



The Florida Bar's Annual Review of  
**U.S. Supreme Court First Amendment Cases**  
October 2024 Term

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*Featuring*

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*(Image credit: Andrea Mohin, The New York Times)*

## Justice David Hackett Souter

1939 – 2025

- “No More Souters” became a rallying cry for the conservative right after Justice Souter disappointed them on many votes, especially his vote two years after joining the Court in *Casey* to reaffirm *Roe v. Wade*. How did his tenure change the nomination process for Supreme Court justices?
- Should we have been surprised by his vote in *Casey*?
- Will there ever be another justice like Souter on the U.S. Supreme Court?
- Is [Justice Amy Coney Barrett](#) likely to drift from the conservative base that supported her appointment, as Justice Souter did?
- At age 69, Justice Souter “left one of the most powerful positions in the world at the top of his game — simply because he thought there was more to life than being a justice on the United States Supreme Court,” his former law clerk, Judge Kevin Newsom of the U.S. Court of Appeals for the Eleventh Circuit, said. “There were, as he saw it, many mountains to hike and books to read.” Should more judges follow his example? Should the Constitution require them to?

## Cases from October 2024 Term

1. *Mahmoud v. Taylor*  
No. 24-297 (not decided yet)  
Reviewing [102 F.4th 191](#) (4th Cir. 2024)  
**Issue:** Whether public schools burden parents' First Amendment right to free exercise of religion when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out?
2. *Free Speech Coalition Inc. v. Paxton*  
No. 23-1122 (not decided yet)  
Reviewing [26 F.4th 1328](#) (5th Cir. 2024)  
**Issue:** Whether courts should apply rational-basis review, rather than strict scrutiny, in deciding whether a Texas law requiring health warning labels on certain pornographic websites and age verification for entering the sites violates the First Amendment.
3. *TikTok v. Garland*  
[145 S. Ct. 57](#)  
*Reversing* [122 F.4th 930](#) (D.C. Cir. 2024)  
**Held:** Because the government's proffered justification for the Protecting Americans from Foreign Adversary Controlled Applications Act was content neutral, intermediate scrutiny, rather than strict scrutiny, applied to the First Amendment challenge to its enactment. The Act did not violate the First Amendment under intermediate scrutiny because it furthered important government interests in preventing China from capturing personal data of U.S. users, and the law did not burden substantially more speech than necessary to further the government's interest.
4. *Catholic Charities Bureau v. Wisconsin Labor & Industry Review Commission*  
[145 S. Ct. 1583](#)  
*Reversing* [3 N.W. 3d 666](#) (Wisc. 2024)  
**Held:** The Wisconsin Supreme Court's decision upholding the denial of the Catholic Charities Bureau's tax exemption for religious entities because the Bureau was not "operated primarily for religious purposes" – as it did not proselytize or limit charitable services to Catholics – violated the First Amendment.

## Emergency Applications

1. *Libby v. Fecteau*  
[145 S. Ct. 1378](#)

**Decision:** The Court granted an emergency injunction pending appeal to restore Maine State Rep. Laurel Libby’s voting rights in the Maine House of Representatives. The House had censured her for a social media post criticizing Maine’s policy of letting transgender athletes play in girls’ sports. Justice Jackson dissented.

## Dissents from Denial of Certiorari

1. *Speech First, Inc. v. Whitten*  
[145 S. Ct. 701](#)

Justices Thomas and Alito dissented from the denial of certiorari. Justice Thomas wrote that the Court should resolve a circuit split about whether university “bias response teams” chill speech in violation of the First Amendment.

2. *Coalition Life v. City of Carbondale*  
[145 S. Ct. 537](#)

Justices Thomas and Alito dissented from the denial of certiorari. Justice Thomas wrote that the Court should have heard the challenge to Carbondale’s ordinance creating a buffer zone around abortion clinics to explicitly overturn *Hill v. Colorado*, in which the Court first upheld such buffer zones.

3. *L.M. v. Town of Middleborough*  
[145 S. Ct. 1489](#)

Justices Thomas and Alito both wrote dissents the denial of certiorari. Both would have taken the case to decide whether a school could discipline a student for wearing a shirt that said, “There are Only Two Genders.”

## *Mahmoud v. Taylor*



*Mahmoud v. Taylor*

No. 24-297

Reviewing [102 F.4th 191](#) (4th Cir. 2024)

***Issue:*** Whether public schools burden the First Amendment right to free exercise of religion when they compel elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out?

### **Background**

In October 2022, the Montgomery County Board of Education approved a group of LGBTQ-Inclusive Books as part of the English Language Arts Curriculum for Montgomery County Public Schools. The books showed a variety of LGBTQ characters to help students learn and develop reading skills like answering questions about characters, retelling key events about characters in a story, and drawing inferences about characters based on their actions.

While the books were to be incorporated into the classrooms for students to find on their own, use as reading material for reading groups, or to be read aloud to the class, the decision about which books to use and how they would be used would be left to the teachers. Teachers also had access to additional materials to help them integrate the books into the classroom, including sample answers for questions that might come up from students or their caregivers.

The books raised some concerns among a variety of groups, including school principals, teachers, and administrators. Some of the concerns were religiously oriented, but many also involved concerns about the age appropriateness of some of the topics and the difficulty of some of the concepts presented.

Many parents, including the plaintiffs in this case, were concerned about having their children exposed to content that was at odds with their religion or that they found to be inappropriate for their children's age groups. Because of these concerns, many caregivers wanted their children exempt from these books.

During the first year the books were included in the curriculum, parents would receive a notice home when any of the book were used and could opt out of their use. The Board of Education publicly reiterated this opt-out policy on March 22, 2023.

However, the next day the Board announced that opting out was no longer permissible, nor would the parents receive a notice regarding the use of the books. Old requests were grandfathered in, but as of the 2023-2024 school year, no students or parents received notice or could opt out of the books.

The Associate Superintendent claimed that the original policy led to high student absenteeism. There were also concerns about accommodating a growing number of opt out requests without undermining the classroom environment. Furthermore, the opt out system burdened teachers to remember which books to use for each student and to come up with alternatives when students couldn't use the books.

The plaintiffs sued, alleging the use of the books violated their and their children's rights to free exercise of religion, free speech, and other laws. The plaintiffs argued they were entitled to notice and the option to opt-out of the use of the books given that the books touched on sensitive religious and ideological issues.

The complaint sought a declaratory judgment, requested an injunction prohibiting forced exposure to the books and reinstating the notice and opt-out options, and sought nominal and actual damages. All the plaintiff parents cited religious views as reasons for their desire to opt their children out of exposure to the books, because they believed their faiths required them to instruct their children on gender, sexuality, and related themes.

After filing the complaint, the plaintiffs moved for a preliminary injunction, but the district court refused to issue one, finding that the plaintiffs has failed to show a cognizable burden to the free exercise of their religion. The plaintiffs filed an interlocutory appeal, and an emergency motion for preliminary injunctive relief pending appeal. The Fourth Circuit denied the motion for injunctive relief, but expedited briefing and oral argument, while the district court granted the parties' joint motion to stay further proceedings.

### **The Fourth Circuit's Decision**

The Fourth Circuit began its analysis by discussing the high burden facing any party seeking a preliminary injunction.

A plaintiff seeking such an injunction must show they are: (1) likely to succeed on the merits, (2) likely to suffer irreparable harm without preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. Generally, a plaintiff must present some evidence showing they are likely to meet the first factor, as opposed to relying on allegations.

In a decision written by Judge G. Steven Agee and joined by Judge DeAndrea Benjamin, the Fourth Circuit discussed what a plaintiff must first prove to establish that a government action has burdened their free exercise of religion in violation of the Free Exercise clause. If the plaintiff can make that showing, then the burden shifts to the defendant to show that action was justified and narrowly tailored.

The court found that the plaintiffs' arguments confused their responsibility to show a burden on their religious exercise with their argument that the Board's policy should be subject to, and fails, strict scrutiny.

The Fourth Circuit mentioned the sparseness of the record, which contained declarations about the plaintiffs' beliefs and declarations from the Board about the changes in the policy. None of the declarations gave examples of how often the books were actually used, what the children had learned from the books, or what conversations had arisen as a result of the books.

Based on this "threadbare" record, the court concluded that the plaintiffs had not shown a cognizable burden to support their free exercise claim, and therefore had not shown a likelihood of succeeding on the merit. It affirmed the district court's decision to deny a preliminary injunction.

The Fourth Circuit also noted that the plaintiff presented no evidence that any government action prevented them from teaching their children their own views on the topics covered in the books.

The Fourth Circuit discussed Supreme Court precedent that establishes there must be either indirect or direct pressure to abandon religious beliefs or act against those beliefs to constitute coercion under the Free Exercise Clause.

The Fourth Circuit also found that *Yoder*—in which the Supreme Court held that Amish children could not be compelled to stay in school until the age of 16 because their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years—did not support the plaintiffs’ argument. The Court in *Yoder* applied a narrower principle to a singular set of facts. Therefore, state law imposed criminal sanctions on Amish parents if they did not keep their children in school until age 16.

The Fourth Circuit did not deny that the plaintiffs might come forward with sufficient evidence to show coercion, especially as applied to elementary school children, who are more impressionable than high school students.

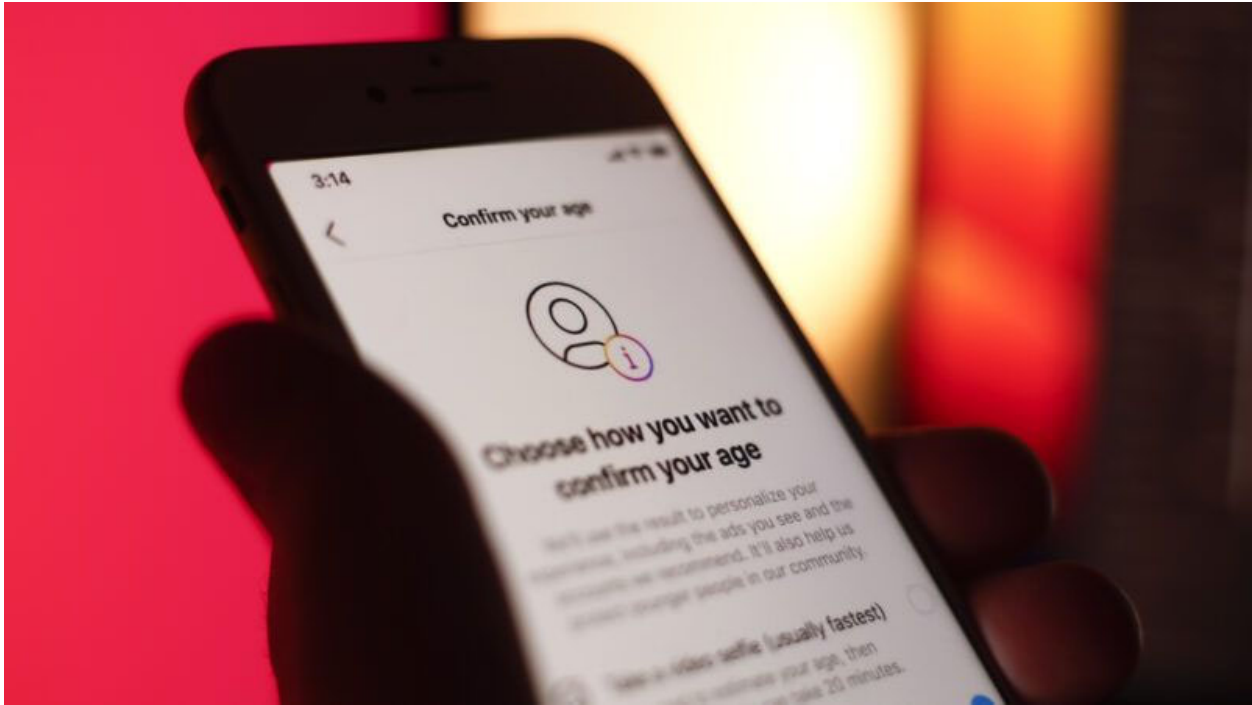
***Judge Quattlebaum’s dissent.*** Judge A. Marvin Quattlebaum Jr., a Trump appointee, dissented.

He wrote the plaintiffs had shown that the Board’s decision to stop sending notices and to deny opt-outs burdened their free exercise because the parents claimed their religions require them to teach their children about certain topics like sex, human sexuality, and gender, and the books expose their children to viewpoints that are at odds with their religious beliefs. Judge Quattlebaum also wrote that the Board’s actions were neither neutral nor generally applicable, and that the parents had established the elements required for a preliminary injunction.

### Discussion Questions

1. How does exposing students to viewpoints and ideas contrary to their own violate their right to practice their own religion? If a teacher endorsed the content of the books or advocated for gay rights while teaching the books, would that violate the student’s religious rights?
2. How does this case differ from *Yoder*, where the Court struck down a law requiring the Amish to enroll their children in school until age 16?
3. If the Court rules for the parents here, could parents object on religious grounds to learning about the civil rights movements, the women’s liberation movement, or other social and civic movements that parents disagree with?
4. Did the Court take this case too soon? Why not review the case after a trial and full records had been developed?

# *Free Speech Coalition Inc. v. Paxton*



*(Image credit: Jaap Arriens/Sipa USA/Newscom)*

## *Free Speech Coalition Inc. v. Paxton*

No. 23-1122

Reviewing 95 F.4th 263 (5th Cir. 2024)

***Issue:*** Whether the Fifth Circuit should have applied rational-basis review, rather than strict scrutiny, in deciding whether a Texas law requiring health warning labels on, and age verification for, certain pornographic websites violates the First Amendment.

### **Background**

Texas H.B. 1181 regulates “commercial entities that knowingly and intentionally publish or distribute material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors.” It requires such websites (1) use age verification methods to limit their material to adults, and (2) display health warnings on their landing pages and on all their advertisements for their websites. Regulated websites may choose a preferred “reasonable age verification method[],” and must show three health warnings on their

landing pages, as well as a notice at the bottom of every webpage. Texas' Attorney General may seek injunctive relief and civil penalties ranging from \$10,000 to \$250,00 per day for violating different provisions of the law.

Free Speech Coalition, Inc., an adult industry trade association, and one adult content creator, and several corporations that produce, sell, and host pornography brought a facial challenge against the law and requested a preliminary injunction.

The district court granted the injunction, holding that the age-verification requirement and health warnings failed strict scrutiny, which it applied under *Ashcroft v. American Civil Liberties Union* (“*Ashcroft II*”) and *Reno v. American Civil Liberties Union*. The district court also held that Section 230 of the Communications Decency Act preempted H.B. 1181 as to certain plaintiffs.

Texas filed an emergency appeal, and the Fifth Circuit issued an administrative stay and later stayed the injunction pending appeal.

### **The 5th Circuit's Decision**

The Fifth Circuit vacated the injunction against the age-verification requirement based on the Supreme Court's decision in *Ginsberg v. New York*.

*Ginsberg* held that a statute prohibiting sale of obscene materials to minors did not invade freedoms constitutionally granted to minors, nor was it unconstitutionally vague for failing to define certain terms like “harmful to minors.” *Ginsberg* also held that defining material as ‘obscene’ based on that material's appeal to minors, as opposed to adults, had a rational relationship to the objective of safeguarding minors from pornography.

Writing for himself and Judge Jennifer Elrod, Judge Jerry E. Smith disagreed that strict scrutiny applied. He explained that even though the concerns in *Ginsberg* necessarily implicated the privacy of adults seeking to purchase “girlie magazines,” the Supreme Court still applied rational-basis scrutiny. The Court also rejected the district court's conclusion that *Reno* and *Ashcroft II* required courts to apply strict scrutiny.

In *Reno*, the Supreme Court applied strict scrutiny because the Communications Decency Act included prohibitions on non-sexual material and minors could not circumvent the law's requirements even with parental consent. The law at issue in *Reno* did not define the prohibited material, was not limited to commercial activity, and did not include an age-verification process. *Reno* was “fundamentally bound up in the [ ] technology of [the time,” the Court wrote.

The Fifth Circuit agreed that *Ashcroft II* provided the plaintiffs’ “best ammunition against H.B. 1181,” even though the Communications Decency Act at issue in *Ashcroft II* was criminal while H.B. 1181 is civil. However, *Ashcroft II* contained no analysis of whether rational basis review applied under *Ginsberg* and did not discuss intermediate scrutiny. The Fifth Circuit took those omissions to mean that *Ashcroft II* did not actually rule on the correct standard of scrutiny, even though the Supreme Court in *Ashcroft II* wrote that the law would fail strict scrutiny if it applied.

The Fifth Circuit affirmed the injunction on the health warning requirement, as unconstitutionally compelled plaintiffs’ speech under *National Institute of Family & Life Advocates v. Becerra (NIFLA)*.

In *NIFLA*, two crisis pregnancy centers, one licensed and one unlicensed, alleged that a California law that (1) required licensed clinics to disseminate a notice stating the existence of publicly-funded family-planning services, and (2) required unlicensed clinics to disseminate a notice stating they were not licensed, violated their First Amendment rights. The Supreme Court held that the notice requirement for licensed clinics was a content-based regulation of speech that was not subject to the lower level of scrutiny that applied to laws requiring professionals to disclose factual, noncontroversial information in their commercial speech. It also held that professional speech is not a separate category of speech exempt from strict scrutiny, and that the notice requirement for unlicensed clinics unduly burdened the clinics’ protected speech.

H.B. 1181 defines sexual material harmful to minors by adding “with respect to minors” or “for minors” to the *Miller* test for obscenity, which established that statutes designed to regulate obscene materials must be carefully limited so as not to impinge on First Amendment rights.

In *Miller*, the Supreme Court held that speech could be regulated as obscenity where the speech appealed to a prurient interest in sex, portrayed sexual conduct in a patently offensive way, and taken as a whole, lacked serious literary, artistic, political, or scientific value.

The Fifth Circuit also reversed the district court’s holding that Section 230 preempted H.B. 1181.

Judge Patrick E. Higginbotham concurred and dissented in part. He disagreed that rational basis review applied to H.B. 1181 based on the State’s compelling interest in protecting children. Rather, he wrote that strict scrutiny should apply to H.B. 1181, which could not be reasonably read to apply only to obscene speech in the hands of minors.

## Discussion Questions

1. Why aren't the "health warnings" that the Texas law requires certain pornographic sites to post like "health warnings" placed on cigarettes or alcohol? Both are compelled speech, but why permit one type of warning but not the other?
2. Are the electronic age-verification methods, including facial recognition technology, substantially more burdensome on an adult's First Amendment rights than in-person age verification methods, such as requiring an adult to present a government ID before entering an adult establishment?
3. Should the Court apply different standards of review to different parts of the Texas statute – rational basis review for provisions that only impact minors, but intermediate or strict scrutiny for provisions that burden adults in order to protect minors?
4. As a practical matter, can a state prevent minors from accessing pornographic websites without burdening adults to some degree?

## *TikTok v. Garland*



*(Image credit: Future Publishing via Getty Images)*

### *TikTok v. Garland*

145 S. Ct. 57

*Reviewing*, 122 F.4th 930 (D.C. Cir. 2024)

***Held:*** Because the government’s proffered justification for the Protecting Americans from Foreign Adversary Controlled Applications Act was content neutral, intermediate scrutiny, rather than strict scrutiny, applied to the First Amendment challenge to its enactment.

The Court also found that the Act did not violate the First Amendment under intermediate scrutiny because the Act furthered important government interests in preventing China from leveraging its control over TikTok to capture personal data of users in the U.S., and the law did not burden substantially more speech than necessary to further the government’s interest.

**9-0**, per curiam decision. Justice Sotomayor filed a concurring opinion in part and concurring in the judgment. Justice Gorsuch filed an opinion concurring in the judgment.

## Background

TikTok is a social media platform that operates in part by showing users a “For You” page made up of videos selected for each user by a proprietary algorithm. The algorithm makes recommendations based on how each user interacts with the platform. TikTok also moderates content by removing content that violates the platform’s community guidelines, and it can boost content based on TikTok’s “business objectives or other goals.”

TikTok’s ultimate parent company is ByteDance, a privately held company in China. ByteDance is subject to a Chinese law that requires it to assist or cooperate with the Chinese government’s intelligence work and to ensure the Chinese government has the power to access and control the private data the company holds.

As of January 19, 2025, the Protecting Americans from Foreign Adversary Controlled Applications Act (“PAFACAA”) made it unlawful for companies in the U.S. to provide services to distribute, maintain, or update TikTok, unless U.S. operation of the platform was severed from Chinese control. The law specifies that a foreign adversary controlled app can avoid the prohibitions if it undergoes a qualified divestiture that the President determines will result in the app no longer being controlled by a foreign adversary, among other things.

Congress passed the law after President Trump’s 2020 order for ByteDance to divest all interests and rights in any property used to enable or support ByteDance’s operation of the TikTok in the U.S. ByteDance challenged the order’s constitutionality in the D.C. Circuit, which eventually led to a series of negotiations between ByteDance and the government to develop an agreement to resolve security concerns. But no agreement was ever finalized, and PAFACAA came into effect at the beginning of President Trump’s second term.

## The Supreme Court’s Decision

The Supreme Court first assessed whether the Act was subject to First Amendment scrutiny, which can apply to (1) laws that directly regulate expressive conduct, (2) government regulation of conduct with an expressive element, and (3) to some statutes which impose a disproportionate burden on those engaged in protected First Amendment activities, though they may be directed at activity with no expressive component.

The Court reasoned that the Act did not regulate expressive conduct, and in fact only directly regulated ByteDance or TikTok through the divestiture requirement, and the petitioners had identified no cases in which regulation of corporate control was considered a direct regulation of expressive activity or semi-expressive conduct. Therefore, the Court chose not to “break new ground” regarding

whether the conduct regulated by the Act constituted either of the first two types of laws that can trigger First Amendment scrutiny.

The Court turned instead to assessing whether the Act's prohibitions imposed a disproportionate burden on protected First Amendment activities. The petitioners argued that it would be infeasible for TikTok to be divested within the 270-day timeframe required by the Act, and so the Act essentially banned TikTok, which would burden several recognized First Amendment activities.

However, the fact that the Act focuses on targeting a foreign nation's control over a communication platform in the U.S. made it different, in the view of the Court, from other non-expressive activity that has been subjected to First Amendment scrutiny. The Court also found that no need to establish whether regulation of a non-expressive activity that disproportionately burdens those engaged in expressive activity triggered a heightened level of scrutiny. The Court proceeded under the assumption that the challenged provisions were subject to First Amendment scrutiny.

The Court reasoned that the law's prohibitions were content-neutral and applied to TikTok due to a foreign adversary's control over the platform, not because of specific content, but because of national security concerns. Additionally, the government's rationale for the prohibitions were content neutral, as they centered on preventing China from collecting data from U.S. TikTok users. The law's focus on TikTok did not mean the regulation was not content neutral. Though some laws that favor one speaker over another can trigger heightened scrutiny, that does not occur when a law regulates something about the speaker themselves, rather than the content of their words.

The Court applied intermediate scrutiny and held the law satisfied that level of scrutiny because it furthered an important government interest unrelated to the suppression of free expression and did not burden substantially more speech than necessary to further that interest.

*Justice Sotomayor's concurrence in part.* Justice Sotomayor concurred with the opinion, except that Part II.A, where the Court assumed without decided that the First Amendment applied to the Court. Justice Sotomayor wrote that she did not need to assume the First Amendment applied. She had no doubt that it did.

*Justice Gorsuch's concurrence in the judgment.* Justice Gorsuch wrote in part to acknowledge his reservations about the short (two week) amount of time the Court had to decide a major First Amendment case affecting more than 170 million Americans.

“I harbor serious reservations about whether the law before us is ‘content neutral’ and thus escapes ‘strict scrutiny,’” Justice Gorsuch wrote.

Justice Gorsuch was also pleased that the Court did not consider secret evidence the government gave the Court, but not the petitioners. “Efforts to inject secret evidence into judicial proceedings present obvious constitutional concerns,” he wrote.

He also praised the Court for not crediting the government’s claimed interest in preventing the covert manipulation of content. “One man’s ‘covert content manipulation’ is another’s ‘editorial discretion.’ Journalists, publishers, and speakers of all kinds routinely make less-than-transparent judgments about what stories to tell and how to tell them. Without question, the First Amendment has much to say about the right to make those choices.”

“Too often in recent years, the government has sought to censor disfavored speech online, as if the internet were somehow exempt from the full sweep of the First Amendment. But even as times and technologies change, “the principle of the right to free speech is always the same.”

### **Discussion Questions**

1. Did the Court need to decide this case as rapidly as it did? Should it have done so? Given the length of time Congress took to pass the PAFACAA and have it take effect, should the Court have enjoined the law for a few months while it consider the case on a standard briefing schedule?
2. Justice Gorsuch wrote in his concurrence that litigation over the tier of scrutiny that should apply “can sometimes take on a life of its own and do more to obscure than to clarify the ultimate constitutional questions.” Is this case an example of that? And what other mode of analysis, if any, should the Court use?
3. Except for Justice Gorsuch, the entire Court seems convinced that this law is content-neutral. Is it? As an alternative to TikTok divesting foreign ownership, why couldn’t Congress have prohibited TikTok from collecting and sharing data from U.S. users with its parent company?

# *Catholic Charities Bureau v. Wisconsin Labor & Industry Review Commission*



*(Credit: cbsuperior.org/about-us)*

*Catholic Charities Bureau v. Wisconsin Labor & Industry Review Commission*  
[No. 24-154](#)

***Held:*** The Wisconsin Supreme Court’s decision upholding the denial of the Catholic Charities Bureau’s tax exemption for religious entities because the Bureau was not “operated primarily for religious purposes” – as it did not proselytize or limit charitable services to Catholics – violated the First Amendment.

9-0. Justice Sotomayor wrote for the unanimous court. Justices Thomas and Jackson filed concurring opinions.

## **Background**

Catholic Charities Bureau, Inc. and four sub entities sought an exemption from paying unemployment compensation taxes under Wisconsin law.

Wisconsin law requires most employers to make regular contributions to a state unemployment fund through payroll taxes. However, there is an exception that allows nonprofit organizations that are “operated primarily for religious purposes” and “operated, supervised, controlled, or principally supported by a church or convention or association of churches” to be exempt from those taxes.

The petitioners sought the exemption because they were controlled by the Roman Catholic Diocese of Superior, Wisconsin. Catholic Charities is the social ministry arm of the Diocese and provides services to the disadvantaged without regard to race, sex, or religion. It also employs people without regard to religion. It does not mandate religious training or orientation, proselytize, or require people receiving their services to be members of the Catholic faith.

When petitioners first requested the exemption, the Wisconsin Department of Workforce Development denied the request. They appealed, and an administrative law judge reversed. The case ultimately went before the Wisconsin Supreme Court.

Wisconsin Supreme Court agreed that Catholic Charities was not entitled to the tax exemption because it did not operate primarily for religious purposes. To determine whether an organization is operated primary for religious purposes, the Wisconsin Supreme Court held that courts should look to the organization's motivations and activities, and in particular whether the organization participated in worship services, religious outreach, ceremony, or religious education.

Based on those factors, the Wisconsin Supreme Court found Catholic Charities' actions were secular, not religious, and did not qualify for the exemption.

The U.S. Supreme Court granted certiorari to decide whether the Wisconsin Supreme Court's interpretation of the statute creating the religious employer exemption, § 108.02(15)(h)(2), violated the First Amendment as applied to the petitioners.

### **The Supreme Court's Decision**

Writing for an unanimous Court, Justice Sonia Sotomayor considered whether the government may not prefer one religion over another or pass laws that aid or oppose any religion under the Establishment Clause.

The Court held that the Wisconsin Supreme Court's inquiry into whether the petitioners operated primarily for religious purposes was suspect and improperly discriminated between religions that proselytized and those that did not. In essence, the Court held that the Wisconsin court recognized that the petitioners' actions were religiously motivated, but nonetheless found petitioners ineligible because their organizations did not attempt to proselytize.

However, the Wisconsin court did not consider that the petitioners faith barred them from 'misusing works of charity for purposes of proselytism.' which precluded qualification for the exemption under the Wisconsin court's interpretation. Therefore, the Wisconsin Supreme Court's interpretation of the exemption granted a denominational preference by differentiating between religious groups who proselytize and those that do not.

Given the fact that the exemption statute grants denominational preferences, it must be justified by a compelling government interest and be narrowly tailored to further that interest. First, the State argued that the law served a compelling interest in ensuring unemployment coverage for its citizens, and second, the State argued that the Wisconsin Supreme Court's interpretation of the exemption statute

is narrowly tailored to avoid involving the state in employment decisions involving faith and doctrine.

As to the first interest, the Supreme Court found that the law was “vastly underinclusive” in ensuring unemployment coverage, as the State exempted over 40 forms of employment from the unemployment program, including religious entities that provide similar services as the petitioners but whose work is done directly by the church or its ministers instead of by a separate nonprofit.

As to the second interest, the State claimed the exemption allowed the State to avoid having to determine whether an employee who is tasked with inculcating religious doctrine. The Supreme Court found that the State failed to demonstrate that the exemption statute is in fact tailored to their supposed anti-entanglement interest because if the State were truly attempting to avoid opening on employees’ compliance with religious doctrine, it could have limited an exemption to employees tasked with proselytizing.

***Justice Thomas’ concurrence.*** Though he joined in the Court’s opinion in full, Justice Thomas wrote that he believed the Wisconsin Supreme Court’s holding that Catholic Charities was distinct from the Catholic Dioceses of Superior violated the church autonomy doctrine that required courts to respect how churches internally organize themselves. He wrote that the Wisconsin Supreme Court should not have treated a religious institution as “nothing more than its corporate entities.”

***Justice Jackson’s concurrence.*** Justice Jackson wrote separately to note the Federal Unemployment Tax Act, which was the model for Wisconsin’s exemption statute, did not distinguish between charitable organizations based on proselytization and was not based on religious motivation. Rather, the law focused on what the entity actually did, as opposed to why or how they did it.

### Discussion Questions

1. What is the practical result of this decision for government benefits for religious institutions? Can the government ever distinguish between religious functions and other non-religious functions that churches increasingly provide?
2. Should we be surprised that the opinion was unanimous?
3. Justice Thomas emphasizes the church autonomy doctrine in his concurrence. How far is the Court likely to take this doctrine? Will it defer entirely to churches to define themselves for whatever purpose?

# Emergency Applications

*Libby v. Fecteau*

[145 S. Ct. 1378](#)

**Decision:** The Court granted an emergency injunction pending appeal to restore Maine State Rep. Laurel Libby’s voting rights in the Maine House of Representatives. The House had censured her for a social media post criticizing Maine’s policy of letting transgender athletes play in girls’ sports. Justice Jackson dissented.

**Justice Jackson’s dissent.** Justice Jackson would have denied an injunction pending appeal because she wrote that Rep. Libby’s right to relief was not “indisputably clear.” The Maine House’s censure of Rep. Libby for her social media post “raises many difficult questions.”

She opined more broadly on the Court’s increasing use of emergency applications to make preliminary and consequential rulings on cases.

“Not very long ago, this Court treaded carefully with respect to exercising its equitable power to issue injunctive relief at the request of a party claiming an emergency. The opinions are legion in which individual Justices, reviewing such requests in chambers, declined to intervene—reiterating that ‘such power should be used sparingly and only in the most critical and exigent circumstances.’ . . .”

“Those days are no more. Today’s Court barely pauses to acknowledge these important threshold limitations on the exercise of its own authority. It opts instead to dole out error correction as it sees fit, regardless of the lack of any exigency and even when the applicants’ claims raise significant legal issues that warrant thorough evaluation by the lower courts that are dutifully considering them.”

“The watering down of our Court’s standards for granting emergency relief is, to me, an unfortunate development. . . . At the very least, by lowering the bar for granting emergency relief, the Court itself will bear responsibility for the resulting systemic disruption, as a surge in requests for our ‘extraordinary’ intervention—at earlier and earlier stages of ongoing lower court proceedings, and with greater and greater frequency—will undoubtedly follow.”

## Discussion Question

1. Is Justice Jackson right that the “Court barely pauses to acknowledge” limits on granting emergency applications today? If so, what caused this change?

## Dissents from Denial of Certiorari

### *Speech First, Inc. v. Whitten*

[145 S. Ct. 701](#)

Justices Thomas and Alito dissented from the denial of certiorari. Justice Thomas wrote that the Court should resolve a circuit split about whether university “bias response teams chill speech in violation of the First Amendment.

**Justice Thomas’s dissent.** Justice Thomas argued that the Seventh Circuit’s approach to evaluating a party’s standing to challenge government action chilling speech is “very likely wrong.”

In other challenges to “bias response” teams, the Seventh Circuit has held that to establish standing, a plaintiff had to show the policies “pose a credible threat of enforcement” or a plaintiff “faced an objectively reasonable chilling effect on his or her speech.” Since the teams in this case could not enforce sanctions and students were not required to meet with them, Speech First lacked standing.

1. Is Justice Thomas correct that the Seventh Circuit has set the bar to standing too high? Where should the Court draw the line?

\* \* \*

### *Coalition Life v. City of Carbondale*

[145 S. Ct. 537](#)

Justices Thomas and Alito dissented from the denial of certiorari. Justice Thomas wrote that the Court should have heard the challenge to Carbondale’s ordinance creating a buffer zone around abortion clinics to explicitly overturn *Hill v. Colorado*, in which the Court first upheld such buffer zones.

**Justice Thomas’s dissent.** Justice Thomas wrote that the Court should explicitly overrule *Hill v. Colorado*, given the decision’s “diminished status” by a series of decisions, most notably *Dobbs*, where the majority wrote that *Hill* “distorted” the Court’s First Amendment jurisprudence. “Following our repudiation in *Dobbs*, I do not see what is left of *Hill*.” Justice Thomas compared the precedent to the slow death to the Court’s Establishment Clause precedent in *Lemon v. Kurtzman*.

1. Why does the Court slowly weaken precedents like *Hill* and *Lemon* without explicitly overthrowing them? By doing this, does the Court abdicate its judicial duty, as Justice Thomas argues?

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***L.M. v. Town of Middleborough***  
[145 S. Ct. 1489](#)

Justices Thomas and Alito both wrote dissents the denial of certiorari. Both would have taken the case to decide whether under *Tinker v. Des Moines Independent Comm'ty Sch. Dist.*, a school could discipline a student for wearing a shirt that said, "There Are Only Two Genders."

**Justice Alito's dissent.** A seventh grader at Nicols Middle School wore a shirt to school that read: "There Are Only Two Genders." The principal told the student, L.M., that teachers were concerned for student's "physical safety" of students and LGBTQ+ students were "upset." The principal sent L.M. home after he refused to take off the shirt. About a week later, L.M. wore another shirt to school. This one said: "There Are CENSORED Genders." L.M. was sent to the principal's office, but this time, he changed his shirt rather than be sent home.

L.M. sued, but the district court entered judgment for the school and the First Circuit affirmed. The court distinguished *Tinker*, which involved wearing black armbands to protest the Vietnam War, and held a school could ban passive student speech "if:

(1) the expression is reasonably interpreted to demean one of those characteristics of personal identity [that] are unalterable or otherwise deeply rooted and that demeaning them strike[s] a person at the core of his being; and

(2) the demeaning message is reasonably forecasted to poison the educational atmosphere due to its serious negative psychological impact on students . . . and thereby lead to symptoms of a sick school—symptoms . . . of substantial disruption."

1. Was the First Circuit right that student speech that offends a person's immutable identity, whether gender or race, should be given less stringent First Amendment protection than other student speech?
2. Justice Alito wrote that the First Circuit erred in emphasizing that the case involved children, ages 10 to 14. "That should not make a difference," Justice Alito wrote, noting that Mary Beth Tinker was 13. Is Justice Alito right?