The Florida Bar’s Annual Review of
U.S. Supreme Court First Amendment Decisions
October Term 2020
June 25, 2021 / 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

The Hon. Marcia C. Cooke
U.S. District Court
Southern District of Florida

David A. Karp
Of Counsel
Carlton Fields

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

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

L. Martin Reeder, Jr.
Partner
Atherton McAuliffe & Reeder P.A.
Cases This Year

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* Joined on October 27, 2020, succeeding Ruth Bader Ginsburg who died on September 18, 2020

| The “Liberals”        |           |     |            |          |              |      |           |
| Stephen Breyer        | Clinton   | 83  | Harvard    | Jewish   | Army         | 3    | Married   |
| Sonia Sotomayor       | Obama     | 67  | Yale       | Catholic | No           | 0    | Divorced  |
| Elena Kagan           | Obama     | 61  | Harvard    | Jewish   | No           | 0    | Single    |

Questions for the Panel

What is the significance of these statistics?

1. All justices attended Harvard or Yale law schools, except Justice Coney Barrett.
2. All justices are Catholic (78%) or Jewish (22%).
   - 100% of GOP appointees are Catholic
   - 67% of Democratic appointees are Jewish
3. Six justices are men. Three are women.
4. The average age of the justices is 64.44 years.
5. Seven justices (78%) are married with children.
6. Eight justices (89%) have been married.
7. Justice Stephen Breyer is the oldest justice at age 83. He is 10 years older than the next oldest justice, Clarence Thomas, who is 73. Many democrats have called on Justice Breyer to resign so that President Biden could appoint his successor.
8. Former Justice Sandra Day O’Connor is 91. She resigned in 2006 at age 70. She was succeeded by Justice Samuel Alito appointed by President George W. Bush.
9. Former Justice David Souter is 81. He resigned in 2009 and was succeeded by Justice Sonia Sotomayor appointed by President Barrack Obama.
10. President Biden has appointed a commission to study the Supreme Court. What should it recommend and how might changes impact First Amendment jurisprudence?
   - Change the number of seats?
   - Impose term limit?
   - Impose age limit?
   - Change case selection?

Commission is to report within 180 days of first meeting.
The commissioners are:

1. Kate Andrias (Rapporteur) is a Professor of Law at the University of Michigan. A graduate of Yale Law School, she clerked for Justice Ruth Bader Ginsburg.

2. Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School.

3. Bob Bauer (Co-Chair) is Professor of Practice and Distinguished Scholar in Residence at the New York University School of Law and Co-Director of NYU Law’s Legislative and Regulatory Process Clinic.

4. William Baude is a Professor of Law and Faculty Director of the Constitutional Law Institute at the University of Chicago Law School. He is a graduate of the University of Chicago and the Yale Law School, and a former clerk for then-Judge Michael McConnell and Chief Justice John Roberts.

5. Elise Boddie is a Professor of Law and Judge Robert L. Carter Scholar at Rutgers University.


7. Andrew Manuel Crespo is a Professor of Law at Harvard University. He served as a law clerk to Justice Stephen Breyer and then to Associate Justice Elena Kagan during her inaugural term on the Court.

8. Walter Dellinger is the Douglas Maggs Emeritus Professor of Law at Duke University and a Partner in the firm of O’Melveny & Myers. He graduated from University of North Carolina and Yale Law School and served as law clerk to Supreme Court Justice Hugo Black.


10. Richard H. Fallon, Jr. joined the Harvard Law School faculty in 1982 and is currently Story Professor of Law.

11. Caroline Fredrickson is a Distinguished Visiting Professor from Practice at Georgetown Law and a Senior Fellow at the Brennan Center for Justice. She received her J.D. from Columbia Law School with honors. She clerked for the Hon. James L. Oakes of the United States Court of Appeals for the Second Circuit.

12. Heather Gerken is the Dean and Sol & Lillian Goldman Professor of Law at Yale Law School. She became dean of Yale Law School on July 1, 2017.

14. Jack Goldsmith is the Learned Hand Professor of Law at Harvard Law School.

15. Thomas B. Griffith served on the U. S. Court of Appeals for the D. C. Circuit from 2005 – 2020. He is now Special Counsel at Hunton Andrews Kurth, a Senior Advisor to the National Institute for Civil Discourse, and a Lecturer on Law at Harvard Law School. He is a graduate of Brigham Young University and the University of Virginia School of Law.

16. Tara Leigh Grove is the Charles E. Tweedy, Jr., Endowed Chairholder of Law and Director of the Program in Constitutional Studies at the University of Alabama School of Law.

17. Bert I. Huang is Michael I. Sovern Professor of Law at Columbia University. He served as a law clerk for Justice David H. Souter.

18. Sherrilyn Ifill is the President & Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. She holds an undergraduate degree from Vassar College, and a J.D. from New York University School of Law.

19. Michael S. Kang is the William G. and Virginia K. Karnes Research Professor at Northwestern Pritzker School of Law. He received his BA and JD from the University of Chicago.

20. Olatunde Johnson is the Jerome B. Sherman Professor of Law at Columbia Law School. She served as constitutional and civil rights counsel to Senator Edward M. Kennedy. She clerked for Justice John Paul Stevens.

21. Alison L. LaCroix is the Robert Newton Reid Professor of Law at the University of Chicago Law School. She received her B.A. and J.D. from Yale University, and her A.M. and Ph.D. from Harvard University.

22. Margaret H. Lemos is the Robert G. Seaks Professor of Law at Duke Law School. Clerked for John Paul Stevens. She received her J.D. from New York University School of Law and her B.A. from Brown University.

23. David F. Levi is the Levi Family Professor of Law and Judicial Studies and Director of the Bolch Judicial Institute at Duke Law School. He clerked for Justice Lewis F. Powell, Jr.

24. Trevor W. Morrison serves as Dean of NYU School of Law. He served as associate counsel to President Barack Obama.

25. Caleb Nelson is the Emerson G. Spies Distinguished Professor of Law and the Caddell and Chapman Professor of Law at the University of Virginia School of Law.

27. Michael D. Ramsey is Hugh and Hazel Darling Foundation Professor of Law at the University of San Diego School of Law. He served for Justice Antonin Scalia.

28. Cristina M. Rodríguez (Co-Chair) is the Leighton Homer Surbeck Professor of Law at Yale Law School. She earned her B.A. and J.D. degrees from Yale. She clerked for Justice Sandra Day O’Connor.

29. Kermit Roosevelt is a professor of law at the University of Pennsylvania Carey Law School. He clerked for Justice David H. Souter.

30. Bertrall Ross is the Chancellor’s Professor of Law at the University of California, Berkeley School of Law. He earned his law degree from Yale Law School.

31. David A. Strauss is the Gerald Ratner Distinguished Service Professor of Law and the Faculty Director of the Supreme Court and Appellate Clinic at the University of Chicago.

32. Laurence H. Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus at Harvard University.

33. Adam White is a resident scholar at the American Enterprise Institute and an assistant professor of law at George Mason University’s Antonin Scalia Law School.

34. Keith E. Whittington is the William Nelson Cromwell Professor of Politics at Princeton University. He completed his Ph.D. in political science at Yale University.

35. Michael Waldman is the president of the Brennan Center for Justice at NYU School of Law.
Damages in First Amendment Cases

1. Tanzin v. Tanvir, No. 19-71
894 F.3d 449 (2d Cr. 2019)
S. Ct. Case No. 19-71
Oral Argument: Oct. 6, 2020
Decided: Dec. 10, 2020

The Votes (8-0)

Majority: Thomas, J.
Roberts, C.J.
Breyer, J.
Alito, J.
Sotomayor, J.
Kagan, J.
Gorsuch, J.
Kavanaugh, J.

Quick Summary

RFRA’s express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities. (a) RFRA’s text provides that persons may sue and “obtain appropriate relief against a government,” 42 U. S. C. §2000bb–1(c), including an “official (or other person acting under color of law) of the United States,” §2000bb–2(1).

The Facts

The Religious Freedom Restoration Act of 1993 (RFRA) was enacted in the wake of Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872, to provide a remedy to redress Federal Government violations of the right to free exercise under the First Amendment.

Its express remedies provision, 42 U. S. C. §2000bb–1(c), permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities for violating litigants’ right to free exercise of religion under the First Amendment.

Respondents are practicing Muslims who sued under RFRA, claiming that federal agents placed them on the No Fly List for refusing to act as informants against their religious communities.
They sought injunctive relief against the agents in their official capacities and monetary damages against the agents in their individual capacities.

Disposition Below

The District Court found that RFRA does not permit monetary relief and dismissed their individual-capacity claims.

The Second Circuit reversed, holding that RFRA’s remedies provision encompasses money damages against Government officials.

Justice Thomas’s Unanimous Opinion (8-0)

RFRA’s express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities. RFRA’s text provides that persons may sue and “obtain appropriate relief against a government,” 42 U. S. C. §2000bb–1(c), including an “official (or other person acting under color of law) of the United States,” §2000bb–2(1).

RFRA supplants the ordinary meaning of “government” with a different, express definition that includes “official[s].”

It then underscores that “official[s]” are “person[s].” Under RFRA’s definition, relief that can be executed against an “official . . . of the United States” is “relief against a government.”

This reading is confirmed by RFRA’s use of the phrase “persons acting under color of law,” which has long been interpreted by this Court in the 42 U. S. C. §1983 context to permit suits against officials in their individual capacities. See, e.g., Memphis Community School Dist. v. Stachura, 477 U. S. 299, (b) RFRA’s term “appropriate relief” is “open-ended” on its face; thus, what relief is “‘appropriate’ ” is “inherently context dependent.” Sossamon v. Texas, 563 U. S. 277, 286.
In the context of suits against Government officials, damages have long been awarded as appropriate relief, and though more limited today, they remain an appropriate form of relief.

The availability of damages under §1983 is particularly salient here. When Congress first enacted RFRA, the definition of “government” included state and local officials. In order to reinstate the pre-Smith substantive protections of the First Amendment and the right to vindicate those protections by a claim, §2000bb(b), the remedies provision must have encompassed at least the same forms of relief authorized by §1983.

Because damages claims have always been available under §1983 for clearly established violations of the First Amendment, that means RFRA provides, as one avenue for relief, a right to seek damages against Government employees. The presumption in Sossamon, 563 U. S. 277, is inapplicable because this case does not involve sovereign immunity. 894 F. 3d 449, affirmed.

Editor’s Note:

In City of Boerne v. Flores (1997), the Supreme Court held RFRA was not a proper exercise of Congress’s enforcement power. However, RFRA continues to be applied to the federal government in cases such as Gonzales v. O Centro Espírita Beneficente União do Vegetal (2006) and Burwell v. Hobby Lobby Stores, Inc. (2014). In additional, in 2000 Congress enacted the Religious Land Use and Institutionalized Persons Act to restore the restrictions imposed by RFRA to prisons and land use regulations.

**Questions for the Panel**

1. Is this just a simple statutory construction case?

2. Or, does this reflect a zeal for restricting government interference with religion?

3. Does this just square up the remedies that section 1983 provides for violations of First Amendment rights with the remedies available under RFRA?

4. RFRA was enacted because Congress concluded that the Court’s interpretation of the Free Exercise Clause of the First Amendment as not requiring strict scrutiny of laws of general applicability failed to provide sufficient freedom of individuals to engage in religious practices. It authorized injunctive and declaratory relief to invalidate laws that interfere with religion without compelling justification. Is there a reason that Congress might have had for not also creating a damage remedy against government officials adopting generally applicable laws?

5. Might Congress have been concerned that creating a damage remedy would given religion too much power to override generally applicable laws and chill legislators from enacting laws regarded as essential to protect public welfare but that might give rise to damage claims?
6. While section 1983 does allow damage claims against government officials, it does not require strict scrutiny of any laws of general applicability.

7. Are RFRA and RLUIPA now super laws that not only override everything else but also deter federal legislation, local land use regulation, and prison regulation that are needed for public health, safety and welfare?

8. Should Congress amend RFRA and RLUIPA to overrule this result?
2. Chike Uzuegbunam v. Preczewski,
781 Fed. Appx. 824 (11th Cir. July 1, 2019)
Supreme Court Case No. 19-968
Oral Argument: Jan. 12, 2021
Decided: March 8, 2021

The Votes (8-1-1)

The request for nominal damages satisfies the redressability element necessary for Article III standing which a plaintiff’s claim is based on a complete violation of a legal right.

Majority: Thomas, J.
Breyer, J.
Alito, J.
Sotomayor, J.
Kagan, J.
Gorsuch, J.
Kavanaugh, J.
Coney Barrett, J.

Concur: Kavanaugh, J.

A defendant should be able to accept a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits.

Dissent: Roberts, C.J.

The case is moot because a federal court cannot grant plaintiffs any effectual relief whatever.
The Facts

Chike Uzuegbunam is an evangelical Christian who believes that an important part of exercising his religion includes sharing his faith.

In 2016, he decided to share his faith at Georgia Gwinnett College, a public college where he was enrolled as a student. At an outdoor plaza on campus near the library where students often gather, Uzuegbunam engaged in conversations with interested students and handed out religious literature.

A campus police officer soon informed Uzuegbunam that campus policy prohibited distributing written religious materials in that area and told him to stop. Uzuegbunam complied with the officer's order.

The college's Director of the Office of Student Integrity explained that Uzuegbunam could speak about his religion or distribute materials only in two designated "free speech expression areas," which together make up just 0.0015 percent of campus. And he could do so only after securing the necessary permit.

Uzuegbunam then applied for and received a permit to use the free speech zone.

Twenty minutes after Uzuegbunam began speaking on the day allowed by his permit, another campus police officer again told him to stop, this time saying that people had complained about his speech.

Campus policy prohibited using the free speech zone to say anything that "disturbs the peace and/or comfort of person(s)."

The officer told Uzuegbunam that his speech violated this policy because it had led to complaints. The officer threatened Uzuegbunam with disciplinary action if he continued.

Uzuegbunam again complied with the order to stop speaking. Another student who shares Uzuegbunam's faith, Joseph Bradford, decided not to speak about religion because of these events.

Both students sued a number of college officials in charge of enforcing the college's speech policies, arguing that those policies violated the First Amendment. As relevant here, they sought nominal damages and injunctive relief.

Disposition Below

The officials initially attempted to defend the policy, stating that Uzuegbunam's discussion of his religion "arguably rose to the level of 'fighting words.'"

But they quickly abandoned that strategy and instead decided to get rid of the challenged policies.
They then moved to dismiss, arguing that the suit was moot, because of the policy change. The students agreed that injunctive relief was no longer available, but they disagreed that the case was moot.

They contended that their case was still live because they had also sought nominal damages. The District Court dismissed the case, holding that the students' claim for nominal damages was insufficient by itself to establish standing.

The Eleventh Circuit affirmed. 781 Fed. Appx. 824 (2019). It stated that a request for nominal damages can save a case from mootness in certain circumstances, such as where a person pleads but fails to prove an amount of compensatory damages. But, because the students did not request compensatory damages, their plea for nominal damages could not by itself establish standing.

GGC revised its "Freedom of Expression Policy" such that students would be permitted to speak anywhere on campus without having to obtain a permit except in certain limited circumstances.

GGC also removed the challenged portion of its "Student Code of Conduct." Both revised policies superseded the Prior Policies and have been in full force and effect since February 28, 2017.

The officials moved to dismiss the First Amended Complaint as moot. One year later, Uzuegbunam graduated.

The district court dismissed the case as moot. The Eleventh Circuit affirmed.

Justice Thomas’s Majority Decision

To satisfy the "irreducible constitutional minimum" of Article III standing, a plaintiff must not only establish (1) an injury in fact (2) that is fairly traceable to the challenged conduct, but he must also seek (3) a remedy that is likely to redress that injury. Spokeo, Inc. v. Robins, 578 U. S. 330, 338 (2016).

The only question is whether the remedy sought—nominal damages—can redress the constitutional violation that Uzuegbunam alleges occurred when campus officials enforced the speech policies against him.

In determining whether nominal damages can redress a past injury, we look to the forms of relief awarded at common law. The parties agree common law courts routinely awarded nominal damages.

They dispute what kinds of harms those damages could redress.
Early courts required the plaintiff to prove actual monetary damages in every case: "[I]njury & damnum [injury and damage] are the two grounds for the having [of] all actions, and without these, no action lieth." Cable v. Rogers, 3 Bulst. 311, 312, 81 Eng. Rep. 259 (K. B. 1625).

Later courts, however, reasoned that every legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages (such as compensatory, statutory, or punitive damages), and they did so where there was no apparent continuing or threatened injury for nominal damages to redress.

The latter approach was followed both before and after ratification of the Constitution. An early case about voting rights effectively illustrates this common-law understanding. Faced with a suit pleading denial of the right to vote, the court rejected the plaintiff’s claim because, among other reasons, the plaintiff had not established actual damages. Ashby v. White, 2 Raym. Ld. 938, 941-943, 948, 92 Eng. Rep. 126, 129, 130, 133 (K. B. 1703).

Dissenting, Lord Holt argued that the common law inferred damages whenever a legal right was violated. The House of Lords overturned the majority decision, thus validating Lord Holt’s position.

Lord Holt’s position also prevailed in courts on this side of the Atlantic.

Justice Story explained that a prevailing plaintiff "is entitled to a verdict for nominal damages" whenever "no other [kind of damages] be proved." Webb v. Portland Mfg. Co., 29 F. Cas. 506, 508-509 (No. 17,322) (CC Me. 1838).

The dissent says Justice Story took a potentially contradictory position elsewhere and asserted that both actual damages and a violation of a legal right are required.

But in the same source the dissent cites, Justice Story said that nominal damages are "presumed" "[w]here the breach of duty is clear." Commentaries on the Law of Agency § 217, p. 211 (1839).

The rule allowing nominal damages for a violation of any legal right, though "decisively settled," Parker, 17 Conn., at *304, was not universally followed—as is true for most common-law doctrines.

The prevailing rule, was "that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage." 1 T. Sedgwick, Measure of Damages 71, n. a (7th ed. 1880); see also id., at 72 (citing Lord Holt’s opinion in Ashby).

The officials and the dissent argue courts could award nominal damages only when a plaintiff pleaded compensatory damages but failed to prove a specific amount.

The cases themselves did not require a plea for compensatory damages as a condition for receiving nominal damages.
Respondents and the dissent thus get the relationship between nominal damages and compensatory damages backwards. Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages.

The argument that a claim for compensatory damages is a prerequisite for an award of nominal damages also rests on the flawed premise that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff.

But this view is against the weight of the history discussed above, and we have already expressly rejected it. Despite being small, nominal damages are certainly concrete.

The next difficulty faced by respondents and the dissent is their inability to square their argument with established principles of standing. Early courts routinely awarded nominal damages alone. Certainly, no one seems to think that those judgments were without legal effect.

Likewise, any analogy to attorney's fees and costs fails. A request for attorney's fees or costs cannot establish standing because those awards are merely a "byproduct" of a suit that already succeeded, not a form of redressability. Steel Co., 523 U. S., at 107; see also Lewis v. Continental Bank Corp., 494 U. S. 472, 480 (1990). In contrast, nominal damages are redress, not a byproduct.

A request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right.

The dissent worries that after today the Judiciary will be required to weigh in on legal questions "whenever a plaintiff asks for a dollar." But petitioners still would have satisfied redressability if instead of one dollar in nominal damages they sought one dollar in compensation for a wasted bus fare to travel to the free speech zone.

Congress abolished the statutory amount-in-controversy requirement for federal-question jurisdiction in 1980. And we have never held that one applies as a matter of constitutional law.

We hold only that, for the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right.

Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Because "every violation [of a right] imports damage," nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms.

We do not decide whether Bradford can pursue nominal damages. Nominal damages go only to redressability and are unavailable where a plaintiff has failed to establish a past, completed injury. The District Court should determine in the first instance
whether the enforcement against Uzuegbunam also violated Bradford’s constitutional rights.

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

Justice Kavanaugh’ concurrence.

I agree with THE CHIEF JUSTICE and the Solicitor General that a defendant should be able to accept the entry of a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits.

Chief Justice Robert’s Dissent

The case is moot because a federal court cannot grant Uzuegbunam and Bradford “any effectual relief whatever.” Chafin v. Chafin, 568 U. S. 165, 172 (2013) (internal quotation marks omitted).

An award of nominal damages does not alleviate the harms suffered by a plaintiff, and is not intended to. If nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar. Because I would place a higher value on Article III, I respectfully dissent.

Alexander Hamilton famously wrote that “the judiciary, from the nature of its functions, will always be the least dangerous” of “the different departments of power.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961).

This was so, Hamilton explained, because the Judiciary “will be least in a capacity to annoy or injure” “the political rights of the Constitution.” Ibid. Whereas “[t]he executive not only dispenses the honors but holds the sword of the community,” and “[t]he legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated,” the Judiciary “may truly be said to have neither FORCE nor WILL but merely judgment.” Ibid.

But that power of judgment can nonetheless bind the Executive and Legislature—and the States. It is modest only if confined to its proper sphere.

The case-or-controversy requirement imposes fundamental restrictions on who can invoke federal jurisdiction and what types of disputes federal courts can resolve.

By insisting that judges be able to provide meaningful redress to litigants, Article III ensures that federal courts exercise their authority only “as a necessity in the determination of real, earnest and vital controversy between individuals.” Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339, 345 (1892).

When plaintiffs like Uzuegbunam and Bradford allege neither actual damages nor the prospect of future injury, an award of nominal damages does not change their status or condition at all.
The Court sees no problem with turning judges into advice columnists.

Any lessons that we learn from the common law, however, must be tempered by differences in constitutional design.

In England “all jurisdictions of courts [were] either mediately or immediately derived from the crown,” 1 W. Blackstone, Commentaries on the Laws of England 257 (1765), an organizational principle the Framers explicitly rejected by separating the Executive from the Judiciary.

“English judicial practice with which early Americans were familiar had long permitted the Crown to solicit advisory opinions from judges.” We would not look to such practice for guidance today.

A focus on common law analogues cannot obscure the significance of the establishment of an independent Judiciary—a “remarkable transformation” from a system with courts operating as “appendages of crown power.”

It is in any event entirely unclear whether common law courts would have awarded nominal damages in a case like the one before us.

The Court is correct to note that plaintiffs at common law often received nominal damages for past violations of their rights. Those awards, however, were generally limited to situations in which prevailing plaintiffs tried and failed to prove actual damages.

The petitioners in this case have asked to recover their fees and costs, but they never sought actual damages, so the common law provides little relevant support.

The historical record is mixed as to whether legal violations were actionable at all without a showing of compensable harm.

The Court does not cite any case in which plaintiffs sought only nominal damages for purely retrospective injuries.

The Court instead relies on several decisions that contained live damages claims, or involved prospective harm to the plaintiff’s reputation, see Marzetti v. Williams, 1 B. & Ad. 415, 420, 109 Eng. Rep. 842, 844 (K. B. 1830) (bank’s failure to timely pay “was injurious to the character of the plaintiff in his trade”); see also C. Addison, Law of Torts 46-47 (1860) (defamation actionable without proof of damage).

The Court also appeals to “categorical” and “definitive” statements by Lord Chief Justice Holt and Justice Story.

The House of Lords likely paid scant attention to Lord Holt’s analysis. It appears instead that the majority decision was reversed as collateral damage in a Whig-Tory political dispute, and “little weight was given to reasoning or eloquence.”

Regardless, the House of Lords held that plaintiff “should recover his damages.
assessed by the jury” at trial, suggesting that the fact of injury alone did not “import” them. Ashby v. White, 1 Bro. P. C. 62, 64, 1 Eng. Rep. 417, 418 (1703).

Justice Story made conflicting statements.

At bottom, the Court relies on a handful of indeterminate sources to justify a radical expansion of the judicial power.

The Court spends little time trying to reconcile its analysis with modern justiciability principles.

Finally, the Court argues that nominal damages provide Article III relief because they “effect[ ] the behavior of the defendant towards the plaintiff” by requiring “money changing hands.”

If this were the standard, then the prospect of attorney’s fees and costs would confer standing at the beginning of a lawsuit and prevent mootness throughout—a proposition we have squarely rejected. See Lewis v. Continental Bank Corp., 494 U. S. 472, 480 (1990).

The best that can be said for the Court’s sweeping exception to the case-or-controversy requirement is that it may itself admit of a sweeping exception: Where a plaintiff asks only for a dollar, the defendant should be able to end the case by giving him a dollar, without the court needing to pass on the merits of the plaintiff’s claims.

Although we recently reserved the question whether a defendant can moot a case by depositing the full amount requested by the plaintiff, Campbell-Ewald Co. v. Gomez, 577 U. S. 153, 166 (2016), our cases have long suggested that he can, see, e.g., California v. San Pablo & Tulare R. Co., 149 U. S. 308, 313-314 (1893).

The United States agrees, arguing in its brief in “support” of the petitioners that “the defendant should be able to end the litigation without a resolution of the constitutional merits, simply by accepting the entry of judgment for nominal damages against him.”

The defendant can even file an offer of judgment for one dollar, rendering the plaintiff liable for any subsequent costs if he receives only nominal damages. See Fed. Rule Civ. Proc. 68(d).

This highlights the flimsiness of the Court’s view of the separation of powers. The scope of our jurisdiction should not depend on whether the defendant decides to fork over a buck.

Perhaps defendants will wise up and moot such claims by paying a dollar, but it is difficult to see that outcome as a victory for Article III. Rather than encourage litigants to fight over farthings, I would affirm the judgment of the Court of Appeals.
Questions for the Panel

1. Will this decision revolutionize all section 1983 cases by closing the mootness hatch?

2. Will nominal damages always allow recovery of attorneys’ fees?

3. The Court has held that a plaintiff who recovers only nominal damages is a prevailing party, but that the reasonable award of attorneys’ fees for such a plaintiff is “usually” zero. Farrar v. Hobby, 506 U.S. 103 (1992). Does that make this a useless decision?

4. Will plaintiffs litigate merely for the prospect of obtaining a nominal damage award and no fees?

5. Will this decision only be applied in Free Exercise cases or will it have practical application in other types of section 1983 cases?

6. Chief Justice Robert’s dissent and Justice Kavanaugh’s concurrence state defendants can moot a nominal-damages claim by offering the plaintiff a dollar. Would the majority agree if the plaintiff refuses to accept the offer? Defendants cannot buy off class representatives in this way. Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016). When a plaintiff owes no fiduciary duty to a class, will the result be different?
3. **South Bay United Pentecostal Church v. Newsom,**  
   *140 S. Ct. 1613*  
   S. Ct. Case No. 19A1044  
   **Decided: May 29, 2020**

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<th>The Votes (5-3-1)</th>
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| **Majority:** Per Curiam  
  Joined By: Roberts, C.J.  
  Ginsburg, J.  
  Breyer, J.  
  Sotomayor, J.  
  Kagan, J.  
| Application to enjoin Gov. Newsom from enforcing Executive Order is denied.  
Courts should defer to judgment of state officials regarding public health emergency. |
| **Dissent:** Kavanaugh, J.  
  Joined By: Thomas, J.  
  Gorsuch, J.  
| The Executive Order discriminates against religious institutions and does not survive strict scrutiny. |

| Dissent: Alito, J.  
| No opinion. |
Per Curiam Ruling on Application for Injunction

The application for injunctive relief presented to Justice KAGAN and by her referred to the Court is denied.

Chief Justice Roberts’ 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, 131 S.Ct. 445, 178 L.Ed.2d 346 (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. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." Jacobson v. Massachusetts, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

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, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

That is especially true where, as here, a party seeks 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, with whom Justice THOMAS and Justice GORSUCH join, dissenting from denial of application for injunctive relief.

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.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

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, 98 S.Ct. 1322, 55 L.Ed.2d 593 (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. ____ , ____ 137 S.Ct. 2012, 2025, 198 L.Ed.2d 551 (2017).

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, 113 S.Ct. 2217.
The Church and its congregants simply want to be treated equally to comparable secular businesses.

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.”

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.

Justice THOMAS, Justice ALITO, Justice GORSUCH, and Justice KAVANAUGH would grant the application.

Questions for the Panel

1. Why did Chief Justice Roberts join with the liberals?
2. Why did Justice Alito not join in Justice Kavanaugh’s dissent even though he would grant the application?
3. Are the conservative justices allowing their religious views to overpower their interpretation of the First Amendment?
4. Does strict scrutiny apply to judgments of this type?
5. Would the result have been the same if the Court had been analyzing a law that restricted the meetings of political parties?
6. Did the Court rule too quickly on the application?
982 F. 3d 1228 (9th Cir. 2020)
S. Ct. Case No. 19A1070
140 S. Ct. 2603 (2020)
Decided: July 24, 2020

**The Votes (5-3-1)**

**Majority:** Per Curiam

**Joined By:**
- Roberts, C.J.
- Ginsburg, J.
- Breyer, J.
- Sotomayor, J.
- Kagan, J.

**Quick Summary**

Application to enjoin Gov. Sisolak from enforcing Executive Order is denied.

**Dissent:** Alito, J.

**Joined By:**
- Thomas, J.
- Kavanaugh, J.

Executive Order that limits churches and synagogues to 50 persons but allows casinos 50% of capacity discriminates against religious institutions and does not survive strict scrutiny.

**Dissent:** Gorsuch, J.

Cannot favor Caesars Palace over Calvary Chapel.

**Dissent, J.**

Kavanaugh, J.

Justification given for different treatment was not sufficient,
Per Curiam Ruling on Application for Injunction

The application for injunctive relief presented to Justice KAGAN and by her referred to the Court is denied.

Justice Alito’s Dissent

Joined by Thomas and Kavanaugh, JJ.

The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance.

But the Governor of Nevada apparently has different priorities. Claiming virtually unbounded power to restrict constitutional rights during the COVID-19 pandemic, he has issued a directive that severely limits attendance at religious services.

A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy—and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed.

That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court’s willingness to allow such discrimination is disappointing.

We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.

Calvary Chapel Dayton Valley is a church located in rural Nevada. It wishes to host worship services for about 90 congregants, a figure that amounts to 50% of its fire-code capacity.

In conducting these services, Calvary Chapel plans to take many precautions that go beyond anything that the State requires.

According to an infectious disease expert, these measures are "equal to or more extensive than those recommended by the CDC."

Yet hosting even this type of service would violate Directive 21, Nevada Governor Steve Sisolak's phase-two reopening plan, which limits indoor worship services to "no more than fifty persons." ECF Doc. 38-2, § 11.
Meanwhile, the directive caps a variety of secular gatherings at 50% of their operating capacity, meaning that they are welcome to exceed, and in some cases far exceed, the 50-person limit imposed on places of worship.

Citing this disparate treatment, Calvary Chapel brought suit in Federal District Court and sought an injunction allowing it to conduct services, in accordance with its plan, for up to 50% of maximum occupancy.

The District Court refused to grant relief, the Ninth Circuit denied Calvary Chapel's application for an injunction pending appeal, and now this Court likewise denies relief.

I would grant an injunction pending appeal.

For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable.

In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules.

Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.

But a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists.

As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

Governor Sisolak issued the directive in question on May 28, more than two months after declaring a state of emergency on March 12. Now four months have passed since the original declaration. The problem is no longer one of exigency, but one of considered yet discriminatory treatment of places of worship.
II


Here, the departure is **hardly subtle**. The Governor's directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people.

Privileged facilities include bowling alleys, § 20, breweries, § 26, fitness facilities, § 28, and **most notably, casinos**, which have operated at 50% capacity for over a month, § 35; ECF Doc. 38-3, p. 5, sometimes featuring not only gambling but live circus acts and shows.

Patrons at a **craps or blackjack table** do not customarily stay six feet apart.

In anticipation of reopening, one casino owner gave away 2,000 one-way air-line tickets to Las Vegas.

The average visitor to Las Vegas visits more than six different casinos, potentially gathering with far more than 50 persons in each one.

Houses of worship can—and have— adopted rules that provide far more protection.

The State notes that facilities other than houses of worship, such as museums, art galleries, zoos, aquariums, trade schools, and technical schools, are also treated less favorably than casinos, but obviously that does not justify preferential treatment for casinos.

Finally, the State argues that preferential treatment for casinos is justified because the State is in a better position to enforce compliance by casinos, which are under close supervision by state officials and subject to penalties if they violate state rules. By contrast, the State notes, rules for houses of worship must be enforced by local authorities.
This argument might make some sense if enforcing the 50% capacity rule were materially harder than enforcing a flat 50-person rule. But there is no reason to think that is so, let alone that it would be compelling enough to justify differential treatment of religion.

While the directive's treatment of casinos stands out, other facilities are also given more favorable treatment than houses of worship. Take the example of bowling alleys.

The directive fares no better under the Free Speech Clause. Laws that restrict speech based on the viewpoint it expresses are presumptively unconstitutional, see, e.g., Iancu v. Brunetti, 588 U. S. ___ - ___, 139 S.Ct. 2294, 2298-2299, 204 L.Ed.2d 714 (2019), and under our cases religion counts as a viewpoint, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 831, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

Here, the Directive plainly discriminates on the basis of viewpoint.

Compare the directive's treatment of casino entertainment and church services. Both involve expression, but the directive favors the secular expression in casino shows over the religious expression in houses of worship.

When large numbers of protesters openly violated provisions of the Directive, such as the rule against groups of more than 50 people, the Governor not only declined to enforce the directive but publicly supported and participated in a protest.

But the State's response to news that churches might violate the directive was quite different. The attorney general of Nevada is reported to have said, "'You can't spit ... in the face of law and not expect law to respond.'"

Respecting some First Amendment rights is not a shield for violating others.

Nevada does not even try to argue that the directive can withstand strict scrutiny.

The State's primary defense of the directive's treatment of houses of worship is based on two decisions of this Court. Quoting certain language in Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), Nevada argues that "when a state exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless (1) there is no real or substantial relation to public health, or (2) the measures are 'beyond all
question' a `plain[,] palpable [invasion] of rights secured by the fundamental law.'"

Even under this test, the directive's discriminatory treatment would likely fail for the reasons already explained.

It is a mistake to take language in Jacobson as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic. Language in Jacobson must be read in context, and it is important to keep in mind that Jacobson primarily involved a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox.

It is a considerable stretch to read the decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case.

The State also points to the Court's recent refusal to issue a temporary injunction against enforcement of a California law that limited the number of persons allowed to attend church services. See South Bay United Pentecostal Church v. Newsom, 590 U. S. ___, 140 S.Ct. 1613, 207 L.Ed.2d 154 (2020). I dissented from that decision, see ibid.; see also id., at ___, 140 S.Ct., at 1613 (KAVANAUGH, J., dissenting), but even if it is accepted, that case is different from the one now before us.

In South Bay, a church relied on the fact that the California law treated churches less favorably than certain other facilities, such as factories, offices, supermarkets, restaurants, and retail stores. But the law was defended on the ground that in these facilities, unlike in houses of worship, "people neither congregate in large groups nor remain in close proximity for extended periods." Id., at ___, 140 S.Ct., at 1614 (ROBERTS, C. J., concurring). That cannot be said about the facilities favored in Nevada. In casinos and other facilities granted preferential treatment under the directive, people congregate in large groups and remain in close proximity for extended periods.

Justice Gorsuch’s Dissent

This is a simple case.

There is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.
Justice Kavanaugh’s Dissent

A State’s closing or reopening plan may subject religious organizations to the same limits as secular organizations. And in light of the devastating COVID-19 pandemic, those limits may be very strict. But a State may not impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms, at least without sufficient justification for the differential treatment of religion.

Nevada has thus far failed to provide a sufficient justification, and its current reopening plan therefore violates the First Amendment.

I

Religion cases are among the most sensitive and challenging in American law.

Difficulties can arise at the outset because the litigants in religion cases often disagree about how to characterize a law. They may disagree about whether a law favors religion or discriminates against religion. They may disagree about whether a law treats religion equally or treats religion differently. They may disagree about what it means for a law to be neutral toward religion.

The definitional battles over what constitutes favoritism, discrimination, equality, or neutrality can influence, if not decide, the outcomes of religion cases. But the parties to religion cases and the judges deciding those cases often do not share a common vocabulary or common background principles. And that disconnect can muddy the analysis, build resentment, and lead to litigants and judges talking past one another.

In my view, some of the confusion and disagreement can be averted by first identifying and distinguishing four categories of laws: (1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike; and (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations.

This case involving Nevada’s reopening plan falls into the fourth category.

Laws—like Nevada’s in this case—supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category. Those laws provide benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category.
For example, consider a zoning law that places some secular organizations (apartment buildings, small retail businesses, restaurants, banks, etc.) in a favored or exempt zoning category, and places some secular organizations (office buildings, large retail businesses, movie theaters, music venues, etc.) in a disfavored or non-exempt zoning category.

Suppose that religious properties arguably could be considered similar to some of the secular properties in both categories. What, then, are the constitutional limits and requirements with respect to how the legislature may categorize religious organizations?

In those circumstances, the Court’s precedents make clear that the legislature may place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category without causing an Establishment Clause problem.

Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category.

Put simply, under the Court’s religion precedents, when a law on its face favors or exempts some secular organizations as opposed to religious organizations, a court entertaining a constitutional challenge by the religious organizations must determine whether the State has sufficiently justified the basis for the distinction.

It is not enough for the government to point out that other secular organizations or individuals are also treated unfavorably. The point "is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is not regulated."

II

Nevada has now had more than four months to respond to the initial COVID-19 crisis and adjust its line-drawing as circumstances change. Yet Nevada is still discriminating against religion.

Nevada undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens. But it does not have a persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms.

The State wants to jump-start business activity and preserve the economic well-being of its citizens. But no precedent suggests that a State may discriminate
against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide.

Nevada's rules reflect an implicit judgment that for-profit assemblies are important and religious gatherings are less so; that moneymaking is more important than faith during the pandemic. But that rationale "devalues religious reasons" for congregating "by judging them to be of lesser import than nonreligious reasons," in violation of the Constitution. Lukumi, 508 U.S. at 537-538, 113 S.Ct. 2217. The Constitution does not tolerate discrimination against religion merely because religious services do not yield a profit.

More broadly, the State insists that it is in the midst of an emergency and that it should receive deference from the courts and not be bogged down in litigation.

State and local governments, not the federal courts, have the primary responsibility for addressing COVID-19 matters such as quarantine requirements, testing plans, mask mandates, phased reopenings, school closures, sports rules, adjustment of voting and election procedures, state court and correctional institution practices, and the like.

But COVID-19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services.

Questions for the Panel

1. Why no defense of the Court’s denial of the injunction by the majority?

2. Did the majority conclude that the governor’s decision survives strict scrutiny or that strict scrutiny simply does not apply? Does it matter? What is a sufficient justification for different treatment?

3. Nevada’s electoral votes went for Biden. Is it now clear that this case is all about the Presidential election?

4. Has First Amendment jurisprudence been strengthened, weakened, or not affected at all by this decision?

5. Are the dissenters correct that no deference should be given to governors in a public health emergency when their orders are more restrictive of religious institutions than other institutions?

6. Was the governor’s order aimed at winning votes from union workers in casinos?
7. On July 17, 2020, seven days before this decision, Justice Ginsburg announced that her cancer had returned, that she is receiving chemotherapy and she will not retire. Comment?

8. How would the dissenters evaluate zoning regulations which explicitly treat churches and synagogues differently from other institutions like schools, clubs, and stores?

9. Was Justice Kavanaugh anticipating that the Court might be asked to invalidate voting laws adopted to permit casting of absentee ballots to protect public health?
141 S. Ct. 63 (2020)  
S. Ct. Case No. 20A87 & No. 20A90  
Decided: November 25, 2020

**The Votes 1-1-1-3)**

- **Per Curiam**
  - Thomas, J.
  - Alito, J.
  - Coney-Barrett, J.

- **Concur:** Gorsuch, J.

- **Concur:** Kavanaugh, J.

- **Dissent:** Roberts, C.J.
  - Joined By: Sotomayor, J.
  - Kagan, J.

**Quick Summary**

Gov. Cuomo is enjoined from enforcing Executive Order’s 10- and 25-person occupancy limits on Diocese pending disposition of the appeal in the Second Circuit and disposition of petition for a writ of certiorari.

South Bay opinion of the Chief Justice was wrong from the start. Government cannot treat churches and synagogues differently from liquor stores.

Discrimination here cannot survive strict scrutiny.

The case is moot because the Governor has revised the restrictions.

Executive order is based on science and does not discriminate against religion.
Per Curiam Ruling on Applications for Injunction

The application for injunctive relief presented to JUSTICE BREYER and by him referred to the Court is granted. Respondent is enjoined from enforcing Executive Order 202.68’s 10- and 25-person occupancy limits on applicants pending disposition of appeal to the Second Circuit and petition for a writ of certiorari, if sought.

An Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as “red” or “orange” zones.

In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25.

The two applications, one filed by the Roman Catholic Diocese of Brooklyn and the other by Agudath Israel of America and affiliated entities, contend that these restrictions violate the Free Exercise Clause of the First Amendment, and they ask us to enjoin enforcement of the restrictions while they pursue appellate review.

Citing a variety of remarks made by the Governor, Agudath Israel argues that the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included.

Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities. And they tell us without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak.

The applicants have clearly established their entitlement to relief pending appellate review. They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest. See Winter v. Natural Resources Defense Council, Inc., 555 U. S. 7, 20 (2008). Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential.

The applicants have made a strong showing that the challenged restrictions violate “the minimum requirement of neutrality” to religion. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 533 (1993).
Statements made in connection with the challenged rules can be viewed as targeting the “‘ultra-Orthodox [Jewish] community.’”


In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as “essential” may admit as many people as they wish.

And the list of “essential” businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.

The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

A health department official testified about a large store in Brooklyn that could “literally have hundreds of people shopping there on any given day.”

Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. Factories and schools have contributed to the spread of COVID–19, id., but they are treated less harshly than the Diocese’s churches and Agudath Israel’s synagogues, which have admirable safety records.

Because the challenged restrictions are not “neutral” and of “general applicability,” they must satisfy “strict scrutiny,” and this means that they must be “narrowly tailored” to serve a “compelling” state interest.

Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as “narrowly tailored.”

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue.

It has not been shown that granting the applications will harm the public.

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten.

This matter is not moot. And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange.

Justice Gorsuch’s Concurrence

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. See Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 546 (1993).

Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

Some Governors have issued edicts, at the flick of a pen, asserting the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples.

What could justify so radical a departure from the First Amendment’s terms and long-settled rules about its application?

Our colleagues offer two possible answers. Initially, some point to a solo concurrence in South Bay Pentecostal Church v. Newsom, 590 U. S. ___ (2020), in which THE CHIEF JUSTICE expressed willingness to defer to executive orders in the pandemic’s early stages based on the newness of the emergency and how little was then known about the disease.

At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic’s shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired
concurrence from South Bay, courts must resume applying the Free Exercise Clause.

Today, a majority of the Court makes this plain.

Not only did the South Bay concurrence address different circumstances than we now face, **that opinion was mistaken from the start.**

Start with the mode of analysis.

The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of **strict scrutiny**—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest. Church of Lukumi, 508 U. S., at 546.

Next, if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution’s penumbras, it does not follow that the same fate should befall the **textually explicit right to religious exercise.**

The State has effectively sought to ban all traditional forms of worship in affected “zones” **whenever the Governor decrees** and for as long as he chooses.

Tellingly no Justice now disputes any of these points.

I can only surmise that dissent lies in a judicial impulse to **stay out of the way in times of crisis.** But if that impulse may be understandable or even admirable in other circumstances, **we may not shelter in place when the Constitution is under attack.** Things never go well when we do.

It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions.

To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the “off ” switch in the shadow of our review would be, in my view, just another **sacrifice of fundamental rights** in the name of judicial modesty.

While the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded **executive edicts** that reopen **liquor stores** and **bike shops** but shutter **churches, synagogues, and mosques.**

**Justice Kavanaugh’s Concurrence**
I vote to grant the applications of the Roman Catholic Diocese of Brooklyn and Agudath Israel of America for temporary injunctions against New York’s 10-person and 25-person caps on attendance at religious services.

New York’s 10-person and 25-person caps on attendance at religious services in red and orange zones (which are areas where COVID–19 is more prevalent) are much more severe than most other States’ restrictions, including the California and Nevada limits at issue in South Bay United Pentecostal Church v. Newsom, 590 U. S. ___ (2020), and Calvary Chapel Dayton Valley v. Sisolak, 591 U. S. ___ (2020).

In South Bay, houses of worship were limited to 100 people (or, in buildings with capacity of under 400, to 25% of capacity). And in Calvary, houses of worship were limited to 50 people.

Moreover, New York’s restrictions on houses of worship not only are severe, but also are discriminatory.

The State’s discrimination against religion raises a serious First Amendment issue and triggers heightened scrutiny, requiring the State to provide a sufficient justification for the discrimination.

The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship.

But once a State creates a favored class of businesses, as New York has, the State must justify why houses of worship are excluded from that favored class.

Judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.

Chief Justice Roberts’ Dissent

None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions. At these locations, the applicants can hold services with up to 50% of capacity, which is at least as favorable as the relief they currently seek.

It is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic.
If the Governor does reinstate the numerical restrictions the applicants can return to this Court, and we could act quickly on their renewed applications.

As noted, the challenged restrictions raise serious concerns under the Constitution, and I agree with JUSTICE KAVANAUGH that they are distinguishable from those we considered in South Bay United Pentecostal Church v. Newsom, 590 U. S. ___ (2020), and Calvary Chapel Dayton Valley v. Sisolak, 591 U. S. ___ (2020).

See ante, at 1, 3–4 (concurring opinion). I take a different approach than the other dissenting Justices in this respect.

To be clear, I do not regard my dissenting colleagues as “cutting the Constitution loose during a pandemic,” yielding to “a particular judicial impulse to stay out of the way in times of crisis,” or “shelter[ing] in place when the Constitution is under attack.” Ante, at 3, 5–6 (opinion of GORSUCH, J.). They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution.

Justice Breyer’s Dissent
Joined by Justices Sotomayor and Kagan

The District Court in the Diocese’s case found that New York’s regulations were “crafted based on science and for epidemiological purposes.” ___ F. Supp. 3d ____, ____, 2020 WL 6120167, *10 (EDNY, Oct. 16, 2020). It wrote that they treated “religious gatherings . . . more favorably than similar gatherings” with comparable risks, such as “public lectures, concerts or theatrical performances.” Id., at *9.

The court also recognized the Diocese’s argument that the regulations treated religious gatherings less favorably than what the State has called “essential businesses,” including, for example, grocery stores and banks.

But the court found these essential businesses to be distinguishable from religious services and declined to “second guess the State’s judgment about what should qualify as an essential business.”

The District Court denied the motion for a preliminary injunction.

The Court of Appeals for the Second Circuit also denied the Diocese’s request for an emergency injunction pending appeal, but it called for expedited briefing and scheduled a full hearing on December 18 to address the merits of the appeal.
This Court, unlike the lower courts, has now decided to issue an injunction that would prohibit the State from enforcing its fixed-capacity restrictions on houses of worship in red and orange zones while the parties await the Second Circuit’s decision.

I cannot agree with that decision.

For one thing, there is no need now to issue any such injunction.

Those parts of Brooklyn and Queens where the Diocese’s churches and the two applicant synagogues are located are no longer within red or orange zones.

An injunction is an “extraordinary remedy.” Nken v. Holder, 556 U. S. 418, 428 (2009) (internal quotation marks omitted). That is especially so where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts’ determination.

The virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other. The risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces.

The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants’ First Amendment challenges.

We have previously recognized that courts must grant elected officials “broad” discretion when they “undertake to act in areas fraught with medical and scientific uncertainties.” South Bay United Pentecostal Church v. Newsom, 590 U. S. ___, ___ (2020) (ROBERTS, C. J., concurring) (slip op., at 2) (alteration omitted).

That is because the “Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.” Ibid. (alterations and internal quotation marks omitted).

The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to “changing facts on the ground.” Id., at 3. And they can do so more quickly than can courts.

Justice Sotomayor’s Dissent
Joined by Kagan, J.
Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York’s public health measures aimed at containing the spread of COVID–19 in areas facing the most severe outbreaks.

Earlier this year, this Court twice stayed its hand when asked to issue similar extraordinary relief. See South Bay United Pentecostal Church v. Newsom, 590 U. S. ___ (2020); Calvary Chapel Dayton Valley v. Sisolak, 591 U. S. ___ (2020). I see no justification for the Court’s change of heart, and I fear that granting applications such as the one filed by the Roman Catholic Diocese of Brooklyn (Diocese) will only exacerbate the Nation’s suffering.

Ironically, due to the success of New York’s public health measures, the Diocese is no longer subject to the numerical caps on attendance it seeks to enjoin. Yet the Court grants this application to ensure that, should infection rates rise once again, the Governor will be unable to reimplement the very measures that have proven so successful at allowing the free (and comparatively safe) exercise of religion in New York.

The Diocese attempts to get around South Bay and Calvary Chapel by disputing New York’s conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores.

Undeterred, JUSTICE GORSUCH offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York’s rules (e.g., going to the liquor store or getting a bike repaired).

But JUSTICE GORSUCH does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID–19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time.

In truth, this case is easier than South Bay and Calvary Chapel. While the state regulations in those cases generally applied the same rules to houses of worship and secular institutions where people congregate in large groups, New York treats houses of worship far more favorably than their secular comparators.

And whereas the restrictions in South Bay and Calvary Chapel applied statewide, New York’s fixed-capacity restrictions apply only in specially designated areas experiencing a surge in COVID–19 cases.
The Diocese suggests that, because New York’s regulation singles out houses of worship by name, it cannot be neutral with respect to the practice of religion. Thus, the argument goes, the regulation must, ipso facto, be subject to strict scrutiny.

It is true that New York’s policy refers to religion on its face. But as I have just explained, that is because the policy singles out religious institutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them.

Surely the Diocese cannot demand laxer restrictions by pointing out that it is already being treated better than comparable secular institutions.

Finally, the Diocese points to certain statements by Governor Cuomo as evidence that New York’s regulation is impermissibly targeted at religious activity—specifically, at combatting heightened rates of positive COVID–19 cases among New York’s Orthodox Jewish community.

The Diocese suggests that these comments supply “an independent basis for the application of strict scrutiny.” I do not see how. The Governor’s comments simply do not warrant an application of strict scrutiny under this Court’s precedents.

Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a “Muslim Ban,” originally conceived of as a “‘total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.’” Trump v. Hawaii, 585 U. S. ___, ___ (2018) (slip op., at 27).

If the President’s statements did not show “that the challenged restrictions violate the ‘minimum requirement of neutrality’ to religion,” ante, at 2 (quoting Lukumi, 508 U. S., at 533), it is hard to see how Governor Cuomo’s do.


Lukumi struck down a law that allowed animals to be killed for almost any purpose other than animal sacrifice, on the ground that the law was a “‘religious gerrymander’” targeted at the Santeria faith. Smith holds “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or
prescribes) conduct that his religion prescribes (or proscribes).” 494 U. S., at 879 (internal quotation marks omitted).

The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives.

Questions for the Panel

1. Did the substitution of Amy Comey Barrett for Ruth Bader Ginsburg on October 27, 2020, determine the outcome of this case?

2. Will that substitution affect future cases? How?

3. Did the Court afford proper deference to the factual findings of the District Court?

4. Did the new conservative majority use this case to school Chief Justice Roberts?

5. Was the Chief Justice’s dissent a retreat from his previous position that the federal judiciary should defer to executive branch decisions in a time of crisis?

6. Why aren’t the liberal justices standing up for the First Amendment rights of churches and synagogues?

7. Could this decision be responsible for hundreds or thousands of deaths? How would we know?

8. How much of this case is about the Presidential election of 2020?

9. Was the majority attempting to endorse the re-election of President Trump? What the minority trying to undermine his re-election?
*Decided: February 5, 2021*

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The Facts

On August 28, 2020, California enacted the Blueprint for a Safer Economy (the "Blueprint"), which serves as the current framework underlying California's COVID-19 restrictions and which South Bay challenges in this case.

The Blueprint provides "revised criteria for loosening and tightening restrictions on activities" based on (1) the prevalence of COVID-19 in the relevant county, and (2) an activity's calculated risk level.

The Blueprint assigns each county to one of four tiers, ranging from Tier 1 ("Widespread") to Tier 4 ("Minimal"), which reflect COVID-19's transmission risk in each county.

In assessing to which tier a county belongs, California analyzes a county's case rate (number of individuals who have the virus per 100,000) and the test positivity rate. California reevaluates each county's tier status on a weekly basis; as local conditions improve, counties are eligible to move to a less-restrictive tier with more permissive policies.

Within each tier, activities are subject to different restrictions based on the activity's risk level.

In any given tier, the greater the transmission risk an activity poses, the greater the restrictions California imposes on it.

The Blueprint imposes "greater restrictions on congregate activities involving groups of people, and particularly indoor congregate activities, because, even after applying precautions required by general and industry-specific guidelines, they pose greater transmission risk."

The Blueprint's assessment of indoor worship services reflects the widely shared consensus in the scientific community that this activity presents an "especially risky type of public gathering." This is because worship services bring together (1) a large number of people from different households, (2) in the same place for an extended period of time, (3) to participate in a communal activity, which necessarily allows respiratory droplets exhaled by an infected, but asymptomatic, individual to accumulate in doses large enough to infect others. Moreover, religious services often involve singing and chanting, which propel respiratory droplets farther thereby increasing transmission risk. In other words, indoor worship services "involve large groups of people who are coming together for the purpose of being together."
Initially, the Blueprint appeared effective; new COVID-19 infection rates fell as summer came to a close. But in late October, case rates began to climb, then to skyrocket exponentially. In an attempt to curb the rising case numbers, California’s Department of Public Health issued additional guidance pertaining to private gatherings.

The guidance prohibited gatherings that involved more than three households and prohibited indoor private gatherings in Tier 1 counties. In all remaining tiers, indoor gatherings are "strongly discouraged." The guidance also prohibited "singing, chanting, shouting, cheering, and similar activities" at indoor gatherings.

As of January 19, 2021, California became the first state to record more than three million cases. On January 21, the State recorded a record 736 deaths in a single day, bringing the total of Californians who have died from the virus to 35,004.

Disposition Below

On May 11, 2020, Plaintiffs South Bay United Pentecostal Church and Bishop 1137*1137 Hodges (collectively, "South Bay") filed a complaint alleging that the four-stage Resilience Roadmap violated the First Amendment's Free Exercise, Establishment, Free Speech, and Assembly Clauses; the Fourteenth Amendment’s Due Process and Equal Protection Clauses; and rights enumerated in Article 1, sections 1 through 4, of the California Constitution.

The district court denied a temporary restraining order.

The Ninth Circuit denied a motion for injunction.


Chief Justice Roberts concurred in the denial of the application, writing that the Roadmap "appear[ed] consistent with the Free Exercise Clause of the First Amendment." Id. at 1613 (Roberts, C.J., concurring). The Chief Justice emphasized that:

On October 15, 2020, the district court issued an order again denying South Bay's motion for preliminary injunctive relief, concluding that South Bay remained unlikely to succeed on its Free Exercise claim.
Meanwhile, as scientific understanding of the virus evolved, the legal landscape for resolving COVID-19-related First Amendment issues also shifted.

On November 25, 2020, the Supreme Court issued its decision in Roman Catholic Diocese of Brooklyn v. Cuomo, ___ U.S. ___, 141 S. Ct. 63, ___ L.Ed.2d ___ (2020) (per curiam), which elevated the level of scrutiny that courts are to apply to Free Exercise claims.

In light of the Supreme Court's decision, South Bay again moved this court for an injunction pending appeal. We denied the request but vacated the district court's October 15 order and remanded the case for further consideration. S. Bay United Pentecostal Church v. Newsom, 981 F.3d 765 (9th Cir. 2020).[16]

On remand, the district court again denied South Bay's request for preliminary injunctive relief, this time applying the higher level of scrutiny as required by the Supreme Court.

On December 22, 2020, South Bay appealed and filed an emergency motion for an injunction pending appeal. The Ninth Circuit denied the emergency request without prejudice, expedited the appeal, and affirmed denial of the injunction.

The Ninth Circuit held district court properly refused to enjoin:

- Temporary prohibition on indoor worship in Tier 1 zones of the Blueprint.
- State-wide ban on indoor singing and chanting.
- 100- and 200-person attendance caps on indoor worship under Tier 2 and 3 zones of the Blueprint.

Per Curiam Opinion re Application for Injunction

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is granted in part.

Respondents are enjoined from enforcing the Blueprint's Tier 1 prohibition on indoor worship services.

The application is denied with respect to the percentage capacity limitations, and respondents are not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1.
The application is denied with respect to the prohibition on singing and chanting during indoor services.

This order is without prejudice to the applicants presenting new evidence to the District Court that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner.

Chief Justice Roberts’ Concurrence

As I explained the last time the Court considered this evolving case, federal courts owe significant deference to politically accountable officials with the "background, competence, and expertise to assess public health."

The State has concluded, for example, that singing indoors poses a heightened risk of transmitting COVID-19. I see no basis in this record for overriding that aspect of the state public health framework.

At the same time, the State’s present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake.

I adhere to the view that the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." Ibid. (internal quotation marks and alteration omitted).

But the Constitution also entrusts the protection of the people's rights to the Judiciary—not despite judges being shielded by life tenure, see post, at 6 (KAGAN, J., dissenting), but because they are. Deference, though broad, has its limits.

Justice Barrett, with whom Justice Kavanaugh joins, concurring in the partial grant of application for injunctive relief.

I agree with JUSTICE GORSUCH’s statement, save its contention that the Court should enjoin California's prohibition on singing and chanting during indoor services.

The applicants bore the burden of establishing their entitlement to relief from the singing ban. In my view, they did not carry that burden—at least not on this record.

As the case comes to us, it remains unclear whether the singing ban applies
across the board (and thus constitutes a neutral and generally applicable law) or else favors certain sectors (and thus triggers more searching review).

Of course, if a chorister can sing in a **Hollywood studio** but not in her church, California's regulations cannot be viewed as neutral. But the record is uncertain, and the decisions below unfortunately shed little light on the issue. As the order notes, however, the applicants remain free to show that the singing ban is not generally applicable and to advance their claim accordingly.

**Statement of Justice Gorsuch**
** Joined by Thomas & Alito, JJ.**

California has openly imposed more stringent regulations on religious institutions than on many businesses.

At "Tier 1," applicable today in most of the State, California forbids any kind of indoor worship.

Meanwhile, the State allows most retail operations to proceed indoors with 25% occupancy, and other businesses to operate at 50% occupancy or more.

Apparently, California is the only State in the country that has gone so far as to ban all indoor religious services.

When a State so obviously targets religion for differential treatment, our job becomes that much clearer. Regulations like these violate the First Amendment unless the State can show they are the least restrictive means of achieving a compelling government interest.

Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. Even in times of crisis—**perhaps especially in times of crisis**—we have a duty to hold governments to the Constitution.

The State says religious exercises involve (1) large numbers of people mixing from different households; (2) in close physical proximity; (3) for extended periods; (4) with singing.

California errs to the extent it suggests its four factors are always present in worship, or always absent from the other secular activities its regulations allow. Nor has California sought to explain why it cannot address its legitimate concerns with rules short of a total ban.

Each of the State's shortcomings are telltale signs this Court has long used
to identify laws that fail strict scrutiny. See, e.g., First Nat. Bank of Boston v. Bellotti, 435 U. S. 765, 793 (1978) (The State’s proffered "purpose is belied, however, by the provisions of the statute, which are both underinclusive and overinclusive.").

Scores might pack into train stations or wait in long checkout lines in the businesses the State allows to remain open, while some worshippers may seek only to pray in solitude, go to confession, or study in small groups.

The less restrictive option of limiting the number of people who may gather at one time could be sufficient as it has been for many stores and businesses.

California is not as concerned with the close physical proximity of hairstylists or manicurists.

California allows people to sit in close proximity inside buses too.

California does not limit its citizens to running in and out of other establishments; no one is barred from lingering in shopping malls, salons, or bus terminals.

Narrowly tailored options, like a reasonable limit on the length of indoor religious gatherings, might meet the state’s concerns.

The singing ban may not be what it first appears. California’s powerful entertainment industry has won an exemption.

A total ban on religious singing is not narrowly tailored to its legitimate public health concerns. Even if a full congregation singing hymns is too risky, a single masked cantor could lead worship behind a mask and a plexiglass shield.

A lone muezzin could not sing the call to prayer from a remote location inside a mosque as worshippers file in.

California may argue its prohibitions are merely temporary because vaccinations are underway. But the State’s "temporary" ban on indoor worship has been in place since August 2020, and applied routinely since March.

California no longer asks its movie studios, malls, and manicurists to wait. And one could be forgiven for doubting its asserted timeline. Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner. As this crisis enters its second year — and hovers over a second
Lent, a second Passover, and a second Ramadan—it is too late for the State to
defend extreme measures with claims of temporary exigency, if it ever could.
Drafting narrowly tailored regulations can be difficult. But if Hollywood may host
a studio audience or film a singing competition while not a single soul may enter
California's churches, synagogues, and mosques, something has gone seriously
awry.

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

Justices of this Court are not scientists. Nor do we know much about public
health policy.

Yet today the Court displaces the judgments of experts about how to
respond to a raging pandemic.

Under the Court's injunction, the State must treat worship services like
secular activities that pose a much lesser danger. That mandate defies our
caselaw, exceeds our judicial role, and risks worsening the pandemic.

The First Amendment demands "neutrality" in actions affecting religion,
but does not require things which are different be treated as though they were
the same.

California's scheme homes in on indoor gatherings because they pose a
heightened danger of COVID transmission.

The medical experts testified about California imposed more severe
capacity limits on gathering places like churches and theaters than on other indoor
sites because shopping "involves less close proximity" with other people—and for
less time—than does an indoor worship service, lecture, or similar event.

Workplaces can have higher capacity limits because employers (and, by
extension, their employees) must comply with "detailed, workplace-specific
COVID prevention plans subject to enforcement by State labor authorities." Film
production studios in California must test their employees as many as three times
a week—a requirement that "could not feasibly be applied to the congregation of
a house of worship."

Given all that evidence, California's choices make good sense.

Is it that the Court does not believe the science, or does it think even the
best science must give way? In any event, the result is clear: The State may not
treat worship services like activities found to pose a comparable COVID risk, such
as political meetings or lectures.

The Court insists on treating unlike cases, not like ones, equivalently.

This is no garden-variety legal error: In forcing California to ignore its experts' scientific findings, the Court impairs the State's effort to address a public health emergency.

And who knows what today's decision will mean for other restrictions challenged in other cases?

I fervently hope that the Court's intervention will not worsen the Nation's COVID crisis. But if this decision causes suffering, we will not pay. Our marble halls are now closed to the public, and our life tenure forever insulates us from responsibility for our errors.

That would seem good reason to avoid disrupting a State's pandemic response. But the Court forges ahead regardless, insisting that science-based policy yield to judicial edict. I respectfully dissent.

JUSTICE THOMAS and JUSTICE GORSUCH would grant the application in full.

JUSTICE ALITO would grant the application with respect to all of the capacity restrictions on indoor worship services and the prohibition against indoor singing and chanting, and would stay for 30 days an injunction against the percentage attendance caps and the prohibition against indoor singing and chanting. JUSTICE ALITO would have the stay lift in 30 days unless the State demonstrates clearly that nothing short of those measures will reduce the community spread of COVID-19 at indoor religious gatherings to the same extent as do the restrictions the State enforces with respect to other activities it classifies as essential.

Questions for the Panel

1. The conservative judges seem to be saying that because the state has made poor choices to exempt some industries, it must make poor choices to religious institutions, irrespective of whether that endangers public health. Has underinclusive analysis ever worked that way?

2. When a regulation is underinclusive, it usually demonstrates the state lacks a strong interest in the regulation and it therefore fails
to survive strict scrutiny. But what if underinclusiveness appears to be a product of political pressure? Does this also show that the state lacks a sufficient interest to justify its regulation?

3. Might the number of people attending religious services be so much greater than those making movies or having manicures justify different treatment? What if 5,000,000 people attend churches and synagogues and 5,000 are making movies?

4. Do the arguments made by the competing opinions in this case echo the arguments that were made in the 2020 presidential election campaigns? Does that matter?

5. Where do we go from here when it comes to regulations which arguably treat religious practices differently than other practices?

6. Will this case have an impact on whether the Court overturns Roe v. Wade next year? If so, why? If not, why not?
7. **Tandon v. Newsom,**
No. 21-15228 (9th Cir. Mar. 30, 2021)
S. Ct. Case No. No. 20A151
Decided: April 9, 2021

**The Votes (5-1-3)**

- **Majority:** Per Curiam
  Joined By: Thomas, J.
  Alito, J.
  Gorsuch, J.
  Kavanaugh, J.
  Coney-Barrett, J.

- **Statement:** Roberts, C.J.

- **Dissent:** Kagan, J.
  Joined By: Breyer, J.
  Sotomayor, J.

**Quick Summary**

- Governor enjoined from enforcing prohibition against gatherings in homes to three households.
  Would deny the injunction. No reason stated.

- California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment.
State restrictions "apply to private gatherings, and all other gatherings not covered by existing sector guidance are prohibited."

"Gatherings are defined as social situations that bring together people from different households at the same time in a single space or place."

Indoor and outdoor gatherings are limited to three households, but indoor gatherings are prohibited in Tier 1 and "strongly discouraged" in the remaining tiers.

The limit gatherings in public parks or other outdoor spaces to three households.

A gathering must be in a space that is "large enough" to allow physical distancing of six feet, should be two hours or less in duration, and attendees must wear face coverings.

Singing, chanting, shouting, cheering, and similar activities are allowed at outdoor gatherings with restrictions, but singing and chanting are not allowed at indoor gatherings.

The law provides exemptions, which allow outdoor gatherings with social distancing, political protests and rallies, worship services, and cultural events such as weddings and funerals.

Outdoor services with social distancing are allowed at houses of worship, such as churches, mosques, temples, and synagogues.

Indoor services at houses of worship are subject to capacity restrictions (25% of capacity in Tier 1 and 2 counties, and 50% of capacity in Tier 3 and 4 counties), and other safety modifications including face coverings, COVID-19 prevention training, social distancing, cleaning and disinfection protocols, and restrictions on singing and chanting.

The restrictions for houses of worship also apply to cultural ceremonies such as funerals and wedding ceremonies.

However, wedding receptions are subject to the gatherings restrictions, so in Tier 1 receptions must take place outdoors and are limited to three households, while outdoor or indoor receptions, limited to three households, are allowed in the other tiers.
"[S]tate public health directives do not prohibit in-person outdoor protests and rallies" with social distancing and face coverings, but "Local Health Officers are advised to consider appropriate limitations on outdoor attendance capacities," and that failure to follow the social distancing restrictions and to wear face coverings "may result in an order to disperse or other enforcement action."

Indoor protests and rallies are not allowed in Tier 1 counties but are allowed in other counties subject to the capacity restrictions for places of worship, social distancing, face covering requirements, and prohibitions on singing and chanting.

Disposition Below

The district court denied a preliminary injunction on February 21, 2021.

Plaintiffs moved for an emergency injunction pending appeal in the Ninth Circuit, seeking to prohibit the enforcement of California's restrictions on private "gatherings" and various limitations on businesses as applied to Appellants' in-home Bible studies, political activities, and business operations.

The Ninth Circuit denied the motion.

The Per Curiam Grant of Injunction

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is granted pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought.

* * *

The Ninth Circuit’s failure to grant an injunction pending appeal was erroneous. This Court’s decisions have made the following points clear.

First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U. S. ___–___ (2020) (per curiam) (slip op., at 3–4).

It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue. Id., at ___–___ (KAVANAUGH, J., concurring) (slip op., at 2–3).
Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. Id., at ___ (per curiam) (slip op., at 3) (describing secular activities treated more favorably than religious worship that either “have contributed to the spread of COVID–19” or “could” have presented similar risks). Comparability is concerned with the risks various activities pose, not the reasons why people gather. Id., at ___ (GORSUCH, J., concurring) (slip op., at 2).

Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors “are always present in worship, or always absent from the other secular activities” the government may allow. South Bay United Pentecostal Church v. Newsom, 592 U. S. ___, ___ (2021) (statement of GORSUCH, J.) (slip op., at 2); id., at ___ (BARRETT, J., concurring) (slip op., at 1). Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too. Roman Catholic Diocese, 592 U. S., at ___–___ (slip op., at 4–5); South Bay, 592 U. S., at ___ (statement of GORSUCH, J.) (slip op., at 3).

Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants “remain under a constant threat” that government officials will use their power to reinstate the challenged restrictions. Roman Catholic Diocese, 592 U. S., at ___ (slip op., at 6); see also High Plains Harvest Church v. Polis, 592 U. S. ___ (2020).

These principles dictated the outcome in this case, as they did in Gateway City Church v. Newsom, 592 U. S. ___ (2021).

First, California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.

Second, the Ninth Circuit did not conclude that those activities pose a lesser risk of transmission than applicants’ proposed religious exercise at home. The Ninth Circuit erroneously rejected these comparators simply because this Court’s previous decisions involved public buildings as opposed to private buildings. Tandon v. Newsom, ___ F. 3d ___, ___, ___–___, 2021 WL 1185157, *3, *5–*6 (CA9 2021).
Third, instead of requiring the State to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities, the Ninth Circuit erroneously declared that such measures might not “translate readily” to the home. Id., at *8.

The State cannot “assume the worst when people go to worship but assume the best when people go to work.” Roberts v. Neace, 958 F. 3d 409, 414 (CA6 2020) (per curiam).

And fourth, although California officials changed the challenged policy shortly after this application was filed, the previous restrictions remain in place until April 15th, and officials with a track record of “moving the goalposts” retain authority to reinstate those heightened restrictions at any time. South Bay, 592 U.S., at ___ (statement of GORSUCH, J.) (slip op., at 6).

Applicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights “for even minimal periods of time”; and the State has not shown that “public health would be imperiled” by employing less restrictive measures. Roman Catholic Diocese, 592 U.S., at ___ (slip op., at 5). Accordingly, applicants are entitled to an injunction pending appeal.

This is the fifth time the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions on religious exercise. See Harvest Rock Church v. Newsom, 592 U. S. ___ (2020); South Bay, 592 U. S. ___; Gish v. Newsom, 592 U. S. ___ (2021); Gateway City, 592 U. S. ___.

It is unsurprising that such litigants are entitled to relief.

California’s Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny.

And historically, strict scrutiny requires the State to further “interests of the highest order” by means “narrowly tailored in pursuit of those interests.” Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 546 (1993) (internal quotation marks omitted). That standard “is not watered down”; it “really means what it says.” Ibid. (quotation altered).

THE CHIEF JUSTICE would deny the application.
Justice Kagan’s Dissent
Joined by Breyer and Sotomayor, JJ.

I would deny the application largely for the reasons stated in South Bay United Pentecostal Church v. Newsom, 592 U. S. ___ (2021) (KAGAN, J., dissenting).

The First Amendment requires that a State treat religious conduct as well as the State treats comparable secular conduct. Sometimes finding the right secular analogue may raise hard questions. But not today. California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at home gatherings of all kinds, religious and secular alike.

California need not, as the per curiam insists, treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here.

As the per curiam’s reliance on separate opinions and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons.

And even supposing a court should cast so expansive a comparative net, the per curiam’s analysis of this case defies the factual record.

According to the per curiam, “the Ninth Circuit did not conclude that” activities like frequenting stores or salons “pose a lesser risk of transmission” than applicants’ at-home religious activities. Ante, at 3. But Judges Milan Smith and Bade explained for the court that those activities do pose lesser risks for at least three reasons.

No doubt this evidence is inconvenient for the per curiam’s preferred result. But the Court has no warrant to ignore the record in a case that (on its own view, see ante, at 2) turns on risk assessments. In ordering California to weaken its restrictions on at-home gatherings, the majority yet again “insists on treating unlike cases, not like ones, equivalently.” South Bay, 592 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 5).

And it once more commands California “to ignore its experts’ scientific findings,” thus impairing “the State’s effort to address a public health emergency.” Ibid. Because the majority continues to disregard law and facts alike, I respectfully dissent from this latest per curiam decision.
Questions for the Panel

1. Why does Chief Justice Roberts say nothing other than that he would deny the injunction? Has he given up?

2. Who wrote this opinion? Who is now in charge of the U.S. Supreme Court?
   - Justice Gorsuch?
   - Justice Kavanaugh?
   - Justice Coney Barrett?

3. Why is this an unsigned Per Curiam opinion?

4. The Ninth Circuit judges who wrote the opinion below which is overturned were appointed by Presidents Trump and George W. Bush. The dissenting judge also was appointed by President Trump. Is it surprising, then, that the Supreme Court wrote such a sharp opinion castigating the Ninth Circuit panel for ignoring the Court’s prior decisions?

5. Will the Court’s emphasis on Free Exercise claims lead it to invalidate other laws and regulations which treat religious institutions and practices differently than other arguable analogous institutions and practices?

6. Or, are all these COVID opinion sui generis – ensuring only that when a pandemic hits the government can do little or nothing in the name of public health that would restrict religious practices?

7. Is the underlying theme here that if the world is coming to an end, we all need to be free to pray?
8. **Bruni v. City of Pittsburgh,**
941 F. 3d 73 (3d Cit. 2019_
Supreme Court Case No. 19–1184.
141 S.Ct. 578 (2021)
Decided January 11, 2021

The petition for a writ of certiorari is denied.

**The Facts**

The City has demarcated buffer zones at two locations, both of which provide reproductive health services including abortions.

A Pittsburgh ordinance that creates a fifteen-foot "buffer zone" outside the entrance of any hospital or healthcare facility. Pittsburgh, Pa., Code § 623.04 (2005)).

In relevant part, the Ordinance states that "[n]o person or persons shall knowingly congregate, patrol, picket or demonstrate" in the prescribed zone.

Plaintiffs Nikki Bruni, Cynthia Rinaldi, Kathleen Laslow, Julie Cosentino, and Patrick Malley engage in the bulk of their anti-abortion activities outside the buffer zone at Planned Parenthood.

In contrast to the conduct that gave rise to the Ordinance, Plaintiffs do not physically block patients' ingress or egress or engage in violent tactics. Instead, they engage in what they call "sidewalk counseling," meaning "calm" and "quiet conversations" in which they "offer assistance and information to" women they believe are considering having an abortion "by providing them pamphlets describing local pregnancy resources, praying, and ... peacefully express[ing] [a] message of caring support."

That message, Plaintiffs explain, "can only be communicated through close, caring, and personal conversations, and cannot be conveyed through protests."
Nonetheless, the City takes the position that Plaintiffs' sidewalk counseling falls within the prohibition on "demonstrating"—if not "congregating," "patrolling," and "picketing" too,—so while they can engage in sidewalk counseling outside the zone, they cannot once within its bounds.

Plaintiffs describe various ways that the buffer zone has hindered their ability to effectively communicate their message. The street noise makes it difficult for people to hear them, forcing them to raise their voices in a way inconsistent with sidewalk counseling, state restrictions on abortion counselors,

And at the distance at which they are forced to stand, they are unable to differentiate between passersby and individuals who intend to enter the facility, causing them to miss opportunities engage with their desired audience through either speech or leafleting.

In addition to "sidewalk counseling," Plaintiff Nikki Bruni is the local leader of a group participating in the "Forty Days for Life" movement, a global anti-abortion campaign.

Twice a year, campaign participants, including Plaintiffs, pray outside of abortion clinics from 7 AM to 7 PM continuously for forty days. They do so in shifts, and many participants wear or carry signs.

As the leader of the group, Bruni organizes local churches to ensure people are always outside of the clinic so "there's always groups on the sidewalk present during the 40 Days all day every day." Although the exact number of participants is disputed, the record reflects a daily presence of somewhere between ten and forty people.

Disposition Below

Plaintiffs argued that the City Ordinance is facially unconstitutional under the First Amendment.

The District Court granted summary judgment in the City's favor.

The Second Circuit concluded that the Ordinance does not cover sidewalk counseling and thus does not impose a significant burden on speech, and affirmed.
The city of Pittsburgh, like many jurisdictions, has created “buffer zones” around abortion clinics. These zones often impose serious limits on free speech. Many even prohibit certain one-on-one conversations.

In 2000, we upheld one such law, determining that it survived under the First Amendment because it satisfied intermediate scrutiny. Hill v. Colorado, 530 U. S. 703 (2000).


For example, these more recent decisions establish that strict scrutiny is the proper standard of review when a law targets a “specific subject matter . . . even if it does not discriminate among viewpoints within that subject matter.” Reed, 576 U. S., at 169.

I agree with the Court’s decision not to take up this case because it involves unclear, preliminary questions about the proper interpretation of state law.

But the Court should take up this issue in an appropriate case to resolve the glaring tension in our precedents.
Questions for the Panel

1. Was the Court just too busy with COVID cases to bother with overturning Hill v. Colorado?

2. Will the Court overturn it at its next opportunity?

3. Is this another area in which super strict scrutiny will apply going forward?

4. Why did Justice Thomas feel the need to write his statement? Might he be planning to step down although only 73?
S. Ct. Case No. 19-123
Decided: June 17, 2021

The Votes (6-3-3-3)

Majority: Roberts, C.J.
Joined by: Breyer, J.
Sotomayor, J.
Kagan, J.
Kavanaugh, J.
Barrett, J.

Concur: Barrett, J.
Joined by: Kavanaugh, J.

All but ¶ 1
Breyer, J.

Concur in Judgment: Alito, J.
Joined by: Thomas, J.

Concur in Judgment: Gorsuch, J.
Joined by: Thomas, J.

Quick Summary

Refusal of city to contract with Catholic Social Services for foster care services unless it agrees to certify same-sex couples as foster parents violates Free Exercise Clause. City Code was not generally applicable due to discretionary power to exempt, and it does not survive strict scrutiny.

Employment Division v. Smith, 494 U.S. 872 (1990), might be wrong in holding a neutral and generally applicable law does not violate the Free Exercise Clause. But this need not be addressed.

Employment Division v. Smith, 494 U.S. 872 (1990), should be overruled and City Code should be invalidated.

Majority is wrong that the Code is not generally applicable. City might make eliminate the power to create exemptions and then the court would be required to overrule Smith.
The Facts

A reporter from the Philadelphia Inquirer informed the City of Philadelphia’s Department of Human Services in March 2018 that two of its agencies would not work with same-sex couples as foster parents.

Human Services investigated this allegation, which it considered a violation of the City’s anti-discrimination laws. When the agencies confirmed that, because of their religious views on marriage, they would not work with gay couples, Human Services ceased referring foster children to them.

One of those agencies, Catholic Social Services ("CSS"), sued the City claiming that the City has violated its rights under the First Amendment’s Free Exercise, Establishment, and Free Speech Clauses, as well as under Pennsylvania’s Religious Freedom Protection Act.

No same-sex couple had ever sought certification from CSS. If one did, CSS said it would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.

The district court denied CSS’s motion preliminary injunctive relief after a three-day hearing. The court also determined that the free speech claims were unlikely to succeed because CSS performed certifications as part of a government program.

The Third Circuit affirmed, noting the contract between the parties had expired, held the City could insist on the inclusion of new language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal because the terms were a neutral and generally applicable policy.

CSS and the foster parents sought review. They challenged the Third Circuit’s determination that the City’s actions were permissible under Smith and also asked this Court to reconsider that precedent.

Chief Justice Roberts’ Majority Decision

Joined by Breyer, Sotomayor, Kagan, Kavanaugh, & Coney Barrett, J

The City’s actions have burdened CSS’s religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.

The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement.

And “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” Thomas v. Review Bd. of Ind. Employment Security Div., 450 U. S. 707, 714 (1981). Our task is to
decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Employment Division v. Smith, 494 U.S. 872 (1990), held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. 494 U.S., at 878–882.

CSS urges us to overrule Smith.

We need not. This case falls outside Smith because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable. See Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 531–532 (1993) (invalidating ordinance prohibiting Santeria sacrificing but not other killing of animals).

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n, 584 U. S. ___, ___–___ (2018) (slip op., at 16–17); Lukumi, 508 U. S., at 533. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it “invite[s]” the government to consider the particular reasons for a person’s conduct by providing “‘a mechanism for individualized exemptions.’” Smith, 494 U. S., at 884 (quoting Bowen v. Roy, 476 U. S. 693, 708 (1986) (opinion of Burger, C. J., joined by Powell and Rehnquist, JJ.)).

Section 3.21 is not generally applicable as required by Smith.

The current version of section 3.21 specifies in pertinent part: “Rejection of Referral. Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner’s designee, in his/her sole discretion.” Supp. App. to Brief for City Respondents 16–17.

The City argues that governments should enjoy greater leeway when setting rules for contractors and managing its internal operations. But principles of neutrality and general applicability still constrain the government in its capacity as manager.

The City asserts that its non-discrimination policies serve three compelling interests:

1. Maximizing the number of foster parents,
2. Protecting the City from liability, and
3. Ensuring equal treatment of prospective foster parents and foster children.
Rather than rely on “broadly formulated interests,” courts must “scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.” O Centro, 546 U. S., at 431. The question is whether the City has a compelling interest in denying an exception to CSS.

Once properly narrowed, the City’s asserted interests are insufficient.

Including CSS in the program seems likely to increase, not reduce, the number of available foster parents.

The City offers only speculation that it might be sued over CSS’s certification practices.

As for equal treatment, “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” Masterpiece Cakeshop, 584 U. S., at ___ (slip op., at 9). But this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City’s contention that its nondiscrimination policies can brook no departures. See Lukumi, 508 U. S., at 546–547. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

Justice Barrett’s Concurrence
Joined by Kavanaugh, J., and Joined by Breyer, J. except ¶ 1

Petitioners have made serious arguments that Smith ought to be overruled.

The historical record is more silent than supportive on the question.

The textual and structural arguments against Smith are more compelling.

It is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace Smith?

I am skeptical about swapping Smith’s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court’s resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced.

Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U. S. 171 (2012).

(assessing whether government’s interest is “‘compelling’”), with Gillette v. United States, 401 U. S. 437, 462 (1971) (assessing whether government’s interest is “substantial”).

And if the answer is strict scrutiny, would pre-Smith cases rejecting free exercise challenges to garden-variety laws come out the same way? See Smith, 494 U. S., at 888–889.

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether Smith stays or goes.

All nine Justices agree that the City cannot satisfy strict scrutiny.

Justice Alito’s Concurrence in the Judgment
Joined by Thomas & Gorsuch, JJ

In Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872 (1990), the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment’s Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice.

Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to Smith, provides no protection. This severe holding is ripe for reexamination.

There is no question that Smith’s interpretation can have startling consequences.

Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with Smith even though it would have prevented the celebration of a Catholic Mass anywhere in the United States.

Suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under Smith even though it would have prevented the celebration of a Catholic Mass anywhere in the United States.

Suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under Smith even though it would have prevented the celebration of a Catholic Mass anywhere in the United States.

Or suppose that this Court or some other court enforced a rigid rule禁止 prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy Smith even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added.

Many people believe they have a religious obligation to assist such children. Jews and Christians regard this as a scriptural command, and it is a mission that the Catholic Church has undertaken since ancient times.
Catholic foster care agencies in Philadelphia and other cities have a long record of finding homes for children whose parents are unable or unwilling to care for them.

The City has barred Catholic Social Services (CSS) from continuing this work.

Remarkably, the City took this step even though it threatens the welfare of children awaiting placement in foster homes. There is an acute shortage of foster parents, both in Philadelphia and in the country at large.

By ousting CSS, the City eliminated one of its major sources of foster homes. And that’s not all. The City went so far as to prohibit the placement of any children in homes that CSS had previously vetted and approved.

One of the questions that we accepted for review is “[w]hether Employment Division v. Smith should be revisited.” We should confront that question.

The Court declines to do so on what appears to be a superfluous (and likely to be short-lived) feature of the City’s standard annual contract with foster care agencies.

This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today’s decision, it can simply eliminate the never-used exemption power.

If it does that, then, voilà, today’s decision will vanish—and the parties will be back where they started. The City will claim that it is protected by Smith; CSS will argue that Smith should be overruled; the lower courts, bound by Smith, will reject that argument; and CSS will file a new petition in this Court challenging Smith. What is the point of going around in this circle?

We should reconsider Smith without further delay.

Smith can’t be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment’s adoption.

JUSTICE BARRETT makes the surprising claim that “[a] longstanding tenet of our free exercise jurisprudence” that “pre-dates” Smith is “that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions.”

If there really were such a “longstanding [pre-Smith] tenet,” one would expect to find cases stating that rule, but JUSTICE BARRETT does not cite even one such case. RFRA and RLUIPA have restored part of the protection that Smith withdrew, but they are both limited in scope and can be weakened or repealed by Congress at any time. They are no substitute for a proper interpretation of the Free Exercise Clause.
The phrase “no law” applies to the freedom of speech and the freedom of the press, as well as the right to the free exercise of religion, and there is no reason to believe that its meaning with respect to all these rights is not the same. With respect to the freedom of speech, we have long held that “no law” does not mean that every restriction on what a person may say or write is unconstitutional. See, e.g., Miller v. California, 413 U. S. 15, 23 (1973); see also Federal Election Comm’n v. Wisconsin Right to Life, Inc., 551 U. S. 449, 482 (2007) (opinion of ROBERTS, C. J.); Times Film Corp. v. Chicago, 365 U. S. 43, 47–49 (1961).

Many restrictions on what a person could lawfully say or write were well established at the time of the adoption of the First Amendment and have continued to this day. Fraudulent speech, speech integral to criminal conduct, speech soliciting bribes, perjury, speech threatening physical injury, and obscenity are examples. See, e.g., Donaldson v. Read Magazine, Inc., 333 U. S. 178, 190–191 (1948) (fraud); Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 498 (1949) (speech integral to criminal conduct); McCutcheon v. Federal Election Comm’n, 572 U. S. 185, 191–192 (2014) (plurality opinion) (quid pro quo bribes); United States v. Dunnigan, 507 U. S. 87, 96–97 (1993) (perjury); Virginia v. Black, 538 U. S. 343, 359 (2003) (threats); Miller, 413 U. S., at 23 (obscenity).

The First Amendment has never been thought to have done away with all these rules. Alexander Meiklejohn reconciled this conclusion with the constitutional text: The First Amendment “does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech.” Free Speech and Its Relation to Self-Government 19 (1948) (emphasis deleted).

In other words, the Free Speech Clause protects a right that was understood at the time of adoption to have certain defined limits. See Konigsberg v. State Bar of Cal., 366 U. S. 36, 49, and n. 10 (1961).

The same is true of the Free Exercise Clause. See infra, at 28–36. No one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice.

Whatever the outer boundaries of the term “religion” as used in the First Amendment, there can be no doubt that CSS’s contested policy represents an exercise of “religion.”

When the First Amendment was adopted, the right to religious liberty already had a long, rich, and complex history in this country.

For present purposes, we can narrow our focus and concentrate on the circumstances that relate most directly to the adoption of the Free Exercise Clause. As has often been recounted, critical state ratifying conventions approved the Constitution on the understanding that it would be amended to provide express protection for certain fundamental rights, and the right to religious liberty was unquestionably one of those rights. As noted, it was expressly protected in 12 of the 13 State Constitutions, and these state constitutional provisions provide the best evidence of the scope of the right
embodied in the First Amendment. When we look at these provisions, we see one predominant model. This model extends broad protection for religious liberty but expressly provides that the right does not protect conduct that would endanger “the public peace” or “safety.”

This model had deep roots in early colonial charters.

The model favored by Congress and the state legislatures—providing broad protection for the free exercise of religion except where public “peace” or “safety” would be endangered—is antithetical to Smith.

Based on the text of the Free Exercise Clause and evidence about the original understanding of the free-exercise right, the case for Smith fails to overcome the more natural reading of the text. Indeed, the case against Smith is very convincing.

That conclusion cannot end our analysis. “We will not overturn a past decision unless there are strong grounds for doing so,” Janus v. State, County, and Municipal Employees, 585 U. S. ___, ___ (2018) (slip op., at 34), but at the same time, stare decisis is “not an inexorable command.” Ibid. (internal quotation marks omitted).

Four factors weigh strongly against Smith: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down.

If Smith is overruled, what legal standards should be applied in this case? The answer that comes most readily to mind is the standard that Smith replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.

Whether this test should be rephrased or supplemented with specific rules is a question that need not be resolved here because Philadelphia’s ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case.

After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.

Justice Gorsuch’s Concurrence in the Judgment
Joined by Alito & Kavanaugh, JJ.

A majority agrees the City of Philadelphia’s treatment of Catholic Social Services (CSS) violates the Free Exercise Clause. But, they say, there’s no “need” or “reason” to address the error of Smith today.

On the surface it may seem a nice move, but dig an inch deep and problems emerge.
The district court held that the City’s public accommodations law (its Fair Practices Ordinance or FPO) is both generally applicable and applicable to CSS.

The majority ignores the FPO’s expansive definition of “public accommodations.” It ignores the reason the district court offered for why CSS falls within that definition.

Even playing along with this statutory shell game doesn’t solve the problem.

The majority’s gloss on state law isn’t just novel, it’s probably wrong.

If anything, the majority’s next move only adds to the confusion. It denies cooking up any of these arguments on its own. It says it merely means to “agree with CSS’s position . . . that its ‘foster services do not constitute a “public accommodation” under the City’s Fair Practices Ordinance.’”

This sets up the majority’s final move—where the real magic happens. Having conjured a conflict within the contract, the majority devises its own solution.

From start to finish, it is a dizzying series of maneuvers. The majority changes the terms of the parties’ contract, adopting an uncharitably broad reading (really revision) of §3.21. It asks us to ignore the usual rule that a more specific contractual provision can comfortably coexist with a more general one. And it proceeds to resolve a conflict it created by rewriting §15.1.

Given all the maneuvering, it’s hard not to wonder if the majority is so anxious to say nothing about Smith’s fate that it is willing to say pretty much anything about municipal law and the parties’ briefs.

Had we followed the path JUSTICE ALITO outlines—holding that the City’s rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable—this case would end today.

The majority’s course guarantees that this litigation is only getting started.

Questions for the Panel

1. Justice Alito writes a compelling 77-page concurrence advocating the overruling of Smith and Justice Gorsuch writes a compelling concurrence attacking the majority’s justification for avoiding the issue. Why wouldn’t Justices Barrett and Kavanaugh just go along, especially since they seem to agree that the text of the Free Exercise Clause prohibits more than just discrimination?

2. Would Barrett and Kavanaugh vote to uphold Smith?

3. Does this case reveal why the Court became so divided over the Covid cases?

4. How broad an impact on regulatory power would a decision overruling Smith Have?
S. Ct. Case No. 20-197
Decided: April 5, 2001

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit with instructions to dismiss the case as moot. See United States v. Munsingwear, Inc., 340 U. S. 36 (1950).

JUSTICE THOMAS’S Concurrence

When a person publishes a message on the social media platform Twitter, the platform by default enables others to republish (retweet) the message or respond (reply) to it or other replies in a designated comment thread. The user who generates the original message can manually “block” others from republishing or responding.

Donald Trump, then President of the United States, blocked several users from interacting with his Twitter account. They sued. The Second Circuit held that
the comment threads were a “public forum” and that then-President Trump violated the First Amendment by using his control of the Twitter account to block the plaintiffs from accessing the comment threads. Knight First Amdt. Inst. at Columbia Univ. v. Trump, 928 F. 3d 226 (2019). But Mr. Trump, it turned out, had only limited control of the account; Twitter has permanently removed the account from the platform.

Because of the change in Presidential administration, the Court correctly vacates the Second Circuit’s decision. See United States v. Munsingwear, Inc., 340 U. S. 36 (1950).

I write separately to note that this petition highlights the principal legal difficulty that surrounds digital platforms—namely, that applying old doctrines to new digital platforms is rarely straightforward.

Respondents have a point, for example, that some aspects of Mr. Trump’s account resemble a constitutionally protected public forum. But it seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it.

The disparity between Twitter’s control and Mr. Trump’s control is stark, to say the least. Mr. Trump blocked several people from interacting with his messages. Twitter barred Mr. Trump not only from interacting with a few users, but removed him from the entire platform, thus barring all Twitter users from interacting with his messages.1

Under its terms of service, Twitter can remove any person from the platform—including the President of the United States—“at any time for any or no reason.” Twitter Inc., User Agreement (effective June 18, 2020). This is not the first or only case to raise issues about digital platforms. While this case involves a suit against a public official, the Court properly rejects today a separate petition alleging that digital platforms, not individuals on those platforms, violated public accommodations laws, the First Amendment, and antitrust laws. Pet. for Cert., O. T. 2020, No. 20–969.

The petitions highlight two important facts. Today’s digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.

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1 At the time, Mr. Trump’s Twitter account had 89 million followers.
On the surface, some aspects of Mr. Trump’s Twitter account resembled a public forum. A designated public forum is “property that the State has opened for expressive activity by part or all of the public.” International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U. S. 672, 678 (1992). Mr. Trump often used the account to speak in his official capacity. And, as a governmental official, he chose to make the comment threads on his account publicly accessible, allowing any Twitter user—other than those whom he blocked—to respond to his posts.


Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter’s authority, dictated in its terms of service, to remove the account “at any time for any or no reason.” Twitter exercised its authority to do exactly that.

Because unbridled control of the account resided in the hands of a private party, First Amendment doctrine may not have applied to respondents’ complaint of stifled speech. See Manhattan Community Access Corp. v. Halleck, 587 U. S. ___, ___ (2019) (slip op., at 9) (a “private entity is not ordinarily constrained by the First Amendment”).

Whether governmental use of private space implicates the First Amendment often depends on the government’s control over that space.

For example, a government agency that leases a conference room in a hotel to hold a public hearing about a proposed regulation cannot kick participants out of the hotel simply because they express concerns about the new regulation. See Southeastern Promotions, Ltd. v. Conrad, 420 U. S. 546, 547, 555 (1975). But government officials who informally gather with constituents in a hotel bar can ask the hotel to remove a pesky patron who elbows into the gathering to loudly voice his views. The difference is that the government controls the space in the first scenario, the hotel, in the latter.

Where, as here, private parties control the avenues for speech, our law has typically addressed concerns about stifled speech through other legal doctrines, which may have a secondary effect on the application of the First Amendment.
If part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude. Historically, at least two legal doctrines limited a company’s right to exclude.

First, our legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers. Candeub, Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230, 22 Yale J. L. & Tech. 391, 398–403 (2020) (Candeub); see also Burdick, The Origin of the Peculiar Duties of Public Service Companies, Pt. 1, 11 Colum. L. Rev. 514 (1911).

Justifications for these regulations have varied. Some scholars have argued that common-carrier regulations are justified only when a carrier possesses substantial market power. Candeub 404. Others have said that no substantial market power is needed so long as the company holds itself out as open to the public. Ibid.; see also Ingate v. Christie, 3 Car. & K. 61, 63, 175 Eng. Rep. 463, 464 (N. P. 1850) (“[A] person [who] holds himself out to carry goods for everyone as a business . . . is a common carrier”). And this Court long ago suggested that regulations like those placed on common carriers may be justified, even for industries not historically recognized as common carriers, when “a business, by circumstances and its nature, . . . rise[s] from private to be of public concern.” See German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 411 (1914) (affirming state regulation of fire insurance rates). At that point, a company’s “property is but its instrument, the means of rendering the service which has become of public interest.” Id., at 408.

This latter definition of course is hardly helpful, for most things can be described as “of public interest.” But whatever may be said of other industries, there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers. Candeub 398–405. Telegraphs, for example, because they “resembl[e]d railroad companies and other common carriers,” were “bound to serve all customers alike, without discrimination.” Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 (1894).

In exchange for regulating transportation and communication industries, governments—both State and Federal—have sometimes given common carriers special government favors. Candeub 402–407. For example, governments have tied restrictions on a carrier’s ability to reject clients to “immunity from certain types of suits” or to regulations that make it more difficult for other companies to compete with the carrier (such as franchise licenses). Ibid. By giving these
companies special privileges, governments place them into a category distinct from other companies and closer to some functions, like the postal service, that the State has traditionally undertaken.

2 This Court has been inconsistent about whether telegraphs were common carriers. Compare Primrose, 154 U. S., at 14, with Moore v. New York Cotton Exchange, 270 U. S. 593, 605 (1926). But the Court has consistently recognized that telegraphs were at least analogous enough to common carriers to be regulated similarly. Primrose, 154 U. S., at 14.

3 Telegraphs, for example, historically received some protection from defamation suits. Unlike other entities that might retransmit defamatory content, they were liable only if they knew or had reason to know that a message they distributed was defamatory. Restatement (Second) of Torts §581 (1976); see also O’Brien v. Western Union Tel. Co., 113 F. 2d 539, 542 (CA1 1940).

Second, governments have limited a company’s right to exclude when that company is a public accommodation. This concept—related to common-carrier law—applies to companies that hold themselves out to the public but do not “carry” freight, passengers, or communications. See, e.g., Civil Rights Cases, 109 U. S. 3, 41–43 (1883) (Harlan, J., dissenting) (discussing places of public amusement). It also applies regardless of the company’s market power. See, e.g., 78 Stat. 243, 42 U. S. C. §2000a(a).

B

Internet platforms of course have their own First Amendment interests, but regulations that might affect speech are valid if they would have been permissible at the time of the founding. See United States v. Stevens, 559 U. S. 460, 468 (2010). The long history in this country and in England of restricting the exclusion right of common carriers and places of public accommodation may save similar regulations today from triggering heightened scrutiny—especially where a restriction would not prohibit the company from speaking or force the company to endorse the speech. See Turner Broadcasting System, Inc. v. FCC, 512 U. S. 622, 684 (1994) (O’Connor, J., concurring in part and dissenting in part); PruneYard Shopping Center v. Robins, 447 U. S. 74, 88 (1980). There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner.

1

In many ways, digital platforms that hold themselves out to the public
resemble traditional common carriers.

Though digital instead of physical, they are at bottom communications networks, and they “carry” information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public. Federal law dictates that companies cannot “be treated as the publisher or speaker” of information that they merely distribute. 110 Stat. 137, 47 U. S. C. §230(c).

The analogy to common carriers is even clearer for digital platforms that have dominant market share. Similar to utilities, today’s dominant digital platforms derive much of their value from network size. The Internet, of course, is a network. But these digital platforms are networks within that network. The Facebook suite of apps is valuable largely because 3 billion people use it. Google search—at 90% of the market share—is valuable relative to other search engines because more people use it, creating data that Google’s algorithm uses to refine and improve search results.

These network effects entrench these companies. Ordinarily, the astronomical profit margins of these platforms—last year, Google brought in $182.5 billion total, $40.3 billion in net income—would induce new entrants into the market. That these companies have no comparable competitors highlights that the industries may have substantial barriers to entry.

To be sure, much activity on the Internet derives value from network effects. But dominant digital platforms are different. Unlike decentralized digital spheres, such as the e-mail protocol, control of these networks is highly concentrated. Although both companies are public, one person controls Facebook (Mark Zuckerberg), and just two control Google (Larry Page and Sergey Brin). No small group of people controls e-mail.

Much like with a communications utility, this concentration gives some digital platforms enormous control over speech. When a user does not already know exactly where to find something on the Internet—and users rarely do—Google is the gatekeeper between that user and the speech of others 90% of the time. It can suppress content by deindexing or downlisting a search result or by steering users away from certain content by manually altering autocomplete results. Grind, Schechner, McMillan, & West, How Google Interferes With Its Search Algorithms and Changes Your Results, Wall Street Journal, Nov. 15, 2019.

Facebook and Twitter can greatly narrow a person’s information flow through similar means. And, as the distributor of the clear majority of e-books and
about half of all physical books, Amazon can impose cataclysmic consequences on authors by, among other things, blocking a listing. It changes nothing that these platforms are not the sole means for distributing speech or information. A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today’s digital platforms, nothing is.

If the analogy between common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform’s right to exclude.

When a platform’s unilateral control is reduced, a government official’s account begins to better resemble a “government-controlled space.” Mansky, 585 U. S., at ___ (slip op., at 7); see also Southeastern Promotions, 420 U. S., at 547, 555 (recognizing that a private space can become a public forum when leased to the government).

Common-carrier regulations, although they directly restrain private companies, thus may have an indirect effect of subjecting government officials to suits that would not otherwise be cognizable under our public-forum jurisprudence.

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4 As of 2018, Amazon had 42% of the physical book market and 89% of the e-book market. Day & Gu, The Enormous Numbers Behind Amazon’s Market Reach, Bloomberg, Mar. 27, 2019.

This analysis may help explain the Second Circuit’s intuition that part of Mr. Trump’s Twitter account was a public forum. But that intuition has problems.

First, if market power is a predicate for common carriers (as some scholars suggest), nothing in the record evaluates Twitter’s market power.

Second, and more problematic, neither the Second Circuit nor respondents have identified any regulation that restricts Twitter from removing an account that would otherwise be a “government-controlled space.”

2

Even if digital platforms are not close enough to common carriers, legislatures might still be able to treat digital platforms like places of public accommodation. Although definitions between jurisdictions vary, a company ordinarily is a place of public accommodation if it provides “lodging, food,
entertainment, or other services to the public . . . in general.” Black’s Law Dictionary 20 (11th ed. 2019) (defining “public accommodation”); accord, 42 U. S. C. §2000a(b)(3) (covering places of “entertainment”). Twitter and other digital platforms bear resemblance to that definition. This, too, may explain the Second Circuit’s intuition.

Courts are split, however, about whether federal accommodations laws apply to anything other than “physical” locations. Compare, e.g., Doe v. Mutual of Omaha Ins. Co., 179 F. 3d 557, 559 (CA7 1999) (Title III of the Americans with Disabilities Act (ADA) covers websites), with Parker v. Metropolitan Life Ins. Co., 121 F. 3d 1006, 1010–1011 (CA6 1997) (en banc) (Title III of the ADA covers only physical places); see also 42 U. S. C. §§2000a(b)–(c) (discussing “physica[l] locat[ions]”).

Once again, a doctrine, such as public accommodation, that reduces the power of a platform to unilaterally remove a government account might strengthen the argument that an account is truly government controlled and creates a public forum. See Southeastern Promotions, 420 U. S., at 547, 555. But no party has identified any public accommodation restriction that applies here.

II

The similarities between some digital platforms and common carriers or places of public accommodation may give legislators strong arguments for similarly regulating digital platforms. “[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of ” digital platforms. Turner, 512 U. S., at 684 (opinion of O’Connor, J.).

That is especially true because the space constraints on digital platforms are practically nonexistent (unlike on cable companies), so a regulation restricting a digital platform’s right to exclude might not appreciably impede the platform from speaking. See id., at 675, 684 (noting restrictions on one-third of a cable company’s channels but recognizing that regulation may still be justified); PruneYard, 447 U. S., at 88. Yet Congress does not appear to have passed these kinds of regulations. To the contrary, it has given digital platforms “immunity from certain types of suits,” Candeub 403, with respect to content they distribute, 47 U. S. C. §230, but it has not imposed corresponding responsibilities, like nondiscrimination, that would matter here.

None of this analysis means, however, that the First Amendment is irrelevant until a legislature imposes common carrier or public accommodation restrictions—only that the principal means for regulating digital platforms is through those methods. Some speech doctrines might still apply in limited circumstances, as this Court has recognized in the past.
For example, although a “private entity is not ordinarily constrained by the First Amendment,” Halleck, 587 U. S., at __, ___ (slip op., at 6, 9), it is if the government coaxes or induces it to take action the government itself would not be permitted to do, such as censor expression of a lawful viewpoint. Ibid.


But no threat is alleged here. What threats would cause a private choice by a digital platform to “be deemed . . . that of the State” remains unclear. Id., at 1004. And no party has sued Twitter. The question facing the courts below involved only whether a government actor violated the First Amendment by blocking another Twitter user. That issue turns, at least to some degree, on ownership and the right to exclude.

* * *

The Second Circuit feared that then-President Trump cut off speech by using the features that Twitter made available to him. But if the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves. As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital platforms. The extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raise interesting and important questions. This petition, unfortunately, affords us no opportunity to confront them.

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Threats directed at digital platforms can be especially problematic in the light of 47 U. S. C. §230, which some courts have misconstrued to give digital platforms immunity for bad-faith removal of third-party content. Malwarebytes, Inc. v. Enigma Software Group USA, LLC, 592 U. S. ___, ___–___ (2020) (THOMAS, J., statement respecting denial of certiorari) (slip op., at 7–8). This immunity eliminates the biggest deterrent—a private lawsuit—against caving to an unconstitutional government threat.

For similar reasons, some commentators have suggested that immunity
provisions like §230 could potentially violate the First Amendment to the extent those provisions pre-empt state laws that protect speech from private censorship. See Volokh, Might Federal Preemption of Speech Protective State Laws Violate the First Amendment? The Volokh Conspiracy, Reason, Jan. 23, 2021. According to that argument, when a State creates a private right and a federal statute pre-empts that state law, “the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.” Railway Employees v. Hanson, 351 U. S. 225, 232 (1956); accord, Skinner v. Railway Labor Executives’ Assn., 489 U. S. 602, 614–615 (1989).

Questions for the Panel

1. Should Supreme Court justices give advisory opinions as commentaries on orders denying a writ of certiorari?

2. Justice Thomas did this previously to offer his opinion that New York Times v. Sullivan should be overruled. Is he writing these opinions in anticipation that he will be off the Court before he can address the issues as a member of the Court?

3. Is a governmental official’s Twitter page a public forum?

4. Should digital platforms be treated as common carriers or public accommodations?

5. Would a law that restricts a platform’s right to exclude be constitutional?

6. Might Section 230 justify imposition of regulation on social media platforms?

7. Chapter 2021-32, Laws of Florida. It provides in part:

   A social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate. A social media platform must provide each user a method by which the user may be identified as a qualified candidate and which provides sufficient information to allow the social media platform to confirm the user’s qualification by reviewing the website of the Division of Elections or the website of the local supervisor of elections.
Upon a finding of a violation of subsection (2) by the Florida Elections Commission, in addition to the remedies provided in ss. 106.265 and 106.27, the social media platform may be fined $250,000 per day for a candidate for statewide office and $25,000 per day for a candidate for other offices.

A social media platform that willfully provides free advertising for a candidate must inform the candidate of such in-kind contribution. Posts, content, material, and comments by candidates which are shown on the platform in the same or similar way as other users’ posts, content, material, and comments are not considered free advertising.

8. A challenge is pending in federal court. Will the law be upheld or invalidated?
Student Speech

**Mahanoy Area School District v. B.L.,**
964 F. 3d 170 (3d Cir. 2020)
S. Ct. Case No. 20-255

**The Votes (7-2-1)**

- **Majority:** Breyer, J.
- **Joined By:** Roberts, C.J.
- Alito, J.
- Sotomayor, J.
- Kagan, J.
- Kavanaugh, J.
- Barrett, J.

- **Concur:** Alito, J.
- **Joined By:** Gorsuch, J.

- **Dissent:** Thomas, J.

**Quick Summary**

High school’s interest in regulating off-campus speech is not sufficient to overcome cheerleader’s interest in expressing herself through profanity’s directed at the school on Snapchat regarding her status as a cheerleader. America’s public schools are the nurseries of democracy. One-year suspension from team violated First Amendment.

Schools can limit some off-campus speech, but speech here does not fall into any of the categories of off-campus speech that can be regulated.

150 years of history support the coach’s decision to discipline the cheerleader. Our student-speech cases are untethered from any textual or historical foundation.
The Facts

B.L. made the Mahanoy Area High School junior varsity cheerleading team as a rising freshman. As a rising sophomore, B.L. hoped to make varsity, but to her chagrin again made only JV.

Meanwhile, an incoming freshman made the varsity squad, skipping JV entirely. B.L. responded by posting two messages on Snapchat, a social media application that allows users to send text, photo, and video messages to other users, or “friends.”

B.L.’s first message consisted of a photo in which B.L. and a friend raised their middle fingers; B.L. captioned the photo, “Fuck school fuck softball fuck cheer fuck everything.”

B.L.’s second message, posted just after the first, consisted of the text: “Love how me and [another student] get told we need a year of JV before we make varsity but that[] doesn’t matter to anyone else? 😅.”

B.L. sent these messages on a Saturday during the school year to an audience of 250 Snapchat friends, many of whom were classmates and some of whom were fellow cheerleaders at the school. One of B.L.’s fellow cheerleaders sent a screenshot of the messages to one of Mahanoy’s two cheerleading coaches.

That coach informed her co-coach, who had already heard of B.L.’s messages from cheerleaders and other students. Pet.App.5a. During the school week, “word of B.L.’s [s]naps spread through the school,” prompting “[s]everal students, both cheerleaders and non-cheerleaders, [to] approach[] the second coach throughout the school day “to express their concerns” about B.L. returning to the team.

The uproar escalated: “Students were visibly upset” and “repeatedly for several days” brought B.L.’s messages up with the cheerleading coaches.

Given the magnitude of the reaction, “the coaches felt the need to enforce [the relevant school rules] against B.L. to avoid chaos and maintain a team-like environment.” Id. (cleaned up).

The coaches determined that B.L. had violated team rules that B.L. had agreed to follow, namely that cheerleaders “have respect for [their] school, coaches, teachers, [and] other cheerleaders” and avoid “foul language and inappropriate gestures.”

The rules further warned students that “[t]here will be no toleration of
any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.

The coaches also concluded that B.L.’s messages “violated a school rule requiring student athletes to ‘conduct[] themselves in such a way that the image of Mahanoy School District would not be tarnished in any manner.’”

The coaches removed B.L. from the cheer team for the school year, but informed B.L. that she could try out again as a rising junior. B.L. and her parents appealed to the athletic director, the principal, the district superintendent, and the school board, all of whom upheld the coaches’ decision. Id. B.L. and her parents resp

Disposition Below

The district court granted B.L.’s motion for summary judgment, holding that B.L.’s dismissal from the cheerleading team violated her First Amendment rights. The court noted that “whether Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503 (1969) applies to speech uttered beyond the schoolhouse gate is an open question” in the Third Circuit.

The district court concluded that even if Tinker extends to off-campus speech, B.L.’s off-campus messages were insufficiently disruptive for the school to warrant discipline.

A divided Third Circuit affirmed on different grounds.

Justice Breyer’s Majority Opinion


We have made clear that students do not “shed their constitutional rights to freedom of speech or expression,” even“ at the school house gate.” Tinker, 393 U. S., at 506

But we have also made clear that courts must apply the First Amendment “in light of the special characteristics of the school environment.” Hazelwood School Dist. v. Kuhlmeier, 484 U. S. 260, 266(1988) (internal quotation mark omitted).

One such characteristic, which we have stressed, is the fact that schools at times stand in loco parentis, i.e., in the place of parents. See Bethel School Dist. No. 403 v. Fraser, 478 U. S. 675, 684(1986).
This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) “indecent,” “lewd,” or “vulgar” speech uttered during a school assembly on school grounds, see id., at 685; (2) speech, uttered during a class trip, that promotes “illegal drug use,” see Morse v. Frederick, 551 U. S. 393, 409(2007); and (3) speech that others may reasonably perceive as “bear[ing] the imprimatur of the school,” such as that appearing in a school-sponsored newspaper, see Kuhlmeier,484 U. S., at 271.

Finally, in Tinker, we said schools have a special interest in regulating speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” 393 U. S., at 513. These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

We do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus.

The school’s regulatory interests remain significant in some off-campus circumstances. The parties’ briefs, and those of amici, list several types of off-campus behavior that may call for school regulation.

These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

It may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B. L.’s proposed rule. See Tr. of Oral Arg. 71, 85.

We hesitate to determine precisely which of many school-related off-campus activities belong on such a list.

Three features of off-campus speech distinguish schools ‘efforts to regulate that speech from their efforts to regulation-campus speech.

First, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, courts must be more skeptical of a school’s efforts to regulate off-campus speech.
Third, the school itself has an interest in protecting a student’s **unpopular expression**, especially when the expression takes place off campus.

**America’s public schools are the nurseries of democracy.** Our representative democracy only works if we protect the “marketplace of ideas.” This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People’s will.

That protection must include the protection of unpopular ideas, for popular ideas have lessened for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, “I **disapprove of what you say, but I will defend to the death your right today it.**” (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Consider B. L.’s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team’s coaches, and the school—in a word or two, **criticism of the rules of a community** of which B. L. forms a part.

This criticism did not involve features that would place it outside the First Amendment’s ordinary protection. B. L.’s posts, while crude, did **not** amount to **fighting words**. See Chaplinsky v. New Hampshire, 315 U. S. 568 (1942).

And while. L. used vulgarity, her speech was **not obscene** as this Court has understood that term. See Cohen v. California, 403 U. S. 15, 19–20 (1971). To the contrary, B. L. uttered the kind of **pure speech** to which, were she an adult, the First Amendment would provide strong protection.

Consider too **when, where, and how** B. L. spoke.

Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless (for reasons we have just explained, supra, at 7–8) diminish the school’s interest in punishing B. L.’s utterance.

But what about the school’s interest, here primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that general interest into three parts.
First, we consider the school’s interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. The strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time.

Second, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class “for just a couple of days” and that some members of the cheerleading team were “upset” about the content of B. L.’s Snapchats.

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale. Little suggests any serious decline in team morale.

It might be tempting to dismiss B. L.’s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. See Tyson & Brother v. Banton, 273 U.S. 418, 447 (1927) (Holmes, J. Dissenting).

“We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.” Cohen, 403 U.S., at 25.

Justice Alito’s Concurrence

Joined by Gorsuch, J.

Why does the First Amendment ever allow the free-speech rights of public-school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school?

It is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom.

But when a public school regulates what students say or write when they are not on school grounds and are not participating in a school program, the school has the obligation to answer the question with which I began.

The only plausible answer that comes readily to mind is consent, either express or implied. The theory must be that by enrolling a child in a public school, parents’ consent on behalf of the child to the relinquishment of some of the child’s free-speech rights.
Under the common law, as Blackstone explained, “[a father could] delegate part of his parental authority . . . to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, [namely,]that of restraint and correction, as may be necessary to answer the purposes for which he is employed.” 1 W. Blackstone, Commentaries on the Laws of England 441 (1765)(some emphasis added).

Blackstone’s explanation of the doctrine seems to treat it primarily as an implied term in a private employment agreement between a father and those with whom he contracted for the provision of educational services for his child, and therefore the scope of the delegation that could be inferred depended on “the purposes for which [the tutor or schoolmaster was] employed.”

Because public school students attend school for only part of the day and continue to live at home, the degree of authority conferred is obviously less than that delegated to the head of a late-18th century boarding school, but because public school students are taught outside the home, the authority conferred may be greater in at least some respects than that enjoyed by a tutor of Blackstone’s time.

Parents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree—for example, by giving permission for a child to participate in an extracurricular activity or to go on a school trip.

In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children.

Parents do not implicitly relinquish all that authority when they send their children to a public school.

There is no basis for concluding that the original public meaning of the free speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off premises student speech. Compare post, at 2–4 (THOMAS, J., dissenting).

At the time of the adoption of the First Amendment, public education was virtually unknown, and the Amendment did not apply to the States.
The degree to which enrollment in a public school can be regarded as a delegation of authority over off-campus speech depends on the nature of the speech and the circumstances under which it occurs.

One category of off-premises student speech falls easily within the scope of the authority that parents implicitly or explicitly provide.

Most of the specific examples of off-premises speech that the Court mentions fall into this category.

At the other end of the spectrum, is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern.

It is unreasonable to infer that parents who send a child to a public school thereby authorize the school to take away such a critical right.

This is true even if the student’s off-premises speech on a matter of public concern is intemperate and crude.

When a student engages in oral or written communication of this nature, the student is subject to whatever restraints the student’s parents impose, but the student enjoys the same First Amendment protection against government regulation as all other members of the public.

And the Court has held that these rights extend to speech that is couched in vulgar and offensive terms.

Between these two extremes lie the categories of off-premises student speech that appear to have given rise to the most litigation. I do not attempt to set out the test to be used in judging the constitutionality of a public school’s efforts to regulate such speech.

The present case simply involves criticism (albeit in a crude manner) of the school and an extracurricular activity.

The school did not claim that the messages caused any significant disruption of classes.

As for the messages’ effect on the morale of the cheerleading squad, the coach of a team sport may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time, but it is self-evident that this authority has limits.
There are parents who would not have been pleased with B. L.’s language and gesture, but it is not reasonable to infer that her parents gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity.

There are more than 90,000 public school principals in this country and more than 13,000 separate school districts. It is predictable that there will be occasions when some will get carried away, as did the school officials in the case at hand.

If today’s decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.

**Justice Thomas’s Dissent**

The Court fails to mention the 150 years of history supporting the coach.

Schools historically could discipline students in circumstances like those presented here.

Public schools retained substantial authority to discipline students. As I have previously explained, that authority was near plenary while students were at school.

And, although schools had less authority after a student returned home, it was well settled that they still could discipline students for off-campus speech or conduct that had a proximate tendency to harm the school environment.

Perhaps the most familiar example applying this rule is a case where a student, after returning home from school, used “disrespectful language” against a teacher—he called the teacher “old”—“in presence of the [teacher] and of some of his fellow pupils.” Id., at 115 (emphasis deleted). The Vermont Supreme Court held that the teacher could discipline a student for this speech because the speech had “a direct and immediate tendency to injure the school, to subvert the master’s authority, and to beget disorder and insubordination.” Id., at 120; see also ibid. (“direct and immediate tendency to . . . bring the master’s authority into contempt”).

This rule was widespread. It was consistent with “the universal custom” in New England. And a justice of the Rhode Island Supreme Court, presiding over a trial, declared the rule “well settled.”
So widespread was this rule that it served not only as the basis for schools to discipline disrespectful speech but also to regulate truancy.

Some courts made statements that could suggest that schools had no authority at all to regulate off-campus speech, but, these courts made it clear that the rule against regulating off-campus speech applied only when that speech was “nowise connected with the management or successful operation of the school.”

If there is a good constitutional reason to depart from this historical rule, the majority and the parties fail to identify As a result, the coach had authority to discipline B. L.

The majority favors a few pragmatic guideposts. This is not the first time the Court has chosen intuition over history when it comes to student speech. The larger problem facing us today is that our student-speech cases are untethered from any textual or historical foundation. That failure leads the majority to miss much of the analysis relevant to these kinds of cases.

The Fourteenth Amendment was ratified against the background legal principle that publicly funded schools operated not as ordinary state actors, but as delegated substitutes of parents. This principle freed schools from the constraints the Fourteenth Amendment placed on other government actors.

Plausible arguments can be raised in favor of departing from that historical doctrine. One might argue that the delegation logic of in loco parentis applies only when delegation is voluntary. The Court, however, did not make that (or any other) argument against this historical doctrine.

The Court’s decision not to create a solid foundation in Tinker, and now here not to consult the relevant history, predictably causes the majority to ignore relevant analysis.

The historical test suggests that authority of schools over off-campus speech may be greater when students participate in extracurricular programs.

A profanity-laced screed delivered on social media or at the mall has a much different effect on a football program when done by a regular student than when done by the captain of the football team. So, too, here.

Schools often will have more authority, not less, to discipline students who transmit speech through social media. Because off-campus speech made through social media can be received on campus (and can spread rapidly to countless people), it often will have a greater proximate tendency to harm the school environment than will an off-campus in-person conversation.
The majority uncritically adopts the assumption that B. L.’s speech, in fact, was off campus. But, the location of her speech is a much trickier question than the majority acknowledges.

Because speech travels, schools sometimes may be able to treat speech as on campus even though it originates off campus.

Where it is foreseeable and likely that speech will travel onto campus, a school has a stronger claim to treating the speech as on-campus speech.

The Court transparently takes a common-law approach to today’s decision. In effect, it states just one rule: Schools can regulate speech less often when that speech occurs off campus.

Courts (and schools) will almost certainly be at a loss as to what exactly the Court’s opinion today means.

Here, the Court reaches the wrong result under the appropriate historical test, I respectfully dissent.

Questions for the Panel

1. Would the bright line test advocated by the Third Circuit have been better?
2. Why isn’t online speech regarded by the majority as on-campus speech?
3. Can high school coaches, teachers and administrators apply these standards?
4. What is the standard? Don’t discipline online speech unless it seriously disrupts the school?
5. Why doesn’t the majority give more credence to Justice Thomas’s viewpoint that the First Amendment does not restrict the authority of school’s to discipline online student speech regarded as undermining the school?
6. Will this decision lead to more disruptive student speech online which will be difficult or impossible to discipline?
7. And will money damages now be sought against teachers and coaches?
8. Or at least nominal damages and attorneys’ fees?
9. Has the Court fully considered the practical impact that this decision will have on the public school system?

10. Might the conservative members of the Court regard these principles as providing a further impetus for parents to place their children in religious rather than public schools?
12. **Americans for Prosperity Foundation v. Becerra**  
903 F.3d 1000, *reh’g en banc denied*, 919 F.3d 1177 (9th Cir. 2019)  
S. Ct. Case Nos. 19-251 & 19-255  
Oral Argument: April 26, 2021

**The Facts**

*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.

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."

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."

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.

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.

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. 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.

Disposition of Thomas More Law Center Below

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.

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, finding the Schedule B requirement (1) furthers California's compelling interest in enforcing its laws and that (2) the plaintiff had failed to show the requirement places an actual burden on First Amendment rights.

The Ninth Circuit left open the possibility 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."

The Law Center and the Foundation argued they made such a showing.

The Ninth Circuit reversed, holding they had shown neither (1) an actual chilling effect on association nor (2) a reasonable probability of harassment at the hands of the state from the Attorney General's demand for nonpublic disclosure of Schedule B forms.

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."
The Ninth Circuit identified some risk that the Attorney General could be compelled to make Schedule B information available for public inspection in the absence of a "rule[]" or "regulation[]," formalizing the Attorney General's discretionary policy of maintaining Schedule B confidentiality.

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.

After presiding over a bench trial in each case, the district court held the Schedule B requirement unconstitutional as applied to the Foundation and the Law Center.

The district court first rejected the plaintiffs' facial challenges, holding they were precluded by our opinion in Center for Competitive Politics. It then 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.

The Ninth Circuit reversed and vacated the permanent injunctions, holding evidence that some individuals may be deterred from contributing if plaintiffs are required to submit their Schedule Bs to the Attorney General shows at most a modest impact on contributions.

The Ninth Circuit also held plaintiffs had not shown a reasonable probability that the plaintiffs' Schedule B information would become public and so the plaintiffs had not established a reasonable probability of retaliation against contributors.

The Ninth Circuit also denied a motion for rehearing en banc. Five judges dissented from the denial.

Judge Sandra Segal Ikuta (George W. Bush) wrote for the dissenter:

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).

*  *  *

The First Amendment freedom to associate is vital to a functioning civil society. For groups with "dissident beliefs," it is fragile. The Supreme Court has recognized this time and time again, but the panel decision strips these groups of First Amendment protection.

Judges Callahan (George W. Bush), Bea (George W. Bush), Bennett (Trump), and R. Nelson (Trump). Joined the opinion.

Judges Fisher (Clinton), Paez (Clinton) and Nguyen (Obama) responded:

Organizations operated exclusively for religious, charitable, scientific or educational purposes are eligible for an exemption from federal and state taxes under § 501(c)(3) of the Internal Revenue Code and § 23701 of the California Revenue & Tax Code.
Organizations avail themselves of this status to avoid taxes and collect tax-deductible contributions.

* * * * *

Organizations such as plaintiffs Americans for Prosperity Foundation and Thomas More Law Center are required to report the name and address of any person who contributed the greater of $5,000 or 2 percent of the organization’s total contributions for the year. See 26 C.F.R. § 1.6033-2(a)(2)(iii)(a). An organization with $10 million in annual revenue, for example, must report contributors who have given in excess of $200,000 for the year. Between 2010 and 2015, the Thomas More Law Center was required to report no more than seven contributors; Americans for Prosperity Foundation was required to report no more than 10 contributors — those contributing over $250,000.

* * * * *

The Schedule B requirement survives exacting scrutiny, because the requirement serves an important governmental interest in preventing charitable fraud without imposing a substantial burden on the exercise of First Amendment rights.
13. **Houston Community College System v. Wilson,**
955 F.3d 490, *reh’g en banc denied*, 966 F.3d 341 (5th Cir. 2020)
S. Ct. Case No. 20-804

Dave Wilson has been described as an anti-gay, Tea Party activist who beat a 24-year-old incumbent for his seat on the Houston Community College System Board of Trustees, in a heavily Democratic and African American district by pretending to be black.

After his election, publicly alleged that fellow African American Board members were violating the Board's bylaws and not acting in HCC's best interests. He hired a private investigator to check on the alleged residency of one member, produced robocalls, and gave interviews voicing his criticisms.

The Board responded by censuring him for acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct."

Wilson countered with a lawsuit against HCC, which alleged that the censure violated his free speech rights and injured his reputation, HCC moved to dismiss for lack of jurisdiction and failure to state a claim, and the district court granted that motion.

A panel of the Fifth Circuit reversed, concluding that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983." Wilson v. Houston Cmty. Coll. Sys., 955 F.3d 490, 498 (5th Cir. 2020).

The en banc Fifth Circuit denied rehearing.
EDITH H. JONES (Reagan), Circuit Judge, joined by WILLET (Trump), HO (Trump), DUNCAN (Trump), and OLDHAM (Trump), Circuit Judges, dissenting from the denial of rehearing en banc.

The panel's holding is out of step with four sister circuits, all of them in agreement that a legislature's public censure of one of its members, when unaccompanied by other personal penalties, is not actionable under the First Amendment.

The First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions.... This principle protects Zilich's right to oppose the mayor without retribution and it also protects defendants' right to oppose Zilich by acting on the residency issue which was left unresolved for over two years.

Given the increasing discord in society and governmental bodies, the attempts of each side in these disputes to get a leg up on the other, and the ready availability of weapons of mass communication with which each side can tar the other, the panel's decision is the harbinger of future lawsuits.

It weaponizes any gadfly in a legislative body and inflicts an immediate pocketbook injury on the censuring institution.

Political infighting of this sort should not be dignified with a false veneer of constitutional protection and has no place in the federal courts.

JAMES C. HO, Circuit Judge, dissenting from denial of rehearing en banc:

Holding office in America is not for the faint of heart. With leadership comes criticism —whether from citizens of public spirit or personal malice, colleagues with conflicting visions or competing ambitions, or all of the above.

Those who seek office should not just expect criticism, but embrace it. Tough scrutiny is not a bug, but a defining feature of our constitutional structure. In America, we trust our citizens to determine for themselves what is right—and to count on vigorous, unrelenting debate to guide them.
Petitions Pending

Free Exercise

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

   QUESTIONS PRESENTED

   Barronelle Stutzman is a Christian artist who imagines, designs, and creates floral art. She serves everyone and sells pre-arranged flowers for use in any event. But she cannot take part in or create custom art that celebrates sacred ceremonies that violate her faith.

   After serving Robert Ingersoll, a gay client, for nearly ten years, Barronelle politely referred him to three other florists when he asked her to create floral art celebrating his same-sex wedding. That resulted in Washington’s unprecedented attack on Barronelle in both her personal and professional capacities, and a ruling that she discriminated against Robert because of his sexual orientation. The ruling threatens to bankrupt her. After this Court vacated and remanded in light of Masterpiece Cakeshop, the Washington Supreme Court doubled-down, reissuing most of its prior decision word for word and cabining Masterpiece to prohibit religious hostility only by adjudicators—not executive-branch officials like the State’s Attorney General. In so doing, the court decided the following important federal questions in conflict with decisions of this Court and multiple Courts of Appeals:

   1. Whether the 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.
   2. Whether the Free Exercise Clause’s prohibition on religious hostility applies to the executive branch.

2. Institute for Free Speech v. Rodriguez,
   No. 17-17403 (9th Cir. 2019)
   S. Ct. Case No. 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.
   2. Whether official demands for membership or donor information outside the electoral context should be reviewed under strict or exacting scrutiny.
QUESTIONS PRESENTED

Question 1: Are state actors, acting under color of state law, entitled to claim petitioning immunity from liability for a First Amendment retaliation claim brought under 42 U.S.C. § 1983?

Question 2: If such immunity exists, is a showing that a state actor’s civil lawsuit was (a) objectively baseless, and (b) filed for the purpose and with the intent of chilling First Amendment-protected speech and petitioning activities sufficient to overcome any petitioning immunity claimed by the state actor?
4. **Baisley v. International Association of Machinists and Aerospace Workers,**
   No. 20-50319 (5th Cir. Dec. 22, 2020)
   S. Ct. Case No. 20-1643

   Issue: Whether opt-out procedures for collecting union fees for ideological and political activities violate the First Amendment or the Railway Labor Act

5. **Crowe v. Oregon State Bar,**
   No. 19-35463 No. 19-35470 (9th Cir. Feb. 26, 2021)
   S. Ct. Case 20-1678

   Issue: Whether the statute that compels attorneys to subsidize Oregon State Bar’s political and ideological speech is subject to “exacting” scrutiny