The Florida Bar’s Annual Review of
U.S. Supreme Court First Amendment Decisions
October Term 2019

June 19, 2020 / 2-4 p.m.

Moderator
Thomas R. Julin
Gunster, Yoakley & Stewart, P.A.

Starring

The Hon. Adalberto Jordan
United States Court of Appeals Judge
Eleventh Circuit Court of Appeals

The Hon. Donald M.
Middlebrooks
U.S. District Court
Southern District of Florida

Dean Howard M. Wasserman
Associate Dean for Research and
Faculty Development
Professor of Law
Florida International University
College of Law

Dean Lili Levi
Professor of Law, Dean's Distinguished
Scholar, and Vice Dean for Intellectual Life
University of Miami
College of Law

Laura Besvinick
Stroock Stroock & Lavan

Timothy J. McGinn
Gunster, Yoakley & Stewart, P.A.

L. Martin Reeder, Jr.
Atherton McAuliffe & Reeder P.A.

Enrique D. Arana
Jason P. Kairella
David A. Karp
Justin S. Wales.
Carlton Fields
Richard J. Ovelmen Memoriam

The seminar is devoted this year to the Memory of Richard J. Ovelmen. Rick conceived of this seminar more than three decades ago, chaired it for many years, and participated every year, offering valuable insights about First Amendment theory and entertaining the thousands of lawyers who have attended. The seminar will open this year with remembrances of Rick by a group of lawyers who worked most closely with him: Laura Besvinick, Enrique Rana, Jason Kairella, David Karp, and Justin Wales.

Cases This Year

Establishment and Free Exercise Clauses

   Supreme Court Case No. 18-1455
   Oral Argument: None
   Certiorari Denied with Opinion: April 6, 2020 ................................................................. 1

2. **Roman Catholic Archdiocese of San Juan, Puerto Rico v. Feliciano**
   Supreme Court Case No. 18-921
   Decided: February 24, 2020 ................................................................................................... 4

3. **South Bay United Pentecostal Church v. Gavin Newsom**,
   No. 3:20-cv-00865-BAS-AHG (S.D. Cal. May 15, 2020), injunction pending appeal denied,
   No. 20-55533 (9th Cir. May 22, 2020)
   Supreme Court Case No. 19A1044
   Application Denied with Opinions: May 29, 2020 ................................................................. 9
4. **Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,**
   930 F.3d 543 (3d Cir. 2019)
   S. Ct. Case No. 19-431
   Oral Argument: May 6, 2020 ................................................................. 15

5. **St. James School v. Biel,**
   911 F.3d 603 (2018), reh. en banc denied, 926 F. 3d 1238 (9th Cir. 2019)
   S. Ct. Case No. 19-348
   Oral Argument: May 11, 2020

and

**Morrissey-Berru v. Our Lady of Guadalupe School,**
Case No. No. 17-56624 (9th Cir. Apr. 30, 2019)
No. 17-56624 (9th Cir. 2019)
S. Ct. Case No. 19-267
Oral Argument: May 11, 2020 ................................................................. 18

6. **Espinoza v. Montana Department of Revenue,**
   2018 Mt. 306 (Mont. Dec. 12, 2018)
   S. Ct. Case No. 18-1195
   Oral Argument: January 22, 2020 ............................................................. 23

**Compelled Speech**

7. **Jarchow v. State Bar of Wisconsin,**
   No. 19-3444 (7th Cir. 2019) (summary affirmance)
   S. Ct. Case No. 19-831
   Certiorari Denied with Opinion: June 1, 2020 ........................................... 25

   911 F.3d 104 (2d Cir. 2018)
   S. Ct. Case No. 19-177
   Oral Argument: March 25, 2020 ............................................................. 28

9. **Chiafalo v. Washington,**
   193 Wash. 2d 380 (Wash. 2019)
   S. Ct. Case No. 19-465
   Oral Argument: May 13, 2020 ................................................................. 31
Prior Restraints, Overbreadth & Vagueness

10. Thompson v. Hebdon,
    909 F.3d 1027 (9th Cir. 2018)
    S. Ct. Case No. 19-122
    No Oral Argument
    Decided Per Curiam on Nov. 25, 2019 ................................................................. 34

    923 F.3d 159 (4th Cir. 2019)
    S. Ct. Case No. 19-631
    Oral Argument: May 6, 2020 .............................................................................. 38

12. United States v. Evelyn Sineneng-Smith,
    910 F. 3d 461 (9th Cir. 2018)
    S. Ct. Case No. 19-67 (May 7, 2020)
    Oral Argument: ................................................................................................. 42

Petitions Granted for Next Year

Free Exercise

1. Fulton v. City of Philadelphia, 19-123
    922 F. 3d 140 (3rd Cir. 2019)
    S. Ct. Case No. 19-123
    Oral Argument: TBD .......................................................................................... 51

Government Speech

2. Carney v. Adams,
    922 F.3d 166 (3d Cir. 2019)
    S. Ct. Case No. 19-309
    Oral Argument: March 25, 2020 ......................................................................... 33

Petitions Pending

Free Exercise

1. Arlene’s Flowers Inc. v. Washington
    441 P.3d 1203 (Wash. 2019)
    S. Ct. Case No. 19-333 ...................................................................................... 52
Prior Restrains

2. Veronica Price v. City of Chicago
   915 F.3d 1107 (7th Cir. 2019)
   S. Ct. Case No. 18-1516 .......................................................... 55

Compelled Speech

3. Box v. Planned Parenthood of Indiana and Kentucky Inc.
   896 F.3d 809 (7th Cir. 2018)
   S. Ct. Case No. 18-1019 .......................................................... 56

4. Americans for Prosperity Foundation v. Becerra
   919 F.3d 1177 (9th Cir. 2019)
   S. Ct. Case No. 19-251 .......................................................... 57

   and

   Thomas More Law Center v. Becerra
   919 F.3d 1177 (9th Cir. 2019)
   S. Ct. Case No. 19-255 .......................................................... 59

5. Institute for Free Speech v. Becerra
   No. 17-17403 (9th Cir. 2019)
   S. Ct. Case No. 19-793 .......................................................... 66

6. Reisman v. Associated Faculties of the University of Maine
   939 F.3d 409 (1st Cir. 2019)
   S. Ct. Case No. 19-847 .......................................................... 70
## Supreme Court of the United States

<table>
<thead>
<tr>
<th>Justice</th>
<th>Appointer</th>
<th>Age</th>
<th>Law School</th>
<th>Religion</th>
<th>Mil.</th>
<th>Kids</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Roberts</td>
<td>Bush 43</td>
<td>65</td>
<td>Harvard</td>
<td>Catholic</td>
<td>No</td>
<td>2</td>
<td>Married</td>
</tr>
<tr>
<td>Clarence Thomas</td>
<td>Bush 41</td>
<td>72</td>
<td>Yale</td>
<td>Catholic</td>
<td>No</td>
<td>1</td>
<td>Married</td>
</tr>
<tr>
<td>Samuel Alito</td>
<td>Bush 43</td>
<td>70</td>
<td>Yale</td>
<td>Catholic</td>
<td>Army Reserve</td>
<td>2</td>
<td>Married</td>
</tr>
<tr>
<td>Neil Gorsuch</td>
<td>Trump</td>
<td>53</td>
<td>Harvard</td>
<td>Catholic</td>
<td>No</td>
<td>2</td>
<td>Married</td>
</tr>
<tr>
<td>Brett Kavanaugh</td>
<td>Trump</td>
<td>55</td>
<td>Yale</td>
<td>Catholic</td>
<td>No</td>
<td>2</td>
<td>Married</td>
</tr>
</tbody>
</table>

### The “Conservatives”

### The “Liberals”

<table>
<thead>
<tr>
<th>Justice</th>
<th>Appointer</th>
<th>Age</th>
<th>Law School</th>
<th>Religion</th>
<th>Mil.</th>
<th>Kids</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ruth Ginsburg</td>
<td>Clinton</td>
<td>87</td>
<td>Harvard/Col.</td>
<td>Jewish</td>
<td>No</td>
<td>2</td>
<td>Married</td>
</tr>
<tr>
<td>Stephen Breyer</td>
<td>Clinton</td>
<td>82</td>
<td>Harvard</td>
<td>Jewish</td>
<td>Army</td>
<td>3</td>
<td>Married</td>
</tr>
<tr>
<td>Sonia Sotomayor</td>
<td>Obama</td>
<td>66</td>
<td>Yale</td>
<td>Catholic</td>
<td>No</td>
<td>0</td>
<td>Divorced</td>
</tr>
<tr>
<td>Elena Kagan</td>
<td>Obama</td>
<td>60</td>
<td>Harvard</td>
<td>Jewish</td>
<td>No</td>
<td>0</td>
<td>Single</td>
</tr>
</tbody>
</table>

### Questions for the Panel

What is the significance of these statistics?

1. All justices attended Harvard and Yale law schools.
2. All justices are Catholic (67%) or Jewish (33%).
   - 100% of GOP appointees are Catholic
   - 75% of Democratic appointees are Jewish
3. Six justices are men. Three are women.
4. The average age of the justices is 67.78 years.
5. Seven justices (78%) are married with children.
6. Eight justices (89%) have been married.
Establishment and Free Exercise Clauses

1. Archdiocese of Washington v. Washington Metropolitan Area Transit Authority
   897 F.3d 1014 (D.C. Cir. 2018)
   Supreme Court Case No. 18-1455
   Certiorari Denied with Opinion: April 6, 2020

   The petition for a writ of certiorari is denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

The Facts

   The Washington Metropolitan Transit Authority ("WMATA"), like other transit authorities, sells commercial advertising space to defray the costs of its services, and for years it had accepted ads on all types of subjects.

   In 2015 WMATA closed its advertising space to issue-oriented ads, including political, religious, and advocacy ads.

   This decision followed extended complaints from riders, community groups, business interests, and its employees, resulting in regional and federal concerns about the safety and security of its transportation services, vandalism of its property, and a time-intensive administrative burden reviewing proposed ads and responding to complaints about ads.

   The Archdiocese of Washington contends that decision violates the First Amendment and the Religious Freedom Restoration Act ("RFRA") and seeks a mandatory preliminary injunction that would require WMATA to place an avowedly religious ad on the exteriors of its buses.

Disposition Below

   The district court denied a motion for preliminary injunction. The D.C. Circuit affirmed, holding: “By urging a capacious vision of viewpoint discrimination, it would effectively prevent the limitation of a non-public forum to commercial advertising, and upend decades of settled doctrine permitting
governments to run transit companies without establishing forums for debate on the controversial issues of the ages and of the day, including not only the subject of religion but also politics and advocacy issues. Indeed, having allowed any speech, governments might be required to accept speech on all subjects because the Archdiocese offers no principled limit cabining its position to religion.”

Statement of Justice Gorsuch, with whom Justice Thomas joins, respecting the denial of certiorari

Because the full Court is unable to hear this case, it makes a poor candidate for our review.


At Christmastime a few years ago, the Catholic Church sought to place advertisements on the side of local buses in Washington, D. C. The proposed image was a simple one—a silhouette of three shepherds and sheep, along with the words “Find the Perfect Gift” and a church website address.

No one disputes that, if Macy’s had sought to place the same advertisement with its own website address, the Washington Metropolitan Area Transit Authority (WMATA) would have accepted the business gladly. Indeed, WMATA admits that it views Christmas as having “‘a secular half’” and “‘a religious half,’” and it has shown no hesitation in taking secular Christmas advertisements. Pet. for Cert. 1.

Still, when it came to the church’s proposal, WMATA balked. That is viewpoint discrimination by a governmental entity and a violation of the First Amendment. In fact, this Court has already rejected no-religious-speech policies materially identical to WMATA’s on no fewer than three occasions over the last three decades. See Good News Club v. Milford Central School, 533 U. S. 98 (2001); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819 (1995); Lamb’s Chapel v. Center Moriches Union Free School Dist., 508 U. S. 384 (1993).

In each case, the government opened a forum to discussion of a particular subject but then sought to ban discussion of that subject from a religious viewpoint. What WMATA did here is no different.

WMATA’s response only underscores its error. WMATA suggests that its
conduct comported with our decision in Rosenberger because it **banned religion as a subject** rather than discriminated between religious and nonreligious viewpoints.

But that reply rests on a misunderstanding of Rosenberger. There, the Court recognized **that religion is not just a subject isolated to itself**, but often also “a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.” 515 U. S., at 831.

That means the government may minimize religious speech incidentally by reasonably limiting a forum like bus advertisement space to subjects where religious views are unlikely or rare. But once the government allows a subject to be discussed, it cannot silence religious views on that topic. See Good News Club, 533 U. S., at 110–112.

So the government may designate a forum for **art or music**, but it cannot then forbid discussion of Michelangelo’s David or Handel’s Messiah. And once the government declares **Christmas open for commentary**, it can hardly turn around and mute religious speech on a subject that so naturally invites it.

**Questions for the Panel**

1. Would the Supreme Court rule that government authorities cannot define the limits of the content of speech in a public forum?

2. Would such a ruling be based on the First Amendment or on RFRA?

3. If based on RFRA, would the rule be that wherever commercial speech is allowed then religious speech also must be allowed, but political speech still can be prohibited?

4. Can the government give greater rights to secular speech than non-secular speech?

5. Will the full Court reconsider this controversy and hold that the WMATA policy violates the First Amendment?

6. If so, what sort of policy could WMATA adopt which would permit it to ban religious speech?
Free Exercise

2. Roman Catholic Archdiocese of San Juan, Puerto Rico v. Feliciano
   Supreme Court Case No. 18-921
   Decided: February 24, 2020

   The Votes: (9-2)
   Majority: Per Curiam
   Joined By: All
   Concur: Alito, J.
   Joined By: Thomas, J.

   Quick Summary
   Puerto Rico Supreme Court’s affirmance of injunction requiring Catholic Church to pay $4.7 million is reversed because trial court lacked jurisdiction in light of bankruptcy stay.

   Catholic Church might not be a single entity.

   Hard to say if Church can be responsible for actions of others, and if it can, the First Amendment still might shield the Church if civil claims threaten free exercise.

The Facts

In 1979, the Office of the Superintendent of Catholic Schools of the Archdiocese of San Juan created a trust to administer a pension plan for employees of Catholic schools. Perpetuo Socorro Academy, San Ignacio de Loyola Academy and San Jose Academy participated.
The Trust had terminated the plan, **eliminating the employees' pension benefits.**

In 2016, active and retired employees of the academies filed complaints in the Puerto Rico Court of First Instance.

The employees sued the Roman Catholic and Apostolic Church of Puerto Rico as the supervisory authority over all Catholic institutions in Puerto Rico. They also sued the Archdiocese of San Juan, the Superintendent, the three academies, and the Trust.

**The Decision Below**

The Puerto Rico Court of First Instance, in an order affirmed by the Puerto Rico Court of Appeals, denied a preliminary injunction requiring the payment of benefits, but the Puerto Rico Supreme Court reversed.

The Supreme Court concluded that "if the Trust did not have the necessary funds to meet its obligations, the participating employers would be obligated to pay."

But, because "there was a dispute as to which defendants in the case had legal personalities," the Supreme Court remanded the case to the Court of First Instance to "determine who would be responsible for continuing paying the pensions, pursuant to the preliminary injunction."

The Court of First Instance determined that the "Roman Catholic and Apostolic Church in Puerto Rico" was the only defendant with separate legal personhood.

The Court held such personhood existed by virtue of the Treaty of Paris of 1898, through which Spain ceded Puerto Rico to the United States. The Court found that the Archdiocese of San Juan, the Superintendent, and the academies each constituted a "division or dependency" of the Church, because those entities were not separately incorporated.

The Court of First Instance **ordered the Church to make payments** to the employees in accordance with the pension plan.

Ten days later, the Court issued a second order requiring the Church to deposit **$4.7 million** in a court account within 24 hours.

The next day, the Court issued a third order, requiring the sheriff to "seize
assets and moneys of . . . the Holy Roman Catholic and Apostolic Church, and any of its dependencies, that are located in Puerto Rico.

The Puerto Rico Court of Appeals reversed. It held the Church is a legally nonexistent entity, but that the Archdiocese of San Juan and the Perpetuo Socorro Academy could be ordered to make contribution payments.

The Puerto Rico Supreme Court again reversed, reinstating the preliminary injunction issued by the trial court.

The Supreme Court held that the "relationship between Spain, the Catholic Church, and Puerto Rico is sui generis, given the particularities of its development and historical context." It explained that the Treaty of Paris recognized the "legal personality" of "the Catholic Church" in Puerto Rico.

The Puerto Rico Supreme Court also observed "each entity created that operates separately and with a certain degree of autonomy from the Catholic Church is in reality a fragment of only one entity that possesses legal personality," at least where the entities have not "independently submit[ted] to an ordinary incorporation process."

Two Justices dissented.

The Archdiocese petitioned this Court for a writ of certiorari.

The Unanimous Per Curiam Decision

The Archdiocese argues that the Free Exercise and Establishment Clauses of the First Amendment require courts to defer to "the Church's own views on how the Church is structured."

Thus, in this case, the courts must follow the Church's lead in recognizing the separate legal personalities of each diocese and parish in Puerto Rico. The Archdiocese claims that the Puerto Rico Supreme Court decision violated the "religious autonomy doctrine," which provides:

"[W]hen ever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

Id., at 20 (quoting Watson v. Jones, 13 Wall. 679, 727 (1872)).
The Solicitor General argues the Puerto Rico Supreme Court violated the fundamental tenet of the Free Exercise Clause that a government may not "single out an individual religious denomination or religious belief for discriminatory treatment." Brief for United States 8 (citing Murphy v. Collier, 587 U. S. ____ (2019); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 524-525 (1993); Fowler v. Rhode Island, 345 U. S. 67, 69 (1953)).

We find that the Court of First Instance lacked jurisdiction to issue the payment and seizure orders because the Trust had filed for Chapter 11 bankruptcy and this litigation was sufficiently related to the bankruptcy to give rise to federal jurisdiction. Id., at 5-6 (citing 28 U. S. C. §§1334(b), 1452).

The Solicitor General agrees that the Court of First Instance lacked jurisdiction but argues that this defect does not prevent us from addressing additional errors, including those asserted under the Free Exercise Clause.

That may be correct, given that the Puerto Rico courts do not exercise Article III jurisdiction. But we think the preferable course at this point is to remand the case to the Puerto Rico courts to consider how to proceed in light of the jurisdictional defect we have identified.

The judgment of the Puerto Rico Supreme Court is vacated, and the case is remanded.

Justice Alito’s Concurrence
Joined by Justice Thomas

I join the opinion of the Court but write separately to note other important issues that may arise on remand.

First, the decision of the Supreme Court of Puerto Rico is based on an erroneous interpretation of this Court's old decision in Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico, 210 U. S. 296, 323-324 (1908). The main question decided by the Supreme Court of Puerto Rico below was whether the Catholic Church in Puerto Rico is a single entity for civil law purposes or whether any subdivisions, such as dioceses or parishes, or affiliated entities, such as schools and trusts, are separate entities for those purposes.

The Supreme Court of Puerto Rico held that Ponce decided that in Puerto Rico the Catholic Church is a single entity for purposes of civil liability. That was incorrect.

It would have been appropriate for us to reverse the decision below on that ground were it not for the jurisdictional issue that the Court addresses.
Whether Catholic Church assets may be reached by claims based on conduct of individuals affiliated with the Catholic Church is a difficult and important issue, that this Court's old decision in Ponce did not address.

And, the Free Exercise Clause of the First Amendment demands that all jurisdictions use neutral rules in determining whether entities associated with a religious body may be held responsible for debts incurred by other associated entities.

Beyond this lurk more difficult questions, including (1) the degree to which the First Amendment permits civil authorities to question a religious body’s own understanding of its structure and the relationship between associated entities and (2) whether, and if so to what degree, the First Amendment places limits on rules on civil liability that seriously threaten the right of Americans to the free exercise of religion as members of a religious body.

The Court does not reach these issues, but they may well merit our review.

Questions for the Panel

1. Why are Justices Alito and Thomas soliciting a case which asks the Court to decide whether it can question a religious institution’s determination of its internal liability for civil claims?

2. Is this case about the Affordable Care Act?

3. Is this case about New York Times v. Sullivan?

4. How might the Court rule on a case in which the Catholic Church determined that its assets could not be reached based on claims against the actions of a local parish?

5. Are Justices Thomas and Alito concerned that civil claims could destroy religious institutions or are they concerned that religious institutions could inflict large damages with impunity?

6. Does the Free Exercise of the First Amendment say anything about this at all?

7. Does the Free Exercise Clause provide any shield against generally applicable civil tort claims at all?

<table>
<thead>
<tr>
<th>The Votes:</th>
<th>(5-1-3)</th>
<th>Quick Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Majority:</td>
<td>Per Curiam</td>
<td>Application denied for temporary injunction to stop enforcement of Governor of California’s Executive Order aims to limit the spread of COVID–19. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.</td>
</tr>
<tr>
<td>Joined By:</td>
<td>Roberts, C.J.</td>
<td>Deference to the Governor’s decision is required.</td>
</tr>
<tr>
<td></td>
<td>Ginsburg, J.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Breyer, J.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sotomayor, J.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Kagan, J.</td>
<td></td>
</tr>
<tr>
<td>Concur, J.</td>
<td>Roberts, C.J.</td>
<td></td>
</tr>
<tr>
<td>Not Joined:</td>
<td>Alito, J.</td>
<td>No opinion.</td>
</tr>
<tr>
<td>Dissent:</td>
<td>Kavanaugh, J.</td>
<td>California’s 25% occupancy cap on religious worship services indisputably discriminates against religion.</td>
</tr>
<tr>
<td>Joined By:</td>
<td>Thomas, J.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Gorsuch, J.</td>
<td></td>
</tr>
</tbody>
</table>
The Facts

The Governor of California’s Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

The Decision Below

The district court denied a motion for a temporary restraining order challenging the application of the State of California and County of San Diego's stay-at-home orders to in-person religious services.

The Ninth Circuit held appellants did not demonstrate a sufficient likelihood of success on appeal because the state action did not "infringe upon or restrict practices because of their religious motivation" and did not "in a selective manner impose burdens only on conduct motivated by religious belief." It held: “We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure. In the words of Justice Robert Jackson, if a ‘[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.’ Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).”

Judge Collins dissented. Pandemic does not allow suspension of First Amendment rights. Case must be evaluated under traditional principles set forth in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). California did not purport simply to proscribe specific forms of underlying physical conduct that it identified as dangerous, such as failing to maintain social distancing or having an excessive number of persons within an enclosed space. Instead, Executive Order N-33-20 presumptively prohibited California residents from leaving their homes for any reason, except to the extent that an exception to that order granted back the freedom to conduct particular activities or to travel back and forth to such activities. Because the Reopening Plan, on its face, is not neutral, it is subject to strict scrutiny. It fails strict scrutiny because the State's compelling interest in public health "could be achieved by narrower [regulations] that burdened religion to a far lesser degree."
The Majority Decision
Joined by Chief Justice Roberts and
Justices Ginsburg, Breyer, Sotomayor and Kagan

Application denied.

Chief Justice Robert’s Concurrence

The Governor of California’s Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide.

At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. “Such a request demands a significantly **higher justification** than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.” Respect Maine PAC v. McKee, 562 U. S. 996 (2010) (internal quotation marks omitted). This power is used where “the legal rights at issue are indisputably clear” and, even then, “sparingly and only in the most critical and exigent circumstances.” S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California’s guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. **Similar or more severe restrictions apply to comparable** secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.

And the Order exempts or **treats more leniently only dissimilar activities**, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a **dynamic and fact-intensive** matter
subject to reasonable disagreement.


Where those broad limits are not exceeded, they should not be subject to second-guessing by an ”unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 545 (1985). That is especially true where, as here, a party seeks Cite as: 590 U. S. ____ (2020) 3 ROBERTS, C. J., concurring emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is ”indisputably clear” that the Government’s limitations are unconstitutional seems quite improbable.

Justice Kavanaugh’s Dissent
Joined by Justices Thomas and Gorsuch

I would grant the Church’s requested temporary injunction because California’s latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses.

Such discrimination violates the First Amendment. In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower.

The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

As a general matter, the “government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.” McDaniel v. Paty, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is “odious to our Constitution.” Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U. S. ___, ___ (2017) (slip op., at 15); see also, e.g., Good News Club v. Milford Central School, 533 U. S. 98 (2001); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819 (1995); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520 (1993); Lamb’s Chapel v. Center Moriches Union Free School Dist., 508 U. S. 384 (1993);
To justify its discriminatory treatment of religious worship services, California must show that its rules are “justified by a compelling governmental interest” and “narrowly tailored to advance that interest.” Lukumi, 508 U. S., at 531–532. California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But “restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom.” Roberts v. Neace, 958 F. 3d 409, 414 (CA6 2020) (per curiam).

What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap. California has not shown such a justification.

The Church has agreed to abide by the State’s rules that apply to comparable secular businesses. That raises important questions: “Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?” Ibid.

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot “assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings.” Ibid.

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could “insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities.” Id., at 415.

Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion. In sum, California’s 25% occupancy cap on religious worship services indisputably
discriminates against religion, and such discrimination violates the First Amendment. See Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church’s request for a temporary injunction. I respectfully dissent.

**Questions for the Panel**

1. How significant is Chief Justice Roberts’ break with the conservative majority?

2. Might the Chief Justice be leading the left to the right, rather than abandoning the right for the left?

3. Is a pandemic the same as a heckler? Is looting the same? In Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).” Justice William O. Douglas wrote the five-justice majority’s opinion facially invalidating Chicago’s ordinance which criminalized “breaches of the peace.” Justice Robert Jackson, dissenting, wrote that he would have upheld the ordinance, noting “the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two.”

4. Isn’t Justice Kavanaugh right about this or is Chief Justice Roberts right that there is enough of a difference between religious services and essential businesses?

5. Will this decision be seen similar to Korematsu v. United States, 323 U.S. 214 (1944)? Justice Hugo Black wrote the decision and pointed out “ all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.” The Court then held: “[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”

6. Could this decision be used to justify the suspension of other First Amendment rights such as freedom of speech and of the press?
4. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 930 F.3d 543 (3d Cir. 2019)  
S. Ct. Case No. 19-431  
Oral Argument: May 6, 2020

Questions Presented

(1) Whether a litigant who is directly protected by an administrative rule and has been allowed to intervene to defend it lacks standing to appeal a decision invalidating the rule if the litigant is also protected by an injunction from a different court; and

(2) Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage.

The Facts

The Women's Health Amendment to the Affordable Care Act ("ACA") mandated that women's health insurance include coverage for preventive health care.

Through the Amendment, Congress directed the Health Resources and Services Administration ("HRSA"), a component of the Department of Health and Human Services ("HHS"), to issue guidelines setting forth the preventive health care services that women should be provided.
Among the services HRSA identified was contraceptive care.

Nowhere in the enabling statute did Congress grant the agency the authority to exempt entities from providing insurance coverage for such services nor did Congress allow federal agencies to issue regulations concerning this coverage without complying with the Administrative Procedure Act.

In May 2017, President Donald Trump issued an executive order directing the HHS and the Departments of Labor and Treasury to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under [42 U.S.C. § 300gg-13(a)(4)]." Exec. Order No. 13,798 § 3, 82 Fed. Reg. 21,675 (May 9, 2017).

In response, and without issuing a notice of proposed rulemaking or soliciting public comment, the Agencies issued two new Interim Final Rules: the Religious IFR and the Moral IFR.

These IFRs expanded the existing exemption and Accommodation framework, made the Accommodation process voluntary, and offered similar protections to organizations with moral objections to contraceptives.

Pennsylvania filed suit against various governmental entities and sought to enjoin the enforcement of the IFRs. The States’ amended complaint pled five counts: (I) violation of Equal Protection of the laws under the Fifth Amendment; (II) violation of Title VII of the Civil Rights Act and the Pregnancy Discrimination Act; (III) violation of the procedural requirements of the APA; (IV) violation of the substantive requirements of the APA; and (V) violation of the Establishment Clause of the First Amendment.

Little Sisters of the Poor Saints Peter and Paul Home intervened.

Disposition Below

The District Court granted a preliminary injunction of the IFRs. See generally Pennsylvania v. Trump, 281 F. Supp. 3d 553 (E.D. Pa. 2017). The Court held that Pennsylvania was likely to succeed on its procedural and substantive challenges under the APA. Id. at 576, 581. The Government appealed, and the District Court granted a stay pending appeal.

The Third Circuit affirmed.
Questions for the Panel

1. Do administrative rules which exempt religious institutions from compliance with the Affordable Care Act violate the Establishment Clause?

2. Will the Supreme Court reach this issue by upholding the administrative challenges to the rules?

3. If these rules can be withheld can other governmental actions which provide exemptions to religious institutions from other government regulations also survive Establishment Clause challenges?
Questions Presented

Whether the First Amendment’s religion clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions.

Whether the First Amendment’s religion clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions exception from the remainder of the statute.
The Facts of Biel

Plaintiff Kristin Biel was fired from her fifth grade teaching position at St. James Catholic School after she told her employer that she had breast cancer and would need to miss work to undergo chemotherapy. St. James fired her. She sued St. James claiming that her termination violated the Americans with Disabilities Act ("ADA").

Disposition of Biel Below

Senior District Judge Terry J. Hatter Jr. (Carter) held the lawsuit against St. James was barred by the First Amendment's "ministerial exception" to generally applicable employment laws.

The Ninth Circuit (Paul J. WATFORD, and Michelle T. FRIEDLAND) reversed, holding that, assessing the totality of Biel's role at St. James, the ministerial exception does not foreclose her claim.

In Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C., 565 U.S. 171, 181 (2012), the Supreme Court held the First Amendment's Establishment and Free Exercise Clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers." See also U.S. Const. amend. I.

In Hosanna-Tabor, the Supreme Court focused on:

1. whether the employer held the employee out as a minister,
2. whether the employee's title reflected ministerial substance and training,
3. whether the employee held herself out as a minister, and
4. whether the employee's job duties included "important religious functions."

There was no religious component to Biel’s liberal studies degree or teaching credential. St. James had no religious requirements for her position. After Biel began working, her training consisted of only a half-day conference whose religious substance was limited. St. James did not hold Biel out as a minister by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic. St. James gave her the title "Grade 5 Teacher." Her employment was at-will and on a yearlong renewable contract.
Nothing indicates that Biel considered herself a minister or presented herself as one to the community. She described herself as a teacher and claimed no benefits available only to ministers.

Biel did teach lessons on the Catholic faith four days a week. She also incorporated religious themes and symbols into her overall classroom environment and curriculum, as the school required.

The First Amendment "insulates a religious organization's `selection of those who will personify its beliefs.'" Puri, 844 F.3d at 1159 (quoting Hosanna-Tabor, 565 U.S. at 188, 132 S.Ct. 694). But it does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith.

We cannot read Hosanna-Tabor to exempt from federal employment law all those who intermingle religious and secular duties but who do not "preach [their employers'] beliefs, teach their faith,... carry out their mission ... [and] guide [their religious organization] on its way." 565 U.S. at 196, 132 S.Ct. 694.

The district court's grant of summary judgment to St. James is REVERSED and REMANDED.

Judge Fisher’s Dissent

I conclude that Biel was a minister.

I would affirm the District Court's decision that Biel is barred from bringing an action against St. James under the Americans with Disabilities Act.

St. James designates Biel a "Catholic school educator" in the school's Code of Ethics.

Some religions may not require formal training for ministers.

Although Biel taught her students the tenets of the Catholic faith, she did not present herself to the public as a minister. This factor therefore weighs against concluding that Biel was a minister.

Biel's taught religion class four times a week based on the catechetical textbook Coming to God's Life.

In considering the complete picture of Biel's employment, I am struck by the importance of her stewardship of the Catholic faith to the children in her class.
The majority misses the point of the ministerial exception, which is to **shield the relationship** between a church and its ministers from the eyes of the court without requiring the church to provide a religious justification for an adverse employment decision.

**Petition for Rehearing and Rehearing en banc are DENIED.**

R. NELSON (Trump) Circuit Judge, with whom BYBEE (Bush 43), CALLAHAN (Bush 43), BEA (Bush 43), M. SMITH (Bush 43), IKUTA (Bush 43), BENNETT (Trump), BADE (Trump), and COLLINS (Trump), Circuit Judges, join, dissenting from the denial of rehearing en banc:

By declining to rehear this case en banc, our court embraces the narrowest construction of the First Amendment's "ministerial exception" and splits from the consensus of our sister circuits that the employee’s ministerial function should be the key focus.

As amici explain, the panel majority's approach trivializes the significant religious function performed by Catholic school teachers.

In turning a blind eye to St. James's religious liberties protected by both Religion Clauses, we exhibit the very hostility toward religion our Founders prohibited and the Supreme Court has repeatedly instructed us to avoid. Accordingly, I dissent.

**The Facts of Morrissey-Berru**

In 1999, Agnes Deirdre Morrissey-Berru became a full-time teacher at a Catholic parochial school in Hermosa Beach, California, Our Lady of Guadalupe School. She taught fifth and sixth-grade classes for 16 years. Her responsibilities included incorporating religious doctrine and worship into her teaching practice.

In a 2016 complaint, Morrissey-Berru, age 65, alleged that the school demoted her from a full-time teacher to a part-time teacher in 2014, then told her in May 2015 she would not be returning to work the next year because of budget cuts. She said she was falsely accused of agreeing to retire at the end of the school year.

Morrissey-Berru alleged her demotion and termination violated the federal Age Discrimination in Employment Act ("ADEA").
Disposition of Morrissey-Berru Below

U.S. District Judge Steven J. Wilson (Reagan) granted summary judgment for the school, finding her claim barred by ministerial exception to the First Amendment. The court ruled that Morrissey-Berru qualified as a minister due to her role and responsibilities as a teacher with Our Lady of Guadalupe School.

The Ninth Circuit (RAWLINSON (Clinton) and MURGUIA (Clinton), Circuit Judges, and GILSTRAP (Obama), District Judge, reversed, holding that considering the totality of the circumstances, Morrissey-Berru was a "minister."

Morrissey-Berru's formal title of "Teacher" was secular. Aside from taking a single course on the history of the Catholic church, Morrissey-Berru did not have any religious credential, training, or ministerial background. Morrissey-Berru also did not hold herself out to the public as a religious leader or minister.

Morrissey-Berru did have significant religious responsibilities as a teacher at the School. She committed to incorporate Catholic values and teachings into her curriculum, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year.

However, an employee's duties alone are not dispositive under Hosanna-Tabor's framework. See Biel v. St. James Sch., 911 F.3d 603, 609 (9th Cir. 2018). On balance, Ninth Circuit concluded that the ministerial exception does not bar Morrissey-Berru's ADEA claim.

Questions for the Panel

1. Will the Supreme Court reverse both Biel and Morrissey-Berru?

2. Is there any basis for distinguishing the two cases?

3. Are we going to see many subsequent cases like this because the factors the Supreme Court has required courts to apply are so subject to manipulation based on the religious views of judges?
Question Presented

Does it violate the Religion Clauses of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

The Facts

Like 37 other States, Montana has a “No-Aid Clause” in its Constitution, which prohibits aid to “sectarian schools.”

Notwithstanding this clause, the Montana Legislature enacted a statute providing for a school-choice program which provided for aid to both religious and non-religious schools while also requiring adherence to the No-Aid Clause.

After the Montana Department of Revenue issued a rule finding only nonreligious schools eligible to participate in the program, parents who wanted to use vouchers to send their children to sectarian schools sued, alleging the rule was illegal.

Disposition Below

The Montana Supreme Court held that the program’s provision of aid to religious schools violated the No-Aid Clause and struck down the statute as a whole so that no aid would be given to religious or non-religious private schools.
This case is a follow on to Trinity Lutheran v. Comer (2017) which held that a state had violated the First Amendment by barring religious institutions from a state-funded program to make playgrounds safer.

A footnote in the majority opinion by the chief justice made clear that the decision narrowly involved express discrimination based on religious identity with respect to playground resurfacing and did not address religious uses of funding or other forms of discrimination.

Petitioners are supported by 32 amicus briefs from religious and conservative organizations and the United States.

Montana contends that a State with principled opposition to aiding religious institutions can achieve that goal by not funding similarly situated nonreligious institutions. So, a State can decline to rebuild church playgrounds—but only if it declines to rebuild any playgrounds. And it can decline to support religious private schools—but only if it declines to support any private school.

Montana is supported by 14 amicus briefs.

Questions for the Panel

1. Will the Supreme Court invalidate the No-Aid clause of the Montana Constitution on First Amendment grounds?

2. If states can fund religious institutions in the same way they fund other institutions, will religious institutions funded by the state maintain their full Free Exercise rights to that they can claim immunity to statutes such as the Americans with Disabilities Act and the Age Discrimination in Employment Act?

3. Will state-funded religious institutions also be entitled to publish their messages in limited public fora which prohibit publication of political messages?
Compelled Speech

7. Jarchow v. State Bar of Wisconsin,
No. 19-3444 (7th Cir. 2019) (summary affirmance)
S. Ct. Case No. 19-831
Certiorari Denied with Opinion: June 1, 2020

The Petition for Writ of Certiorari is denied.


A majority of States, including Wisconsin, have "integrated bars." Unlike voluntary bar associations, integrated or mandatory bars require attorneys to join a state bar and pay compulsory dues as a condition of practicing law in the State. Petitioners are practicing lawyers in Wisconsin who allege that their Wisconsin State Bar dues are used to fund "advocacy and other speech on matters of intense public interest and concern."

Among other things, petitioners allege that the Wisconsin State Bar has taken a position on legislation prohibiting health plans from funding abortions, legislation on felon voting rights, and items in the state budget. Petitioners' First Amendment challenge to Wisconsin's integrated bar arrangement is foreclosed by Keller v. State Bar of Cal., 496 U. S. 1 (1990), which this petition asks us to revisit. I would grant certiorari to address this important question.

In Abood v. Detroit Bd. of Ed., 431 U. S. 209 (1977), the Court held that a law requiring public employees to pay mandatory union dues did not violate the freedom of speech guaranteed by the First Amendment, id., at 235-236. In Keller, the Court extended Abood to integrated bar dues based on an "analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." 496 U. S., at 12. Applying Abood, the Court held that "[t]he State Bar may . . . constitutionally
fund activities germane to [its] goals" of "regulating the legal profession and improving the quality of legal services" using "the mandatory dues of all members." 496 U. S., at 13-14.

Two Terms ago, we overruled Abood in *Janus v. State, County, and Municipal Employees*, 585 U. S. ___ (2018). We observed that "Abood was poorly reasoned," that "[i]t has led to practical problems and abuse," and that "[i]t is inconsistent with other First Amendment cases and has been undermined by more recent decisions." Id., at ___ (slip op., at 1). After considering arguments for retaining Abood that sounded in both precedent and original meaning, we held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 585 U. S., at ___ (slip op., at 48).

Our decision to overrule Abood casts significant doubt on Keller. The opinion in Keller rests almost entirely on the framework of Abood. Now that Abood is no longer good law, there is effectively nothing left supporting our decision in Keller. If the rule in Keller is to survive, it would have to be on the basis of new reasoning that is consistent with Janus.[*]

Respondents argue that our review of this case would be hindered because it was dismissed on the pleadings. But any challenge to our precedents will be dismissed for failure to state a claim, before discovery can take place. And in any event, a record would provide little, if any, benefit to our review of the purely legal question whether Keller should be overruled.

Short of a constitutional amendment, only we can rectify our own erroneous constitutional decisions. We have admitted that *Abood was erroneous*, and Abood provided the foundation for Keller. In light of these developments, we should reexamine whether Keller is sound precedent. Accordingly, I respectfully dissent from the denial of certiorari.

* Respondents resist this conclusion by citing Harris v. Quinn, 573 U. S. 616 (2014), which predates Janus. But all we said in Harris was that "a refusal to extend Abood" would not "call into question" Keller. Harris, 573 U. S., at 655. Now that we have overruled Abood, Keller has unavoidably been called into question.
Questions for the Panel

1. Why did the majority duck this case?

2. Is the majority begging state bar associations to develop a record which could justify their existence?

3. Might the Florida Bar be able to show that it can compel lawyers to be members of the Florida Bar and to pay dues which are used for speech in which the Bar engages?

4. Are bar associations fundamentally different from government employee unions?

5. Is the Supreme Court begging bar associations to develop a good record upon which it can hold that bar associations warrant different First Amendment treatment than government employee unions?

6. Will the Supreme Court’s decision be based on the fact that the members of the Supreme Court are lawyers and bar association members?
The Facts

Plaintiffs are domestic organizations that fight HIV/AIDS abroad. Many work through legally-distinct affiliates.

For example, plaintiff InterAction is a network of U.S.-based humanitarian organizations and contains, as a member, the domestic entity Save the Children Federation, Inc., which is a part of the global set of entities operating as Save the Children, an international aid organization that focuses on children's health.

Save the Children Federation, Inc., in turn, is part of the Save the Children Association, a non-profit Swiss association that owns the Save the Children logo and maintains criteria for Save the Children members.

There are more than 30 distinct Save the Children entities incorporated around the world in addition to in the United States, such as in Australia, Brazil, Canada, India, Japan, Norway, South Africa, Spain, and Swaziland. These entities comprise Save the Children, and share the same name, logo, brand, and mission, even though they are distinct legal entities incorporated in various jurisdictions worldwide.

Maintaining a unified global identity, branding, and approach enhances the ability of an organization to perform its aid mission.

Moreover, various legal and administrative considerations encourage (and sometimes require) such international aid organizations to operate as formally legally distinct entities, despite otherwise being unified.

As an example, the president and chief executive officer of plaintiff Pathfinder International attested that defendant United States Agency for International Development ("USAID") gives preference for Leadership Act contracts to NGOs that are incorporated outside the United States and sought to
increase direct partnerships with local organizations in order to enhance the long-term effectiveness of aid delivery.

USAID also limits a significant number of potential grants to organizations incorporated outside of the United States. Moreover, some foreign governments require NGOs to be incorporated in their countries in order to be permitted to undertake public health work there.

Overall, factors such as these have caused international aid organizations to be organized as formally legally distinct entities while operating with a unified and consistent identity, mission, and work. As a consequence, these organizations appear to the public as unified entities. Throughout this litigation, plaintiffs have emphasized that, while they do not support prostitution, they would not include in their mission statements a policy officially expressing an opposition to prostitution because, among other things, effectively fighting diseases like HIV/AIDS often requires direct involvement with sex-worker communities.

In AOSI, the Supreme Court explained that requiring the recipient of government funds to adopt the Government's view on the issue of prostitution and sex trafficking violated the plaintiffs' First Amendment rights by compelling speech with which they disagreed.

The Government contends that foreign entities, like plaintiffs' affiliates, do not possess First Amendment rights, and therefore the aid can be withheld.

Disposition Below

The District Court converted its preliminary injunction to a permanent injunction barring the Government from imposing the Policy Requirement on plaintiffs or their affiliates.

The Second Circuit affirmed, holding the Supreme Court's decision considered this question and resolved it in plaintiffs' favor because it noted a funded organization could employ affiliates outside the federal program to exercise its First Amendment rights.

The Second Circuit also rejects an argument that the District Court violated Federal Rule of Civil Procedure 65 by imposing a permanent injunction on the basis of letter briefing and without a formal motion or a full hearing.
Judge Straub’s Dissent

Today, a majority panel of this Court requires the United States to fund the activities of foreign organizations, which have no constitutional rights, despite their refusal to comply with our government’s funding condition.

There is no support for such a startling holding. The majority misreads the Supreme Court’s 2013 decision in this case, which only held that the First Amendment protects United States-based organizations from being required to adopt a particular policy position as a condition of federal funding and to conform their privately-funded activities to that position.

The majority decision extends the Supreme Court's holding to an unspecified group of "clearly identified" foreign "affiliates," or "co-branded" foreign partner organizations—an issue that was not before the Supreme Court, and a result that is clearly foreclosed by two of this Court's precedential decisions.

Questions for the Panel

1. Is it correct that entities outside of the United States have no First Amendment rights?

2. Can the U.S. condition the receipt of foreign aid on the recipient’s agreement to engage in speech which the government requires?

3. Could the government withhold aid unless a foreign government expresses support for the United States’ foreign policy objectives?

4. Does this case have anything to do with President Trump’s phone call to Ukraine Prime Minister Volodymyr Zelensky?

5. If the United States conditioned sending military aid to a foreign entity on the entity announcing investigation of a political opponent of the President, would that violate anyone’s First Amendment rights? Could the opponent contend his or her First Amendment rights were violated?

6. Will the Supreme Court hold that although US-based recipients of fund to fight HIV/AIDS cannot be required to oppose prostitution, their foreign affiliated can?
The Facts

Under Washington State election law RCW 29A.56.320, each political party with presidential candidates is required to nominate electors from its party equal to the number of senators and representatives allotted to the state.

People nominated are required to pledge to vote for the candidate of their party. Should nominees choose not to vote for their party candidate, they may be subject to a civil penalty of up to $1,000. See RCW 29A.56.340.

The people of the state do not vote for presidential electors. Rather, they vote for presidential candidates. The nominees of the party that wins the popular vote are appointed by the legislature to be Washington State's presidential electors. Along with all but two other states, Washington has a "winner-take-all" electoral system.

Levi Guerra, Esther John, and Peter Chiafalo were nominated as presidential electors for the Washington State Democratic Party ahead of the 2016 presidential election. Hillary Clinton and Tim Kaine won the popular vote in Washington State, meaning appellants and their fellow Democratic Party nominees were appointed by the legislature to serve as electors for the State of Washington.

Based on the results from the nationwide election, it was expected that Donald Trump would become the next president.
Nationwide, some electors, including appellants, announced they would not vote for either Clinton or Trump and would instead attempt to prevent Trump from receiving the minimum number of Electoral College votes required to become president.

Under the Constitution, if no candidate receives a majority of the Electoral College votes, the House of Representatives is to determine who will be the next president.

On December 19, 2016, the plaintiffs along with the other presidential electors, met in Olympia to cast their ballots. They did not vote for Hillary Clinton and Tim Kaine, as required by their pledge, but instead voted for Colin Powell for president and a different individual for vice-president.

These votes were counted and transmitted to Congress for the official tally of the electoral votes. On December 29, 2016, the Washington secretary of state fined appellants $1,000 each, under RCW 29A.56.340, for failing to vote for the nominee of their party.

Disposition Below

A Thurston County Superior Court upheld an administrative law judge’s imposition of the $1,000 fine, holding "[t]he State is not adding a qualification, nor is the State here requiring specific performance of the pledge."

The electors filed a notice of appeal and filed a motion for direct review in Montana Supreme Court. It held article II, section 1 of the United States Constitution grants to the states plenary power to direct the manner and mode of appointment of electors to the Electoral College and the fine imposed pursuant to RCW 29A.56.340 falls within that authority.

The Montana Supreme Court further hold nothing under article II, section 1 or the Twelfth Amendment to the Constitution grants to the electors absolute discretion in casting their votes and the fine does not interfere with a federal function. Finally, an elector acts under the authority of the State, and no First Amendment right is violated when a state imposes a fine based on an elector's violation of his pledge. We affirm the trial court.

Justice Steven González’s dissent

A State's authority to penalize its electors is an issue of first impression. But in Ray v. Blair, 343 U.S. 214 (1952), Justice Robert H. Jackson opined in dissent:
No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the [individuals] best qualified for the Nation's highest offices.

Id. at 232, 72 S. Ct. 654 (Jackson, J., dissenting) (citing THE FEDERALIST No. 68 (Alexander Hamilton)).

There is a meaningful difference between the power to appoint and the power to control.

Questions for the Panel

1. Do electors have First Amendment rights?

2. Aren’t electors public officials performing a public duty so that their speech can be controlled by the States that have appointed them?

3. Why have an electoral college at all? Why not just add up the electoral votes that each candidate wins?

7. Can textualism survive the Supreme Court’s decision in Bostock v. Clayton County? Justice Gorsuch, supported by Chief Justice Roberts and Justices Ginsburg, Alito, Sotomayor and Kagan, invoked textualism to interpret Title VII’s prohibition against discrimination “on the basis of sex” as prohibiting discrimination on the basis of sexual orientation or transgender status. Justices Alito, Thomas and Kavanaugh claimed that textualism required the opposite result.
Prior Restraints, Overbreadth & Vagueness

10. David Thompson, Aaron Downing & Jim Crawford v. Hebdon, 909 F. 3d 1027 (9th Cir. 2018)
    Supreme Court Case No. 19-122
    No Oral Argument
    Decided: Nov. 25, 2019

The Votes (9-1)

Majority: Per Curiam

Quick Summary

The Ninth Circuit erred in upholding Alaska’s $500 campaign contribution limit without considering Randall v. Sorrell decision invalidating Vermont’s $400 limit. Remanded for reconsideration in light of Randall.

Concur: Ginsburg, J.

Peculiarities of Alaska may warrant low limits on campaign contributions.

The Facts

Alaska law limits the amount an individual can contribute to a candidate for political office, or to an election-oriented group other than a political party, to $500 per year. Alaska Stat. § 15.13.070(b)(1) (2018).

Petitioners Aaron Downing and Jim Crawford are Alaska residents. In 2015, they contributed the maximum amounts permitted under Alaska law to candidates or groups of their choice, but wanted to contribute more. They sued members of the Alaska Public Offices Commission, contending that Alaska’s individual-to-candidate and individual-to-group contribution limits violate the First Amendment.
The Decision Below


Applying Circuit precedent, the Ninth Circuit analyzed whether the contribution limits furthered a “sufficiently important state interest” and were “closely drawn” to that end. 909 F.3d at 1034 (quoting Montana Right to Life Assn. v. Eddleman, 343 F.3d 1085, 1092 (2003); internal quotation marks omitted).


The court below explained that under its precedent in this area “the quantum of evidence necessary to justify a legitimate state interest is low: the perceived threat must be merely more than ‘mere conjecture’ and ‘not ... illusory.’ ” 909 F.3d at 1034 (quoting Eddleman, 343 F.3d at 1092; some internal quotation marks omitted). The court acknowledged that “McCutcheon and Citizens United created some doubt as to the continuing vitality of [this] standard,” but noted that the Ninth Circuit had recently reaffirmed it. 909 F.3d at 1034, n. 2.

After surveying the State’s evidence, the court concluded that the individual-to-candidate contribution limit “focuses narrowly on the state’s interest,’ ‘leaves the contributor free to affiliate with a candidate,’ and ‘allows the candidate to amass sufficient resources to wage an effective campaign,’ ” and thus survives First Amendment scrutiny. Id., at 1036 (quoting Eddleman, 343 F.3d at 1092; alterations omitted); see also 909 F.3d at 1036–1039.

The court also found the individual-to-group contribution limit valid as a tool for preventing circumvention of the individual-to-candidate limit. See id., at 1039–1040.

The Unanimous Per Curiam Decision

In reaching those conclusions, the Ninth Circuit declined to apply our precedent in Randall v. Sorrell, 548 U.S. 230, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006), the last time we considered a non-aggregate contribution limit. See 909
In Randall, we invalidated a Vermont law that limited individual contributions on a per-election basis to $400 to a candidate for Governor, Lieutenant Governor, or other statewide office; $300 to a candidate for state senator; and $200 to a candidate for state representative.

Justice BREYER’s opinion for the plurality observed that “contribution limits that are too low can ... harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.” 548 U.S. at 248–249, 126 S.Ct. 2479;.

A contribution limit that is too low can therefore “prove an obstacle to the very electoral fairness it seeks to promote.” Id., at 249, 126 S.Ct. 2479 (plurality opinion).

The Ninth Circuit declined to consider Randall “because no opinion commanded a majority of the Court,” 909 F.3d at 1037, n. 5, instead relying on its own precedent predating Randall by three years.

Courts of Appeals from ten Circuits have, however, correctly looked to Randall in reviewing campaign finance restrictions.

In Randall, we identified several “danger signs” about Vermont’s law that warranted closer review. Alaska’s limit on campaign contributions shares some of those characteristics.

Alaska’s $500 individual-to-candidate contribution limit is “substantially lower than ... the limits we have previously upheld.”

Alaska’s individual-to-candidate contribution limit is “substantially lower than ... comparable limits in other States.”

Alaska’s contribution limit is not adjusted for inflation.

The case is remanded for that court to revisit whether Alaska’s contribution limits are consistent with our First Amendment precedents.

Justice Ginsburg’s Concurrence

Alaska’s law does not exhibit certain features found troublesome in Vermont’s law.

Political parties in Alaska are subject to much more lenient contribution
limits than individual donors.

Alaska has the second smallest legislature in the country and derives approximately 90 percent of its revenues from one economic sector—the oil and gas industry.

These characteristics make Alaska “highly, if not uniquely, vulnerable to corruption in politics and government.”

“[S]pecial justification” of this order may warrant Alaska’s low individual contribution limit. See Randall, 548 U.S. at 261, 126 S.Ct. 2479.

Questions for the Panel

1. Why no objection from the textualists?

2. Does the First Amendment say anything about adjustments for inflation or campaign finance?

3. Was the case used by the majority to confer majority recognition for Randall v. Sorrell?

4. Does Justice Breyer’s decision in Randall impose a more stringent standard than the Ninth Circuit applied here?

5. Will invalidation of the low limits help poor candidates more than it helps big oil companies?

6. How will the Supreme Court decide this case?
11. **Barr v. American Association of Political Consultants Inc.**  
923 F.3d 159 (4th Cir. 2019)  
S. Ct. Case No. 19-631 (Argued May 6, 2020)

Issue: Whether the government-debt exception to the Telephone Consumer Protection Act of 1991’s automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.

**The Facts**

Congress enacted the Telephone Consumer Protection Act of 1991 in response to American consumers’ objections to unwanted phone calls.

The TCPA bans, with certain exceptions, automated calls to cell phones that use “any automatic telephone dialing system or an artificial or prerecorded voice.” See 47 U.S.C. § 227(b)(1)(A).

When it was enacted, the TCPA exempted calls “for emergency purposes,” and calls with “the prior express consent of the called party.”

In 2015, Congress also exempted automated debt-collection calls “made solely to collect a debt owed to or guaranteed by the United States” and automated calls made by the federal government itself.
In May 2016, the Plaintiffs filed this lawsuit in the Eastern District of North Carolina, alleging, inter alia, that the debt-collection exemption to the automated call ban contravenes their free speech rights because it is a **content-based restriction** on speech that fails to satisfy strict scrutiny review.

**Disposition Below**

The district court denied the Plaintiffs’ summary judgment motion and awarded summary judgment to the Government.

The court rejected the Free Speech Clause challenge, holding the Free Speech Clause prohibits a restriction on speech that is predicated on “its message, its ideas, its subject matter, or its content.” See AAPC, 323 F. Supp. 3d at 742 (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015)).

Although the Opinion ruled that the debt-collection exemption to the automated call ban is a “content-based speech restriction,” it ruled that the TCPA satisfies strict scrutiny because the exemption did not contravene subvert the privacy interests furthered by the ban.

The district court rebuffed the argument of the Plaintiffs that less restrictive alternatives would equally advance the purposes of the automated call ban, explaining that alternatives proposed by the Plaintiffs — such as time-of-day limitations, mandatory caller identity disclosure, and do-not-call lists — would not further the privacy interests underlying the TCPA and were otherwise implausible.

The Fourth Circuit Court of Appeals agreed that strict scrutiny applies but concluded, contrary to the district court, that the TCPA could not survive such scrutiny in light of the debt-collection exemption.

In agreement with the Government, however, the Fourth Circuit upheld the TCPA ban on automated calls by severing the debt-collection exemption from the TCPA.

The Fourth Circuit held the Supreme Court has recognized that severance is the preferred remedy. As the Chief Justice explained in the Court’s NFIB v. Sebelius decision, if Congress wants the balance of a statute to stand when one aspect is constitutionally flawed, a reviewing court “must leave the rest of the [statute] intact.” See 567 U.S. 519, 587 (2012).

By severing the flawed portion of a statute, the court can limit the impact of its ruling of constitutional infirmity. See Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328 (2006); United States v. Under Seal, 819 F.3d 715, 721-22 (4th Cir. 2016) (recognizing that severance of a flawed portion of a statute

Complementing the Supreme Court’s strong preference for a severance in these circumstances, Congress has explicitly mandated that, if a TCPA provision is determined to be constitutionally infirm, severance is the appropriate remedy. That is, Congress has directed that, if any part of the TCPA “is held invalid, the remainder . . . shall not be affected.” See 47 U.S.C. § 608.

That severability provision eases our inquiry on the severance issue and creates “a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.” See Alaska Airlines, 480 U.S. at 686 (citing INS v. Chadha, 462 U.S. 919, 932 (1983)). As a result, severance of the debt-collection exemption from the balance of the automated call ban will comply with the explicit directive of Congress and with controlling Supreme Court precedent.

We are also satisfied that a severance of the debt-collection exemption will not undermine the automated call ban. For twenty-four years, from 1991 until 2015, the automated call ban was “fully operative.” Free Enter. Fund, 561 U.S. at 509 (citations and internal quotation marks omitted).

As a result, the Plaintiffs simply cannot show that excising the debt-collection exemption will hamper the function of the ban. See Alaska Airlines, 480 U.S. at 686 (explaining that only “strong evidence” overcomes presumption created by severability clause). In these circumstances, we agree with the Government and direct the severance of the debt-collection exemption from the balance of the automated call ban.

Questions for the Panel

1. Is this decision doing what Justice Thomas recommendation to jettison the overbreadth doctrine?

2. Why would any plaintiff challenge the constitutionality of flawed content-based restrictions in the future if the end result will be that the restriction on speech will be broadened?

3. Will government authorities include more unconstitutional restrictions in future legislation because they know it is unlikely that no one will have an incentive to challenge them?
4. Could Congress exempt automated calls that express a religious message from the ban? Could it exempt calls from the Republican Party?

5. Should this case have been decided on standing grounds because the plaintiffs were challenging the constitutionality of an exemption which did not apply to them and, if invalidated, would afford them no relief from the ban?

6. Would agnostics have standing to challenge an exemption to the TCPA for religious calls even though a successful challenge would not remove the ban on agnostic calls? Would a Democrat have standing to challenge an exemption for Republican calls even though a successful challenge would not remove the ban on Democrat calls?

7. Would a better result have been invalidation of the TCPA so that it would force Congress to decide whether it prefers a TCPA with no exemptions or no exemptions?

8. Is deference to a severability clause always appropriate? Shouldn’t such clauses generally be ignored because they were passed without knowing what the flaws in the statute might be?
12. United States v. Evelyn Sineneng-Smith, 910 F. 3d 461 (9th Cir. 2018)
S. Ct. Case No. 19-67
Decided: May 7, 2020

The Votes (9-1)

Majority: Ginsburg, J.

Concur: Thomas, J.

Quick Summary

Ninth Circuit should not have taken over the appeal to require briefing of overbreadth issue not briefed by the parties.

The Court’s overbreadth jurisprudence is untethered from the text and history of the First Amendment.

The overbreadth doctrine is inconsistent with principles governing facial challenges.

The overbreadth doctrine is inconsistent with principles governing third-party standing.
The Facts

Evelyn Sineneng-Smith operated an immigration consulting firm in San Jose, California.

Her clients, most of them from the Philippines, worked without authorization in the home health care industry in the United States.

Between 2001 and 2008, Sineneng-Smith assisted her clients in applying for a “labor certification” that once allowed certain aliens to adjust their status to that of lawful permanent resident permitted to live and work in the United States. §1255(i)(1)(B)(ii).

To qualify for the labor certification dispensation she promoted to her clients, an alien had to be in the United States on December 21, 2000, and apply for certification before April 30, 2001. §1255(i)(1)(l).

Sineneng-Smith knew her clients did not meet the application-filing deadline; hence, their applications could not put them on a path to lawful residence.

Nevertheless, she charged each client $5,900 to file an application with the Department of Labor and another $900 to file with the U.S. Citizenship and Immigration Services.

She collected more than $3.3 million from her unwitting clients.

Sineneng-Smith was indicted for multiple violations of 8 U.S.C. §1324(a)(1)(A)(iv) and (B)(i) which makes it a federal felony to “encourage[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.” §1324(a)(1)(A)(iv).

The crime carries an enhanced penalty if “done for the purpose of commercial advantage or private financial gain.” §1324(a)(1)(B)(i).

Disposition Below

In the District Court, Sineneng-Smith urged that the statute did not cover her conduct, and if it did, it violated the Petition and Free Speech Clauses of the First Amendment as applied.
She was convicted on two counts under §1324(a)(1)(A)(iv) and (B)(i), and on other counts (filing false tax returns and mail fraud) she does not now contest. Throughout the District Court proceedings and on appeal, she was represented by competent counsel.

On appeal from the §1324 convictions to the Ninth Circuit, both on brief and at oral argument, she repeated the arguments she earlier presented to the District Court.

The Ninth Circuit panel named three amici and invited them to brief and argue issues framed by the panel, including a question Sineneng-Smith herself never raised earlier: “[W]hether the statute of conviction is overbroad . . . under the First Amendment.”

In the ensuing do over of the appeal, counsel for the parties were assigned a secondary role. The Ninth Circuit ultimately concluded, in accord with the invited amici’s arguments, that §1324(a)(1)(A)(iv) is unconstitutionally overbroad.

The Government petitioned for the Supreme Court’s review because the judgment of the Court of Appeals invalidated a federal statute.

Justice Ginsburg’s Unanimous Decision

We now hold that the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion. We therefore vacate the Ninth Circuit’s judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel.

As this Court stated in Greenlaw v. United States, 554 U. S. 237 (2008), “in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” Id., at 243.

In criminal cases, departures from the party presentation principle have usually occurred “to protect a pro se litigant’s rights.” Id., at 244; see, e.g., Castro v. United States, 540 U. S. 375, 381–383 (2003) (affirming courts’ authority to recast pro se litigants’ motions to “avoid an unnecessary dismissal” or “inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a pro se motion’s claim and its underlying legal basis” (citation omitted)).

But as a general rule, our system “is designed around the premise that [parties represented by competent counsel] know what is best for them, and are
responsible for advancing the facts and argument entitling them to relief.” *Id.*, at 386 (Scalia, J., concurring in part and concurring in judgment).

No extraordinary circumstances justified the panel’s takeover of the appeal. Sineneng-Smith herself had raised a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others.

ELECTING not to address the party-presented controversy, the panel projected that §1324(a)(1)(A)(iv) might cover a wide swath of protected speech, including political advocacy, legal advice, even a grandmother’s plea to her alien grandchild to remain in the United States. 910 F. 3d, at 483–484.

Never mind that Sineneng-Smith’s counsel had presented a contrary theory of the case in the District Court, and that this Court has repeatedly warned that “invalidation for [First Amendment] overbreadth is ‘strong medicine’ that is not to be ‘casually employed.’” *United States v. Williams*, 553 U. S. 285, 293 (2008) (*quoting Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U. S. 32, 39 (1999)). As earlier observed, a court is not hidebound by the precise arguments of counsel, but the Ninth Circuit’s radical transformation of this case goes well beyond the pale.

We vacate the Ninth Circuit’s judgment and remand the case for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties.

**Justice Thomas’s Concurrence**

The Court of Appeals’ decision violates far more than the party presentation rule. It highlight the troubling nature of this Court’s overbreadth doctrine.

That doctrine provides that “a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 559 U. S. 460, 473 (2010) (*quoting Washington State Grange v. Washington State Republican Party*, 552 U. S. 442, 449, n. 6 (2008)).

Although I have previously joined the Court in applying this doctrine, I have since developed doubts about its origins and application. It appears that the overbreadth doctrine lacks any basis in the Constitution’s text, violates the usual standard for facial challenges, and contravenes traditional standing principles. I would therefore consider revisiting this doctrine in an appropriate case.
This Court’s overbreadth jurisprudence is **untethered from the text** and **history** of the First Amendment. It first emerged in the mid-20th century. In *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Court determined that an anti-picketing statute was “invalid on its face” due to its “sweeping proscription of freedom of discussion,” id., at 101–105.

Since then, the Court has invoked this rationale to facially invalidate a wide range of laws, from statutes enacted by Congress, to measures passed by city officials. These laws covered a variety of subjects, from nudity in drive-in movies, to charitable solicitations, to depictions of animal cruelty.

And all these laws were considered unconstitutional not because they necessarily violated an individual’s First Amendment rights but “because of a judicial prediction or assumption that the statute’s very existence may cause [some citizens] to refrain from constitutionally protected [activity].” *Broadrick v. Oklahoma*, 413 U. S. 601, 612 (1973) (emphasis added).

Notably, this Court has not attempted to ground its void-for-overbreadth rule in the **text or history** of the First Amendment.

The doctrine is driven by a judicial determination of what serves the public good.

The overbreadth doctrine shares a close relationship with this Court’s **questionable vagueness doctrine**. In fact, it appears that the Court’s void-for-overbreadth rule developed as a result of the vagueness doctrine’s application in the First Amendment context.

In addition to its questionable origins, the overbreadth doctrine violates the usual standard for facial challenges. Typically, this Court will deem a statute unconstitutional on its face only if “no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U. S. 739, 745 (1987).

But the overbreadth doctrine empowers courts to hold statutes facially unconstitutional **even when they can be validly applied in numerous circumstances**, including the very case before the court.

When a court entertains—or in this case, seeks out—an overbreadth challenge, it casts aside the “judicial restraint” necessary to avoid “‘premature’” and “‘unnecessary pronouncement[s] on constitutional issues.’”

Our “modern practice of strik[ing] down” legislation as facially unconstitutional bears little resemblance to the practices of 18th and 19th century
By relaxing the standard for facial challenges, the overbreadth doctrine encourages “speculat[ion]” about “‘imaginary’ cases,” and “summon[s] forth an endless stream of fanciful hypotheticals.”

This “threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.”

The overbreadth doctrine also is at odds with traditional standing principles.

The overbreadth doctrine’s disregard for the general rule against third-party standing is especially problematic in light of the rule’s apparent roots in Article III’s case-or-controversy requirement.

Overbreadth doctrine turns a traditional common-law rule on its head: It allows a litigant without a legal injury to assert the First Amendment rights of hypothetical third parties, so long as he has personally suffered a real-world injury.

At common law, this sort of “factual harm without a legal injury was *damnum absque injuria* and provided no basis for relief.”

Here, the overbreadth challenge embraced by respondent on appeal relied entirely on the free speech rights of others—immigration lawyers, activists, clergy, and even grandmothers.

The overbreadth doctrine appears to be the *handiwork of judges*, based on the misguided “notion that some constitutional rights demand preferential treatment.” *Whole Woman’s Health*, 579 U. S., at ___ (THOMAS, J., dissenting) (slip op., at 14).

It seemingly lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges, and violates Article III principles regarding judicial power and standing. In an appropriate case, we should consider revisiting this doctrine.
Questions for the Panel

1. Is the Court afraid to address Justice Thomas’s criticism of the overbreadth doctrine?

2. Which Justices, if any, might join him to abolish the overbreadth doctrine?

3. Haven’t all of his criticism been addressed many times before?

4. Would Justice Thomas reach the same conclusion if the Democrats controlled the legislative process?

5. Isn’t the text of the Constitution broad enough to incorporate the overbreadth doctrine?

6. Why does Justice Thomas Have so little concern about the constitutionality of state laws that deter much speech and that are likely to go unchallenged other than by those to whom the laws could be constitutionally applied?
1. **Fulton v. City of Philadelphia,**
922 F. 3d 140 (3rd Cir. 2019)
S. Ct. Case No. 19-123
Oral Argument:

**Question Presented**

Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim — namely that the government would allow the same conduct by someone who held different religious views — as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held;

**The Facts**

Catholic Social Services is a religious non-profit organization affiliated with the Archdiocese of Philadelphia that provides foster care services in Philadelphia.

Foster care is comprehensively regulated both by the Commonwealth of Pennsylvania and by the City of Philadelphia.

The City of Philadelphia had contracts with 30 foster care agencies, including CSS. These are one-year contracts renewed on an annual basis.

Agencies are compensated by the City for their services; CSS's contract provided for a per diem rate for each child placed in one of its affiliated foster homes. This payment did not cover its full expenses, meaning that CSS operated at a loss.
The contract prohibited CSS from discriminating due to race, color, religion, or national origin, and it incorporated the City's Fair Practices Ordinance, which in part prohibits sexual orientation discrimination in public accommodations.

CSS takes the position that it cannot certify a same-sex married couple as foster parents consistent with its religious views.

The City Council passed a resolution stating that "the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom," and declared that any "agency which violates City contract rules in addition to the Fair Practices Ordinance should have their contract with the City terminated with all deliberate speed."

CSS filed suit, alleging 16 causes of action against the City, Human Services, and the Human Relations Commission.

Disposition Below

The District Court denied a motion for preliminary injunctive relief.

The Third Circuit held the District Court did not abuse its discretion in finding that CSS has not shown a likelihood of success on the merits of its Establishment Clause claim.

It also held CSS unlikely to succeed because the City's actions were regulatory rather than retaliatory in nature. It explained that “the First Amendment does not prohibit government regulation of religiously motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs.”
2. Carney v. Adams,
922 F.3d 166 (3d Cir. 2019)
S. Ct. Case No. 19-309
Oral Argument: March 25, 2020

The Facts

Article IV, Section 3 of the Delaware Constitution reads in relevant part:

Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations:

First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.

Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.

Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices
shall be of the same major political party; and at any time when the
total number of such offices shall be an odd number, then not more
than a bare majority of the members of all such offices shall be of
the same major political party; the remaining members of the
Courts above enumerated shall be of the other major political
party.

Fourth, at any time when the total number of Judges of the
Family Court shall be an even number, not more than one-half of
the Judges shall be of the same political party; and at any time
when the total number of Judges shall be an odd number, then not
more than a majority of one Judge shall be of the same political
party.

Fifth, at any time when the total number of Judges of the
Court of Common Pleas shall be an even number, not more than
one-half of the Judges shall be of the same political party; and at
any time when the total number of Judges shall be an odd number,
then not more than a majority of one Judge shall be of the same
political party.

James R. Adams wanted to be considered for a judicial position in that
state. He is an independent.

Following the announcement of several judicial vacancies, Adams
considered applying for judicial appointment but chose not to because the
candidate must be a Republican.

Adams claimed that under Elrod v. Burns and Branti v. Finkel, a provision
that limits a judicial candidate’s freedom to associate (or not) with a political party
of his or her choice is unconstitutional. Adams sued to invalidate Article IV, Section
3 of the Delaware Constitution as violating the First Amendment.

Disposition Below

The District Court considered the first three sections because they contain
both a bare majority component and a major political party component. She
concluded that although Adams did not apply for an open judicial position on one
of those courts, his application would have been futile because the openings
available around the time he filed his complaint were not available to
Independents like himself.

Sections four and five, however, contain only the bare majority
component, and District Court concluded that Adams did not have standing to
challenge those sections because his status as an Independent would not have
prevented his application from being considered. She nevertheless concluded
that he had prudential standing to challenge those sections and found that sufficient to confer jurisdiction.

Turning to the merits, District Court determined that Article IV, Section 3 restricted access to a government position (here, a judgeship) based on political affiliation.

The District Court found that the narrow policymaking exception laid out in Elrod and Branti, which allows a government employer to make employment decisions based on political allegiance for policymakers, did not apply.

The District Court also cited the Delaware Judges' Code of Judicial Conduct, which mandates that judges refrain from political activity and instructs judges not to be swayed by personal opinion.

Because political affiliation could not be seen as a necessary trait for effective judicial decision-making, and because the District Court concluded that judges do not meet the policymaking exception established in Elrod and Branti, she found the provision unconstitutional in its entirety.

The Third Circuit held Adams had shown that his freedom of association rights were violated by the political balance requirement that prevented his application to the Supreme Court, Superior Court, and Chancery Court and held that the first three sections of Article IV, Section 3 violate the First Amendment.

The Third Circuit also held Adams had no standing to challenge the sections of Article IV, Section 3 dealing with the Family Court and the Court of Common Pleas.

Questions for the Panel

1. Will the Supreme Court defer to the States to decide whether they can use political affiliation to select judges?

2. Do applicants for judicial appointment have any political affiliation rights protected by the First Amendment?

3. Will this decision have any impact on the power of the Governor of Florida to appoint Supreme Court justices?

4. Would a decision in favor of Adamas favor Republicans, Democrats, or neither?
Smith should be revisited; and

(3) Whether the government violates the First Amendment by conditioning a religious agency’s ability to participate in the foster-care system on taking actions and making statements that directly contradict the agency’s religious beliefs.
   Supreme Court Case No. 19-333

**Question Presented**

(1) Whether a state violates a floral designer’s First Amendment rights to free exercise and free speech by forcing her to take part in and create custom floral art celebrating same-sex weddings or by acting based on hostility toward her religious beliefs; and

(2) Whether the free exercise clause’s prohibition on religious hostility applies to the executive branch.

**The Facts**


Freed proposed marriage to Ingersoll that same year. The two intended to marry on their ninth anniversary, in September 2013, and were "excited about organizing [their] wedding." Their plans included inviting "[a] hundred plus" guests to celebrate with them at Bella Fiori Gardens, complete with a dinner or reception, a photographer, a caterer, a wedding cake, and flowers.

By the time he and Freed became engaged, Ingersoll had been a customer at Arlene's Flowers for at least nine years, purchasing numerous floral
arrangements from Stutzman and spending an estimated several thousand dollars at her shop. Stutzman is the owner and president of Arlene's Flowers. She employs approximately 10 people, depending on the season, including three floral designers, one of whom is herself. Stutzman knew that Ingersoll is gay and that he had been in a relationship with Freed for several years. The two men considered Arlene's Flowers to be "[their] florist."

Stutzman is an active member of the Southern Baptist church. It is uncontested that her sincerely held religious beliefs include a belief that marriage can exist only between one man and one woman.

On February 28, 2013, Ingersoll went to Arlene's Flowers on his way home from work, hoping to talk to Stutzman about purchasing flowers for his upcoming wedding. Ingersoll told an Arlene's Flowers employee that he was engaged to marry Freed and that they wanted Arlene's Flowers to provide the flowers for their wedding. The employee informed Ingersoll that Stutzman was not at the shop and that he would need to speak directly with her. The next day, Ingersoll returned to speak with Ms. Stutzman. At that time, Stutzman told Ingersoll that she would be unable to do the flowers for his wedding because of her religious beliefs, specifically because of "her relationship with Jesus Christ." Ingersoll did not have a chance to specify what kind of flowers or floral arrangements he was seeking before Stutzman told him that she would not serve him. They also did not discuss whether Stutzman would be asked to bring the arrangements to the wedding location or whether the flowers would be picked up from her shop.

Stutzman asserts that she gave Ingersoll the names of other florists who might be willing to serve him, and that the two hugged before Ingersoll left her store. Ingersoll maintains that he walked away from that conversation "feeling very hurt and upset emotionally."

Early the next morning, after a sleepless night, Freed posted a status update on his personal Facebook feed regarding Stutzman's refusal to sell him wedding flowers. The update observed, without specifically naming Arlene's Flowers, that the couple's "favorite Richland Lee Boulevard flower shop" had declined to provide flowers for their wedding on religious grounds, and noted that Freed felt "so deeply offended that apparently our business is no longer good business" because "[his] loved one [did not fit] within their personal beliefs." This message was apparently widely circulated, though Ingersoll testified that their Facebook settings were such that the message was "only intended for our friends and family." Eventually, the story drew the attention of numerous media outlets.

As a result of the "emotional toll" Stutzman's refusal took on Freed and Ingersoll, they "lost enthusiasm for a large ceremony" as initially imagined. Id. at 1490. In fact, the two "stopped planning for a wedding in September 2013 because
[they] feared being denied service by other wedding vendors." Id. at 351. The couple also feared that in light of increasing public attention—some of which caused them to be concerned for their own safety—as well as then-ongoing litigation, a larger wedding might require a security presence or attract protesters, such as the Westboro Baptist group. So, they were married on July 21, 2013, in a modest ceremony at their home. There were 11 people in attendance. For the occasion, Freed and Ingersoll purchased one bouquet of flowers from a different florist and boutonnieres from their friend. When word of this story got out in the media, a handful of florists offered to provide them wedding flowers free of charge.

Stutzman also received a great deal of attention from the publicity surrounding this case, including threats to her business and other unkind messages.

Prior to Ingersoll's request, Arlene's Flowers had never had a request to provide flowers for a same-sex wedding, and the only time Stutzman has ever refused to serve a customer is when Ingersoll and Freed asked her to provide flowers for their wedding. The decision not to serve Ingersoll was made strictly by Stutzman and her husband. After Ingersoll and Freed's request, Stutzman developed an "unwritten policy" for Arlene's Flowers that they "don't take same sex marriages." Stutzman states that the only reason for this policy is her conviction that "biblically[,] marriage is between a man and a woman." Aside from Ingersoll and Freed, she has served gay and lesbian customers in the past for other, non-wedding-related flower orders.
2. **Veronica Price v. City of Chicago**  
915 F.3d 1107 (7th Cir. 2019)  
S. Ct. Case No. 18-1516

**Question Presented**

Whether the Supreme Court should reconsider Hill v. Colorado in light of the Supreme Court’s intervening decisions in Reed v. Town of Gilbert and McCullen v. Coakley.

**The Facts**

Pro-life "sidewalk counselors" sued to enjoin Chicago's "bubble zone" ordinance, which bars them from approaching within eight feet of a person in the vicinity of an abortion clinic if their purpose is to engage in counseling, education, leafletting, handbilling, or protest. The plaintiffs contend that the floating bubble zone is a facially unconstitutional content-based restriction on the freedom of speech.

**Disposition Below**

The district judge dismissed the claim, relying on Hill v. Colorado, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), which upheld a nearly identical Colorado law against a similar First Amendment challenge.

The Seventh Circuit held Hill's content-neutrality holding is hard to reconcile with both McCullen and Reed v. Town of Gilbert, ___ U.S. ___, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), and its narrow-tailoring holding is in tension with McCullen. But also found neither McCullen nor Reed overruled Hill. Because Chicago's bubble-zone law was narrower than that upheld in Hill, it affirmed the judgment.
3. **Box v. Planned Parenthood of Indiana and Kentucky Inc.**  
896 F.3d 809 (7th Cir. 2018)  
S. Ct. Case No. 18-1019

**Question Presented**

Whether a state, consistent with the 14th Amendment, may require an ultrasound as part of informed consent at least 18 hours before an abortion.

**The Facts**

Indiana’s Ultrasound Law combines two pre-existing abortion regulations: an informed-consent waiting period and an ultrasound requirement. The Ultrasound Law informs a woman’s abortion choice and affords her the opportunity to reflect on the information conveyed.

Planned Parenthood of Indiana and Kentucky claimed that HEA 1337 unconstitutionally burdens a woman’s right to choose to have an abortion, and it sought preliminary relief enjoining the provision during the pendency of the litigation.

**Disposition Below**

The district court granted the preliminary injunction.

The Seventh Circuit affirmed, holding:

Women, like all humans, are intellectual creatures with the ability to reason, consider, ponder, and challenge their own ideas and those of others. The usual manner in which we seek to persuade is by rhetoric not barriers. The State certainly is entitled to use these rhetorical tools to persuade women not to have an abortion. It has chosen to do so by requiring an informed-consent process — the
required contents of which it has designed and mandated — and an ultrasound and fetal heart beat requirement. It also requires every woman to receive a brochure about abortion, the contents of which the State controls in toto — from how it will present the images of fetuses to the decisions about which medical risks it includes and which it omits (for example, the brochure which a woman takes home and is supposed to ponder for eighteen hours, does not speak of the risk to the fetus from drugs and alcohol that a woman may have consumed prior to knowing about an unplanned pregnancy). Moreover, it states as fact that "human physical life begins when a human ovum is fertilized by a human sperm" — a proposition debated among scientists, religious leaders, and medical ethicists.

Judge Kanne’s Concurrence

Our decision today is compelled by long-standing Supreme Court precedent. See Roe v. Wade, 410 U.S. 113 (1973).
4. **Americans for Prosperity Foundation v. Becerra**

903 F.3d 1000 (9th Cir. 2018), reh. denied, 919 F.3d 1177 (9th Cir. 2019))

S. Ct. Case No. 19-251

**Question Presented**

Whether the exacting scrutiny the Supreme Court has long required of laws that abridge the freedoms of speech and association outside the election context – as called for by NAACP v. Alabama ex rel. Patterson and its progeny – can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest.

**The Facts**

The California Attorney General demanded that thousands of registered charities annually disclose to the State the individual names and addresses of their major donors.

**Disposition Below**

The Ninth Circuit upheld the Attorney General’s demand. The panel applied “exacting scrutiny,” and justified it decision in reliance on cases upholding disclosure requirements governing elections, where public disclosure of donors is recognized as the “least restrictive means of curbing the evils of campaign ignorance and corruption.” Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam).

Five members of the Ninth Circuit dissented from denial of rehearing en banc. (Ikuta, J., joined by Callahan, Bea, Bennett, and R. Nelson, JJ.). They argued that the Ninth Circuit’s rejection of any narrow tailoring requirement in this context “eviscerates the First Amendment protections long established” by the Ninth Circuit. The dissenters argued there is a categorical distinction between the election context, where compelled public disclosure can be an affirmative good, and the non-election context, where compelled disclosure (even to government itself) is at best a necessary evil.
Questions Presented

(1) Whether exacting scrutiny or strict scrutiny applies to disclosure requirements that burden nonelectoral, expressive association rights; and

(2) Whether California’s disclosure requirement violates charities’ and their donors’ freedom of association and speech facially or as applied to the Thomas More Law Center.

The Facts

California's Supervision of Trustees and Charitable Trusts Act requires the Attorney General to maintain a registry of charitable corporations (the Registry) and authorizes him to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the [Registry]." Cal. Gov't Code § 12584.

To solicit tax-deductible contributions from California residents, an organization must maintain membership in the Registry. See id. § 12585. Registry information is open to public inspection, subject to reasonable rules and regulations adopted by the Attorney General. See id. § 12590.

As one condition of Registry membership, the Attorney General requires charities to submit a complete copy of the IRS Form 990 they file with the IRS, including attached schedules. See Cal. Code Regs. tit. 11, § 301.

One of these attachments, Schedule B, requires 501(c)(3) organizations to report the names and addresses of their largest contributors. Generally, they must report "the names and addresses of all persons who contributed ... $5,000
or more (in money or other property) during the taxable year." 26 C.F.R. § 1.6033-2(a)(2)(ii)(f).

**Special rules**, however, apply to organizations, such as the **Foundation and Law Center**, meeting certain support requirements. These organizations need only "provide the name and address of a person who contributed ... in excess of 2 percent of the total contributions ... received by the organization during the year." Id. § 1.6033-2(a)(2)(iii)(a).

An organization with $10 million in receipts, for example, is required to disclose **only contributors providing at least $200,000** in financial support. Here, for any year between 2010 and 2015, the Law Center was obligated to report no more than seven contributors on its Schedule B, and the Foundation was required to report no more than 10 contributors — those contributing over $250,000 to the Foundation.

The IRS and the California Attorney General both make certain filings of tax-exempt organizations publicly available but exclude Schedule B information from public inspection. See 26 U.S.C. § 6104; Cal Gov't Code § 12590; Cal. Code Regs. tit. 11, § 310. At the outset of this litigation, the Attorney General maintained an informal policy treating Schedule B as a confidential document not available for public inspection on the Registry. See Americans for Prosperity Found. v. Harris, 809 F.3d 536, 542 (9th Cir. 2015) (AFPF I). In 2016, the Attorney General codified that policy, adopting a regulation that makes Schedule B information confidential and exempts it from public inspection except in a judicial or administrative proceeding or in response to a search warrant. See Cal. Code Regs. tit. 11, § 310 (July 8, 2016). Under the new regulation:

Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:

1. In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or

2. In response to a search warrant.

Id. § 310(b). In accordance with this regulation, the Attorney General keeps Schedule Bs in a separate file from other submissions to the Registry and excludes them from public inspection on the Registry website.

Thomas More Law Center is a legal organization founded to "restore and defend America's Judeo-Christian heritage" by "represent[ing] people who promote Roman Catholic values," "marriage and family matters, freedom from
government interference in [religion]" and "opposition to the imposition of Sharia law within the United States." Americans for Prosperity Foundation was founded in 1987 as "Citizens for a Sound Economy Educational Foundation," with the mission of "further[ing] free enterprise, free society-type issues."

The Foundation hosts conferences, issues policy papers and develops educational programs worldwide to promote the benefits of a free market. It operates alongside Americans for Prosperity, a 501(c)(4) organization focused on direct issue advocacy.

Charities like the Foundation and the Law Center are overseen by the Charitable Trusts Section of the California Department of Justice, which houses the Registry and a separate investigative and legal enforcement unit (the Investigative Unit).

The Registry Unit processes annual registration renewals and maintains both the public-facing website of registered charities and the confidential database used for enforcement. The Investigative Unit analyzes complaints of unlawful charity activity and conducts audits and investigations based on those complaints.

Beginning in 2010, the Registry Unit ramped up its efforts to enforce charities' Schedule B obligations, sending thousands of deficiency letters to charities that had not complied with the Schedule B requirement.

Since 2001, both the Law Center and the Foundation had either filed redacted versions of the Schedule B or not filed it with the Attorney General at all. Each plaintiff had, however, annually filed a complete Schedule B with the IRS. In 2012, the Registry Unit informed the Law Center it was deficient in submitting Schedule B information. In 2013, it informed the Foundation of the same deficiency.

**Disposition Below**

In response to the Attorney General's demands, the Law Center and the Foundation separately filed suit, alleging that the Schedule B requirement unconstitutionally burdens their First Amendment right to free association by deterring individuals from financially supporting them.

The district court granted both plaintiffs' motions for a preliminary injunction, concluding they had raised serious questions going to the merits of their cases and demonstrated that the balance of hardships tipped in their favor. See Americans for Prosperity Found. v. Harris, No. 2:14-CV-09448-R-FFM, 2015 WL 769778 (C.D. Cal. Feb. 23, 2015). The Attorney General appealed.
While those appeals were pending, the Ninth Circuit upheld the Schedule B requirement against a facial constitutional challenge brought by the Center for Competitive Politics. See Ctr. for Competitive Politics v. Harris, 784 F.3d 1307, 1317 (9th Cir. 2015).

Applying exacting scrutiny, the Ninth Circuit held both that the Schedule B requirement furthers California’s **compelling interest in enforcing its laws** and that the plaintiff had failed to show the requirement places an actual burden on First Amendment rights. See id. at 1316-17.

The Ninth Circuit left open the possibility, however, that a future litigant might "show `a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties' that would warrant relief on an as-applied challenge." Id. at 1317 (alteration omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 74, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)).

The Law Center and the Foundation argue they have made such a showing. In considering the appeal from the preliminary injunction in their favor, the Ninth Circuit disagreed. See AFPF I, 809 F.3d at 540. It held that the plaintiffs had shown neither an actual chilling effect on association nor a reasonable probability of harassment at the hands of the state from the Attorney General's demand for nonpublic disclosure of Schedule B forms. See id. The Law Center and the Foundation had proffered some evidence that **private citizens might retaliate against their contributors** if Schedule B information became public, but "[t]he plaintiffs' allegations that technical failures or cybersecurity breaches are likely to lead to inadvertent public disclosure of their Schedule B forms [were] too speculative to support issuance of an injunction." Id. at 541.

The Ninth Circuit nevertheless identified some risk that the Attorney General could be compelled by § 12590 to make Schedule B information available for public inspection in the absence of a "rule[]" or "regulation[]." Cal. Gov't Code § 12590, formalizing the Attorney General's discretionary policy of maintaining Schedule B confidentiality. See AFPF I, 809 F.3d at 542.

The Attorney General had proposed a regulation to exempt Schedule B forms from the general requirement to make Registry filings "open to public inspection," Cal. Gov't Code § 12590, but the state had not yet adopted the proposed regulation. The Ninth Circuit held that a narrow injunction precluding public disclosure of Schedule B information would address the risk of public disclosure pending the Attorney General's adoption of the proposed regulation. The Ninth Circuit therefore vacated the district court's orders precluding the Attorney General from collecting Schedule B information from the plaintiffs and
instructed the court to enter new orders preliminarily enjoining the Attorney General only from making Schedule B information public. See AFPF I, 809 F.3d at 543.[2]


The district court held that the Attorney General had failed to prove the Schedule B requirement was substantially related to a sufficiently important governmental interest, as necessary to withstand exacting scrutiny.

The court reasoned that the Attorney General had no need to collect Schedule Bs, because he "has access to the same information from other sources," Thomas More Law Ctr., 2016 WL 6781090, at *2, and had failed to demonstrate the "necessity of Schedule B forms" in investigating charity wrongdoing, Americans for Prosperity Found., 182 F.Supp.3d at 1053.

The court also concluded there was "ample evidence" establishing the plaintiffs' employees and supporters face public hostility, intimidation, harassment and threats "once their support for and affiliation with the organization becomes publicly known." Id. at 1055.

The court rejected the proposition that the Attorney General's informal confidentiality policy could "effectively avoid inadvertent disclosure" of Schedule B information, citing a "pervasive, recurring pattern of uncontained Schedule B disclosures" by the Registry Unit. Id. at 1057. Even after the Attorney General codified the non-disclosure policy, the court concluded that this risk of inadvertent public disclosure remained. See Thomas More Law Ctr., 2016 WL 6781090, at *5.

Having found for the plaintiffs on their First Amendment freedom of association claims, the court entered judgment for the plaintiffs and permanently enjoined the Attorney General from enforcing the Schedule B requirement against them.

The Attorney General appealed the judgments. The plaintiffs cross-appealed, challenging the district court's holding that precedent foreclosed a facial attack on the Schedule B requirement.

The Law Center also cross-appealed the district court's adverse rulings on its Fourth Amendment and preemption claims, and the district court's failure to award it attorney's fees.

66

GUNSTER, YOAKLEY & STEWART, P.A.
The Ninth Circuit panel (Fisher, (Clinton). Paez (Clinton), and Nguyen (Obama), JJ.), held the California Attorney General's Schedule B requirement, which obligates charities to submit the very information they already file each year with the IRS, survives exacting scrutiny as applied to the plaintiffs because it is substantially related to an important state interest in policing charitable fraud.

Even assuming arguendo that the plaintiffs' contributors would face substantial harassment if Schedule B information became public, the strength of the state's interest in collecting Schedule B information reflects the actual burden on First Amendment rights because the information is collected solely for nonpublic use, and the risk of inadvertent public disclosure is slight.

The dissent of Judge IKUTA (Bush 43) from the petition for rehearing en banc, joined by Judges CALLAHAN (Bush 43), BEA (Bush 43), BENNETT (Trump), and R. NELSON (Trump)

Controversial groups often face threats, public hostility, and economic reprisals if the government compels the organization to disclose its membership and contributor lists. The Supreme Court has long recognized this danger and held that such compelled disclosures can violate the First Amendment right to association. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

For this reason, the Supreme Court has given significant protection to individuals who may be victimized by compelled disclosure of their affiliations. Where government action subjects persons to harassment and threats of bodily harm, economic reprisal, or "other manifestations of public hostility," NAACP v. Alabama, 357 U.S. at 462, 78 S.Ct. 1163, the government must demonstrate a compelling interest, id. at 463, 78 S.Ct. 1163; Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), there must be a substantial relationship between the information sought and the compelling state interest, Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963), and the state regulation must "be narrowly drawn to prevent the supposed evil," Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 297, 81 S.Ct. 1333, 6 L.Ed.2d 301 (1961) (internal quotation marks omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)).

This robust protection of First Amendment free association rights was desperately needed here. In this case, California demanded that organizations that were highly controversial due to their conservative positions disclose most of their donors, even though, as the district court found, the state did not really need this information to accomplish its goals. Although the state is required to keep donor names private, the district court found that the state's promise of confidentiality was illusory; the state's database was vulnerable to hacking and
scores of donor names were repeatedly released to the public, even up to the week before trial. See Ams. for Prosperity Found. v. Harris, 182 F.Supp.3d 1049, 1057 (C.D. Cal. 2016).

Moreover, as the district court found, supporters whose affiliation had previously been disclosed experienced harassment and abuse. See id. at 1055-56. Their names and addresses, and even the addresses of their children's schools, were posted online along with threats of violence.

Some donors' businesses were boycotted. In one incident, a rally of the plaintiff's supporters was stormed by assailants wielding knives and box cutters, who tore down the rally's tent while the plaintiff's supporters struggled to avoid being trapped beneath it. In light of the powerful evidence at trial, the district court held the organizations and their donors were entitled to First Amendment protection under the principles of NAACP v. Alabama. See id. at 1055.

The panel's reversal of the district court's decision was based on appellate factfinding and crucial legal errors.

First, the panel ignored the district court's fact-finding, holding against all evidence that the donors' names would not be made public and that the donors would not be harassed. See Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1017, 1019 (9th Cir. 2018) ("AFPF II"). Second, the panel declined to apply NAACP v. Alabama, even though the facts squarely called for it. See id. at 1008-09. Instead, the panel applied a lower form of scrutiny adopted by the Supreme Court for the unique electoral context. See Buckley v. Valeo, 424 U.S. 1, 64, 68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

The panel's approach will ensure that individuals affiliated with controversial organizations effectively have little or no protection from compelled disclosure. We should have taken this case en banc to correct this error and bring our case law in line with Supreme Court jurisprudence.
6. Institute for Free Speech v. Becerra  
No. 17-17403 (9th Cir. Oct. 11, 2019)  
S. Ct. Case 19-793

Questions Presented

(1) Whether a state official’s demand for all significant donors to a nonprofit organization, as a precondition to engaging in constitutionally protected speech, constitutes a First Amendment injury; and

(2) Whether official demands for membership or donor information outside the electoral context should be reviewed under strict or exacting scrutiny.

The Facts

Plaintiff is a Virginia nonprofit corporation recognized by the Internal Revenue Service as a § 501(c)(3) public charity. FAC, ¶ 3. Its stated mission is “to promote and defend the First Amendment rights of free political speech, assembly, association, and petition through research, education, and strategic litigation.” Center for Competitive Politics v. Harris (“CCP”), 784 F.3d 1307, 1311 (9th Cir. 2015).

To support its activities, Plaintiff solicits charitable contributions nationwide, including California. Id.

To ensure that charitable status is not abused, the Attorney General has “broad powers under common law and California statutory law to carry out [its] charitable trust enforcement responsibilities.” Id. at 1310; Cal. Gov’t Code § 12598(a).

In order to legally solicit tax-deductible contributions in California, for example, an entity must be registered with the state’s Registry of Charitable Trusts (“Registry”), which is administered by California’s Department of Justice under the
Supervision of Trustees and Fundraisers for Charitable Purposes Act, Cal. Gov't Code §§ 12580 et seq. ("the Act").

In addition to requiring the California Attorney General to maintain a registry of charitable corporation and their trustees and trusts, the Act authorizes the Attorney General to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the Registry." Id. at § 2485.

To maintain membership in the Registry, nonprofit corporations must file annual periodic written reports with the state Attorney General, and the Act requires that the Attorney General promulgate rules and regulations specifying both the filing and procedures and the contents of the reports. Id. at § 12586(b); Cal. Code Regs. Tit. 11, §§ 300 et seq. (2014).

One of the regulations adopted by the Attorney General requires the periodic written reports to include Internal Revenue Service Form 990. Form 990 has a supplement, Schedule B, which lists the names and addresses of an organization’s contributors.

Although many of the documents required by the Registry are open to public inspection, the contents of Form 990 Schedule B have always been considered confidential, accessible only to in-house-staff and handled separately from nonconfidential documents. See CCP, 784 F.3d at 1311. Moreover, in order to codify that longstanding practice on only nonpublic disclosure, California Code of Regulations § 310 was amended effective July 8, 2016 to provide as follows:

Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows: (1) In a court or administrative proceeding brought pursuant to the Attorney General’s charitable trust enforcement responsibilities; or (2) In response to a search warrant.


Plaintiff has been a member of the Registry since 2008.

On January 9, 2014, Plaintiff filed its Annual Registration Renewal Fee Report with Defendant, including a copy of its Form 990 and a redacted version of its Schedule B omitting the names and addresses of its contributors. Plaintiff subsequently received a letter from Defendant dated February 6, 2014 ("Letter"). See ECF No. 37-2.
In the Letter, Defendant acknowledged receipt of Plaintiff’s periodic written report, but stated that “[t]he filing is incomplete because the copy of [its] Schedule B, Schedule of Contributors, does not include the names and addresses of contributors.” Id. (emphasis omitted).

The Letter advised that “[t]he Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers” and requires that Plaintiff must “[w]ithin 30 days of the date of this letter . . . submit a complete copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service.” Id. (emphasis omitted).

**Disposition Below**

On March 7, 2014, Plaintiff filed the present suit against then Attorney General Kamala Harris, in her official capacity, challenging the Attorney General’s disclosure requirements and seeking declaratory and injunctive relief.

Plaintiff subsequently filed a motion for preliminary injunction claims on grounds that said requirements unconstitutionally infringed upon its freedom of association, and that requiring the submission of an unredacted Schedule B was preempted by federal law in any event.

That motion was denied.

With respect to the freedom of association claim, the Court reasoned that Plaintiff had not articulated any objective, specific harm that would befall its members as a result of compliance with the Schedule B Requirement, and thus had failed to make a prima facie showing of infringement concerning its associational rights. Center for Competitive Politics v. Harris, No. 2:14-cv00636-MCE-DAD, 2014 WL 2002244 at *6 (E.D. Cal. May 14, 2014).

The Court further opined that the requirement was valid in any event because it substantially related to the Attorney General’s compelling interest in performing her regulatory and oversight functions. Id. at *7.

Plaintiff appealed this Court’s denial of its preliminary injunction request and the Ninth Circuit affirmed, determining, in relevant part, that the requirement to disclose unredacted Schedule B information to the Attorney General posed no actual burden on Plaintiff’s First Amendment rights and was facially constitutional. CCP, 784 F.3d at 1317.

In assessing the burden on Plaintiff’s First Amendment rights as a result of the disclosure requirements, the appellate panel made it clear that compelled disclosure alone does not constitute a First Amendment injury. See id. at 1314.
Rather to prevail on a First Amendment challenge to compelled disclosure of its donor information, the court found Plaintiff had to produce “evidence to suggest that their significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General’s disclosure requirements.” Id. at 1316.

Plaintiff did not attempt, and thus failed to make, any such showing. Id.

Given the absence of any actual burden on Plaintiff’s First Amendment rights, the Ninth Circuit then weighed the Attorney General’s “compelling interest in enforcing the laws of California,” which included having “immediate access to form 990 Schedule B” filings. Id. at 1316.

The panel recognized that immediate access to Schedule B filings “increases her investigative efficiency” by allowing her to “flag suspicious activity” by reviewing significant donor information.

The court thus concluded that requiring the disclosure of Schedule Bs “bears a ‘substantial relation’” to a “‘sufficiently important’ government interest”, therefore satisfying examination under exacting scrutiny. Id.

Following the Ninth Circuit’s denial of its interlocutory appeal, Plaintiff filed a petition for writ of certiorari, which was denied by the United States Supreme Court on November 9, 2015.

Plaintiff then filed its FAC on August 12, 2016. ECF No. 37. The FAC continues to allege that the Attorney General’s unredacted Schedule B requirement violates Plaintiff ’s First Amendment rights to free association and speech and is preempted by federal law.

Plaintiff further argues that its Fourth Amendment right to be free from unreasonable search and seizure is also being violated. Plaintiff allegedly has chosen to cease fundraising in California rather than comply with the requirement that it file a complete copy of its Schedule B with the Registry. FAC, ¶ 51

For all the foregoing reasons, Defendant’s Motion to Dismiss (ECF No. 44) is GRANTED, in its entirety.5

Because the Court does not believe that further amendment will rectify the deficiencies of the First Amended Complaint, no further leave to amend will be permitted. The Clerk of Court is directed to close the file.

The Ninth Circuit affirmed after the Institute for Free Speech withdrew its opposition to the motion for summary affirmance.
7. **Reisman v. Associated Faculties of the University of Maine**  
939 F.3d 409 (1st Cir. 2019)  
S. Ct. Case No. 19-847

**Question Presented**

Whether it violates the First Amendment to designate a labor union to represent and speak for public-sector employees who object to its advocacy on their behalf.

**The Facts**

The Maine statute that Reisman challenges is the University of Maine System Labor Relations Act, Me. Stat. tit. 26, §§ 1021-1037. Enacted in 1975, the statute is modeled on the National Labor Relations Act, 29 U.S.C. §§ 151-169, and extends collective bargaining rights to employees of the state's universities.

The statute divides university employees into various "bargaining units" based on their occupational groups. See tit. 26, § 1024-A. The faculty in the university system make up one particular bargaining unit, while "[s]ervice and maintenance" employees, for example, constitute another. Id.

To facilitate labor negotiations, the statute provides, among other things, that a union that receives majority support within "a bargaining unit shall be recognized by the university, academy or community colleges as the sole and exclusive bargaining agent for all of the employees in the bargaining unit." Id. § 1025(2)(B). Once so recognized, that union is the bargaining unit's exclusive agent to bargain with the university system "with respect to wages, hours, working conditions and contract grievance arbitration." Id. § 1026(1)(C).

No employee bears an obligation to join a union, see id. § 1023, and, after Janus v. American Federation of State, County, & Municipal Employees, Council 31, ___ U.S. ___, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018), nonmember employees are not obliged to pay agency fees to the union that serves as their bargaining unit's bargaining agent. However, the statute does provide that the bargaining agent "is required to represent all ... employees within the unit without regard to membership in the organization." tit. 26, § 1025(2)(E).
The Associated Faculties of the Universities of Maine ("AFUM" or "the Union") has represented the faculty bargaining unit for Reisman's university since 1978. Reisman "resigned his membership in [AFUM] because he opposes many of the positions [AFUM] has taken, including on political and policy matters." (Internal quotation and citation omitted).

**Disposition Below**

On August 10, 2018, Reisman filed a complaint in the United States District Court for the District of Maine. His complaint alleges that the statute violates his First Amendment rights because, "[b]y designating the Union as [his] exclusive representative," the statute necessarily "compels [him] to associate with the Union[,]... compels [him] to speak and to petition government, ... [and] attributes the Union's speech and petitioning to [him]." Reisman also requests a preliminary "injunction barring Defendants from recognizing the Union as [his] exclusive representative ... [and] barring Defendants from affording preferences to members of the Union."

On December 3, 2018, the District Court dismissed Reisman's suit under Federal Rule of Civil Procedure 12(b)(6). The next day, Reisman filed a notice of appeal. On December 14, 2018, Reisman filed a motion asking this Court for a summary disposition. He argued that this Circuit's binding precedent required us to affirm the District Court's decision and explained that a summary disposition would allow him to petition the Supreme Court for review more quickly.

On February 6, 2019, the First Circuit denied Reisman's motion. This appeal from the District Court's dismissal of his claims then followed.

The First Circuit affirmed.