of fear of facing "'a court action.'" ...

The commission [argued] that "it d[id] not regulate or suppress obscenity but simply exhort[ed] booksellers and advise[d] them of their legal rights." ... [But t]he Court explained that the First Amendment prohibits government officials from relying on the "threat of invoking legal sanctions and other means of coercion ... to achieve the suppression" of disfavored speech. Although the commission lacked the "power to apply formal legal sanctions," the distributor "reasonably understood" the commission to threaten adverse action, and thus the distributor's "compliance with the [c]ommission's directives was not voluntary." To reach this conclusion, the Court considered things like: the commission's coordination with law enforcement and its authority to refer matters for prosecution; the notices themselves, which were "phrased virtually as orders" containing "thinly veiled threats to institute criminal proceedings" if the distributor did not come around; and the distributor's reaction to the notices and followup visits....

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

[1.] Consider first Vullo's authority, which serves as a backdrop to the NRA's allegations of coercion. The power that a government official wields, while certainly not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive. Generally speaking, the greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official. For example, imagine a local affinity group in New York that receives a strongly worded letter. One would reasonably expect that organization to react differently if the letter came from, say, the U.S. Attorney for the Southern District of New York than if it came from

an out-of-state school board.

As DFS superintendent, Vullo had direct regulatory and enforcement authority over all insurance companies and financial service institutions doing business in New York. Just like the commission in *Bantam Books*, Vullo could initiate investigations and refer cases for prosecution. Indeed, she could do much more than that. Vullo also had the power to notice civil charges and, as this case shows, enter into consent decrees that impose significant monetary penalties.

[2.] Against this backdrop, consider Vullo's communications with the DFS-regulated entities, particularly with Lloyd's. According to the NRA, Vullo brought a variety of insurance-law violations to the Lloyd's executives' attention during a private meeting in February 2018. The violations included technical infractions that allegedly plagued the affinity insurance market in New York and that were unrelated to any NRA business. Vullo allegedly said she would be "less interested in pursuing the[se] infractions ... so long as Lloyd's ceased providing insurance to gun groups, especially the NRA."

Vullo therefore wanted Lloyd's to disassociate from all gun groups, although there was no indication that such groups had unlawful insurance policies similar to the NRA's. Vullo also told the Lloyd's executives she would "focus" her enforcement actions "solely" on the syndicates with ties to the NRA, "and ignore other syndicates writing similar policies." {[I]n [the] meeting[,] ... [Vullo also] presented her "desire to leverage [her] powers to combat the availability of firearms, including specifically by weakening the NRA."} The message was therefore loud and clear: Lloyd's "could avoid liability for [unrelated] infractions" if it "aided DFS's campaign against gun groups" by terminating its business relationships with them.

As alleged, Vullo's communications with Lloyd's can be reasonably understood as a threat or as an inducement. Either of those can be coercive. As Vullo concedes, the "threat need not be explicit," and as the Solicitor General explains, "[t]he Constitution does not distinguish between 'comply or I'll prosecute' and 'comply and I'll look the other way.'" So, whether analyzed as a threat or as an inducement, the conclusion is the same: Vullo allegedly coerced Lloyd's by saying she would ignore unrelated infractions and focus her enforcement efforts on NRA-related business alone, if Lloyd's ceased underwriting NRA policies and disassociated from gun-promotion groups.

[3.] The reaction from Lloyd's further confirms the communications' coercive nature. At the meeting itself, Lloyd's "agreed that it would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business." Minutes from a subsequent board of directors' meeting reveal that Lloyd's thought "the DFS investigation had transformed the gun issue into 'a regulatory, legal[,] and compliance matter.'" That reaction is consistent with Lloyd's public announcement that it had directed its syndicates to "terminate all insurance related to the NRA and not to provide any insurance to the NRA in the future."

Other allegations, viewed in context, reinforce the NRA's First Amendment claim. Consider the April 2018 Guidance Letters and accompanying press release, which Vullo issued on official letterhead. Just like in her meeting with the Lloyd's executives, here too Vullo singled out the NRA and other gun-promotion organizations as the targets of her call to action. This time, the Guidance Letters reminded DFS-regulated entities of their obligation to consider their "reputational risks," and then tied that obligation to an encouragement for "prompt actio[n] to manag[e] these risks."

Evocative of Vullo's private conversation with the Lloyd's executives a few weeks earlier, the press release revealed how to manage the risks by encouraging DFS-regulated entities to "'discontinu[e] their arrangements with the NRA,'" just like Chubb did when it stopped underwriting Carry Guard. A follow-on tweet from Cuomo reaffirmed the message: Businesses in New York should "'consider their reputations'" and "'revisit any ties they have to the NRA,'" which he called "'an extremist organization.'"

In sum, the complaint, assessed as a whole, plausibly alleges that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy. If true, that violates the First Amendment....

[D.] [T]his Court cannot simply credit Vullo's assertion that "pursuing conceded violations of the law" is an "'obvious alternative explanation'" for her actions that defeats the plausibility of any coercive threat raising First Amendment concerns. {[T]he NRA [had] offered a variety of insurance programs as a benefit to its members.... In return, the NRA received a percentage of its members' premium payments. One of the NRA's affinity products, Carry Guard, covered personal-injury and criminal-defense costs related to licensed firearm use, and "insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person.... [A DFS] investigation revealed at least two kinds of violations of New York law [in such NRA policies]: that Carry Guard insured intentional criminal acts, and the NRA promoted Carry Guard without an insurance producer license.}

[But] the conceded illegality of the NRA-endorsed insurance programs does not insulate Vullo from First Amendment scrutiny under the *Bantam Books* framework. Indeed, the commission in that case targeted the distribution and display of material that, in its view, violated the State's obscenity laws. Nothing in that case turned on the distributor's compliance with state law. On the contrary, *Bantam Books* held that the commission violated the First Amendment by invoking legal sanctions to suppress disfavored publications, some of which may or may not contain protected speech (*i.e.*, nonobscene material). Here, too, although Vullo can pursue violations of state insurance law, she cannot do so in order to punish or suppress the NRA's protected expression....

[E.] Vullo next argues that this case does not involve unconstitutional coercion because her challenged actions in fact targeted business practices and relationships, which qualify as "nonexpressive activity." The argu-

ment is misplaced. That Vullo "regulate[d]" business activities stemming from the NRA's "relationships with insurers and banks" does not change the allegations that her actions were aimed at punishing or suppressing speech.

In *Bantam Books*, the commission interfered with the business relationship between the distributor and the publishers in order to suppress the publishers' disfavored speech.... One can reasonably infer from the complaint that Vullo coerced DFS-regulated entities to cut their ties with the NRA in order to stifle the NRA's gun-promotion advocacy and advance her views on gun control. Vullo knew, after all, that the NRA relied on insurance and financing "to disseminate its message. {Vullo's boss, Governor Cuomo, also urged businesses to disassociate with the NRA to put the organization "into financial jeopardy" and "shut them down."}

The NRA's allegations, if true, highlight the constitutional concerns with the kind of intermediary strategy that Vullo purportedly adopted to target the NRA's advocacy. Such a strategy allows government officials to "expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over."

It also allows government officials to be more effective in their speech-suppression efforts "[b]ecause intermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire." The allegations here bear this out. Although "the NRA was not even the directly regulated party," Vullo allegedly used the power of her office to target gun promotion by going after the NRA's business partners. Insurers in turn followed Vullo's lead, fearing regulatory hostility....

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

Justice Gorsuch, concurring. [Omitted.—ed.]

Justice Jackson, concurring. [Omitted.—ed.]

XI. COMPELLED DISREGARD OF RELIGION?

A. THE NON-DISCRIMINATION PRINCIPLE

4. *No discrimination among religious groups*, unless strict scrutiny is passed. *Larson v. Valente*, 456 U.S. 228 (1982) (Establishment); *Catholic Charities Bureau, Inc. v. Wisc. Labor & Indus. Rev. Comm'n*, 145 S. Ct. 1583 (2025) (Establishment). *Catholic Charities*, for instance, held that an unemployment tax exemption for religious organizations could not distinguish organizations that "engage in proselytization [or] serve only [coreligionists] in their charitable work" from other organizations:

> Much like a law exempting only those religious organizations that perform baptisms or worship on Sundays, an exemption that requires proselytization or exclusive service of co-religionists establishes a preference for certain religions based on the commands of their religious doctrine.

XIII. EXEMPTIONS FOR RELIGIOUS BELIEVERS

A. REQUIRED EXEMPTIONS

4. THE POST-2020 CASES: RETURNING TO STRICT SCRUTINY?

c. Mahmoud v. Taylor, 145 S. Ct. 2332 (2025)

[In this case, the Court didn't resolve the *Sherbert/Yoder* vs. *Smith* debate, or otherwise speak about religious exemptions generally. Rather, the Court recognized a right to a specific sort of constitutionally mandated exemption—an exemption from laws that compel participation in certain kinds of educational programming that the parents see as contrary to their religious beliefs, and thus "pose[] 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill" in their children.

In this respect, the case is similar to *Hosanna-Tabor*, which likewise recognized a right to a specific sort of constitutionally mandated exemption: there, an exemption from laws that interfere with religious institutions' ability to choose their religious leaders or teachers.—ed.]

Justice Alito delivered the opinion of the Court.

[A.] According to a recent survey, [Montgomery County, Maryland] is ... the "most religiously diverse county" in the Nation. In addition to hosting a diverse mix of Christian denominations, the county ranks in the top five in the Nation in per-capita population of Jews, Muslims, Hindus, and Buddhists.... Most Montgomery County residents with school age children, by choice or necessity, send them to public school....

In the years leading up to 2022, the Board apparently "determined that the books used in its existing [English & Language Arts] curriculum were not representative of many students and families in Montgomery County because they did not include LGBTQ characters." The Board therefore decided to introduce into the curriculum what it described as "'LGBTQ+-inclusive texts.'" As one email sent by MCPS principals reflects, the Board selected the books according to a "Critical Selection Repertoire" that required selectors to review potential texts and ask questions such as: "Is heteronormativity reinforced or disrupted?"; "Is cisnormativity reinforced or disrupted?"; and "Are power hierarchies that uphold the dominant culture reinforced or disrupted?"

In accordance with this "[r]epertoire" and other criteria, the Board eventually selected 13 "LGBTQ+-inclusive" texts for use in the English and Language Arts curriculum from pre-K through 12th grade. At issue in this lawsuit are the five "LGBTQ+-inclusive" storybooks that are approved for students in Kindergarten through fifth grade—in other words, for children who are generally between 5 and 11 years old. [More details on the books will be quoted in Part C below.]

The Board suggested "that teachers incorporate the new texts into the curriculum in the same way that other books are used, namely, to put them on a shelf for students to find on their own; to recommend a book to a student who would enjoy it; to offer the books as an option for literature circles, book clubs, or paired reading groups; or to use them as a read aloud." And "[a]s with all curriculum resources," the Board voiced its "expectation that teachers use the LGBTQ-Inclusive Books as part of instruction." ...

The Board also contemplated that instruction involving the "LGBTQ+-inclusive" storybooks would include classroom discussion. In anticipation of such discussion, the Board hosted a "professional development workshop" in the summer of 2022, where it provided teachers with a guidance document suggesting how they might respond to student inquiries regarding the themes presented in the books.

For example, if a student asserts that two men cannot get married, the guidance document encouraged teachers to respond by saying: "When people are adults they can get married. Two men who love each other can decide they want to get married." If a student claims that a character "can't be a boy if he was born a girl," teachers were encouraged to respond: "That comment is hurtful."

And if a student asks "[w]hat's transgender?", it was recommended that teachers explain: "When we're born, people make a guess about our gender and label us 'boy' or 'girl' based on our body parts. Sometimes they're right and sometimes they're wrong." The guidance document encouraged teachers to "[d]isrupt the either/or thinking" of their students.

At the same workshop, the Board also provided teachers with a guidance document that suggested particular responses to inquiries by parents. For example, if a parent were to ask whether the school was attempting to teach a child to "reject" the values taught at home, teachers were encouraged to respond that "[t]eaching about LGBTQ+ is not about making students think a certain way; it is to show that there is no one 'right' or 'normal' way to be."

The guidance also urged teachers to assure parents that there would not be "explicit instruction" about gender and sexual identity, but that "there may be a need to define words that are new and unfamiliar to students," and that "questions and conversations might organically happen." If parents were not comforted by that information, teachers could tell them that "[p]arents always have the choice to keep their student(s) home while using these texts; however, it will not be an excused absence." ...

[Plaintiff parents—a Muslim couple, a Catholic couple, and a couple who were Catholic and Ukrainian Orthodox—sued, seeking to opt their children out of class instruction that discussed those books.—ed.]

[B.] "[W]e have long recognized the rights of parents to direct 'the religious upbringing' of their children." And we have held that those rights are violated by government policies that "substantially interfer[e] with the religious development" of children. *Wisconsin v. Yoder*. Such interference,

we have observed, "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." {A government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses "a very real threat of undermining" the religious beliefs and practices that the parents wish to instill. *Yoder*.} ...

At its heart, the Free Exercise Clause ... protects "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of" religious acts. And for many people of faith across the country, there are few religious acts more important than the religious education of their children. Indeed, for many Christians, Jews, Muslims, and others, the religious education of children is not merely a preferred practice but rather a religious obligation. The parent petitioners in this case reflect this reality: they all believe they have a "sacred obligation" or "God-given responsibility" to raise their children in a way that is consistent with their religious beliefs and practices....

"Drawing on 'enduring American tradition,' we have long recognized the rights of parents to direct 'the religious upbringing' of their children." And this is not merely a right to teach religion in the confines of one's own home. Rather, it extends to the choices that parents wish to make for their children outside the home. It protects, for example, a parent's decision to send his or her child to a private religious school instead of a public school. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Due to financial and other constraints, however, many parents "have no choice but to send their children to a public school." As a result, the right of parents "to direct the religious upbringing of their" children would be an empty promise if it did not follow those children into the public school classroom. {Public education is a public benefit, and the government cannot "condition" its "availability" on parents' willingness to accept a burden on their religious exercise.

Moreover, since education is compulsory in Maryland, the parents are not being asked simply to forgo a public benefit. They have an obligation—enforceable by fine or imprisonment—to send their children to public school unless they find an adequate substitute. And many parents cannot afford such a substitute.... Private elementary schools in Montgomery County are expensive; many cost $10,000 or more per year prior to financial aid. And homeschooling comes with a hefty price as well; it requires at least one parent to stay at home during the normal workday to educate children, thereby forgoing additional income opportunities.} ...

Yoder concerned a Wisconsin law that required parents to send their children to public or private school until the age of 16. Respondents ... were members of Wisconsin's Amish community who refused to send their children to public school after the completion of the eighth grade. In their view, the values taught in high school were "in marked variance with Amish values and the Amish way of life," and would result in an "impermissible exposure of their children to a 'worldly' influence in conflict with

their beliefs."

In response, this Court observed that formal high school education would "plac[e] Amish children in an environment hostile to Amish beliefs ... with pressure to conform to the styles, manners, and ways of the peer group" and that it would "tak[e] them away from their community, physically and emotionally, during the crucial and formative adolescent period of life." "In short," the Court concluded, "high school attendance ... interposes a serious barrier to the integration of the Amish child into the Amish religious community."

In *Yoder*, ... there was no suggestion that the compulsory-attendance law would *compel* Amish children to make an affirmation that was contrary to their parents' or their own religious beliefs. Nor was there a suggestion that Amish children would be compelled to commit some specific practice forbidden by their religion. Rather, the threat to religious exercise was premised on the fact that high school education would "expos[e] Amish children to worldly influences in terms of attitudes, goals, and values contrary to [their] beliefs" and would "substantially interfer[e] with the religious development of the Amish child."

That interference, the Court held, violated the parents' free exercise rights. The compulsory-education law "carrie[d] with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent" because it placed Amish children into "an environment hostile to Amish beliefs," where they would face "pressure to conform" to contrary viewpoints and lifestyles.

[Later in the opinion, the majority concluded that, because of *Yoder*, the *Employment Division v. Smith* rule that no religious exemptions are required from neutral, generally applicable laws didn't apply. The majority also added:—ed.]

{[O]ur decisions in *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Indian Cemetery Protective Assn.* [do not affect this analysis]. In *Bowen*, a father mounted a free exercise challenge to the Government's use of a Social Security number associated with his daughter. And in *Lyng*, Native Americans and other plaintiffs raised a free exercise challenge to the construction of a paved road on federal land.

In those cases, we held that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens," even when the conduct of such internal affairs might result in "incidental interference with an individual's spiritual activities." And, we emphasized, that conclusion was appropriate because the government actions at issue did not "discriminate" against religion or "coerce individuals into acting contrary to their religious beliefs."

These cases have no application here. The government's operation of the public schools is not a matter of "internal affairs" akin to the administration of Social Security or the selection of "filing cabinets." It implicates direct, coercive interactions between the State and its young residents.

The public school imposes rules and standards of conduct on its students and holds a limited power to discipline them for misconduct. If questions of public school curriculum were purely a matter of internal affairs, one could imagine that other First Amendment protections—such as the right to free speech or the right to be free from established religion—would also be inapplicable in the public school context. But our precedents plainly provide otherwise.} ...

[C.] As our decision in *Yoder* reflects, the question whether a law "substantially interfer[es] with the religious development" of a child will always be fact-intensive. It will depend on the specific religious beliefs and practices asserted, as well as the specific nature of the educational requirement or curricular feature at issue. Educational requirements targeted toward very young children, for example, may be analyzed differently from educational requirements for high school students. {The dissent ... sees no difference between petitioners' young children and the high school students in *Kennedy v. Bremerton School Dist.*... It goes without saying, however, that the age of the children involved is highly relevant in any assessment of the likely effect of instruction on the subjects in question.}

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

In light of the record before us, we hold that the Board's introduction of the "LGBTQ+-inclusive" storybooks—combined with its decision to withhold notice to parents and to forbid opt outs—substantially interferes with the religious development of their children and imposes the kind of burden on religious exercise that *Yoder* found unacceptable....

Like many books targeted at young children, the books are unmistakably normative. They are clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected.

Take, for example, the message sent by the books concerning same-sex marriage. Many Americans "advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 576 U.S. 644 (2015). That group includes each of the parents in this case. The storybooks, however, are designed to present the opposite viewpoint to young, impressionable children who are likely to accept without question any moral messages conveyed by their teachers' instruction.

For example, the book Prince & Knight clearly conveys the message that same-sex marriage should be accepted by all as a cause for celebration. The young reader is guided to feel distressed at the prince's failure to find a princess, and then to celebrate when the prince meets his male partner. The book relates that "on the two men's wedding day, the air filled with cheer and laughter, for the prince and his shining knight would live happily ever after." Those celebrating the same-sex wedding are not just family members and close friends, but the entire kingdom.

For young children, to whom this and the other storybooks are targeted, such celebration is liable to be processed as having moral connotations. If this same-sex marriage makes everyone happy and leads to joyous celebration by all, doesn't that mean it is in every respect a good thing? High school students may understand that widespread approval of a practice does not necessarily mean that everyone should accept it, but very young children are most unlikely to appreciate that fine point.

Uncle Bobby's Wedding ... conveys the same message more subtly. The atmosphere is jubilant after Uncle Bobby and his boyfriend announce their engagement. The book's main character, Chloe, does not share this excitement. "'I don't understand!'" she exclaims, "'Why is Uncle Bobby getting married?'" The book is coy about the precise reason for Chloe's question, but the question is used to tee up a direct message to young readers: "'Bobby and Jamie love each other,' said Mummy. 'When grown-up people love each other that much, sometimes they get married.'"

The book therefore presents a specific, if subtle, message about marriage. It asserts that two people can get married, regardless of whether they are of the same or the opposite sex, so long as they "'love each other.'" That view is now accepted by a great many Americans, but it is directly contrary to the religious principles that the parents in this case wish to instill in their children.

It is significant that this book does not simply refer to same-sex marriage as an existing practice. Instead, it presents acceptance of same-sex marriage as a perspective that should be celebrated. The book's narrative arc reaches its peak with the actual event of Uncle Bobby's wedding, which is presented as a joyous event that is met with universal approval.

And again, there are many Americans who would view the event that way, and it goes without saying that they have every right to do so. But other Americans wish to present a different moral message to their children. And their ability to present that message is undermined when the exact opposite message is positively reinforced in the public school classroom at a very young age.

Next, consider the messages sent by the storybooks on the subject of sex and gender. Many Americans, like the parents in this case, believe that biological sex reflects divine creation, that sex and gender are inseparable, and that children should be encouraged to accept their sex and to live accordingly.

But the challenged storybooks encourage children to adopt a contrary viewpoint. Intersection Allies presents a transgender child in a sex-ambiguous bathroom and proclaims that "[a] bathroom, like all rooms, should be a safe space." The book also includes a discussion guide that asserts that "at any point in our lives, we can choose to identify with one gender, multiple genders, or neither gender" and asks children "**What pronouns fit you best?**" (boldface in original). The book and the accompanying discussion guidance present as a settled matter a hotly contested view of sex and gender that sharply conflicts with the religious beliefs that

the parents wish to instill in their children.

The book Born Ready presents similar ideas in an even less veiled manner. The book follows the story of Penelope, an apparently biological female who asserts "'I AM a boy.'" Not only does the story convey the message that Penelope is a boy simply because that is what she chooses to be, but it slyly conveys a positive message about transgender medical procedures. Penelope says the following to her mother: "I love you, Mama, but I don't want to *be* you. I want to be Papa. I don't want tomorrow to come because tomorrow I'll look like you. Please help me, Mama. Help me to be a boy."

Penelope's mother then agrees that Penelope is a boy, and Penelope exclaims: "For the first time, my insides don't feel like fire. They feel like warm, golden love." To young children, the moral implication of the story is that it is seriously harmful to deny a gender transition and that transitioning is a highly positive experience. The book goes so far as to present a contrary view as something to be reprimanded. When the main character's brother says "'You can't *become* a boy. You have to be born one,'" his mother corrects him by saying: "'Not everything *needs* to make sense. *This is about love*.'" The upshot is that it is hurtful, perhaps even hateful, to hold the view that gender is inextricably bound with biological sex.

These books carry with them "a very real threat of undermining" the religious beliefs that the parents wish to instill in their children. Like the compulsory high school education considered in *Yoder*, these books impose upon children a set of values and beliefs that are "hostile" to their parents' religious beliefs. And the books exert upon children a psychological "pressure to conform" to their specific viewpoints. The books therefore present the same kind of "objective danger to the free exercise of religion" that we identified in *Yoder*.

That "objective danger" is only exacerbated by the fact that the books will be presented to young children by authority figures in elementary school classrooms. As representatives of the Board have admitted, "there is an expectation that teachers use the LGBTQ-Inclusive Books as part of instruction," and "there will be discussion that ensues."

The Board has left little mystery as to what that discussion might look like. The Board provided teachers with suggested responses to student questions related to the books, and the responses make it clear that instruction related to the storybooks will "substantially interfer[e]" with the parents' ability to direct the "religious development" of their children.

In response to a child who states that two men "can't get married," teachers are encouraged to respond "[t]wo men who love each other can decide they want to get married .... There are so many different kinds of families and ways to be a family." If a child says "[h]e can't be a boy if he was born a girl," the teacher is urged to respond "that comment is hurtful." If a child asks "What's transgender?", it is suggested that the teacher answer: "When we're born, people make a guess about our gender .... Sometimes they're right and sometimes they're wrong."

{[W]e cannot accept the Board's characterization of the "LGBTQ+-inclusive" instruction as mere "exposure to objectionable ideas" or as lessons in "mutual respect." As we have explained, the storybooks unmistakably convey a particular viewpoint about same-sex marriage and gender. And the Board has specifically encouraged teachers to reinforce this viewpoint and to reprimand any children who disagree. That goes far beyond mere "exposure."

We similarly disagree with the dissent's deliberately blinkered view that these storybooks and related instruction merely "expos[e] students to the 'message' that LGBTQ people exist" and teach them to treat others with kindness. In making this argument, the dissent ignores what anyone who reads these books can readily see. It ignores the messages that the authors plainly intended to convey. And, what is perhaps most telling, it ignores the Board's stated reasons for inserting these books into the curriculum and much of the instructions it gave to teachers....

The question in cases of this kind is whether the educational requirement or curriculum at issue would "substantially interfer[e] with the religious development" of the child or pose "a very real threat of undermining" the religious beliefs and practices the parent wishes to instill in the child. Whether or not a requirement or curriculum could be characterized as "exposure" is not the touchstone for determining whether that line is crossed.}

In other contexts, we have recognized the potentially coercive nature of classroom instruction of this kind. "The State exerts great authority and coercive power through" public schools "because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards v. Aguillard*; see also *Lee v. Weisman* ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools")....

[D.] The dissent sees the Free Exercise Clause's guarantee as nothing more than protection against compulsion or coercion to renounce or abandon one's religion. Under this test, even instruction that denigrates or ridicules students' religious beliefs would apparently be allowed. We reject this chilling vision of the power of the state to strip away the critical right of parents to guide the religious development of their children. *Yoder* and *West Va. Bd. of Ed. v. Barnette* embody a very different view of religious liberty, one that comports with the fundamental values of the American people.

{In a footnote, the dissent retreats and suggests that denigration and ridicule could amount to prohibited "coercion." But this concession is either meaningless or undermines the dissent's entire argument. The primary definition of "coercion" is little different from compulsion [citing dictionaries]. If that is what the dissent means by "coercion," then it is unclear why ridicule or denigration would qualify as coercion under its test. By contrast, if the dissent defines "coercion" to require less, then it has failed to explain why our understanding of what the Clause protects is flawed.}

[E.] To survive strict scrutiny, a government must demonstrate that

its policy "advances 'interests of the highest order' and is narrowly tailored to achieve those interests." ...

[1.] [A]s a general matter, schools have a "compelling interest in having an undisrupted school session conducive to the students' learning." But the Board's conduct undermines its assertion that its no-opt-out policy is necessary to serve that interest.... [T]he Board continues to permit opt outs in a variety of other circumstances, including for "noncurricular" activities and the "Family Life and Human Sexuality" unit of instruction, for which opt outs are required under Maryland law. And the Board goes to great lengths to provide independent, parallel programming for many other students, such as those who qualify as emergent multilingual learners (EMLs) {24.6% of Montgomery County elementary school students} or who qualify for an individualized educational program {"approximately one out of every eight students" in MCPS schools}. This robust "system of exceptions" undermines the Board's contention that the provision of opt outs to religious parents would be infeasible or unworkable.

The Board's attempt to distinguish the other programs for which it provides opt outs is unconvincing. The Board asserts that the "Family Life and Human Sexuality" unit of instruction is meaningfully different because it is "discrete" and "predictably timed," and therefore schools can accommodate opt outs without producing the same "absenteeism and administrability concerns." But this assertion only tends to show that the Board's concerns about "administrability" are a product of its own design. If the Board can structure the "Family Life and Human Sexuality" curriculum to more easily accommodate opt outs, it could structure instruction concerning the "LGBTQ+-inclusive" storybooks similarly. The Board cannot escape its obligation to honor parents' free exercise rights by deliberately designing its curriculum to make parental opt outs more cumbersome.

The Board also suggests that permitting opt outs from the "LGBTQ+-inclusive" storybooks would be especially unworkable because, when it permitted such opt outs in the past, they resulted in "unsustainably high numbers of absent students." But again, the Board's concern is self-inflicted. The Board is doubtless aware of the presence in Montgomery County of substantial religious communities whose members hold traditional views on marriage, sex, and gender. When it comes to instruction that would burden the religious exercise of parents, the Board cannot escape its obligations under the Free Exercise Clause by crafting a curriculum that is so burdensome that a substantial number of parents elect to opt out. There is no *de maximis* exception to the Free Exercise Clause.

[2.] Nor can the Board's policies be justified by its asserted interest in protecting students from "social stigma and isolation." In Maryland, the "Family Life and Human Sexuality" unit of instruction includes discussions about sexuality and gender. Yet the Board has not suggested that the legally-required provision of opt outs from that curriculum has resulted in stigma or isolation. Even if it did, the Board cannot purport to rescue one group of students from stigma and isolation by stigmatizing and isolat-

ing another. A classroom environment that is welcoming to all students is something to be commended, but such an environment cannot be achieved through hostility toward the religious beliefs of students and their parents.

[3.] We acknowledge that "courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." It must be emphasized that what the parents seek here is not the right to micromanage the public school curriculum, but rather to have their children opt out of a particular educational requirement that burdens their well-established right "to direct 'the religious upbringing' of their children." We express no view on the educational value of the Board's proposed curriculum, other than to state that it places an unconstitutional burden on the parents' religious exercise if it is imposed with no opportunity for opt outs....

Several States across the country permit broad opt outs from discrete aspects of the public school curriculum without widespread consequences. And prior to the introduction of the "LGBTQ+-inclusive" storybooks, the Board's own "Guidelines for Respecting Religious Diversity" gave parents a broad right to have their children excused from specific aspects of the school curriculum. These facts belie any suggestion that the provision of parental opt outs in circumstances like these "will impose impossible administrative burdens on schools." ...

Justice Thomas, concurring. [Omitted.—ed.]

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

[A.] [T]he Court invents a constitutional right to avoid exposure to "subtle" themes "contrary to the religious principles" that parents wish to instill in their children. Exposing students to the "message" that LGBTQ people exist, and that their loved ones may celebrate their marriages and life events, the majority says, is enough to trigger the most demanding form of judicial scrutiny.... [But g]iven the great diversity of religious beliefs in this country, countless interactions that occur every day in public schools might expose children to messages that conflict with a parent's religious beliefs....

The result will be chaos for this Nation's public schools. Requiring schools to provide advance notice and the chance to opt out of every lesson plan or story time that might implicate a parent's religious beliefs will impose impossible administrative burdens on schools.... Classroom disruptions and absences may well inflict long-lasting harm on students' learning and development....

[And m]any school districts, and particularly the most resource strapped, cannot afford to engage in costly litigation over opt-out rights or to divert resources to tracking and managing student absences. Schools may instead censor their curricula, stripping material that risks generating religious objections. The Court's ruling, in effect, thus hands a subset of parents the right to veto curricular choices long left to locally elected school boards....

[B.] In the years leading up to the present dispute, the Board determined that the books in its English language curriculum failed to represent many students and families in the county.... The Board, for instance, determined that some "races and cultures" were not adequately reflected. In response, it added books like The Leavers, which tells the story of an Asian-American immigrant family, and the March trilogy, which recounts the life of civil rights leader John Lewis.

The Board found that LGBTQ children and families were similarly underrepresented in its English language curriculum.... After a years-long process, the Board announced in October 2022 that it would add several new books into the elementary school English language curriculum, five of which are at issue in this case ....

The Board directed the schools to use the new books in the same manner as all other books in the English language program, namely, to "assist students with mastering reading concepts like answering questions about characters, retelling key events about characters in a story, and drawing inferences about story characters based on their actions." The Board made clear to individual schools that "there is no planned explicit instruction on gender identity and sexual orientation in elementary school," using the Storybooks or otherwise. The Board's policies, moreover, mandate that "no student or adult [will be] asked to change how they feel about" issues of "gender identity and sexual orientation," and that, "[i]f a child does not agree with or understand another student's gender identity or expression or their sexuality ..., they do not have to change how they feel about it." ...

[C.] The Free Exercise Clause commands that the government "shall make no law ... prohibiting the free exercise" of religion. "The crucial word in the constitutional text is 'prohibit,'" for it makes clear "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng*.

It follows from the text that the Free Exercise Clause does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Bowen*. Instead, the Clause prohibits the government from compelling individuals, whether directly or indirectly, to give up or violate their religious beliefs....

Simply being exposed to beliefs contrary to your own does not "prohibi[t]" the "free exercise" of your religion. Nor does mere "[o]ffense ... equate to coercion." The Constitution thus does not "guarantee citizens a right entirely to avoid ideas with which they disagree." Indeed, "[i]t would betray its own principles if it did," for "no robust democracy insulates its citizens from views that they might find novel or even inflammatory."

There is no public school exception to these principles. {[T]he majority is, of course, right to observe that not all parents can afford to send their children to private religious schools or to provide for homeschooling. Yet for public schools to function, it is inescapable that some students will be

exposed to ideas and concepts that their parents may find objectionable on religious grounds.}

This Court's decision in *Barnette* is instructive.... [T]he Court distinguished the "compulsion of students to declare a belief" from simply exposing students to ideas that might conflict with their religious tenets. For instance, the Court recognized that schools could "acquain[t students] with the flag salute so that they may be informed as to what it is or even what it means." No problem arose, either, the Court observed, from having objecting students "remai[n] passive during a flag salute ritual," while watching the rest of the class engage in it. What the State could not do, however, is "compe[l] the flag salute and pledge," when those actions required students to "declare a belief" contrary to their own religious views.

So too, in *Kennedy*, the Court recognized that seeing objectionable conduct alone is not actionable under the First Amendment.... Even though hearing and watching an authority figure [such as a high school football coach] engage in a denominational prayer with classmates at a school-sponsored event could, of course, undermine parents' efforts to instill different religious beliefs in their children, a majority of this Court concluded that no cognizable "coercion" had occurred, and so no Establishment Clause violation inhered in the coach's conduct. {The Court ... erred in deciding that the coach's prayer ritual was not coercive. Taking the majority's recitation of the facts at face value, however, the Court plainly viewed exposure to the aforementioned activities as insufficient to raise First Amendment concerns, notwithstanding their apparent potential to undermine a parent's religious upbringing of their child.}

Nor have petitioners shown that MCPS's policies coerced them to give up or violate their religious beliefs. To the contrary, MCPS explicitly prohibits teachers from asking students to give up or change their views regarding gender and sexuality, whether religious or not. The parents have proffered no evidence of teachers acting contrary to that policy. {Denigration and ridicule can easily amount to coercion[, but s]uch conduct bears no resemblance to merely exposing children to concepts or ideas that incidentally conflict with a parent's religious beliefs.} ...

{[The majority claims that t]he record in this case goes "far beyond mere 'exposure,'" because "the storybooks unmistakably convey a particular viewpoint about same-sex marriage and gender," and because the "Board has specifically encouraged teachers to reinforce this viewpoint and to reprimand any children who disagree." The majority, however, makes clear that reading aloud the books is sufficient under its test.... As a result, what it comes down to under the majority's test is that students will hear or read the text of books that "convey a particular viewpoint" that is "contrary to the religious principles" that a parent wishes to instill in their child. That is mere exposure to objectionable ideas in its clearest form.

The majority ... [also] badly misreads the Board's teacher guidance. Far from directing teachers to "accuse [students] of being 'hurtful' when they express a degree of religious confusion," the guidance is plainly de-

signed to foster mutual civility and "respect."

That purpose is clear throughout the materials. For instance, the guidance suggests that, in response to a child's statement that, "[b]eing ... gay, lesbian, queer, etc[.] is wrong and not allowed in my religion," a teacher could respond: "I understand that is what you believe, but not everyone believes that. We don't have to understand or support a person's identity to treat them with respect and kindness ... In any community, we'll always find people with beliefs different from our own and that is okay—we can still show them respect."

That recommended response is careful to respect the religious views of students, while still encouraging civility and "kindness" towards others. Those values, moreover, are precisely what the parents in this case say they endorse.

To the extent students make comments that may be hurtful to classmates in the room, the guidance recommends teachers discourage such behavior. If a student says, "*That's so gay*," the guidance suggests a teacher may respond: "Regardless of how it's intended, using gay to describe something negative reflects a long history of prejudice against LGBTQ+ people, so please don't use it in that way.... You may not have meant to be hurtful: but when you use the word 'gay' in any way outside of its definition, it's disrespectful." Similarly, if a child says, "*That's weird*. He can't be a boy if he was born a girl," the guidance encourages teachers to respond: "That comment is hurtful; we shouldn't use negative words to talk about peoples' identities."

The majority reads these portions of the guidance to direct teachers to "accuse [students] of being 'hurtful' when they express" "confusion" based on their religious views. The majority only reaches that conclusion, however, by omitting portions of the student commentary {"[t]hat's so gay" and "that's weird"} to which the teachers are responding in the guidance. Those excised statements, the majority should presumably agree, could be hurtful to students in the classroom and thus warrant discouragement.

Comments like that, moreover, are sadly not uncommon in the Nation's school system today. In a recent study, "the overwhelming majority" of LGBTQ students reported hearing homophobic language used by their peers, including "that's so gay," "dyke," "faggot," and "tranny." Over two-thirds of LGBTQ students, moreover, reported feeling unsafe at school because of their sexual orientation or gender identity....

The Board's guidance to teachers thus simply seeks to anticipate the kinds of difficult interactions that might arise in response to greater inclusivity toward LGBTQ students. If that is sufficient to render classroom instruction "coercive," then mutual tolerance and respect may no longer have a place in public schools.}

[D.] *Yoder* ... does not support the proposition that any government policy that poses a "very real threat" to a parent's religious development of their child triggers strict scrutiny. The problem in *Yoder* was not that the law exposed children to material that would incidentally "undermine" reli-

gious beliefs, but that it compelled Amish parents to do what their religion forbade: send their children away rather than integrate them into the Amish community at home.

If there were any doubt, this Court already rejected the majority's flawed reading of *Yoder* in *Lyng*.... "The statute directly compelled the Amish to send their children to public high schools 'contrary to the Amish religion and way of life,'" the Court explained [in *Lyng*].... So the mere "threat of undermining" Amish beliefs and practices was not, on its own, what gave rise to a cognizable free exercise burden in *Yoder*. "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs," *Lyng* explained, "the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."

The majority's novel test directly contravenes not only *Lyng*, but also *Bowen*.... The majority's "very real threat" test is irreconcilable with *Bowen*. There can be no question that the Government's challenged policy in *Bowen* gravely threatened the father's ability to direct his child's religious development; the Government's "us[e]" of his daughter's Social Security number would (in the father's sincerely held view) "'rob the spirit' of his daughter." So if the test for identifying a cognizable free exercise burden is, as the majority today claims, whether the law poses "'a very real threat of undermining'" a parent's religious development of their child, then *Bowen* was wrongly decided....

The majority relegates its discussion of *Bowen* and *Lyng* to a few sentences, claiming that those cases involved "internal affairs" of Government. The majority, however, articulates no coherent line between the "internal affairs" that the Court deemed nonactionable in those two cases and the external effects of government decisions that the majority announces are actionable here. In *Bowen*, the entire premise of the father's claim was that the Government's internal choices about how to operate its program would have external effects on his right to direct the religious development of his child .... [And in *Lyng*], the Court acknowledged that the Government's construction of the road would "'physically destro[y] the environmental conditions and the privacy without which the [religious] practices cannot be conducted.'" ...

[E.] Turn, next, to the Court's articulation of what, exactly, the "very real threat" is that triggers the most demanding level of judicial review. The majority declares the inquiry will turn on several context clues: the "specific religious beliefs and practices asserted," the "specific nature of the educational requirement or curricular feature at issue," the age of the children, and the context and manner in which the relevant materials "are presented." On that last point, the majority adds, courts should ask whether the materials are "presented in a neutral manner" or "in a manner that is 'hostile' to religious viewpoints and designed to impose upon students a 'pressure to conform.'"

That test lacks any meaningful limit. Consider what the majority deems intolerably "hostile" to religious views. Uncle Bobby's Wedding, the Court asserts, contains a "subtle" "normative" message about marriage that is "contrary to the religious principles that the parents in this case wish to instill in their children": that "two people can get married, regardless of whether they are of the same or the opposite sex, so long as they 'love each other.'" According to the Court, that message is apparent in the "jubilant" reactions of Uncle Bobby's family to his engagement announcement and a statement by the protagonist's mother that, "[w]hen grown-up people love each other that much, sometimes they get married." ...

Even if *Yoder* had established some form of "threat" test, the majority's application of it in this case would expand it beyond recognition. The Court in *Yoder* detailed, at length, the record evidence that compulsory high school attendance would "result in the destruction of the Old Order Amish church community as it exist[ed] in the United States." ... *Yoder* thus set an exceedingly high bar for future plaintiffs to clear. Indeed, the Court in *Yoder* explicitly predicted that "few other religious groups" could make the showing that the Amish parents in that case had.

Yet, in the majority's eyes, reading aloud Uncle Bobby's Wedding is just "[l]ike the compulsory high school education considered in *Yoder*." That assertion is remarkable. Reading a storybook that portrays a family as happy at the news of their gay son's engagement, the majority claims, is equivalent to a law that threatened the very "survival of [the] Amish communit[y]" in the United States. {The majority's discussion of Prince & Knight is no less eye opening. The Court zeroes in on the book's classic fairytale ending, in which the protagonists' marriage is celebrated by their family and others in the kingdom. According to the majority, that makes reading Prince & Knight equivalent to a law that risked "destruction of the Old Order Amish church community."} ...

The majority's myopic attempt to resolve a major constitutional question through close textual analysis of Uncle Bobby's Wedding also reveals its failure to accept and account for a fundamental truth: LGBTQ people exist. They are part of virtually every community and workplace of any appreciable size. Eliminating books depicting LGBTQ individuals as happily accepted by their families will not eliminate student exposure to that concept. Nor does the Free Exercise Clause require the government to alter its programs to insulate students from that "message."

In distorting *Yoder* to say otherwise, the majority leaves its test without any discernible limits. How are courts objectively to evaluate what amounts to a "very real threat" to a parent's religious development of their child? Should they try to measure the intensity of the parent's protestations, or must they simply accept the parent's assertion that exposure to any particular book threatens their child's religious upbringing? Or will judges simply know it when they see it and call their analysis "fact-intensive"? ...

[F.] Given the multiplicity of religious beliefs in this country, innu-

merable themes may be "contrary to the religious principles" that parents "wish to instill in their children." Books expressing implicit support for patriotism, women's rights, interfaith marriage, consumption of meat, immodest dress, and countless other topics may conflict with sincerely held religious beliefs and thus trigger stringent judicial review under the majority's test. Imagine a children's picture book that celebrates the achievements of women in history, including female scientists, politicians, astronauts, and authors. Perhaps the book even features a page that states, "Girls can do it all!" That message may be "directly contrary to the religious principles that" a parent "wish[es] to instill in their chil[d]." In the majority's view, it appears, that is sufficient to trigger strict scrutiny of any school policy not providing notice and opt out to objecting parents....

See, *e.g.*, *Mozert v. Hawkins Cty. Bd. of Ed.*, 827 F.2d 1058 (6th Cir. 1987) (religious objections to "biographical material about women who have been recognized for achievements outside their homes," lessons on "evolution," and teaching "children to use imagination beyond the limitation of scriptural authority"); *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (religious objections to materials containing "'wizards, sorcerers, giants and other unspecified creatures with supernatural powers'"); *Altman v. Bedford Central School Dist.*, 245 F.3d 49 (2d Cir. 2001) (religious objections to activities involving, among other things, yoga, meditation exercises, and the Drug Abuse Resistance Education (DARE) program); *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979) (religious objections to "mandatory coeducational physical education" that requires children to "view and interact with members of the opposite sex who are wearing 'immodest attire'").

Nor is the Court's reasoning seemingly limited to reading material. Interactions with teachers and students could presumably involve implicit "normative" messages that parents may find "contrary to the religious principles" they wish to impart to their children and therefore "hostile" to their religious beliefs. A female teacher displaying a wedding photo with her wife; a student's presentation on her family tree featuring LGBTQ parents or siblings; or an art display with the phrase "Love Is Love" all could "positively reinforc[e]" messages that parents disapprove on religious grounds. Would that be sufficient to trigger strict scrutiny if a school fails to provide advance notice and the opportunity to opt out of any such exposure? The majority offers no principled basis easily to distinguish those cases from this one.

Hard questions might arise, too, from a school's efforts to encourage mutual respect or to prevent bullying. If a student calls a classmate a "sinner" for not wearing a headcovering or coming out as gay, how can a teacher respond without "undermining" that child's religious beliefs? Can parents litigate the content of teacher responses and impose scripts or opt-out policies for everyday interactions designed to foster tolerance and civility? Again, the majority gives no guidance....

[G.] The damage to America's public education system [from the majority's approach] will be profound.... [S]chool administrators will have to

become experts in a wide range of religious doctrines in order to predict, in advance, whether a parent may object to a particular text, lesson plan, or school activity as contrary to their religious beliefs.

The scale of the problem is only compounded by the majority's conclusion that even "subtle" and implicit messages contained in children's books can trigger notice and opt-out obligations. If a parent objects to all material and interactions that support "nontraditional gender roles," for instance, how are schools workably to deduce what books might cross the line? Or take the parents' request in this very case: How should a school go about identifying "any other instruction related to family life or human sexuality that violates the [p]arents' or their children's religious beliefs" in addition to the five Storybooks at issue here? ...

Managing opt outs will impose even greater administrative burdens. At present, the vast majority of States that allow parents to opt students out of instruction limit that right to a specific course or single curricular unit, rather than permitting opt outs for certain themes or particular materials. That approach ensures that opt outs can be "administered centrally" in a way that "reduce[s] the burden on teachers and principals" and "minimizes interruption o[f] classroom instruction for other students."

Establishing a new constitutional right to opt out of any instruction that involves themes contrary to anyone's religious beliefs will create a nightmare for school administrators tasked with fielding, tracking, and operationalizing highly individualized and vaguely defined requests for particular students, as this Board learned.... Teachers will [also] need to adjust homework assignments to exclude objectionable material and develop bespoke exams for students subject to different opt-out preferences. Schools will have to divert resources and staff to supervising students during opt-out periods, too, which could become a significant drain on funding and staffing that is already stretched thin.

[H.] Worse yet, the majority's new rule will have serious chilling effects on public school curricula.... [S]ome school districts may strip their curricula of content that risks generating religious objections. In the current moment, that means material representing LGBTQ students and families, like the Storybooks here, will be among the first to go, with grave consequences for LGBTQ students and our society. Next to go could be teaching on evolution, the work of female scientist Marie Curie, or the history of vaccines....

Today's ruling threatens the very essence of public education. The Court, in effect, constitutionalizes a parental veto power over curricular choices long left to the democratic process and local administrators. That decision guts our free exercise precedent and strikes at the core premise of public schools: that children may come together to learn not the teachings of a particular faith, but a range of concepts and views that reflect our entire society. Exposure to new ideas has always been a vital part of that project, until now.