MMAA CASE LAW UPDATE

July 2023

CITY STRUCTURES CHARTERS AND IMMUNITIES

SOVEREIGN AND OTHERWISE

Zang v. City of St. Charles

Supreme Court of Missouri, en banc. | January 31, 2023 | 659 S.W.3d 327 | 2023 WL 1384032

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Outline

Home Rule Charter and powers

90-day notice requirement for claims upheld

659 S.W.3d 327
Supreme Court of Missouri,
en banc.

Christopher ZANG, Appellant,
v.
CITY OF ST. CHARLES, Missouri,
Respondent.

No. SC 99419
|
Opinion issued January 31, 2023

Synopsis

Background: Bicyclist injured after falling on open-grated bridge filed suit against defendants including city, alleging claims including premises liability. The Circuit Court, St. Charles County, Daniel Pelikan, J., 2021 WL 2373434, granted city's motion to dismiss premises liability claim for failure to provide required notice of suit. Bicyclist appealed.

Holdings: On transfer from the Court of Appeals, the Supreme Court, Ransom, J., held that:

[1] statute imposing notice requirement for municipalities larger than city did not preempt notice requirement;

[2] statute waiving sovereign immunity for injuries caused by the condition of a public entity's property did not preempt notice requirement;

[3] there was no field preemption of notice requirement;

[4] statute of limitations did not preempt notice requirement; and

[5] statute declining to impose notice requirement for premises liability claims on all negligence claims did not preempt notice requirement.

Affirmed.

Fischer, J., concurred in result.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (21)

[1] **Appeal and Error**⇐Local law, ordinances

Whether a city charter contravenes the Missouri Constitution or state statutes is a question of law meriting de novo review.

[2] **Municipal Corporations**⇐Construction and Operation
Municipal Corporations⇐Presumptions and burden of proof

Municipal ordinances are presumed to be valid and lawful.

[3] **Municipal Corporations**⇐Presumptions and burden of proof

A party challenging the validity of a municipal ordinance carries the burden of proving the municipality exceeded its constitutional or statutory authority.

[4] **Municipal Corporations**⇐Local legislation

Under Missouri's model of home rule, even in the absence of an express delegation by the people of a home rule municipality in their charter, the municipality possesses all powers which are not limited or denied by the State Constitution, by statute, or by the charter itself. Mo. Const. art. 6, § 19(a).

[5] **Municipal Corporations**⇐Local legislation

Under the provision of the Missouri Constitution governing limitations on the power of charter cities, the emphasis is not whether a home rule city has the authority

to exercise a challenged power, but rather the emphasis is whether the exercise of that power conflicts with the Missouri Constitution, state statutes, or the charter itself. Mo. Const. art. 6, § 19(a).

[6] **Municipal Corporations**⇐Local legislation

Whether a state law provision conflicts with a city charter provision, as would preempt the charter provision, is a matter of statutory construction.

[7] **Municipal Corporations**⇐Validity in General

As a general principle, when a city charter provision and statutes do not irreconcilably conflict, both stand.

[8] **Municipal Corporations**⇐Validity in General

If there is irreconcilable conflict between a statute and a city charter provision, the charter provision is preempted.

[9] **Municipal Corporations**⇐Validity in General

Preemption of a city charter provision by a state statute may be either express or implied.

[10] **Municipal Corporations**⇐Validity in General

"Express preemption" of a city charter provision occurs when the legislature explicitly proscribes local regulation in a specific area.

[11] **Municipal Corporations**⇐Validity in General

"Implied preemption" of a city charter provision by a state statute can occur in either of two ways—through conflict preemption or through field preemption.

[12] **Municipal Corporations**⇐Validity in General
Municipal Corporations⇐Concurrent and Conflicting Exercise of Power by State and Municipality
Municipal Corporations⇐Ordinances permitting acts which state law prohibits

"Conflict preemption" occurs when local a law, such as a city charter provision, permits what a state statute prohibits, or prohibits what the statute permits.

[13] **Municipal Corporations**⇐Validity in General
Municipal Corporations⇐Concurrent and Conflicting Exercise of Power by State and Municipality

For purposes of preemption analysis, there is no conflict between a local law, such as a city charter provision, and a state law if the local law merely enlarges or supplements the state law, such as when a locality prohibits more than the state prohibits.

[14] **Municipal Corporations**⇐Validity in General
Municipal Corporations⇐Conformity to constitutional and statutory provisions in general

"Field preemption" occurs when the General Assembly has created a state regulatory scheme that is so comprehensive that it reasonably can be inferred that the General Assembly intended to occupy the legislative field, leaving no room for local supplementation, such as a city charter.

[15] **Automobiles**⇐Concurrent and conflicting regulations
Municipal Corporations⇐Concurrent and Conflicting Exercise of Power by State and Municipality

Statute imposing a notice requirement for personal injury actions against cities of at least a certain population did not prohibit

city, which had a population below such threshold, from enacting its own statutory notice requirement, and thus statute did not preempt notice requirement in city's charter that barred premises liability claim brought against city by bicyclist injured when he fell on open-grated metal bridge, even though statute limited statutory waiver of sovereign immunity for injuries caused by condition of a public entity's property; statute's language and population requirement were clear, unambiguous, and entirely inapplicable to city, and nothing in the statute indicated that legislature intended it to apply to cities that did not meet the population requirement. Mo. Ann. Stat. §§ 82.210, 537.600.1(2).

[16] **Automobiles**⇐Concurrent and conflicting regulations
Municipal Corporations⇐Concurrent and Conflicting Exercise of Power by State and Municipality

Provision of city charter requiring notice to city in order to maintain personal injury action against city did not prohibit anything permitted by statute waiving sovereign immunity for injuries caused by the condition of a public entity's property, and thus statute did not preempt charter's notice requirement, which barred premises liability claim brought without notice against city by bicyclist injured when he fell while crossing open-grated metal bridge. Mo. Ann. Stat. § 537.600.1(2).

[17] **Automobiles**⇐Concurrent and conflicting regulations
Municipal Corporations⇐Concurrent and Conflicting Exercise of Power by State and Municipality

Legislature evinced no intent to occupy the legislative field by preventing constitutional charter cities with populations below a certain threshold from creating notice requirements for actions against such cities, and thus there was no field preemption of notice requirement in city's charter that barred premises liability claim brought against city by injured bicyclist, even though legislature enacted statutes waiving sovereign immunity for injuries caused by the condition of a public entity's property and imposing a notice requirement for cities above the population threshold; although statutes imposing notice requirements covered the majority of cities in the state, legislature did not express an intention to limit notice requirements to those cities, as it could have done. Mo. Ann. Stat. §§ 82.210, 537.600.1(2).

[18] **Municipal Corporations**⇐Necessity and purpose

Numerous reasons exist to justify a notice requirement for personal injury actions against cities, such as: (1) limiting a city's exposure to liability claims, (2) allowing a city to investigate and defend against a claim, (3) protecting against stale claims by allowing prompt investigation of witnesses and the scene before time alters conditions or obscures the memory, and (4) allowing the city to address dangerous conditions promptly to avoid additional risk to citizens and visitors.

[19] **Municipal Corporations**⇐Capacity to sue or be sued in general

It being constitutionally permissible for the legislature to cloak municipalities with immunity by statute, it necessarily follows that any waiver of immunity granted is subject to the limits imposed in the waiver.

[20] **Automobiles**⇐Concurrent and conflicting regulations
Municipal Corporations⇐Concurrent and Conflicting Exercise of Power by State and Municipality

Provision of city charter requiring 90 days' notice to city in order to maintain personal injury action against city did not irreconcilably conflict with applicable five-year statute of limitations, and thus statute of limitations did not preempt notice requirement that barred premises liability claim brought against city by bicyclist injured in fall on open-grated metal bridge, despite bicyclist's argument that both provision and statute created time restrictions for action, although notice requirement might have restricted who was eligible to bring suit against city, it did not change what type of suits could be brought against city or how long a claimant had under the statute of limitations, which functioned independently of the notice requirement and served a different purpose. Mo. Ann. Stat. § 516.120.

[21] **Automobiles**⇨Concurrent and conflicting regulations
Municipal Corporations⇨Concurrent and Conflicting Exercise of Power by State and Municipality

Provision of city charter requiring notice to city in order to maintain personal injury action growing out of any negligence of the city did not irreconcilably conflict with statute that declined to impose on certain negligence claims the notice requirement that state law imposed on premises liability claims, and thus statute did not preempt notice requirement in city's charter that barred premises liability claim brought against city by bicyclist injured while crossing open-grated metal bridge; statute did not permit what the charter provision prohibited and did not contain any indication of an intent by the legislature to occupy the legislative field. Mo. Ann. Stat. § 537.600.1(1).

***329 APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, The Honorable Daniel G. Pelikan, Judge**

Attorneys and Law Firms

Zang was represented by Andrew Martin, Brent A. Sumner and John Greffet of The Sumner Law Group LLC in Clayton, (314) 669-0048.

The city was represented by Portia C. Kayser and Joshua C. Grumke of Practus LLP in St. Louis, (314) 806-0131.

Opinion

Robin Ransom, Judge

***330** Christopher Zang appeals from the circuit court's judgment sustaining the City of St. Charles' motion to dismiss due to Zang's failure to provide notice of suit as required by section 12.3 of the City of St. Charles Charter (the "Charter"). Zang claims the Charter's notice requirement must be stricken because it conflicts with various statutes. Finding no irreconcilable conflict between Charter section 12.3 and the statutes cited by Zang, this Court affirms the circuit court's judgment.

Factual and Procedural Background

In June 2019, Zang fell off his bike and injured himself while crossing an open-grated metal bridge in St. Charles, Missouri. Approximately nine months later, Zang filed suit against the City of St. Charles (the "City") and St. Charles County (the "County") alleging negligence in Count I and premises liability in Count II. Zang claimed the property was owned and/or controlled by the City or the County. Zang did not provide written notice to the City within 90 days of his accident or at any point prior to filing suit.

Commented [ER1]: Facts

The City responded by filing a motion to dismiss in which it argued Zang's premises liability claim was barred because he failed to give proper notice as required by section 12.3 of the Charter.[2] That section provides:

NOTICE OF SUITS.

No action shall be maintained against the city for or on account of an injury growing out of alleged negligence of the city unless notice shall first have been given in writing to the mayor within ninety days of the occurrence for which said damage is claimed, stating the place, time, character and circumstances of the injury, and that the person so injured will claim damages therefor from the city.

Zang countered that the Charter's notice requirement was unconstitutional because it irreconcilably conflicts with section 516.120[3] and the Missouri Constitution.

The circuit court sustained the City's motion and dismissed Zang's premises liability claim. The court found the Charter provision mirrored four similar statutes[4] that require notice and, therefore, "is not inconsistent or in conflict with state law."

This appeal follows.[5]

Standard of Review

[1] [2] [3] Whether section 12.3 of the Charter contravenes the Missouri Constitution or state statutes is a question of law ***331** meriting *de novo* review. *See Poke v. Indep. Sch. Dist.*, 647 S.W.3d 18, 20 (Mo. banc 2022) (explaining questions of statutory interpretation and the existence of sovereign immunity are questions of law subject to *de novo* review); *see also City of Kan. City v. Carlson*, 292 S.W.3d 368, 370 (Mo. App. 2009) ("Whether a city exceeds its statutory authority in passing an ordinance is an issue we review *de novo*."). "[O]rdinances are presumed to be valid and lawful. The party challenging the validity of the ordinance carries the burden of proving the municipality exceeded its constitutional or statutory authority." *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 578 (Mo. banc 2017) (internal citations omitted).

Analysis

Zang claims the circuit court erred in sustaining the City's motion to dismiss because section 12.3 of the Charter conflicts with sections 537.600.1, 82.210, and 516.120. Accordingly, Zang argues the Charter's notice requirement must be invalidated. In the absence of a notice requirement, Zang contends he complied with section 516.120's five-year statute of limitations, the only other time restraint imposed upon him.

I. Background surrounding constitutional charter cities

The City is a constitutional charter city with a population of fewer than 100,000 inhabitants. Having adopted the Charter in 1981, the City derives its charter powers from article VI, section 19(a) of the Missouri Constitution, which states:

> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Article VI, section 19(a) was adopted in 1971. Prior to section 19(a)'s adoption, the grant of powers to charter cities came from article VI, section 19 of the Missouri Constitution (1945), which provided in pertinent part, "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state[.]"

[4] [5] This Court acknowledged the impact of section 19(a)'s adoption in *State ex inf. Hannah ex rel. Christ v. City of St. Charles*, explaining, "prior to the adoption of § 19(a), the powers which a home rule municipality could exercise through the constitutional grant of a right to adopt a charter, were limited to those powers which the people of the city expressly delegated to the city under the charter and those powers given by

statute." 676 S.W.2d 508, 512 (Mo. banc 1984). Now, "[u]nder Missouri's new model of home rule [laid out in section 19(a)], even in the absence of an express delegation by the people of a home rule municipality in their charter, the municipality possesses all powers which are not limited or denied by the constitution, by statute, or by the charter itself." *Id.* In other words, "[u]nder section 19(a), the emphasis no longer is whether a home rule city has the authority to exercise the power involved; the emphasis is whether the exercise of that power ***conflicts with the Missouri Constitution, state statutes*** or the charter itself." *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986) ***332** (emphasis added).[6]

II. The Charter's notice requirement does not conflict with statutory law

[6] [7] [8] Zang alleges various conflicts exist between Charter section 12.3 and sections 82.210, 516.120, and 537.600.1. Whether a state law provision conflicts with a charter provision is a matter of statutory construction. *Id.* "As a general principle, where a charter provision and statutes do not irreconcilably conflict, both stand." *Gates v. City of Springfield*, 744 S.W.2d 487, 488 (Mo. App. 1988). If there is an irreconcilable conflict between a statute and a charter provision, however, the charter provision is preempted. *Coop. Home Care*, 514 S.W.3d at 578-79.

[9] [10] [11] [12] [13] [14] Preemption may be either express or implied. *Id.* at 579. Express preemption occurs when the legislature "explicitly proscribed local regulation in a specific area." *Id.* On the other hand, "[i]mplied preemption can occur in either of two ways—through 'conflict' preemption or through 'field' preemption." *Id.* Conflict preemption occurs when "the [local law] 'permits what the statute prohibits' or 'prohibits what the statute permits.' " *Cape Motor Lodge*, 706 S.W.2d at 211 (quoting *Page W., Inc. v. Cmty. Fire Prot. Dist. of St. Louis Cnty.*, 636 S.W.2d 65, 67 (Mo. banc 1982)). Notably, there is no conflict if the local law merely enlarges or supplements the state law, "such as when the locality prohibits more than the state prohibits." *Coop. Home Care*, 514 S.W.3d at 583. Additionally, "field preemption occurs when the General Assembly has created a state regulatory scheme that is so comprehensive that it reasonably can be inferred that the General Assembly intended to occupy the legislative field, leaving no room for local supplementation." *Id.* at 579.

A. Sections 82.210 and 537.600.1(2)

Zang argues Charter section 12.3 conflicts with sections 82.210 and 537.600.1(2). According to Zang, Charter section 12.3 must be preempted because it: (1) permits what the statute prohibits and (2) occurs in an area in which the General Assembly intended to occupy the legislative field. Neither of Zang's claims is persuasive.

Section 537.600.1(2) waives sovereign immunity for injuries caused by the condition of a public entity's property, specifically:

> Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

For constitutional charter cities with a population of at least 100,000 inhabitants, however, section 537.600.1(2)'s waiver of sovereign immunity is limited by section 82.210's notice requirement.[7] Section 82.210 provides:

> ***333** No action shall be maintained against any city of this state which now has or may hereafter attain a ***population of one hundred thousand inhabitants***, on account of any injuries growing out of any defect in the condition of any bridge, boulevard, street, sidewalk or thoroughfare in said city, until notice shall first have been given in writing to the mayor of said city, ***within ninety days of the occurrence for which such damage is claimed***, stating the place where, the time when such injury was received, and the character and circumstances of the injury, and that the person so injured will claim damages therefor from such city.

(Emphasis added).

[15] To the extent Zang is arguing section 82.210 prohibits constitutional charter cities with populations of fewer than 100,000 inhabitants from creating notice requirements, this argument holds no merit. As Zang concedes at other points in his brief, section 82.210 does not apply to constitutional charter cities with a population of fewer than 100,000 inhabitants. *See Waisblum v. City of St. Joseph*, 928 S.W.2d 414, 417 (Mo. App. 1996) ("Since the City of St. Joseph has fewer than 100,000 inhabitants, § 82.210 does not apply to it and Mr. Waisblum was not required to give the City notice of the occurrence he alleged caused him injury."). The language of section 82.210 and its population requirement is clear and unambiguous. *Id.* Consequently, because section 82.210 is entirely inapplicable to the City, it neither creates a statutory notice requirement for the City nor prohibits it from enacting its own notice requirement.

Moreover, this Court has repeatedly cautioned against the use of the maxim *expressio unius est exclusio* (omissions shall be understood as exclusions) except when the legislature's intent is self-evident within the statute. *See, e.g., State ex rel. Hawley v. Pilot Travel Ctrs., LLC*, 558 S.W.3d 22, 31 (Mo. banc 2018) ("In other words, it must be clear from the statute that the legislature intended for the Board to not possess the power of entering into subrogation contracts with Fund participants." (emphasis omitted)); *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 269-70 (Mo. banc 2005); *Reorganized Sch. Dist. No. R-8 of Lafayette Cnty. v. Robertson*, 262 S.W.2d 847, 850 (Mo. 1953). This Court dealt with a similar challenge in *Cape Motor Lodge*, 706 S.W.2d 208. There, the plaintiffs sought to invalidate an ordinance authorizing Cape Girardeau to enter into an agreement with Southeast Missouri State University because the Missouri Constitution and state law permitted municipalities to enter into such agreements with certain specified entities, which the university was not. *Id.* at 211. This Court disagreed with the plaintiffs, holding the Missouri Constitution and the referenced statute "do not operate as both authorization and limitation. These provisions contain no indication that the express enumerations of the entities named are to be considered as the exclusion of others not named." *Id.* at 212 (internal quotation marks omitted). Similarly, there is no indication section 82.210's applicability to certain constitutional charter cities is to the exclusion of those that do not satisfy its population requirement.

[16] Additionally, while Charter section 12.3 limits section 537.600.1(2)'s waiver of sovereign immunity, the Charter's notice requirement does not prohibit what ***334** section 537.600.1(2) permits. *See* *Findley v. City of Kan. City*, 782 S.W.2d 393, 397 (Mo. banc 1990). Notice requirements have been held constitutional even when they limit a municipality's waiver of sovereign immunity. *Id.* ("If the legislature can bar recovery entirely by the adoption of sovereign immunity, intending to close the floodgates to tort claims as in *Winston*, it follows that the legislature can choose for itself whether to open those floodgates widely or, as in this case, but a crack."); *see also Winston v. Reorganized Sch. Dist. R-2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 328 (Mo. banc 1982) (explaining "a sovereign may prescribe the terms and conditions under which it may be sued").

[17] Likewise, sections 82.210 and 537.600.1(2) do not evince a legislative intent to occupy the field and prevent constitutional charter cities with populations of less than 100,000 inhabitants from creating notice requirements. "State law occupies an area when it has

created a comprehensive scheme on a particular area of the law, leaving no room for local control." *Borron v. Farrenkopf*, 5 S.W.3d 618, 624 (Mo. App. 1999). While Zang emphasizes the four notice statutes cover the majority of cities in Missouri, he fails to explain how that creates a reasonable inference that the legislature intended to occupy the field and leave no room for local supplementation. Had the legislature intended to occupy the field by limiting notice requirements to only the cities qualifying under the notice statutes, it could have said so. *Cape Motor Lodge*, 706 S.W.2d at 212.

B. Section 516.120

Zang next claims Charter section 12.3 irreconcilably conflicts with section 516.120 because both create time restrictions for when an action may be brought. Section 516.120(2) imposes a five-year statute of limitations for "[a]n action upon a liability created by a statute other than a penalty or forfeiture."

[18] [19] In *Findley*, this Court held section 82.210's 90-day notice requirement was constitutional even though it had the same practical effect as a statute of limitations, because notice requirements are rooted in sovereign immunity. 782 S.W.2d at 395.[8] "It being constitutionally permissible for the legislature to cloak municipalities with immunity by statute, it necessarily follows that any waiver of immunity granted is subject to the limits imposed in the waiver." *Id.* at 396. Consequently, because statutory notice requirements are permissible, the remaining question is whether constitutional charter cities can also create such requirements.

[20] Pursuant to article VI, section 19(a)'s grant of authority to constitutional charter cities, the City possesses the power to impose a notice requirement because notice requirements are not limited or denied by section 516.120. *See also Cape Motor Lodge*, 706 S.W.2d at 212 (finding no conflict between an ordinance and statute because the "language of these provisions is not expressly inconsistent, nor in irreconcilable conflict"). In fact, as evinced by the legislature's enactment of section 82.210 and the other notice statutes (which Charter section 12.3 mirrors), notice requirements ***335** can and do coexist with statutes of limitations. *Findley*, 782 S.W.2d at 396. Nothing in section 516.120's five-year statute of limitations restricts or denies the City from creating its own notice requirement. There is no express inconsistency or irreconcilable conflict between Charter section 12.3 and section 516.120. As this Court explained in *Findley*, notice requirements have a different origin than statutes of limitations and serve a different purpose. *Id.* at 395. As such, Charter section 12.3 and section 516.120 function independently and for different reasons. The fact that a claimant can satisfy the City's notice requirement and then still fail to satisfy section 516.120's statute of limitations highlights this distinction.

Additionally, Zang's reliance on *Heater v. Burt*, 769 S.W.2d 127 (Mo. banc 1989), is misplaced because that case considered a charter provision's notice requirement under the prior constitutional grant of power to charter cities, not under article VI, section 19(a). *Id.* at 128-29. In *Heater*, this Court found that a notice requirement was inconsistent with the statute of limitations because "[t]he effect on the injured parties is the same whether their claim is denied by the statute of limitations or a notice-of-claim provision." *Id.* at 130. Under the prior constitutional grant of power to charter cities, any inconsistency between the "laws of the state" and a charter provision would result in the charter provision's invalidation. *Id.* at 129. *Heater*'s analysis turned on the "charter provision plac[ing] a condition precedent for bringing an action of negligence which was not present ***at common law*** and not consistent with the statute of limitations." *Id.* (emphasis added). Of course, the new constitutional provision is different, allowing the exercise of "all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are ***consistent with the constitution of this state*** and are ***not limited or denied either by the charter so adopted or by statute***." Mo. Const. art. VI, sec. 19(a) (emphasis added). In other words, Charter section 12.3 would exceed the City's

charter powers only if it is limited or denied by statute, which is not the case here.

Accordingly, although impermissible under the old constitutional regime, notice requirements are permissible under article VI, section 19(a) because they do not irreconcilably conflict with the statute of limitations in section 516.120, they are simply more restrictive. This Court has explained on numerous occasions that local laws may be more restrictive than statewide laws, so long as a "municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required[.]" *Kan. City v. LaRose*, 524 S.W.2d 112, 117 (Mo. banc 1975); *see also* *Coop. Home Care*, 514 S.W.3d at 583 (quoting *Carlson*, 292 S.W.3d at 372). The notice requirement may restrict who is eligible to bring suit against the City, but it does not change what type of suits can be brought against the City or how long a claimant has under section 516.120's five-year statute of limitations.

C. Section 537.600.1(1)

[21] Finally, Zang claims Charter section 12.3 conflicts with section 537.600.1(1)[9] because the Charter's notice requirement applies to all actions involving "negligence of the city," while state law contains only a notice requirement for premises liability claims. Accordingly, Zang argues Charter ***336** section 12.3 impermissibly requires notice for actions involving the negligent acts or omissions of public employees.

For the same reasons it is permissible for the City to enact its own notice requirements applicable to section 537.600.1(2), it can also do so for section 537.600.1(1). Section 537.600.1(1) neither permits what Charter section 12.3 prohibits nor contains any indication of a legislative intent to occupy the field. *See Cape Motor Lodge*, 706 S.W.2d at 212; *Findley*, 782 S.W.2d at 397.

Conclusion

For the reasons set forth above, the circuit court's judgment is affirmed.

Wilson, C.J., Russell, Powell, Breckenridge and Draper, JJ., concur; Fischer, J., concurs in result.

All Citations

659 S.W.3d 327

Footnotes

1 Zang voluntarily dismissed the County without prejudice in January 2021. Accordingly, this appeal involves only the City.

2 The City moved to dismiss Count I because Zang failed to state a recognized waiver to sovereign immunity. With the consent of the parties, the City's motion to dismiss Count I was converted to a motion for summary judgment. Subsequently, the circuit court entered summary judgment on Count I, and it is not the focus of this appeal.

3 All statutory references are to RSMo 2016, unless otherwise specified.

4 *See* secs. 77.600, 79.480, 81.060, 82.210.

5 After an opinion by the court of appeals, this Court granted transfer. Mo. Const. art. V, sec. 10.

6 For example, this Court explained section 19(a) did not give Kansas City the power "to provide in its charter for its operation of public schools within its corporate limits" because that power was denied by state statute. *Enright v. Kan. City*, 536 S.W.2d 17, 19 (Mo. banc 1976).

7 Similar notice requirements exist for the three other classes of cities in Missouri. *See* secs. 77.600 (applicable to third-class cities), 79.480 (applicable to fourth-class cities), 81.060 (applicable to special charter cities with a population of 500 to 3,000 inhabitants).

8 As *Findley* explained, numerous reasons exist to justify a notice requirement such as: (1) limiting a city's exposure to liability claims; (2) allowing a city to investigate and defend against a claim; (3) protecting against stale claims by allowing prompt investigation of witnesses and the scene before time alters conditions or obscures the memory; and (4) allowing the city to address dangerous conditions promptly to avoid additional risk to citizens and visitors. 782 S.W.2d at 397. These justifications apply equally to constitutional charter cities with populations of more than and fewer than 100,000 inhabitants.

9 Section 537.600.1(1) waives sovereign immunity for "[i]njuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment[.]"

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Poke v. Independence School District

Supreme Court of Missouri, en banc. | July 12, 2022 | 647 S.W.3d 18 | 2022 WL 2707806

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Outline

Sovereign Immunity does not shield a municipality from a Worker's Compensation Retaliation claim

647 S.W.3d 18
Supreme Court of Missouri,
en banc.

Travis **POKE**, Appellant,
v.
INDEPENDENCE SCHOOL DISTRICT,
Respondent.

No. SC 99384
|
Opinion issued July 12, 2022

Synopsis

Background: **School-district** employee brought action against district, asserting violation of state statute through alleged retaliation for filing workers' compensation claim. The Circuit Court, Jackson County, Jennifer Phillips, J., granted summary judgment to district. Employee appealed.

[Holding:] On transfer from the Court of Appeals, the Supreme Court, Robin Ransom, J., held that statute creating private right of action for employees who are discharged, or discriminated against, by employer for exercising workers' compensation rights, read in conjunction with statute defining an "employer" for purposes of Workers' Compensation Law to include governmental entities, waived any sovereign immunity that **school district** had to employee's action; overruling *Krasney v. Curators of University of Missouri*, 765 S.W.2d 646; and *King v. Probate Division, Circuit Court of County of St. Louis, 21st Judicial Circuit*, 958 S.W.2d 92.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (7)

[1] **Appeal and Error**⚖=De novo review
Review of the grant of summary judgment is de novo.

2 Cases that cite this headnote

[2] **Appeal and Error**⚖=Statutory or legislative law
Appeal and Error⚖=Immunity
The existence of sovereign immunity and questions of statutory interpretation are issues of law, which the Supreme Court reviews de novo.

2 Cases that cite this headnote

[3] **Municipal Corporations**⚖=Capacity to sue or be sued in general
When analyzing whether a governmental entity can be liable for damages, court must determine whether the legislature waived sovereign immunity.

1 Case that cites this headnote

[4] **Municipal Corporations**⚖=Capacity to sue or be sued in general
In the absence of an express statutory exception to sovereign immunity, or a recognized common-law exception, sovereign immunity is the rule and applies to all suits against public entities.

1 Case that cites this headnote

[5] **States**⚖=Mode and Sufficiency of Consent
To overcome the general rule of sovereign immunity, it must be shown that the legislature expressly intended to waive sovereign immunity.

1 Case that cites this headnote

[6] **Education**⚖=Grounds for removal or other adverse action

Public Employment⇨Nature, form, and right of action

Statute creating private right of action for employees who are discharged, or discriminated against, by employer for exercising workers' compensation rights, read in conjunction with statute defining an "employer" for purposes of Workers' Compensation Law to include governmental entities, waived any sovereign immunity that **school district** had to its employee's retaliation claim, which alleged employee's termination was motivated by filing of workers' compensation claim; overruling *Krasney v. Curators of University of Missouri*, 765 S.W.2d 646; and *King v. Probate Division, Circuit Court of County of St. Louis, 21st Judicial Circuit*, 958 S.W.2d 92. Mo. Ann. Stat. §§ 287.030, 287.780.

[7] **Education**⇨Liability in general

Statute addressing state civil liability does not apply to **school district**, which is not the state. Mo. Ann. Stat. § 105.850.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, The Honorable Jennifer Phillips, Judge

Attorneys and Law Firms

Poke was represented by Daniel L. Doyle and Robert A. Bruce of Doyle & Associates LLC in Kansas City, Kansas, (913) 371-1930.

The district was represented by J. Drew Marriott and Ryan VanFleet of EdCounsel LLP in **Independence**, (816) 252-9000.

Opinion

Robin Ransom, Judge

***19** Travis **Poke** sued **Independence School District** alleging he had been fired in retaliation for filing a workers' compensation claim in violation of section 287.780.[1] The circuit court dismissed **Poke's** claim on the ground that the **school district** was protected by the doctrine of sovereign immunity. The issue before this Court, therefore, is not whether **Poke** has a valid claim of retaliation. Instead, the only issue is whether such claims can be asserted against the **School District** by any employee under any circumstances. Because the plain language of section 287.780 and related statutes shows the general assembly expressly waived whatever immunity the **school district** might have had, the judgment of the circuit court is reversed and this case is remanded for further proceedings.

Commented [ER1]: issue

Background

Poke was employed by the **school district** as a custodian. In December 2019, **Poke** was injured while folding a cafeteria table. **Poke** aggravated his injury by lifting a full garbage bag while working in January 2020. **Poke independently** sought medical treatment and was diagnosed with a hernia. He initiated a workers' compensation claim with the **school district**. The **school district** directed **Poke** to an authorized treatment provider, who diagnosed **Poke** with inguinal tenderness. As requested, **Poke** also provided the authorized treatment provider with a urine sample.

Poke returned to work. Thereafter, the **school district** discharged **Poke** because his urine sample tested positive for marijuana, violating the **school district's** drug policy. The **school district** denied **Poke's** workers' compensation claim based upon his positive drug test.

In February 2020, **Poke** filed suit under section 287.780 of the Workers' Compensation Law. **Poke** alleged the **school district's** stated basis for terminating his employment was pretextual and he was actually discharged in retaliation for exercising his workers' compensation rights. The **school district** denied **Poke's** allegation and asserted his claim was barred by governmental, sovereign, and/or Eleventh

Amendment immunity. Subsequently, the **school district** filed a motion for summary judgment, arguing it was entitled to sovereign immunity from **Poke's** workers' compensation retaliation claim.

The circuit court sustained the **school district's** motion, finding the **school district** was "entitled to summary judgment based on binding legal precedent holding that Missouri **school districts** have sovereign immunity with respect to workers' compensation retaliation claims." The circuit court's decision relied upon *Krasney v. Curators of University of Missouri*, 765 S.W.2d 646 (Mo. App. 1989), and *King v. Probate Division, Circuit Court of County of St. Louis, 21st Judicial Circuit*, 958 S.W.2d 92 (Mo. App. 1997).

***20** This appeal follows.[2]

Standard of Review

[1] [2] Review of the grant of summary judgment is *de novo*. *See Green v. Fotoohighiam*, 606 S.W.3d 113, 115 (Mo. banc 2020). Additionally, "[t]he existence of sovereign immunity and questions of statutory interpretation are issues of law, which [this court] review[s] *de novo*." *Moore v. Lift for Life Acad., Inc.*, 489 S.W.3d 843, 845 (Mo. App. 2016).

Analysis

Poke argues the circuit court erred in finding the **school district** enjoyed sovereign immunity from his workers' compensation retaliation claim. **Poke** contends that, because the legislature included the state and political subdivisions, such as **school districts**, as employers for the purposes of the Workers' Compensation Law, workers' compensation retaliation claims are authorized against the **school district**.

Section 287.780 creates a private right of action for employees who have been discharged or discriminated against by their employer for exercising their workers' compensation rights. Specifically, section 287.780 provides:

> No employer or agent shall discharge or discriminate against any employee for exercising any of his or her rights under this chapter when the exercising of such rights is the motivating factor in the discharge or discrimination. Any employee who has been discharged or discriminated against in such manner shall have a civil action for damages against his or her employer. For purposes of this section, "motivating factor" shall mean that the employee's exercise of his or her rights under this chapter actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination.

Correspondingly, section 287.030 defines "employer" as used in the Workers' Compensation Law, providing:

> 1. The word "employer" as used in this chapter shall be construed to mean:
>
> ....
>
> (2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi-corporation, or cities under special charter, or under the commission form of government[.]

Significantly, the legislature amended sections 287.780 and 287.030 in 1973 and 1974, respectively. Prior to section 287.780's amendment in 1973, the Workers' Compensation Law did not create a private right of action for workers' compensation retaliation claims. Instead, section 287.780, RSMo 1969, provided an employer's discharge of, or discrimination against, an employee for exercising his or her workers' compensation rights constituted a criminal misdemeanor. *See also Cook v. Hussmann Corp.*, 852 S.W.2d 342, 344 (Mo. banc 1993) (explaining section 287.780 "created a judicially cognizable **independent** tort" following its amendment in 1973); *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122, 126-28 (Mo.

banc 1956) (holding the pre-1973 version of section 287.780 provided no basis for a claim of damages). Likewise, prior to section 287.030.1(2)'s amendment in 1974, governmental entities were not automatically included in the definition ***21** of "employer." Instead, section 287.030.1(2), RSMo 1969, contained a similar list of governmental entities but stated those governmental entities were considered employers for the purposes of the Workers' Compensation Law only if they "elect[ed] to accept this chapter by law or ordinance." Consequently, based upon a natural reading of sections 287.780 and 287.030, particularly in light of their revisions, it is apparent (1) the **school district** falls within the Workers' Compensation Law's definition of "employer"[3] and (2) employers are subject to civil actions for damages if they discharge or discriminate against an employee for exercising his or her workers' compensation rights.

[3] [4] [5] When analyzing whether a governmental entity can be liable for damages, however, this Court must also determine whether the legislature waived sovereign immunity. In Missouri, "in the absence of an express statutory exception to sovereign immunity, or a recognized common law exception ..., sovereign immunity is the rule and applies to all suits against public entities." *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors,* 476 S.W.3d 913, 921-22 (Mo. banc 2016). To overcome the general rule of sovereign immunity, it must be shown that the legislature expressly intended to waive sovereign immunity. *Bachtel v. Miller Cnty. Nursing Home Dist.*, 110 S.W.3d 799, 804 (Mo. banc 2003).

This Court's primary task, therefore, is to determine whether section 287.780 provides the express showing of legislative intent required to waive sovereign immunity for workers' compensation retaliation actions brought against governmental entities. **Poke** avers that, pursuant to this Court's holding in *Bachtel*, section 287.780 constitutes an express waiver of sovereign immunity when read in conjunction with section 287.030.1's definition of "employer."

In *Bachtel*, two former nursing home employees filed suits for damages against a nursing home, alleging they were wrongfully discharged in retaliation for reporting violations of the Omnibus Nursing Home Act, chapter 198, RSMo 2000. *Id.* at 800-01. This Court first found the Omnibus Nursing Home Act provided a private right of action for nursing home employees who were retaliated against for reporting acts of abuse and neglect. *Id.* at 801-02. The key issue was whether a nursing home district, a political subdivision of the state, could be sued for violating the Omnibus Nursing Home Act when the act did "not contain specific language stating that the doctrine of sovereign immunity [was] waived as to nursing home districts." *Id.* at 802-03.

This Court definitively answered in the affirmative, reasoning, "While the most common way to express that intent may be to specifically state that sovereign immunity is waived, the legislature also expresses its intent through other language." *Id.* at 804. The legislature is not required to use "certain magic words." *Id.* Accordingly, because "an employee of a private nursing home can sue under the provisions of the Act for retaliation, and as the provisions so permitting are expressly made applicable to nursing home districts, their language provides the express showing of legislative intent required to find a waiver of sovereign immunity." *Id.* at 805.

[6] [7] The analysis in *Bachtel* is highly instructive to this Court's consideration of sections 287.780 and 287.030 in the instant ***22** case. Just as in *Bachtel*, here the legislature (1) created a private right of action that can be brought against any employer who retaliates against an employee for exercising his or her workers' compensation rights, section 287.780 and (2) specifically included governmental entities in the Workers' Compensation Law's definition of "employer," section 287.030. Consequently, considered together, sections 287.780 and 287.030 reflect an express showing of legislative intent to waive the **school district's** sovereign immunity for **Poke's** workers' compensation retaliation claim. *Bachtel*, 110 S.W.3d at 805.[4]

Commented [ER3]: Legislature can waive without specifically intending to do so. Does this mean subsequent acts should specifically reserve SI in explicit terms? Not likely to happen without a fight.

Commented [ER2]: General Rule on SI

Conclusion

For the reasons set forth above, the circuit court's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Wilson, C.J., Russell, Breckenridge, Fischer and Draper, JJ., and Broniec, Sp.J., concur. Powell, J., not participating.

All Citations

647 S.W.3d 18, 405 Ed. Law Rep. 1193

Footnotes

1 All statutory references are to RSMo 2016, as supplemented through the date the **School District** terminated **Poke's** employment, unless otherwise specified.

2 After an opinion by the court of appeals, this Court granted transfer. Mo. Const. art. V, sec. 10.

3 The **school district** does not dispute it falls within the Workers' Compensation Law's definition of "employer."

4 To the extent *Krasney*, 765 S.W.2d at 650, and *King*, 958 S.W.2d at 93, hold sections 287.780 and 287.030 are insufficient to establish express legislative intent to waive sovereign immunity, they are overruled. *See also Wyman v. Mo. Dep't of Mental Health*, 376 S.W.3d 16, 21 (Mo. App. 2012) (noting *Krasney*'s holding on this point was questionable in light of *Bachtel*).
Additionally, the parties and prior appellate cases devoted significant time analyzing the potential impact of section 105.850 on the waiver of sovereign immunity under section 287.780. Section 105.850 provides: "Nothing in sections 105.800 to 105.850 shall ever be construed as acknowledging or creating any liability in tort or as incurring other obligations or duties except only the duty and obligation of complying with the provisions of chapter 287." However, section 105.850 is not applicable here because section 105.850 addresses only state civil liability and the **school district** is not the state. *See S.M.H. v. Schmitt*, 618 S.W.3d 531, 534 (Mo. banc 2021) ("[P]ublic **school districts** in Missouri are regularly considered political subdivisions—not agencies of the state."); *see also Krasney*, 765 S.W.2d at 650 (involving the board of a state university); *King*, 958 S.W.2d at 93 (involving a state court); *Wyman*, 376 S.W.3d at 21-22 (involving a state agency); *Wille v. Curators of Univ. of Mo.*, 627 S.W.3d 56, 63-65 (Mo. App. 2021) (involving the board of a state university). Moreover, **Poke** neither attempted to bring his action pursuant to sections 105.800 to 105.850 nor argued those sections are the source of the **school district's** waiver of sovereign immunity. This Court will consider the impact, if any, of section 105.850 on section 287.780's waiver of state sovereign immunity should an appropriate case arise.

State ex rel. School District of Kansas City 33 v. Zhang

Missouri Court of Appeals, Western District. | February 7, 2023 | 666 S.W.3d 170 | 2023 WL 1786657

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Outline

Purchase of insurance does not operate as a blanket waiver of sovereign immunity

666 S.W.3d 170
Missouri Court of Appeals, Western District.

STATE of Missouri, EX REL., the SCHOOL DISTRICT OF KANSAS CITY 33, Relator,
v.
The Honorable Jerri J. ZHANG, Respondent.

WD 85738
|
Opinion filed: February 7, 2023
|
Motion for Rehearing and/or Transfer to Supreme Court Denied March 28, 2023
|
Application for Transfer Denied May 23, 2023

Synopsis

Background: School district filed petition for writ of prohibition directing Circuit Court, Jackson County, Jerri Zhang, J., to grant district's motion for summary judgment in underlying tort action brought by former student who was allegedly sexually assaulted on school grounds by another student. The Court of Appeals issued preliminary writ of prohibition.

Holdings: The Court of Appeals, Ardini, P.J., held that:

[1] sovereign immunity exclusion endorsement in district's commercial general liability (CGL) policy did not waive district's sovereign immunity;

[2] governmental immunity endorsement in district's directors, officer, insured entity and employment practices insurance policy did not waive district's sovereign immunity; and

[3] failure by school district agents to sign district's insurance policies did not render policies void and unenforceable.

Preliminary writ made permanent; remanded with instructions.

Procedural Posture(s): Petition for Writ of Prohibition.

West Headnotes (13)

[1] **Municipal Corporations**⇨Nature and grounds of liability

A governmental entity's purchase of liability insurance may function as a waiver of sovereign immunity. Mo. Ann. Stat. § 537.610.1.

[2] **Municipal Corporations**⇨Application of principle of agency to municipalities

A governmental employer may still be liable for the actions of its employee even if the employee is entitled to official immunity.

[3] **Courts**⇨Issuance of Prerogative or Remedial Writs
Courts⇨Prohibition

Court of Appeals has discretion to issue and determine original remedial writs, including writs of prohibition.

[4] **Prohibition**⇨Discretion as to grant of writ

Whether a writ of prohibition should issue in a particular case is a question left to the sound discretion of the court to which application has been made.

[5] **Municipal Corporations**⇨Nature and grounds of liability
Prohibition⇨Grounds for Relief

Sovereign immunity is not a defense to suit but, rather, it is immunity from tort liability altogether, providing a basis for prohibition.

[6] **Prohibition**⇨Grounds for Relief

Prohibition is generally the appropriate remedy to forestall unwarranted and useless litigation.

[7] **Prohibition**⇐Grounds for Relief

Forcing upon a defendant the expense and burdens of trial when the claim is clearly barred is unjust and should be prevented; thus, prohibition is an appropriate remedy when a defendant is clearly entitled to sovereign immunity.

[8] **Insurance**⇐Questions of law or fact

Interpretation of an insurance policy is a question of law.

[9] **Municipal Corporations**⇐Constitutional and statutory provisions

Courts construe narrowly any waiver of sovereign immunity.

[10] **Education**⇐Immunity in general
Insurance⇐Particular Exclusions

Sovereign immunity exclusion endorsement in school district's commercial general liability (CGL) policy did not waive district's sovereign immunity, but rather, expressly disclaimed any waiver of sovereign immunity; endorsement stated that the policy did "not apply to any Claim to which the Insured is Immune under the legal doctrine of sovereign immunity; or would have been immune, but for the Insured's waiver of such immunity." Mo. Ann. Stat. § 537.610.1.

[11] **Education**⇐Immunity in general
Insurance⇐Particular Exclusions

Governmental immunity endorsement in school district's directors, officers, insured entity and employment practices insurance policy did not waive district's sovereign immunity, but rather, expressly disclaimed any waiver of sovereign immunity; endorsement stated that policy excluded coverage for any claim barred by doctrine of sovereign immunity and contained additional disclaimer language that acted to retain district's sovereign immunity. Mo. Ann. Stat. § 537.610.1.

[12] **Municipal Corporations**⇐Nature and grounds of liability

Procurement of an insurance policy does not necessarily waive sovereign immunity for all tort claims asserted against a public entity; rather, immunity is waived only to the extent of and for the specific purposes covered by the insurance purchased. Mo. Ann. Stat. § 537.610.1.

[13] **Education**⇐By other students
Insurance⇐Execution

Failure by school district agents to sign school district's commercial general liability (CGL) insurance policy and directors, officers, insured entity employment practices insurance policy in compliance with statute stating that any contracts by school district "shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed," did not render policies, including the sovereign immunity preservation provisions, void and unenforceable, and thus, school district was still protected by doctrine of sovereign immunity from former student's lawsuit alleging tort claims, including negligence and negligent infliction of emotional distress, related to her sexual assault in school by another student. Mo. Ann. Stat. § 432.070.

***171 ORIGINAL PROCEEDING IN PROHIBITION**

Attorneys and Law Firms

Tyson H. Ketchum, Kansas City, MO, for Relator.

Nickolas C. Templin, Kansas City, MO, for Respondent.
Writ Division: Edward R. Ardini, Jr., Presiding Judge, Alok Ahuja, Judge, and Karen King Mitchell, Judge

Opinion

EDWARD R. ARDINI, JR., PRESIDING JUDGE

Jane Doe ("Plaintiff") filed a lawsuit in the Circuit Court of Jackson County against the School District of Kansas City 33 d/b/a Kansas City Public Schools ("KCPS"). KCPS filed a renewed motion for summary judgment claiming sovereign immunity from Plaintiff's claims, and the trial court—the Honorable Jerri J. Zhang ("Respondent")—overruled the motion. KCPS sought a writ of prohibition from this Court, requesting we direct Respondent to take no action other than to grant KCPS's renewed motion for summary ***172** judgment. We issued a preliminary writ of prohibition that we now make permanent.

Factual and Procedural Background

On June 9, 2020, Plaintiff initiated a lawsuit ("Underlying Lawsuit") against KCPS and four individuals employed by KCPS ("Individual Defendants"). Plaintiff alleged that on September 28, 2015, while she was a student at what is now known as Southeast High School, another student forcibly carried her to an unlocked and unsupervised area of the school's fifth floor, where he sexually assaulted her.

Plaintiff's petition asserted four counts. Counts I and II alleged tort claims against KCPS and the Individual Defendants. Specifically, Count I alleged the tort of negligent training and supervision and breach of ministerial duties, and Count II alleged the tort of negligent infliction of emotional distress. Counts III and IV were asserted solely against KCPS. Count III alleged KCPS was vicariously liable for the actions of the Individual Defendants under the theory of respondeat superior. Count IV asserted a claim of "Premise [sic] Liability – Dangerous Condition."

[1] As relevant to this writ proceeding, Plaintiff also asserted in paragraph 8 of her petition that:

> Defendant KCPS maintains a policy of insurance or belongs to a risk pool that is the legal equivalent of an insurance policy that covers claims for bodily injury against public officials or employees for an occurrence caused by negligent acts and for the breach of ministerial duties as alleged in this Petition.

As discussed in greater detail in our analysis, KCPS is a governmental entity that is entitled to sovereign immunity except to the extent waived. "The purchase of liability insurance may function as a waiver of sovereign immunity." *State ex rel. Blue Springs Sch. Dist. v. Grate*, 576 S.W.3d 262, 265 n.5 (Mo. App. W.D. 2019) (citing § 537.610.1, RSMo[1]).

[2] KCPS and the Individual Defendants filed a motion to dismiss Plaintiff's petition, which was granted in part. The trial court dismissed all claims against the Individual Defendants, finding they enjoyed official immunity from Plaintiff's claims. The trial court also dismissed Count IV ("Premise [sic] Liability – Dangerous Condition"). Thus, the claims remaining in the Underlying Lawsuit after the trial court's dismissal order were Count I (negligent supervision/training and breach of ministerial duties), Count II (negligent infliction of emotional distress), and Count III (respondeat superior liability).[2] KCPS remained the sole named defendant.

Thereafter, KCPS filed a motion for summary judgment, asserting "there is no genuine dispute of material fact and KCPS is shielded as a matter of law by sovereign immunity from Plaintiff's claims." The trial court denied the motion. KCPS sought a writ of prohibition from this Court in Case No. WD84793. The respondent in that writ proceeding (the Honorable David Michael Byrn) opposed the writ petition, in part, by asserting that the summary judgment motion was "premature and filed with an incomplete record."

On September 21, 2021, we denied the writ petition "without prejudice with the understanding that the summary judgment motion may be renewed following the close of discovery."

*173 In May 2022, KCPS filed a renewed motion for summary judgment, again arguing "that there is no genuine dispute as to any material fact and that KCPS is entitled to judgment as a matter of law because it is shielded by sovereign immunity." Plaintiff opposed the motion, asserting KCPS "procured liability insurance covering both it and its agents for claims like those being made by Plaintiff," thereby waiving KCPS's sovereign immunity. Plaintiff also asserted that "the sovereign immunity preservation provisions" in KCPS's insurance policies did "not comply with Missouri law," specifically section 432.070's requirement that contracts entered into by public entities, including school districts, "shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing." Plaintiff asserted that "without proof of compliance with § 432.070, the preservation of sovereign immunity through policy language is inadequate." Respondent denied the motion on the grounds that "there still remains a genuine issue of material fact" and KCPS "failed to illustrate its right to judgment as a matter of law."

KCPS filed a petition for writ of prohibition with this Court, thereby initiating this writ proceeding. KCPS asserted that "extensive discovery revealed no issues of material fact on the issue of sovereign immunity" and Plaintiff "failed to carry the burden to prove KCPS waived sovereign immunity." KCPS sought a writ of prohibition "barring Respondent from taking any further action in the underlying action other than to vacate the Order of Respondent's [entered on] September 2, 2022, denying the renewed motion for summary judgment and to enter summary judgment in favor of KCPS based on sovereign immunity."

After Respondent filed suggestions in opposition to KCPS's writ petition, we issued a preliminary writ of prohibition directing Respondent to refrain from taking any further action in the Underlying Lawsuit until further order of this Court "except to reconsider [the] denial of [KCPS's] Motion for Summary Judgment based on sovereign immunity."

Standard of Review

[3] [4] This Court has discretion to issue and determine original remedial writs, including writs of prohibition. *Blue Springs Sch. Dist.*, 576 S.W.3d at 266. "Whether a writ should issue in a particular case is a question left to the sound discretion of the court to which application has been made." *Id.* at 267.

[5] [6] [7] "Sovereign immunity is not a defense to suit but, rather, it is immunity from tort liability altogether, providing a basis for prohibition." *State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368, 369 (Mo. banc 2016). "[P]rohibition is generally the appropriate remedy to forestall unwarranted and useless litigation." *Blue Springs Sch. Dist.*, 576 S.W.3d at 266. "Because there is no right of appeal from the denial of a motion for summary judgment, the refusal to utilize a writ where the issues before the court are solely matters of law would compel a defendant to defend unwarranted and useless litigation at great expense and burden." *Id.* at 267 (internal marks omitted). "Forcing upon a defendant the expense and burdens of trial when the claim is clearly barred is unjust and should be prevented." *Id.* at 266. "Thus, prohibition is an appropriate remedy when a defendant is clearly entitled to immunity." *Id.* at 267 (internal marks omitted); *see also* *State ex rel. Bd. of Trustees of City of N. Kan. City Mem'l Hosp. v. Russell*, 843 S.W.2d 353, 355 (Mo. banc 1992) ("Where a defendant is clearly entitled *174 to immunity, it is not necessary to wait through a trial and appeal to enforce that protection.").

[8] [9] This writ proceeding requires us to examine whether KCPS's insurance policies waived sovereign immunity for the torts alleged in Plaintiff's petition. Interpretation of an insurance policy is a question of law, *Blue Springs Sch. Dist.*, 576 S.W.3d at 267, and we construe narrowly any waiver of sovereign

immunity, *Topps v. City of Country Club Hills*, 272 S.W.3d 409, 415 (Mo. App. E.D. 2008).

Analysis

KCPS asserts that it is "entitled to an order prohibiting the respondent from proceeding in the underlying action other than to dismiss the action or enter summary judgment for KCPS." Specifically, KCPS asserts that the undisputed material facts show that Plaintiff's claims are barred by sovereign immunity, arguing that no exception to sovereign immunity applies and KCPS did not waive its sovereign immunity "by obtaining insurance coverage that explicitly did not provide coverage for any claim barred by sovereign immunity."

Respondent counters by arguing that the insurance policies—including policy language that preserves KCPS's sovereign immunity—are void because they were not signed by all parties to the contracts as required by section 432.070. Respondent asserts that, as a result, the sovereign immunity preservation provisions "do not have binding force."

We address each issue in turn.

KCPS did not waive its sovereign immunity.

[10] [11] [12] We first find that the insurance policies procured by KCPS did not waive KCPS's sovereign immunity.[3] A public entity—such as a school district—is generally protected from liability for negligent acts under the doctrine of sovereign immunity, unless an exception to sovereign immunity applies, *see* § 537.600,[4] or the public entity waives its immunity through the procurement of liability insurance covering tort claims, *see* § 537.610. Regarding waiver, procurement of an insurance policy does not necessarily waive sovereign immunity for all tort claims asserted against a public entity. Rather, immunity is waived only "to the extent of and for the specific purposes covered by the insurance purchased." *Blue Springs Sch. Dist.*, 576 S.W.3d at 269; *see also* § 537.610.1 (a public entity waives sovereign immunity "only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section ...."). Thus, whether an insurance policy waives sovereign immunity "is expressly dictated, and limited, by the terms of the insurance policy." *Topps*, 272 S.W.3d at 415.

***175** During the relevant time period, KCPS was covered by two insurance policies: a "Commercial General Liability Policy" applicable to occurrences for the policy period of July 1, 2015 to July 1, 2016 (hereinafter the "Commercial Policy") and a "Directors, Officers, Insured Entity and Employment Practices Insurance Policy" applicable to claims made and reported during the period of July 1, 2017 to July 1, 2018 (hereinafter the "Directors and Officers Policy").[5] As detailed below, both policies expressly disclaimed any waiver of sovereign immunity. "[A] number of courts have held that a public entity retains its full sovereign immunity when the insurance policy contains a disclaimer stating that the entity's procurement of the policy was not meant to constitute a waiver of sovereign immunity[.]" *Blue Springs Sch. Dist.*, 576 S.W.3d at 271 (quoting *Topps*, 272 S.W.3d at 418) (internal marks omitted).

KCPS's Commercial Policy contained a "Sovereign Immunity Exclusion Endorsement," which stated that the policy did "not apply to any Claim to which the Insured ... [i]s Immune under the legal doctrine of sovereign immunity, or ... would have been immune ... but for the Insured's waiver of such immunity[.]" The Directors and Officers Policy contained a "Governmental Immunity Endorsement," which expressly stated it did not provide coverage for any claim for which immunity is granted pursuant to section "537.600 et seq.,"[6] and it excluded coverage for any claim barred by the doctrine of sovereign immunity. Moreover, the Directors and Officers Policy contained additional disclaimer language that was almost identical to a provision in the insurance policy at issue in *Topps v. City of Country Club Hills*, and the Eastern District found the *Topps* policy language "act[ed] to retain the City's sovereign

Commented [ER1]: Purchase of insurance is not a blanket waiver of sovereign Immunity

immunity."[7] 272 S.W.3d at 418. Similarly, here, the disclaimer provisions in KCPS's insurance policies acted to retain KCPS's sovereign immunity. *See id.*; *see also* *Russell*, 843 S.W.2d at 360; *Langley v. Curators of Univ. of Mo.*, 73 S.W.3d 808, 811 (Mo. App. W.D. 2002) (insurance policy that expressly stated "[n]othing in this [policy] shall be construed as a waiver of any governmental immunity" retained the public entity's sovereign immunity).

It is uncontroverted in the summary judgment record that the Commercial Policy contained the Sovereign Immunity Exclusion Endorsement and the Directors and Officers Policy contained the Governmental Immunity Endorsement. As described above, these provisions disclaimed ***176** any waiver of sovereign immunity. Accordingly, we find that the undisputed material facts demonstrate that KCPS's insurance policies did not waive KCPS's sovereign immunity.

Section 432.070 does not affect our determination.

[13] Respondent does not contest that the Sovereign Immunity Exclusion Endorsement and the Governmental Immunity Endorsement disclaim any waiver of sovereign immunity. Instead, Respondent argues that the insurance policies—including the sovereign immunity preservation provisions—are void and unenforceable because the insurance policies were not signed by KCPS agents as required by section 432.070.[8] Respondent's argument is self-defeating. Even presuming Respondent was correct in her assertion that KCPS failed to comply with section 432.070, KCPS would still enjoy sovereign immunity from Plaintiff's claims.[9] As previously described, a school district is protected by the doctrine of sovereign immunity unless an exception applies or the school district waives its immunity by procuring liability insurance that covers the plaintiff's claims. If KCPS's insurance policies are void and unenforceable, as Respondent contends, then no insurance policy exists that would operate to waive KCPS's sovereign immunity. *See* *Kindred v. City of Smithville*, 292 S.W.3d 420, 424 (Mo. App. W.D. 2009) ("A contract that fails to comply with Section 432.070 is void *ab initio*, not merely voidable."). In such a situation, KCPS would not have waived its sovereign immunity because it would not have procured liability insurance. On the other hand, if KCPS's policies are valid and enforceable, then—as described above—the policies each contain provisions that preserve KCPS's sovereign immunity. Under either set of circumstances, sovereign immunity protects KCPS from Plaintiff's claims.[10]

177** Respondent attempts to avoid this outcome by arguing that "it is the ***purchase of the policy" that waives sovereign immunity, and KCPS waived its sovereign immunity by purchasing liability insurance, even though the insurance policies "purchased" were, under Respondent's theory, void and unenforceable due to noncompliance with section 432.070. Missouri law does not support this curious argument. In fact, the law is clear that the language of the insurance policy—not merely the act of purchasing a policy—dictates the existence and extent of any waiver. *See* § 537.610.1 (expressly providing that immunity is waived "only to the maximum amount of and only for the purposes covered by such policy of insurance"); *see also Blue Springs Sch. Dist.*, 576 S.W.3d at 269 (in determining whether an insurance policy waives sovereign immunity, "we are guided by the policy language alone"); *Topps*, 272 S.W.3d at 415 ("the extent of [the waiver of sovereign immunity] is expressly dictated, and limited, by the terms of the insurance policy"). The cases relied upon by Respondent merely stand for the general proposition that the purchase of liability insurance may operate as a waiver of sovereign immunity; they do not hold that the act of ***purchasing*** an insurance policy constitutes a waiver, regardless of whether the insurance policy is void and unenforceable.[11] *See generally* *City of Grandview*, 490 S.W.3d at 371-72; *Russell*, 843 S.W.2d at 360.

For these reasons, any failure of KCPS to comply with section 432.070 would not affect our determination that KCPS was immune from Plaintiff's claims.

Conclusion

The undisputed facts demonstrate that KCPS's insurance policies did not waive KCPS's sovereign immunity, therefore KCPS enjoys immunity from the claims asserted in Plaintiff's petition. The preliminary writ of prohibition we issued is made permanent. The matter is remanded with instructions that Respondent enter summary judgment in favor of KCPS in the Underlying Lawsuit.

All concur.

All Citations

666 S.W.3d 170

Footnotes

1 All statutory references are to RSMo 2016.

2 "A governmental employer may still be liable for the actions of its employee even if the employee is entitled to official immunity." *Davis v. Lambert-St. Louis Int'l Airport*, 193 S.W.3d 760, 766 (Mo. banc 2006).

3 To the extent the parties disagree as to whether Plaintiff adequately pleaded in paragraph 8 of her petition that KCPS waived ***its*** sovereign immunity by purchasing insurance (as opposed to the immunity of only KCPS's employees and public officials), we do not resolve this issue. That is because, presuming for the purposes of this proceeding that Plaintiff's allegations were adequate, we find—as discussed more fully *infra*—that the undisputed material facts show KCPS did not waive its sovereign immunity.

4 Section 537.600 provides two exceptions to sovereign immunity: "(1) where injuries result from a public employee's negligent operation of a motor vehicle within the course of employment; and (2) where injuries are caused by a dangerous condition of the [public entity's] property." *Topps*, 272 S.W.3d at 414. Neither exception has been raised in this matter.

5 Plaintiff initially filed her claims against KCPS in a lawsuit commenced in October 2017, which Plaintiff voluntarily dismissed and re-filed in 2020 as the Underlying Lawsuit.

6 "Section 537.600.1 codifies sovereign immunity for tort liability as existed at common law, except to the extent waived, abrogated or modified by statutes in effect prior to September 12, 1977, and except for injuries resulting from a public employees' [sic] operation of a motor vehicle in the course of their employment, or injuries caused by the condition of a public entity's property." *Blue Springs Sch. Dist.*, 576 S.W.3d at 268.

7 *Compare* KCPS's Directors and Officers Policy ("[N]othing contained in this policy will be construed to broaden the liability of the insured beyond the provisions of Sections 537.600 to 537.610 of the Missouri Statutes, as may be amended from time to time, nor to abolish or waive any defense at law which might otherwise be available to the insured or its officers and employees."), *with* the policy language in *Topps*, 272 S.W.3d at 412 ("Nothing contained in this section, or the balance of this document, shall be construed to broaden the liability of [the City] beyond the provisions of sections 537.600 to 537.610 of the Missouri Statutes, nor to abolish or waive any defense at law which might otherwise be available to [the City] or its officers and employees.").

8 Section 432.070 provides that no school district

> shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, ***and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.***

(emphasis added). It is uncontroverted that KCPS agents did not sign the insurance policies at issue.

9 Because Plaintiff's claims would be barred by sovereign immunity whether or not KCPS complied with section 432.070 when purchasing the policies, we need not decide whether the signature requirement of section 432.070 applies to the purchase of standard-form insurance contracts like those involved here.

10 The circumstances here are different than those in *Newsome v. Kansas City, Missouri School District*, in which the Missouri Supreme Court determined that the school district waived its sovereign immunity by purchasing liability insurance. 520 S.W.3d 769, 776-77 (Mo. banc 2017). In *Newsome*, it was undisputed that the school district's insurance policy covered the type of claim asserted by the plaintiff. *Id.* at 776. Months after the school district purchased its policy, it negotiated an endorsement that disclaimed any waiver of sovereign immunity. *Id.* The Missouri Supreme Court found that the endorsement never became part of the policy because it "was not subscribed to by any authorized and appointed agent of the District," as required by section 432.070. *Id.* The Court held that, because the endorsement did not comply with the requirements of section 432.070, the school district could not rely on the endorsement to preserve immunity that was otherwise waived. *Id.* at 767-77. Unlike in *Newsome*, here, the sovereign immunity preservation provisions were part of the school district's insurance policies; the preservation provisions were not later-negotiated endorsements. Thus, the policies here are either valid in their entirety or void in their entirety. As described above, under either scenario KCPS has sovereign immunity.

11 In any event, we question whether KCPS could fairly be said to have "purchased" insurance, if Respondent was correct that the insurance policies were themselves unenforceable and void. " 'Purchase' is defined in Webster's dictionary as meaning 'to obtain by paying money or its equivalent.' " *Tolu v. Reid*, 639 S.W.3d 504, 539 (Mo. App. E.D. 2021) (citations omitted). We fail to see how KCPS could be said to have "obtain[ed]," or "secure[d] the receipt" of insurance, if the insurance contracts were themselves null and void.

End of Document

Torres v. City of St. Louis

United States Court of Appeals, Eighth Circuit. | July 1, 2022 | 39 F.4th 494 | 2022 WL 2374560

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Outline

Qualified Immunity

Use of force / Reasonableness

39 F.4th 494
United States Court of Appeals, Eighth Circuit.

Gina TORRES; Dennis Torres, Plaintiffs - Appellees
v.
CITY OF ST. LOUIS, Defendant
Lance Coats; Glennon P. Frigerio; Joshua D. Becherer; Nicholas Manasco; Ronald Allen, Jr.; John C. Jones; Mark S. Seper; Jon B. Long; Tim Boyce; Benjamin R. Lacy, Defendants - Appellants
Gina Torres; Dennis Torres, Plaintiffs - Appellees
v.
City of St. Louis, Defendant - Appellant
Lance Coats; Glennon P. Frigerio; Joshua D. Becherer; Nicholas Manasco; Ronald Allen, Jr.; John C. Jones; Mark S. Seper; Jon B. Long; Tim Boyce; Benjamin R. Lacy, Defendants

No. 21-1761, No. 21-1918
|
Submitted: January 13, 2022
|
Filed: July 1, 2022

Synopsis

Background: Surviving family members of suspect who was shot and killed during the execution of a search warrant at his grandfather's home brought action against police officers and city, alleging unlawful seizure, use of excessive force, and conspiracy under § 1983 in violation of the Fourth Amendment, and alleging state-law claims for wrongful death and infliction of emotional distress. Additionally, grandfather filed action, alleging unlawful seizure. The United States District Court for the Eastern District of Missouri, David D. Noce, United States Magistrate Judge, 2021 WL 1143909, denied officers' motion for summary judgment. Officers filed interlocutory appeal.

Holdings: The Court of Appeals, Shepherd, Circuit Judge, held that:

[1] two officers could not be liable for use of excessive force;

[2] Court of Appeals lacked jurisdiction to consider whether officers were entitled to qualified immunity;

[3] grandfather was not unlawfully seized in violation of Fourth Amendment; and

[4] Court of Appeals lacked jurisdiction to determine whether officers were entitled to official immunity.

Appeal dismissed in part; reversed and remanded in part.

Procedural Posture(s): Interlocutory Appeal; Motion for Summary Judgment.

West Headnotes (43)

[1] **Federal Courts**⚙=Immunity
Federal Courts⚙=Summary judgment
Where interlocutory appeal comes to the Court of Appeals on a denial of immunity, the Court of Appeals must accept the summary judgment facts as described by the district court because evidentiary determinations are not presently appealable, though the Court of Appeals is not bound by facts found by the district court which are blatantly contradicted by the record.

1 Case that cites this headnote

[2] **Federal Courts**⚙=Summary judgment
Where the district court does not state which facts it found were adequately supported, the Court of Appeals, on interlocutory review of the denial of summary judgment, must determine which

facts it likely assumed by viewing the record in the light most favorable to the plaintiff.

[3] **Federal Courts**⚖Interlocutory, Collateral, and Supplementary Proceedings and Questions; Pendent Appellate Jurisdiction

As to review of a qualified immunity determination on an interlocutory appeal, Court of Appeals' jurisdiction is limited to the purely legal question of whether the conduct that the district court found was adequately supported in the record violated a clearly established federal right.

1 Case that cites this headnote

[4] **Federal Courts**⚖Immunity

On interlocutory appeal from the denial of a motion for summary judgment on qualified immunity grounds, while the Court of Appeals cannot review whether a factual dispute is genuine, the Court may review the purely legal question of whether a factual dispute is material.

1 Case that cites this headnote

[5] **Federal Courts**⚖On separate appeal from interlocutory judgment or order

On interlocutory review of the denial of a motion for summary judgment on qualified immunity grounds, the Court of Appeals lacks jurisdiction to consider an argument that the plaintiff has proffered insufficient evidence to create a genuine issue of fact, but it has jurisdiction to consider an argument that the disputed facts to which the plaintiff cites are unable to affect the outcome of the suit.

[6] **Federal Courts**⚖On separate appeal from interlocutory judgment or order

As to official immunity, the Court of Appeals has limited jurisdiction to review issues of law related to the district court's denial of summary judgment based on the defendant officers' official immunity defense.

1 Case that cites this headnote

[7] **Federal Courts**⚖Immunity

The key to the Court of Appeals' jurisdiction over an interlocutory appeal addressing sovereign immunity is whether the immunity is an immunity from suit rather than a mere defense to liability.

1 Case that cites this headnote

[8] **Federal Courts**⚖Immunity

Because Missouri's sovereign immunity statute generally preserves Missouri's sovereign or governmental tort immunity as existed at common law and specifically refers to sovereign immunity, the Court of Appeals has jurisdiction over an interlocutory appeal from the denial of sovereign immunity, under Missouri law. Mo. Ann. Stat. § 537.600.

1 Case that cites this headnote

[9] **Federal Courts**⚖Immunity

The Court of Appeals reviews the district court's denial of summary judgment on the basis of qualified immunity de novo.

[10] **Civil Rights**⚖Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

"Qualified immunity" is a shield from civil liability for officers whose conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

1 Case that cites this headnote

[11] **Civil Rights**⚖Government Agencies and Officers

Civil Rights⊜Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

To determine whether officers are entitled to qualified immunity, courts follow the familiar two-step inquiry, asking: (1) whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right and (2) whether the right at issue was clearly established at the time of defendant's alleged misconduct.

[12] **Civil Rights**⊜Government Agencies and Officers

A court may consider the two prongs of the qualified immunity analysis in any order.

[13] **Arrest**⊜Use of force

To determine whether defendant-officers used excessive force in violation of the Fourth Amendment, the court asks whether the amount of force used was objectively reasonable under the particular circumstances. U.S. Const. Amend. 4.

[14] **Arrest**⊜Use of force

The reasonableness of a use of force under the Fourth Amendment turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation. U.S. Const. Amend. 4.

1 Case that cites this headnote

[15] **Arrest**⊜Use of force

Absent probable cause for officer to believe that suspect poses immediate threat of death or serious bodily injury to others, use of deadly force is not objectively reasonable, and violates the Fourth Amendment. U.S. Const. Amend. 4.

1 Case that cites this headnote

[16] **Federal Courts**⊜Immunity

The Court of Appeals lacks jurisdiction to review the denial of qualified immunity if at the heart of the argument is a dispute of fact.

[17] **Summary Judgment**⊜Immunity

Regardless of how defendants shape their argument in support of their motion for summary judgment on qualified immunity grounds, the court is obligated to look beyond their characterization of the issue to determine whether they simply arguing that the plaintiffs offered insufficient evidence to create a material issue of fact.

[18] **Federal Courts**⊜Failure to mention or inadequacy of treatment of error in appellate briefs

Absent some reason for failing to raise argument in an opening appellate brief, the Court of Appeals will not consider an argument first raised in a reply brief.

1 Case that cites this headnote

[19] **Civil Rights**⊜Criminal law enforcement; prisons

Two police officers who did not use any force against suspect who was shot and killed by other officers could not be liable for use of excessive force, in § 1983 Fourth Amendment excessive force claim brought by surviving family members of suspect. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

[20] **Civil Rights**⊜Persons Liable in General

To prevail on a § 1983 claim, a plaintiff must show each individual defendant's personal involvement in the alleged constitutional violation. 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[21] **Civil Rights**⊜Criminal law enforcement; prisons

An officer may be held liable under § 1983 only for his or her own use of excessive force in violation of the Fourth Amendment. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

1 Case that cites this headnote

[22] **Civil Rights**⚖Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

In order to be "clearly established," for purpose of the qualified immunity analysis, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

1 Case that cites this headnote

[23] **Civil Rights**⚖Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

The clearly-established inquiry, for purpose of the qualified immunity analysis, must be particularized to the facts of the case such that the state of the law at the time of the violation of the plaintiff's rights would have given a reasonable officer fair warning that the defendant-officer's conduct was unconstitutional.

[24] **Federal Courts**⚖On separate appeal from interlocutory judgment or order

Court of Appeals lacked jurisdiction to decide whether police officers who shot and killed suspect were entitled to qualified immunity, in § 1983 Fourth Amendment excessive force claim brought by surviving family members of suspect, where District Court denied qualified immunity based on genuine factual disputes as to whether suspect fired semi-automatic weapon at police and was armed when he was shot. U.S. Const. Amend. 4.

[25] **Arrest**⚖Particular cases

Suspect was not "seized" by police officers, within meaning of Fourth Amendment, although officers entered suspect's home and allegedly shot their firearms, where suspect did not acquiesce to officers' show of authority and his freedom of movement was not restrained. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

[26] **Arrest**⚖What Constitutes a Seizure or Detention

Person is "seized" within meaning of Fourth Amendment when a law enforcement officer, by means of physical force or show of authority, terminates or restrains the person's freedom of movement. U.S. Const. Amend. 4.

1 Case that cites this headnote

[27] **Arrest**⚖Use of force

An objectively unreasonable use of force is excessive, violating the Fourth Amendment's prohibition against unreasonable seizures. U.S. Const. Amend. 4.

[28] **Conspiracy**⚖Civil rights conspiracies

In order to state a claim for civil rights conspiracy, a plaintiff must allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement. 42 U.S.C.A. § 1985.

[29] **Conspiracy**⚖Civil rights conspiracies

A local government entity cannot conspire with itself through its agents acting within the scope of their employment, for purpose of a civil rights conspiracy claim, even if the plaintiff alleges improprieties in the execution of these duties. 42 U.S.C.A. § 1985.

[30] **Federal Courts**⚖Immunity

The Court of Appeals reviews the district court's denial of summary judgment based on official immunity de novo.

[31] **Federal Courts**⇨Immunity

The Court of Appeals reviews a summary judgment on official immunity grounds based on facts the district court found adequately supported or likely assumed.

[32] **Public Employment**⇨In general; official immunity

Missouri applies the doctrine of official immunity to protect public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts.

[33] **Public Employment**⇨In general; official immunity

Under Missouri law, an act by a public employee is "discretionary," as required to support official immunity, where there is any room whatsoever for variation in when and how a particular task can be done.

[34] **Municipal Corporations**⇨Police and fire

Public Employment⇨Law enforcement personnel

Under Missouri law, an officer's decision to use force in the performance of his duties is "discretionary," supporting officer's entitlement to official immunity.

[35] **Public Employment**⇨In general; official immunity

Under Missouri law, acts performed by public employees in bad faith or with malice do not qualify as "discretionary acts" for purposes of official immunity.

[36] **Public Employment**⇨In general; official immunity

Under Missouri law, "bad faith" by a public employee, precluding official immunity, requires a dishonest purpose, moral obliquity, conscious wrongdoing, or breach of a known duty through some ulterior motive.

1 Case that cites this headnote

[37] **Public Employment**⇨In general; official immunity

Under Missouri law, "malice" by a public employee, precluding official immunity, involves actions that are so reckless or wantonly and willfully in disregard of one's rights that a trier of fact could infer from such conduct bad faith or an improper or wrongful motive.

1 Case that cites this headnote

[38] **Federal Courts**⇨On separate appeal from interlocutory judgment or order

Court of Appeals lacked jurisdiction to decide whether police officers who shot and killed suspect were entitled to official immunity, under Missouri law, from liability, in claims for wrongful death and negligent infliction of emotional distress brought by surviving family members of suspect, where District Court denied official immunity based on genuine factual disputes as to whether suspect fired semi-automatic weapon at police and was armed when he was shot.

[39] **Federal Courts**⇨On separate appeal from interlocutory judgment or order

As with qualified immunity, appellate jurisdiction to review the denial of official immunity, under Missouri law, is limited to issues of law.

1 Case that cites this headnote

[40] **Municipal Corporations**⇨Capacity to sue or be sued in general

Generally, Missouri law immunizes political subdivisions from state-law tort claims. Mo. Ann. Stat. § 537.610(1).

[41] **Municipal Corporations**⇨Nature and grounds of liability

Missouri courts construe narrowly waivers of sovereign immunity via the purchase of liability insurance by a local government entity, instructing that the extent of the waiver is expressly dictated, and limited, by the terms of the insurance policy. Mo. Ann. Stat. § 537.610(1).

[42] **Municipal Corporations**⇨Trial, judgment, and review

Under Missouri law, the question of whether a political subdivision has waived its sovereign immunity is a question of law.

1 Case that cites this headnote

[43] **Federal Courts**⇨Amendment, correction, or supplementation
Federal Courts⇨Matters or evidence considered

Generally, an appellate court cannot consider evidence that was not contained in record below, but when interests of justice demand it, the appellate court may order the record of the case enlarged.

***498** Appeal from United States District Court for the Eastern District of Missouri - St. Louis

Attorneys and Law Firms

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Brandon David Laird, Erin K. McGowan, Assistant City Counselor, Andrew D. Wheaton, City Counselor's Office, Saint Louis, MO, for Docket No. 21-1918 Defendant-Appellant.

Before BENTON, SHEPHERD, and STRAS, Circuit Judges.

Opinion

SHEPHERD, Circuit Judge.

***499** Isaiah Hammett was killed during the St. Louis Metropolitan Police Department's (SLMPD) execution of a search warrant at his grandfather's home. As relevant to this appeal, appellees Gina Torres (Gina) and Dennis Torres (Dennis),[1] Hammett's surviving mother and grandfather, respectively, brought Fourth Amendment excessive force and unlawful seizure claims under 42 U.S.C. § 1983, conspiracy claims under 42 U.S.C. §§ 1983 and 1985, and state law wrongful death and infliction of emotional distress claims against the City of St. Louis and SLMPD Officers Lance Coats, Glennon P. Frigerio, Joshua D. Becherer, Nicholas Manasco, Ronald Allen, Jr., John C. Jones, Mark S. Seper, Jon B. Long, Tim Boyce, and Benjamin R. Lacy (collectively, the defendant officers). The district court denied the City and defendant officers' (together, appellants) motion for summary judgment on these claims, and appellants filed the present appeal. To the extent that appellants assert arguments beyond the scope of our jurisdiction, we dismiss their appeal. On the few arguments that remain, having jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine, we reverse and remand.

I.

On June 7, 2017, an SLMPD SWAT team executed a search warrant for Dennis's home, which authorized officers to seize "Marijuana, Heroin, or any other Illegal Narcotic, U.S. Currency, Drug Transaction Records, Firearms, and any other instrument of the crime." At the time the SLMPD officers executed the search warrant, Dennis and Hammett were the only two individuals inside the home. Officer Boyce used a "battering ram" to breach the front door of the home, and officers detonated a noise diversion device commonly known as a "flash bang." SLMPD officers then entered the home and discharged their weapons a collective 93 times, shooting Hammett 24 times and killing him. At some point during the incident, Dennis called 911 and stated that someone was shooting into his home and that he did not see anyone. Police photographs taken after the incident show an AK-47 type assault rifle next to Hammett's body.

The parties presented vastly different accounts of the remaining details of this incident to the district court. Appellants alleged that, as officers entered Dennis's home, gunfire came through the bedroom door and wall in the officers' direction and Officers Long, Manasco, Coats, Frigerio, Allen, and Jones returned fire into the ***500** bedroom door and wall. They claim that Hammett then entered the dining room armed with an AK-47 pointed in the officers' direction and, fearing for their lives, Officers Long, Manasco, Coats, Becherer, and Seper fired at Hammett. Appellants note that nine 7.62x39mm cartridge cases were seized after the incident, which laboratory tests confirmed were fired from the AK-47 found next to Hammett's body.

[1] [2] Appellees claimed that ballistic evidence, audio recordings, and eyewitness and expert testimony directly contradict appellants' claims that Hammett fired the AK-47 and was carrying it when he was shot.[2] They rely on Dennis's deposition testimony, in which he stated that he was asleep in his bedroom when he was awakened by the sound of gunfire. Dennis testified that Hammett came into his bedroom, picked him up, and placed him on the floor before going into the dining room. He claimed that Hammett did not have anything in his hands when he went into the dining room and that he did not see a gun next to Hammett's body when he later crawled into his wheelchair and went into the dining room. Dennis further testified that he did not hear an AK-47 fire during the incident and would have noticed the sound because he had heard it "thousands" of times during his military service in Vietnam. In addition to Dennis's deposition testimony, appellees relied on the affidavit and expert deposition testimony of L. Samuel Andrews, who, as noted by the district court,

> trained the [SLMPD] SWAT team on numerous occasions, conducted an extensive inspection of the ballistic evidence at the premises and found no bullet hole in the home that match[ed] a 7.62 caliber gun and did not find any evidence of damage to the front living room wall which would have been there if the AK-47 rounds were fired through the bedroom wall and door as claimed by the officers.

R. Doc. 175, at 16.

Further, in response to appellants' claim that the defendant officers did not use force against Dennis, appellees directed the district court to Dennis's deposition testimony claiming that officers "opened fire" on him when he called out Hammett's name. Specifically, Dennis stated that while he was on the floor in his bedroom and after he "heard a thump" and saw that Hammett had fallen to the floor in the dining room, he called out Hammett's name and two shots went off right by his head, which would have hit him had he gotten up. Once the shooting stopped, ***501** Dennis crawled into his wheelchair and went into the dining room, where he saw Hammett's body. Dennis stated that he then complied with the officers' command to come out with his hands up.

Based on their version of the foregoing facts, appellees asserted eight claims against the City and defendant officers, bringing Counts 1-4 of their amended complaint in Gina's name and Counts 5-8 in Dennis's name. Count 1 asserts a § 1983 claim for use of excessive force in violation of the Fourth Amendment

against the defendant officers, and Count 5 asserts the same in addition to a § 1983 claim for unreasonable seizure in violation of the Fourth Amendment against the defendant officers. Counts 2 and 6 assert §§ 1983 and 1985 conspiracy claims against the defendant officers. Counts 3 and 7 assert Monell[3] claims against the City. Finally, Counts 4 and 8 assert state law wrongful death and infliction of emotional distress claims against the defendant officers and the City. Appellants filed a motion for summary judgment, claiming that the defendant officers were entitled to qualified immunity on Counts 1, 2, 5, and 6 and that the City and defendant officers were entitled to sovereign immunity and official immunity, respectively, on Counts 4 and 8. As to Counts 3 and 7, appellants argued that the City was entitled to summary judgment because there was no genuine dispute of material fact as to whether the City had a policy, practice, or custom that caused a constitutional violation. Subsequently, appellants filed a Daubert[4] motion, requesting that the district court strike Andrews' affidavit and bar him from testifying at trial, and appellees filed a motion to defer or deny appellants' Daubert motion without prejudice until the close of expert discovery (collectively, the Andrews motions).

As relevant here, the district court considered appellants' motion for summary judgment and the Andrews motions in its March 25, 2021, order. The district court denied in part and granted in part appellants' motion for summary judgment. As to the defendant officers, the district court denied the motion, holding that the defendant officers were not entitled to qualified immunity on the constitutional claims asserted in Counts 1, 2, 5, and 6 or official immunity on the state law claims asserted in Counts 4 and 8. As to the City, the district court granted the motion as to appellees' Monell claims asserted in Counts 3 and 7, but it denied the motion as to the state law claims asserted in Counts 4 and 8, holding that the City was not entitled to sovereign immunity. The district court considered Andrews' affidavit and deposition testimony in ruling on appellants' motion for summary judgment, but did not rule on the Andrews motions, instead setting a hearing to review the matter. Following appellants' interlocutory appeal to this Court, the district court denied appellees' motion to defer or deny appellants' motion to exclude Andrews' testimony, with directions to refile following this Court's ruling. Before briefing before this Court commenced, appellees filed a motion to dismiss appellants' interlocutory appeal for lack of jurisdiction because the district court's order denying summary judgment was based on disputed questions of fact.

II.

[3] [4] [5] [6] [7] [8] We begin by addressing our jurisdiction to review the district court's order ***502** denying appellants qualified immunity, official immunity, and sovereign immunity. See Murray, 800 F.3d at 982 ("The 'first and fundamental question' in an appeal from a denial of qualified immunity is that of jurisdiction." (citation omitted)). First, as to review of a qualified immunity determination on an interlocutory appeal, "our jurisdiction is limited to the purely legal question of whether the conduct that the district court found was adequately supported in the record violated a clearly established federal right." Taylor v. St. Louis Cmty. Coll., 2 F.4th 1124, 1126-27 (8th Cir. 2021); see also Jones v. McNeese, 675 F.3d 1158, 1160-61 (8th Cir. 2012) ("A defendant may appeal an order denying summary judgment based on qualified immunity only 'to the extent that it turns on an issue of law.' " (citation omitted)). Thus, while "we 'cannot review whether a factual dispute is genuine,' ... we 'may review the purely legal question [of] whether a factual dispute is material.' " Just v. City of St. Louis, 7 F.4th 761, 765-66 (8th Cir. 2021) (citation omitted). In other words, "we lack jurisdiction to consider an argument that the plaintiff has proffered insufficient evidence to create a genuine issue of fact, [but] we have jurisdiction to consider an argument that the disputed facts to which the plaintiff cites are unable to affect the outcome of the suit." Id. at 766 (citations omitted). Second, as to official immunity, this Court similarly has "limited jurisdiction to review issues of law related to the district court's denial of summary judgment based on [the defendant officers'] official immunity defense." Thompson v. Dill, 930

F.3d 1008, 1013 (8th Cir. 2019). Finally, as to sovereign immunity, "the key to our jurisdiction over an interlocutory appeal addressing sovereign immunity is whether the immunity is an 'immunity from suit rather than a mere defense to liability.' " Argonaut Great Cent. Ins. Co. v. Audrain Cnty. Joint Commc'ns, 781 F.3d 925, 929 (8th Cir. 2015) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Because Missouri's sovereign immunity statute "generally preserves Missouri's 'sovereign or governmental tort immunity as existed at common law' " and "specifically refers to 'the immunity of [a] public entity from liability and suit,' " we have jurisdiction in this interlocutory appeal over whether the City is entitled to sovereign immunity. See id. at 930 (quoting Mo. Rev. Stat. § 537.600). Having mapped the boundaries of our jurisdiction, we now turn to appellants' arguments.

A.

[9] [10] [11] [12] Appellants first argue that the district court erred in finding that the defendant officers were not entitled to qualified immunity on appellees' Fourth Amendment excessive force claims asserted in Counts 1 and 5. We review the district court's denial of summary judgment on the basis of qualified immunity de novo. Williams v. City of Burlington, 27 F.4th 1346, 1350 (8th Cir. 2022). "Qualified immunity is a shield from civil liability for officers whose conduct 'does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." ' " Just, 7 F.4th at 766 (citation omitted). To determine whether officers are entitled to qualified immunity, courts follow the familiar two-step inquiry, asking: "1) 'whether the facts that a plaintiff has alleged [...] or shown [...] make out a violation of a constitutional right' and 2) 'whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.' " Williams, 27 F.4th at 1350 (quoting Pearson v. Callahan, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). "The court may consider these steps in any order, but '[u]nless the answer to both of these questions is yes, the defendants are entitled to qualified immunity.' *503 " Ehlers v. City of Rapid City, 846 F.3d 1002, 1008 (8th Cir. 2017) (citations omitted).

[13] [14] [15] Because appellants' arguments in support of their assertion that the district court erred in denying the defendant officers qualified immunity primarily concern the issue of whether the defendant officers used excessive force, we begin with the first step. "To determine whether [the defendant officers] used excessive force in violation of the Fourth Amendment, we 'ask[ ] "whether the amount of force used was objectively reasonable under the particular circumstances." ' " Banks v. Hawkins, 999 F.3d 521, 525 (8th Cir. 2021) (second alteration in original) (citation omitted). "The reasonableness of a use of force turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation." Williams, 27 F.4th at 1351 (citation omitted). " '[A]bsent probable cause' for an officer to believe that the suspect poses 'an immediate threat of death or serious bodily injury' to others, 'use of deadly force is not objectively reasonable.' " Cole ex rel. Est. of Richards v. Hutchins, 959 F.3d 1127, 1132 (8th Cir. 2020) (citation omitted).

[16] [17] [18] In support of their assertion that the district court erred in denying Officers Long, Manasco, Becherer, Seper, Coats, Frigerio, Allen, and Jones qualified immunity, appellants first argue that neither Andrews' opinions nor Dennis's testimony controverts the fact that Hammett was armed when he was shot and, thus, do not create a genuine dispute of material fact.[5] Appellants further argue that Andrews' opinions are inadmissible and, therefore, the district court erred by relying on them in concluding that appellees' excessive force claims were subject to a genuine dispute of material fact. "We lack jurisdiction to review the denial of qualified immunity 'if at the heart of the argument is a dispute of fact.' " Taylor, 2 F.4th at 1127 (citation omitted). "[D]efendants that have been denied qualified immunity cannot create appellate jurisdiction by using qualified immunity verbiage to cloak factual disputes as a legal issue." Berry v. Doss, 900 F.3d

Commented [ER2]: What force is reasonable?

Commented [ER1]: The qualified immunity analysis

1017, 1021 (8th Cir. 2018). Regardless of how defendants shape their argument, "we are obligated to look beyond their characterization of the issue to 'determine whether [they are] simply arguing that the plaintiff[s] offered insufficient evidence to create a material issue of fact.' " Id. (first alteration in original) (citation omitted). Here, appellants' argument is essentially one of sufficiency of the evidence, and determining whether Andrews' opinions and Dennis's testimony create a genuine issue of fact is something we lack jurisdiction to do. See, e.g., Riggs v. Gibbs, 923 F.3d 518, 523 (8th Cir. 2019) (concluding that this Court lacked jurisdiction to consider argument that plaintiff had put forth insufficient evidence disputing material fact); Austin v. Long, 779 F.3d 522, 524 (8th Cir. 2015) (same).

Further, we need not reach the issue of whether Andrews' opinions are admissible. The district court relied on Dennis's testimony ***504** in concluding that a genuine dispute of fact existed as to the issue of whether the defendant officers used excessive force, and his testimony that Hammett was not armed and there was no gun next to his body is material to this issue. See Dill, 930 F.3d at 1013 ("[W]here it is *not* objectively reasonable for an officer to believe a suspect poses an immediate threat to the officer or others, 'deadly force is not justified.' " (citation omitted)). Thus, even if we were to conclude that Andrews' opinions are inadmissible, the outcome of our qualified immunity analysis would be the same.

Appellants next argue that the district court erred in denying Officers Long, Manasco, Becherer, Seper, Coats, Frigerio, Allen, and Jones qualified immunity because each had probable cause to believe that Hammett posed an imminent threat of serious harm. Appellants contend that, considering only admissible evidence, it is undisputed that Hammett fired his AK-47 through the bedroom wall and door and emerged from the bedroom carrying the AK-47 pointed in the officers' direction. This argument is based on facts not assumed by the district court, which gave credit to appellees' version of the facts detailed supra Section I. See Murray, 800 F.3d at 983 ("[W]e are constrained by the version of the facts that the district court assumed or likely assumed in reaching its decision."). Again, this argument is essentially one of sufficiency of the evidence. In order for us to reach appellants' argument that these officers had probable cause, "we would have to exceed our jurisdiction and cast aside the district court's factual findings, analyze the factual record, and resolve genuine factual disputes against the non-moving party. This we cannot do." Taylor, 2 F.4th at 1127. Further, "while we have exercised jurisdiction in qualified immunity cases when the record plainly forecloses the district court's finding of a material factual dispute, we find nothing in this record ... that clearly contradicts the district court's factual determinations ...." Id. (citation omitted).

[19] [20] [21] Appellants finally argue that the district court erred in denying Officers Boyce and Lacy qualified immunity because neither officer employed any force against Hammett or Dennis. "To prevail on a § 1983 claim, a plaintiff must show each individual defendant's personal involvement in the alleged violation." White v. Jackson, 865 F.3d 1064, 1081 (8th Cir. 2017). "An officer may be held liable only for his or her own use of excessive force." Grider v. Bowling, 785 F.3d 1248, 1252 (8th Cir. 2015). In its separate analysis of Officers Boyce and Lacy's conduct, the district court noted that Officer Boyce carried the battering ram, breached the front door of Dennis's home, and jumped from the front porch into the alleyway when gunfire erupted. As to Officer Lacy, the district court found that Officer Lacy was not a member of the SWAT team, did not enter Dennis's home at any point prior to Hammett's death, and did not fire any shots during the execution of the search warrant. Appellees do not contest these findings and concede in their briefing to this Court that Officers Boyce and Lacy did not use any force against Hammett. Therefore, because appellees present no evidence showing Officers Boyce or Lacy's personal involvement in the alleged use of excessive force against Hammett and, thus, fail to create a genuine issue of material fact that either officer violated Hammett's constitutional right to be free from excessive force, we reverse the district court's denial of qualified immunity to Officers Boyce and Lacy as to appellees' Fourth Amendment excessive force claims.

See White, 865 F.3d at 1081 (finding that officer was entitled to qualified immunity where plaintiff presented no evidence ***505** showing officer's personal involvement in alleged use of excessive force).

[22] [23] [24] Appellants' remaining argument concerns the second step of the qualified immunity analysis: whether Hammett's Fourth Amendment right to be free from excessive force was clearly established in June 2017. "In order to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " Ehlers, 846 F.3d at 1008 (alteration in original) (citation omitted). "The inquiry 'must be particularized to the facts of the case' such that 'the state of the law' in [June] 2017 would have given a reasonable officer 'fair warning' that shooting [Hammett] 'was unconstitutional.' " Banks, 999 F.3d at 529 (citations omitted). Appellants argue that the district court erred in denying Officers Long, Manasco, Becherer, Seper, Coats, Frigerio, Allen, and Jones qualified immunity because it was not clearly established in June 2017 that "it is constitutionally unreasonable to use deadly force against a suspect, who during the execution of a search warrant, fires at officers and then approaches officers with a rifle shouldered and at the ready." Appellants' Br. 58. Though appellants present this argument in terms of the clearly established prong of the qualified immunity inquiry, they base their argument on facts not assumed by the district court. See Murray, 800 F.3d at 984. The district court found a genuine factual dispute as to whether Hammett fired the AK-47 and was armed when he was shot. Whether or not Hammett was armed when the defendant officers used deadly force against him is material to the question of whether it was clearly established that the officers could not use deadly force in this situation. "At bottom, this is an argument about the sufficiency of the evidence, a question we lack jurisdiction to review, however inventively it is structured as an abstract legal argument." Id.

Therefore, based upon the foregoing, as to appellees' claims asserted in Counts 1 and 5 that the defendant officers violated Hammett's Fourth Amendment right to be free from excessive force, we find that we lack jurisdiction to consider appellants' arguments that the district court erred in denying Officers Long, Manasco, Becherer, Seper, Coats, Frigerio, Allen, and Jones qualified immunity and we reverse the denial of qualified immunity to Officers Boyce and Lacy.

B.

[25] In addition to asserting that the defendant officers violated Hammett's right to be free from excessive force, Count 5 asserts that the defendant officers violated Dennis's Fourth Amendment right to be free from unreasonable seizure and excessive force. The district court found a genuine dispute of material fact existed where appellees alleged that, while Dennis was still in the bedroom and after Hammett was already on the floor, officers "opened fire" on Dennis after he called out Hammett's name. Appellants argue that the district court erred in denying the defendant officers qualified immunity on this basis because Dennis was not seized or subjected to force in violation of the Fourth Amendment.

[26] [27] "[A] person is seized within the meaning of the Fourth Amendment 'when the officer, by means of physical force or show of authority, terminates or restrains [the person's] freedom of movement.' " United States v. Warren, 984 F.3d 1301, 1303 (8th Cir. 2021) (quoting Brendlin v. California, 551 U.S. 249, 254, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)). "An objectively unreasonable use of force is excessive, violating the Fourth Amendment's prohibition against unreasonable seizures." ***506** Williams, 27 F.4th at 1350-51. It is undisputed that Dennis was not shot or otherwise injured at the time that he claims the defendant officers opened fire on him. Thus, there was no application of physical force. See Steed ex rel. Steed v. Mo. State Highway Patrol, 2 F.4th 767, 770 (8th Cir. 2021) (finding that officers did not apply physical force and no seizure occurred where plaintiff did not drive over spike strips deployed by officers); Cole v. Bone, 993 F.2d 1328, 1332 (8th Cir. 1993) (concluding that plaintiff was not seized until he was struck by officer's bullet). Further, there was no acquiescence with a show of authority. See Schulz v. Long, 44

F.3d 643, 647 (8th Cir. 1995) ("[O]ne becomes seized when the officer's show of authority has the effect of stopping his movement."). As he stated during his deposition, Dennis did not know who was shooting at him and after "everything stopped," he got into his wheelchair and went into the living room. It was only at that point that he heard someone tell him to come outside with his hands up and he acquiesced.[6] Thus, even assuming that the shots fired at Dennis were a show of authority, he did not acquiesce to that show of authority and his freedom of movement was not restrained when he remained laying on the floor as he had been before officers opened fire on him and then got into his wheelchair and moved to a different room of the house. Cf. Cole, 993 F.2d at 1333 (finding shots fired at truck were not seizures because they failed to produce a stop). Therefore, because there was no application of physical force or acquiescence to a show of authority, Dennis was not seized for purposes of the Fourth Amendment, and we reverse the district court's denial of qualified immunity to the defendant officers as to Dennis's excessive force and unlawful seizure claims asserted in Count 5.

C.

[28] [29] Appellants next argue that the district court erred in denying the defendant officers qualified immunity on appellees' §§ 1983 and 1985 conspiracy claims (Counts 2 and 6) because these claims are barred by the intracorporate conspiracy doctrine and the law on § 1983 intracorporate conspiracy claims is not clearly established. We begin with appellees' § 1985 claim. "In order to state a claim for conspiracy under § 1985, a plaintiff 'must allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement.' " Kelly v. City of Omaha, 813 F.3d 1070, 1077 (8th Cir. 2016) (citation omitted). However, under the intracorporate conspiracy doctrine, " '[t]his [C]ourt has held that a corporation and its agents are a single person in the eyes of the law, and a corporation cannot conspire with itself' to violate 42 U.S.C. § 1985." L.L. Nelson Enters. v. Cnty. of St. Louis, 673 F.3d 799, 812 (8th Cir. 2012) (citation omitted). We have extended the intracorporate conspiracy doctrine to § 1985(2) and (3) conspiracy claims, which, *inter alia*, "provide[ ] a cause of action for damages sustained as a result of conspiracies to obstruct justice" and "conspiracies to deprive individuals of equal privileges and immunities and equal protection under the law," respectively, Kelly, 813 F.3d at 1077, finding that " 'a local government entity cannot conspire with itself through its agents acting within the scope of their employment,' even if the plaintiff 'alleges ***507** improprieties in the execution of these duties,' "[7] Faulk v. City of St. Louis, 30 F.4th 739, 749 (8th Cir. 2022) (citation omitted). Though appellees allege improprieties in the defendant officers' execution of their duties, "this fact alone is insufficient to evade the intracorporate conspiracy doctrine." Kelly, 813 F.3d at 1079. Thus, because the City could not have conspired with itself through the defendant officers acting within the scope of their employment, we reverse the district court's denial of qualified immunity on appellees' § 1985 conspiracy claims.

Moving to appellees' § 1983 conspiracy claims, we recently noted that "we have never definitively addressed the issue whether the [intracorporate conspiracy] doctrine applies to § 1983 conspiracy claims." Faulk, 30 F.4th at 749. In Faulk, we concluded that our opinions recognizing § 1983 conspiracy claims against police officers from the same department who conspired to violate clearly established rights do not address the applicability of the intracorporate conspiracy doctrine and, thus, "do not clearly establish that reasonable officers 'would ... have known with any certainty' that planning, designing, monitoring, or executing 'the illegal kettling plan' would expose them to damage liability for a § 1983 *conspiracy* claim." Id. at 749-50 & n.6 (quoting Ziglar v. Abbasi, — U.S. —, 137 S. Ct. 1843, 1869, 198 L.Ed.2d 290 (2017)). Similarly, here, given the uncertain applicability of the doctrine, these precedents do not clearly establish that reasonable officers would have known that agreeing and planning to violate Hammett's and Dennis's constitutional rights and then taking steps to cover up their use of excessive force

would expose them to liability for a § 1983 conspiracy claim. Thus, because it is not clearly established that the intracorporate conspiracy doctrine does not apply to § 1983 conspiracy claims, we reverse the district court's denial of qualified immunity to the defendant officers on Counts 2 and 6.

D.

[30] [31] [32] [33] [34] [35] [36] [37] Appellants next argue that the district court erred in denying the defendant officers official immunity as to the state law wrongful death and infliction of emotional distress claims asserted against them in Counts 4 and 8. We review the district court's denial of summary judgment based on official immunity de novo. Davis v. Buchanan Cnty. (Davis II), 11 F.4th 604, 616 (8th Cir. 2021). As with qualified immunity, "we 'review a summary judgment of official immunity based on facts the district court found adequately supported or likely assumed.' " See Birkeland ex rel. Birkeland v. Jorgensen, 971 F.3d 787, 792 (8th Cir. 2020) (citation omitted). "Missouri applies the doctrine of official immunity to 'protect[ ] public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts.' " Letterman, 859 F.3d at 1125 (alteration in original) (citation omitted). "An act is discretionary ... where 'there is any room whatsoever for variation in when and how a particular task can be done.' " Davis II, 11 F.4th at 629 (citation omitted). "An 'officer's decision to use force in the performance of his duties is discretionary.' " ***508** Boude v. City of Raymore, 855 F.3d 930, 935 (8th Cir. 2017) (citation omitted) (applying Missouri law); see also N.S. ex rel. Lee, 35 F.4th at 1115 ("Official immunity shields Missouri police officers from liability for their discretionary decisions, including when they 'draw[ ] and fire[ ] a weapon,' even if they are negligent." (alterations in original) (citation omitted)). "However, acts performed in bad faith or with malice do not qualify as discretionary acts." Dill, 930 F.3d at 1015. Bad faith "requires 'a dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive,' " while malice "involves actions that are 'so reckless or wantonly and willfully in disregard of one's rights that a trier of fact could infer from such conduct bad faith or [an] improper or wrongful motive.' " N.S. ex rel. Lee, 35 F.4th at 1115 (alterations in original) (citation omitted). "In Missouri, a bad-faith allegation survives summary judgment if a plaintiff states 'facts from which it could reasonably be inferred that [defendant] acted in bad faith or from an improper or wrongful motive.' " Boude, 855 F.3d at 935 (alteration in original) (citation omitted).

[38] [39] Here, the district court found that appellees had "proffer[ed] evidence and facts sufficient for a reasonable factfinder to find defendants used excessive and unreasonable force or manufactured false evidence in bad faith" and that "the parties' distinctly different accounts create[d] a clear dispute of material fact." Appellants argue that, based upon the admissible evidence, nothing supports appellees' claim that the defendant officers manufactured false evidence and there is no genuine dispute that Hammett was armed at the moment that he was shot and killed. However, relying in part on Dennis's testimony, the district court credited appellees' assertions that Hammett was not carrying the AK-47 and did not fire the AK-47 when he was shot and that the AK-47 was placed next to Hammett's body post-mortem. As with qualified immunity, our jurisdiction is limited to issues of law, and this argument is, again, essentially one of sufficiency of the evidence. See supra Section II.A.; Dill, 930 F.3d at 1013 (stating that, similar to qualified immunity, "we have limited jurisdiction to review issues of law related to the district court's denial of summary judgment based on [the defendant's] official immunity defense"). Therefore, we lack jurisdiction to address appellants' argument.[8]

E.

[40] [41] [42] Appellants finally argue that the district court erred in denying the City sovereign immunity[9] as to appellees' state ***509** law claims asserted under Counts 4 and 8. "Generally, Missouri law immunizes political subdivisions from state-law tort claims."

Davis I, 5 F.4th at 909. Still, a political subdivision "may purchase liability insurance for tort claims, made against ... the political subdivision," thereby waiving the entity's sovereign immunity "only to the maximum amount of and only for the purposes covered by such policy of insurance ... and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state." Mo. Rev. Stat. § 537.610(1); see also Hendrix v. City of St. Louis, 636 S.W.3d 889, 900 (Mo. Ct. App. 2021) ("Section 537.610 allows an entity protected by sovereign immunity to waive that immunity by either purchasing insurance or by adopting a self-insurance plan for those claims."). Missouri courts construe such waivers "narrowly," instructing that "the extent of the waiver is 'expressly dictated, and limited, by the terms of the insurance policy.' " Hendrix, 636 S.W.3d at 900 (citation omitted). The question of whether a political subdivision has waived its sovereign immunity is a question of law. Id. The district court denied the City sovereign immunity because it found disputed issues of material fact existed as to whether the City was self-insured. The record, however, contradicts this conclusion.

The record contains the Declaration of Nancy R. Kistler, the Deputy City Counselor for the City of St. Louis, which stated that the "City has not purchased any liability insurance policy to cover torts, personal injuries, or any other claims that do not arise from dangerous property conditions or the operation of motor vehicles." R. Doc. 67-4. The record also contains the Affidavit of Dionne M. Flowers, the Register for the City of St. Louis, which stated that

> the Office of the Register has no record of any City ordinance duly enacted by the City's Board of Aldermen that purports to adopt a plan of self-insurance providing liability coverage for the City for tort claims other than those arising from motor vehicle accidents with vehicles operated by City employees and claims arising from the dangerous condition of public property.

R. Doc. 67-5, at 1. Flowers's affidavit further stated that "the Office of the Register has no record of any ordinance being duly enacted by the City Board of Alderm[e]n that purports to purchase or obtain insurance from the entity known as the Public Facilities Protection Corporation ('PFPC')." R. Doc. 67-5, at 1. The record does not contain an insurance policy or ordinance that purports to adopt a plan of self-insurance providing coverage for appellees' claims. Appellees do not dispute that there is no insurance policy in the record, nor do they identify an ordinance demonstrating that the City's Board of Aldermen has duly adopted a self-insurance plan covering appellees' claims. Rather, they argue that the City is self-insured through the PFPC and cite a letter from Julian Bush, the City Counselor for the City of St. Louis, to Alderwoman Megan E. Green, in which Bush explains that the purpose of the PFPC is to "insure the City against all claims" and states that the PFPC "can be properly thought of to be self-insurance." R. Doc. 109-9, at 1. In addition, appellees note that the record includes documents corroborating Bush's description of the PFPC and demonstrating the intent that the PFPC serve as a ***510** form of self-insurance. See R. Doc. 109-10, at 2-3; R. Doc. 109-11, at 1-2.

[43] Appellees argue that the Bush letter and accompanying documents demonstrate that the City has waived sovereign immunity, or at the very least, create a disputed question of fact as to whether the City has waived sovereign immunity. The Missouri Court of Appeals, however, recently rejected a similar argument. In Hendrix, the court considered evidence nearly identical to that included in the present record. 636 S.W.3d at 900-01. Specifically, the court considered the same statements from Kistler, Flowers, and Bush as detailed above, along with "the PFPC's articles of incorporation, its bylaws, a document entitled 'City of St. Louis Risk Management Program,' [and] a screenshot from the City's website referring to the PFPC as 'the city's self-insurance program.' " Id. Notwithstanding the Bush letter and other PFPC evidence, the court concluded that the plaintiff "ha[d] not produced any evidence to overcome the City's evidence supporting summary judgment," i.e., Kistler's declaration and Flowers's affidavit, reasoning that the

letter from Bush merely reflected the City Counselor's, not the City's governing body's, opinion. Id. at 901. Further, the court concluded that "the PFPC's articles of incorporation, its bylaws, and the 'City of St. Louis Risk Management Program' letter also fail[ed] to show that the City either has liability insurance or is self-insured for negligent supervision and training claims." Id. Here, neither Kistler's declaration nor Flowers's affidavit is contradicted by the Bush letter and accompanying documents.[10] Therefore, we find that the district court erred in concluding that disputed issues of material fact existed as to whether the City was self-insured, and we reverse the denial of sovereign immunity to the City.

III.

For the foregoing reasons, we dismiss in part, reverse in part, and remand for proceedings consistent with this opinion. To the extent we find that we lack jurisdiction to consider appellants' arguments, we grant appellees' motion to dismiss.

All Citations

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Footnotes

1 We refer to Gina and Dennis Torres by their first names to differentiate between them, not to imply any familiarity or informality.

2 Because this interlocutory appeal comes to us on a denial of immunity, "we must accept the summary judgment facts as described by the district court because evidentiary determinations are not presently appealable," though "we are ... not bound by facts found by the district court which are 'blatantly contradicted by the record.' " Johnson v. City of Minneapolis, 901 F.3d 963, 965 & n.2 (8th Cir. 2018) (citations omitted); see also N.S. ex rel. Lee v. Kan. City Bd. of Police Comm'rs, 35 F.4th 1111, 1113 (8th Cir. 2022) ("In the immunity context, [the summary judgment] standard requires us to evaluate the evidence using the plaintiff-friendly version of the facts identified by the district court."). Where the district court does "not state which facts it found were adequately supported, we must determine which facts it likely assumed by viewing the record in the light most favorable to the plaintiff." Thompson v. Murray, 800 F.3d 979, 983 (8th Cir. 2015). Here, the district court detailed the allegations made by appellees in their amended complaint but did not clearly state which of those allegations it found were adequately supported for purposes of summary judgment. Thus, relying on the district court's analysis in the portion of its order considering appellants' motion for summary judgment and viewing the record in the light most favorable to the appellees, we determine that the following facts were most likely assumed by the district court. See id.

3 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

4 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

5 In their reply brief, appellants argue for the first time that, even if Andrews' testimony is deemed admissible, this Court should nonetheless find that Officers Frigerio, Allen, and Jones are entitled to qualified immunity because their shots were fired only into the wall and door and did not physically touch Hammett. "Absent some reason for failing to raise an argument in an opening brief, this [C]ourt will not consider an argument first raised in a reply brief." United States v. Brown, 108 F.3d 863, 867 (8th Cir. 1997). Because appellants provide no excuse for failing to raise this argument in their opening brief, we do not consider it.

6 Dennis has not argued that he was seized when he complied with the command to come outside. See Letterman v. Does, 789 F.3d 856, 861 (8th Cir. 2015) ("To survive a challenge based on qualified immunity, a *plaintiff* must show the defendants violated a person's constitutional right and the constitutional right was clearly established at the time of the violation." (emphasis added)).

7 Though appellees do not specify which subsection of § 1985 their claims implicate, we find that it is not possible for their claims to fall under § 1985(1), which proscribes, in relevant part, "conspiracies to interfere with the performance of official duties by federal officers" because no federal officers were involved in this incident and, thus, there could be no conspiracy to interfere with their official duties. See Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1429 (8th Cir. 1986).

8 We need not address appellants' additional argument that Officer Lacy is separately entitled to official immunity because he had no role in making entry into Dennis's home, used no force against Hammett or

Dennis, and did not act in bad faith or with an improper motive in obtaining the search warrant. As to the argument that Officer Lacy is entitled to official immunity because he did not make entry into the residence and used no force, assuming for the sake of argument that appellants are correct, we do not see, and appellants do not explain, how these facts separate Officer Lacy from the district court's finding that appellees proffered sufficient evidence for a reasonable factfinder to find the defendant officers "manufactured false evidence in bad faith." As to the argument that Officer Lacy did not act in bad faith or with an improper motive in obtaining the search warrant, we find that the district court did not address this issue in the context of appellants' motion for summary judgment, and therefore, it is not appropriate for our review. See Daisy Mfg. Co. v. NCR Corp., 29 F.3d 389, 395 (8th Cir. 1994) ("Ordinarily, we do not decide issues that the district court did not adjudicate.").

9 "Because the statute and the parties refer to this statutorily provided immunity as 'sovereign immunity,' we do too. But to be clear, what we are discussing is not the immunity inherent to sovereigns that we usually discuss in the Eleventh Amendment context." Davis v. Buchanan Cnty. (Davis I), 5 F.4th 907, 909 n.1 (8th Cir. 2021).

10 We have reviewed appellees' motion to supplement the record on appeal and the list of payments made by the PFPC attached thereto. "Generally, an appellate court cannot consider evidence that was not contained in the record below," but "[w]hen the interests of justice demand it, an appellate court may order the record of a case enlarged." Dakota Indus., Inc. v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th Cir. 1993). "This authority to enlarge a record is rarely exercised and is a narrow exception to the general rule that an appellate court may consider only the record made before the district court." Id. Given Kistler's declaration and Flowers's affidavit and appellees' failure to contradict these statements, we find such a list irrelevant to the issue of whether the City was self-insured and deny appellees' motion to supplement the record.

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N.S. by and through Lee v. Kansas City Board of Police Commissioners

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Outline

Qualified Immunity

Official Immunity

Use of force

35 F.4th 1111
United States Court of Appeals, Eighth Circuit.

N.S., Only child of decedent, Ryan Stokes, BY AND THROUGH her natural mother and next friend, Brittany LEE; Narene James, Plaintiffs - Appellants

v.

KANSAS CITY BOARD OF POLICE COMMISSIONERS; Michael Rader; Leland Shurin; Angela Wasson-Hunt; Alvin Brooks; Mayor Sly James, Defendants - Appellees

David Kenner, Defendant

William Thompson; Darryl Forte, in his individual capacity; Richard Smith, in his official capacity as Chief of Police of the Kansas City, MO Police Department, Defendants - Appellees

No. 20-1526
|
Submitted: December 14, 2021
|
Filed: May 31, 2022

Synopsis

Background: Survivors of suspect shot and killed by police officer during chase filed § 1983 action against officers and department asserting claims for excessive force and wrongful death. The United States District Court for the Western District of Missouri, Brian C. Wimes, J., 2018 WL 10419344, denied officer's motion for summary judgment, and officer appealed. The Court of Appeals, 933 F.3d 967, vacated and remanded. On remand, the District Court, Wimes, J., 2020 WL 641728, entered summary judgment in officer's favor, and plaintiffs appealed.

Holdings: The Court of Appeals, Stras, Circuit Judge, held that:

[1] officer was entitled to qualified immunity from liability under § 1983;

[2] officer was entitled to official immunity from liability under state law; and

[3] municipal defendants were not subject to liability under § 1983.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (5)

[1] **Federal Courts**⇨Summary judgment
Federal Courts⇨Summary judgment

Court of Appeals reviews district court's decision to grant summary judgment de novo, viewing record in light most favorable to non-movants and drawing all reasonable inferences in their favor.

1 Case that cites this headnote

[2] **Civil Rights**⇨Sheriffs, police, and other peace officers

It was not clearly established in July 2013 that shooting fleeing suspect in back without warning while he was raising his hands in unknown car violated Fourth Amendment, and thus police officer was entitled to qualified immunity from liability in § 1983 excessive force action, even though suspect's alleged crime was theft of cell phone, and he did not have weapon. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

1 Case that cites this headnote

[3] **Municipal Corporations**⇨Police and fire

Public Employment⚖Law enforcement personnel

Official immunity shields Missouri police officers from liability for their discretionary decisions, including when they draw and fire weapon, even if they are negligent, but immunity ends where bad faith or malice begins.

4 Cases that cite this headnote

[4] **Municipal Corporations**⚖Police and fire

Public Employment⚖Law enforcement personnel

Under Missouri law, police officer was entitled to official immunity from liability for shooting fleeing suspect in back without warning while he was raising his hands in unknown car, absent evidence that officer was acting in bad faith or malice.

2 Cases that cite this headnote

[5] **Civil Rights**⚖Criminal law enforcement; prisons

Civil Rights⚖Criminal law enforcement; prisons

City, its police department, and police chief were not subject to liability under § 1983 for police officer's alleged use of excessive force against fleeing suspect, despite contention that department's "Hot Spots" program, which allowed non-patrol officers to occasionally work streets, and lack of specific foot-pursuit training, amounted to deliberate or conscious choice to ignore public safety, absent evidence that municipal defendants had notice that these procedures were inadequate and likely to result in constitutional violation. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

*1112 Appeal from United States District Court for the Western District of Missouri - Kansas City

Attorneys and Law Firms

Brian F. McCallister, The McCallister Law Firm, P.C., Kansas City, MO, argued (Andrew D. Ferrell, The McCallister Law Firm, P.C., Kansas City, MO, Cynthia L. Short, CLS Mitigation & Consulting Services, L.L.C., Riverside, MO, on the brief), for plaintiffs-appellees.

Jeffrey J. Simon, Husch Blackwell LLP, Kansas City, MO, argued (Michael T. Raupp, Husch Blackwell LLP, Kansas City, MO, Eric Schmitt, Atty. Gen., Jefferson City, MO, Diane Peters, Asst. Atty. Gen., Kansas City, MO, on the brief), for defendants-appellants.

Before LOKEN, ARNOLD, and STRAS, Circuit Judges.

Opinion

STRAS, Circuit Judge.

Kansas City Police Officer William Thompson shot and killed Ryan Stokes during a foot chase. Despite the tragic circumstances, the district court[1] concluded *1113 that Officer Thompson was entitled to both qualified and official immunity. We affirm.

I.

We have seen this case before. The last time, we remanded to allow the district court to "specifically identify[ ] the plaintiff-friendly version of the disputed facts" and "evaluate whether [Officer] Thompson, in light of all of the information available to him at the moment, violated clearly established law when he shot Stokes." *N.S. v. Kan. City Bd. of Police Comm'rs*, 933 F.3d 967, 970 (8th Cir. 2019). And then we instructed the court to use those same plaintiff-friendly facts to determine whether he was entitled to official immunity under Missouri law. *Id.* at 970–71.

Rather than denying qualified immunity, as it had done before, the district court determined that there had been no constitutional violation at all, clearly established or

otherwise. Its conclusion on official immunity was similar: Officer Thompson had been negligent at most, meaning that Stokes's family could not recover for wrongful death. *See* *Wealot v. Brooks*, 865 F.3d 1119, 1129 (8th Cir. 2017) (describing Missouri's official-immunity doctrine).

Now the plaintiffs have appealed. In addition to contesting the grant of summary judgment to Officer Thompson, Stokes's family argues that they should receive a trial on their claims against the Kansas City Board of Police Commissioners and the other municipal officials named in their complaint. *See* *Monell v. Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

II.

[1] We review the district court's decision to grant summary judgment de novo, viewing the record in the light most favorable to Stokes's family and drawing all reasonable inferences in their favor. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *McManemy v. Tierney*, 970 F.3d 1034, 1037 (8th Cir. 2020). In the immunity context, this standard requires us to evaluate the evidence using the plaintiff-friendly version of the facts identified by the district court. *See N.S.*, 933 F.3d at 970.

We then have to determine whether the defendants are entitled to judgment as a matter of law. *See* *Phillips v. Mathews*, 547 F.3d 905, 909 (8th Cir. 2008). If they are, we will affirm the grant of summary judgment. *See* *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505 ("Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment."). If not, the case goes on.

A.

Seconds after receiving a police dispatch about a suspected cellphone theft and an ensuing foot chase, Officer Thompson saw Stokes run into a parking lot. His destination was a red car, and once he reached it, he opened and shut the driver's side door.[2] He then turned to face the officer who had been chasing him. What happened next is hotly disputed, but the family's side of the story is what matters at this point.

***1114** Officer Thompson, who was standing behind Stokes at the time, saw him raise his hands to his waist. Misinterpreting the gesture as threatening, Officer Thompson fired without warning at Stokes, who was trying to surrender. Stokes later died from his injuries.

Although a search revealed a gun in the car, the car's owner said that it had been in there all night. So even if Officer Thompson insists that he saw a gun in Stokes's hand during the chase, we must assume that he did not have one. *See N.S.*, 933 F.3d at 969.

B.

Applying these plaintiff-friendly facts, our task now is to evaluate the family's excessive-force claim against Officer Thompson. *See* 42 U.S.C. § 1983. The key issue is whether he is entitled to qualified immunity, which depends on how we answer two questions. First, did his actions violate a constitutional right? Second, was the right clearly established? *See Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019) (en banc). If the answer to either question is no, Officer Thompson gets immunity. *See id.* (explaining that we may answer these questions in either order).

[2] We can skip directly to the second question. The Supreme Court has explained that "the focus" of the clearly-established-right inquiry "is on whether the officer had fair notice that [his] conduct was unlawful." *Kisela v. Hughes*, — U.S. —, 138 S. Ct. 1148, 1152, 200 L.Ed.2d 449 (2018) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam)). Here, "judged against the backdrop of the law at the time of the conduct," a reasonable officer would not have had "fair notice" that shooting Stokes in these

circumstances violated the Fourth Amendment. *Id.* (quoting *Brosseau*, 543 U.S. at 198, 125 S.Ct. 596).

Central to our conclusion is *Thompson v. Hubbard*, 257 F.3d 896, 898 (8th Cir. 2001), which involved "a report of shots fired and two suspects fleeing on foot from the scene of an armed robbery." One of the suspects climbed over a short fence and fell to the ground. *Id.* When he stood up, he "looked over his shoulder at [an officer], and moved his arms as though reaching for a weapon at waist level." *Id.* When the suspect's arms continued to move despite an order to "stop," the officer fired a single shot into the suspect's back and killed him. *Id.* No weapon was found. *Id.*

Even so, we concluded that the officer's "use of force ... was within the bounds of the Fourth Amendment." *Id.* at 899. Critical to our decision was the idea that "[a]n officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun." *Id.*

Even under the plaintiff-friendly version of the facts, Officer Thompson faced a similar choice here: use deadly force or face the possibility that Stokes might shoot a fellow officer. And just like in *Hubbard*, Officer Thompson could only see the suspect from behind, which obscured his view and required a "split-second judgment[ ]—in circumstances that [we]re tense, uncertain, and rapidly evolving." *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

It is true that there are some differences here. For one thing, the suspect in *Hubbard* was fleeing from the scene of an armed robbery, *id.* at 898, a much more serious crime than stealing a cell phone. For another, Officer Thompson remained silent in the face of possible danger, whereas the officer in *Hubbard* shouted "stop" before using deadly force. Despite these differences, a reasonable officer in ***1115** *these* circumstances "might not have known for certain that [his] conduct was unlawful," particularly given that Stokes had just accessed the inside of an unknown vehicle before raising his hands. *Ziglar v. Abbasi*, ––– U.S. ––––, 137 S. Ct. 1843, 1867, 198 L.Ed.2d 290 (2017). This uncertainty, a by-product of *Hubbard*, means that Officer Thompson did not violate a *clearly established* right. *See Kisela*, 138 S. Ct. at 1152.

C.

None of the cases discussed by the family are any closer than *Hubbard*. *Tennessee v. Garner*, 471 U.S. 1, 4 & n.2, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), for example, did not involve the same level of potential danger because the minor suspect in that case was busy climbing a fence when an officer shot him. In another case, *Nance v. Sammis*, 586 F.3d 604, 607 (8th Cir. 2009), plain-clothed officers confronted two *children* after dark who were *walking* toward an apartment complex. They shot one of them without warning after seeing what turned out to be a toy gun in the child's waistband—a different situation than we have here. *Id.* Finally, *Ngo v. Storlie*, 495 F.3d 597, 600–01 (8th Cir. 2007), involved an officer-on-officer shooting, not an officer who fired at a fleeing suspect.

At most, these cases would create uncertainty for someone in Officer Thompson's shoes. To prevail, however, the family had to establish that "the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela*, 138 S. Ct. at 1153 (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778–79, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014)). "Existing precedent," in other words, "must have placed the statutory or constitutional question beyond debate." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). In light of *Hubbard*, it did not.

III.

[3] Nor has the family shown that Officer Thompson acted "in bad faith or with malice." *Wealot*, 865

F.3d at 1129 (quoting *Blue v. Harrah's N. Kan. City, LLC*, 170 S.W.3d 466, 479 (Mo. Ct. App. 2005)). Official immunity shields Missouri police officers from liability for their discretionary decisions, including when they "draw[ ] and fire[ ] a weapon," even if they are negligent. *Seiner v. Drenon*, 304 F.3d 810, 813 (8th Cir. 2002). But immunity ends where bad faith or malice begins. *See Blue*, 170 S.W.3d at 479.

Both are forms of "wrongful intent." *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 447 (Mo. banc 1986). The former requires "a dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive." *Id.* (quotation marks omitted). And the latter involves actions that are "so reckless or wantonly and willfully in disregard of one's rights that a trier of fact could infer from such conduct bad faith or [an] improper or wrongful motive." *Id.* (quotation marks omitted).

[4] There is no evidence of either here. Nothing suggests, for example, that Officer Thompson was retaliating against Stokes for something that happened earlier or that they had a pre-existing relationship. *See Wealot*, 865 F.3d at 1129 (examining the officers' prior "treatment" of the plaintiff); *Twiehaus*, 706 S.W.2d at 448–49 (considering what the defendant knew about decedent's prior suicide attempts). By their own account, the family's best evidence of wrongful intent is that the gun may have been moved from a holster to the driver's side seat. The problem with this theory, however, is that there is no evidence that *Officer Thompson* was the one who moved it. As we have explained before, "speculation and conjecture are insufficient to defeat summary judgment." ***1116** *See Gannon, Int'l, Ltd. v. Blocker*, 684 F.3d 785, 794 (8th Cir. 2012).

IV.

Nor is there enough to find the municipal defendants liable under a deliberate-indifference theory. *See Monell v. Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The family's argument is that the "Hot Spots" program, which allows non-patrol officers to occasionally work the streets, and the lack of specific foot-pursuit training, amounted to a "deliberate or conscious choice" to ignore public safety. *Parrish v. Ball*, 594 F.3d 993, 997, 1002 (8th Cir. 2010) (explaining the requirements for this type of claim).

Commented [ER1]: Official Immunity

[5] To survive summary judgment, the family had to offer evidence that the municipal defendants "had notice that [these] procedures were inadequate and likely to result in" a constitutional violation. *Id.* at 998 (quotation marks omitted). On this point, the family has nothing linking either policy to any other incident involving the use of excessive force. *See Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1216 (8th Cir. 2013) (holding that the "single incident" of excessive force in *that* case did not give rise to municipal liability). Without notice, there can be no deliberate indifference. *See id.* ("Notice is the touchstone of deliberate indifference in the context of § 1983 municipal liability.").

V.

We accordingly affirm the judgment of the district court.

All Citations

35 F.4th 1111

Footnotes

1 The Honorable Brian C. Wimes, United States District Judge for the Western District of Missouri.

2 We acknowledge the family's attorney treated this fact as disputed at oral argument. But this position appears to be a late-breaking change: the family's appellate brief assumes it to be true, and it was never contested before the district court. Appellant's Br. 19; *see Cole v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 533 F.3d 932, 936 (8th Cir. 2008) ("[A] party cannot assert arguments that were not presented to the district court in opposing summary judgment in an appeal contesting an adverse grant of summary judgment").

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MMAA CASE LAW UPDATE

July 2023

KEEPING YOUR CITY OUT OF TROUBLE AND BEING READY FOR COURT WHEN IT COMES

Nighbert v. City of St. Louis

Missouri Court of Appeals, Eastern District, DIVISION ONE. | December 20, 2022 | 658 S.W.3d 603 | 2022 WL 17813653

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Outline

Make a complete record or be prepared to suffer the consequences!

658 S.W.3d 603
Missouri Court of Appeals, Eastern District,
DIVISION ONE.

Holly NIGHBERT, Appellant,
v.
CITY OF ST. LOUIS, Preservation Board of the City of St. Louis, Richard Callow, Melanie Fathman, Tiffany Hamilton, Michael Killeen, David Richardson, Anthony Robinson, Randy Vines, and Joseph Vacarro, Respondents.

No. ED 110496
|
Filed: December 20, 2022

Synopsis

Background: Owner of property in neighborhood designated as local historic district sought judicial review of decision of city's preservation board, which upheld the city's cultural resources office's denial of demolition permit application. The Circuit Court, City of St. Louis, Christopher E. McGraugh, J., affirmed. Owner appealed.

[**Holding:**] The Court of Appeals, Quigless, J., held that board's findings of fact were conclusory and incomplete, and thus were inadequate for judicial review.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

West Headnotes (11)

[1] **Administrative Law and Procedure**⇐ Decision reviewed

Administrative Law and Procedure⇐ Findings; evidence

On administrative review of a contested case, Court of Appeals reviews agency's decision, rather than circuit court's, to determine whether record in its entirety contains sufficient competent and substantial evidence to support decision. Mo. Ann. Stat. § 536.140.

[2] **Administrative Law and Procedure**⇐ Review

Administrative Law and Procedure⇐ Sufficiency of evidence

On administrative review of a contested case, Court of Appeals reviews whole record and no longer views evidence in light most favorable to agency's decision. Mo. Ann. Stat. § 536.140.

[3] **Administrative Law and Procedure**⇐ Correctness or error

On Court of Appeals' administrative review of contested case, party aggrieved by agency's decision bears burden of persuasion to demonstrate that decision is erroneous. Mo. Ann. Stat. § 536.140.

[4] **Administrative Law and Procedure**⇐ In general; necessity

Trial court reviews a contested case by reviewing the record created before the administrative agency. Mo. Ann. Stat. § 536.140.

[5] **Administrative Law and Procedure**⇐ In general; purpose

Agency's determination of findings is not separate function from its decision in case; rather, agency's findings of fact and conclusions of law are essential part of, and basis for, its decision. Mo. Ann. Stat. § 536.090.

[6] **Administrative Law and Procedure**⇐ Necessity

Statute requiring that administrative decision and order in a contested case shall be in writing requires findings of fact and conclusions of law that enable the trial court to review the agency's decision on the record to determine whether the decision violates statute governing areas to which judicial review of agency decision may extend; without findings of fact and conclusions of law, the court has no basis to conduct such a review. Mo. Ann. Stat. §§ 536.090, 536.140.

[7] **Administrative Law and Procedure**⇐ Sufficiency

For the Court of Appeals to conduct a proper judicial review of agency decision in contested case, the agency is required to issue a written decision containing specific findings of fact and conclusions of law about contested issues. Mo. Ann. Stat. §§ 536.090, 536.140.

[8] **Administrative Law and Procedure**⇐ Sufficiency

Absent specific findings of fact, a reviewing court cannot conduct meaningful review of administrative decision. Mo. Ann. Stat. §§ 536.090, 536.140.

[9] **Environmental Law**⇐Hearing and determination

Findings of fact of city's preservation board were conclusory and incomplete, and thus were inadequate for judicial review, in action brought by owner of property in neighborhood designated as local historic district, seeking judicial review of board's decision, which upheld the city's cultural resources office's denial of demolition permit application, where board did not identify and make essential findings of fact regarding its application of the eight criteria set forth in local ordinance governing consideration of an application for a demolition permit, and board made no express credibility determinations as a basis for its decision. Mo. Ann. Stat. §§ 536.090, 536.140.

[10] **Administrative Law and Procedure**⇐ Sufficiency

Reviewing court should be able to review the agency's decision in contested case intelligently without resorting to the evidence, in the context of the necessity of findings of fact and conclusions of law. Mo. Ann. Stat. §§ 536.090, 536.140.

[11] **Administrative Law and Procedure**⇐ Necessity

Judicial review is inappropriate without findings of fact and conclusions of law explaining the basis for the administrative decision. Mo. Ann. Stat. §§ 536.090, 536.140.

***604** Appeal from the Circuit Court of the City of St. Louis, 1922-CC11482, Honorable Christopher E. McGraugh, Judge

Attorneys and Law Firms

Elkin L. Kistner, William Kistner, Co-Counsel, 1406 N. Broadway, St. Louis, Mo. 63102, for appellant.

Travis F. Warren, 1520 Market Street, Room 4025, St. Louis, Mo. 63103, for respondent.

Opinion

Angela T. Quigless, P.J.

***605** Plaintiff, Holly Nighbert, appeals the judgment, entered by the Circuit Court of the City of St. Louis, affirming the decision of the City of St. Louis Preservation Board ("the Board") to deny Nighbert's application for a demolition permit for a building in the Benton Park neighborhood. Because the Board's findings of fact and conclusions of law are insufficient

to explain the basis for the Board's decision, we reverse and remand with instructions that the circuit court order the Board to make specific findings of fact and conclusions of law regarding the eight criteria enumerated in St. Louis City Ordinance 64832.

Factual and Procedural Background

St. Louis City Ordinance 67175 (July 18, 2006) designates portions of the Benton Park neighborhood within the City as a Local Historic District, sets out the boundaries of the Benton Park Historic District, and provides for a development plan for the district. St. Louis City Ordinance 64832 (Dec. 29, 1999) establishes Preservation Review Districts, and designates certain portions of the City as such districts. The Benton Park Historic District is one such Preservation Review District established under Ordinance 64832, which *inter alia* governs application, review, and approval of demolition permits for structures located within Preservation Review Districts. More broadly, St. Louis City Ordinance 64689 (July 9, 1999, as amended by St. Louis City Ordinance 64925 (Apr. 18, 2000)) seeks to identify and preserve the City's cultural resources, and sets forth criteria nearly identical to those contained in Ordinance 64832 for evaluating applications for demolition permits.

Nighbert owns the property at 3243 Indiana in the Benton Park Historic District, and she owns and resides on the adjoining property. Nighbert applied to the City's Cultural Resources Office ("CRO") for a permit that would allow her to demolish the building located at 3243 Indiana ("the building"), a single-family brick home built in 1905. Nighbert planned to demolish the building and use the lot as a side yard for her home. The CRO denied the application for a demolition permit. Nighbert appealed to the City's Preservation Board. Following an evidentiary hearing on the record, the Board upheld the CRO's denial of the demolition permit application, finding *inter alia*, that the building is a "Merit building under Ordinance #64832," and a "contributing resource to the Benton Park National Register District and the Benton Park Local Historic District." Nighbert sought judicial review. The circuit court affirmed the Board's decision denying the permit, and finding that the decision was supported by substantial evidence, did not violate the provisions of any law, and was neither arbitrary nor an abuse of discretion. Nighbert appeals.

Standard of Review

Administrative review of a contested case, as here, is governed by Section 536.140 RSMo (2016).[1] *Heller v. City of St. Louis*, 580 S.W.3d 87, 89 (Mo. App. E.D. 2019). We will uphold an agency's decision ***606** unless it is: (1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) not supported by competent and substantial evidence upon the whole record; (4) unauthorized by law; (5) made upon unlawful procedure or without a fair trial; (6) arbitrary, capricious, or unreasonable; or (7) an abuse of discretion. Section 536.140.2; *Ballpark Lofts III, LLC v. City of St. Louis*, 395 S.W.3d 588, 590 (Mo. App. E.D. 2013).

[1] [2] [3] We review the agency's decision—rather than the circuit court's—to determine whether the record in its entirety contains sufficient competent and substantial evidence to support the decision. *Id.* We review the whole record, and we no longer view the evidence in the light most favorable to the agency's decision. *Heller*, 580 S.W.3d at 89. "The party aggrieved by the agency's decision bears the burden of persuasion to demonstrate that the decision is erroneous." *Vaughn v. Mo. Dep't of Soc. Servs.*, 323 S.W.3d 44, 46 (Mo. App. E.D. 2010).

Discussion

In three points on appeal, Nighbert challenges the Board's decision to uphold denial of the application for a demolition permit for 3243 Indiana. First, Nighbert claims the record contained no evidence indicating the CRO conducted the exterior inspection of the structure as required by Ordinance 64832. In her second point,

Nighbert claims the Board's decision was against the weight of the evidence, arbitrary, and capricious because the demolition permit application satisfied at least five of the seven applicable demolition criteria enumerated in Ordinance 64832, thus demonstrating Nighbert's entitlement to the permit. Finally, Nighbert claims the Board failed to issue a decision containing findings of fact with regard to the criteria enumerated in Ordinance 64832. Because Nighbert's third point is dispositive, we do not address her other points.

[4] Ordinance 64832 § 8 and Ordinance 64689 § 63, which pertain to appeals of applications for demolition permits, make this a contested case governed by the Missouri Administrative Procedure Act, Chapter 536, RSMo. "Any such appeal shall be deemed and conducted as a contested case within the meaning of Chapter 536, RSMo., as amended, and shall be appealable and reviewable as in such chapter provided." Ordinance 64832 § 8; Ordinance 64689 § 63. The parties do not dispute that this is a contested case. The circuit court reviews a contested case by reviewing the record created before the administrative agency. Section 536.140; *450 N. Lindbergh Legal Fund, LLC v. City of Creve Coeur*, 477 S.W.3d 49, 53 (Mo. App. E.D. 2015). On appeal, we review the agency's decision to determine whether the record in its entirety contains sufficient competent and substantial evidence to support the decision. *Ballpark Lofts*, 395 S.W.3d at 590.

[5] Because it is a contested case, the Board's decision was subject to section 536.090, which provides in relevant part:

> Every decision and order in a contested case shall be in writing, and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

The agency's determination of findings is not a separate function from its decision in the case. *607 *Redman v. State Bd. of Registration for Healing Arts*, 316 S.W.3d 357, 361 (Mo. App. W.D. 2010). Rather, the agency's findings of fact and conclusions of law are an essential part of, and the basis for, its decision. *Id.*

[6] [7] [8] Section 536.090 requires findings of fact and conclusions of law that enable the circuit court to review the agency's decision on the record to determine whether the decision violates any provision of section 536.140.2. *Complete Auto Body & Repair, Inc. v. St. Louis County*, 232 S.W.3d 722, 725 (Mo. App. E.D. 2007). Without findings of fact and conclusions of law, this Court has no basis to conduct such a review. *Conlon Group, Inc. v. City of St. Louis*, 944 S.W.2d 954, 958 (Mo. App. W.D. 1997). For us to conduct a proper judicial review, the agency is required to issue a written decision containing specific findings of fact and conclusions of law about contested issues. *Redman*, 316 S.W.3d at 361. *See also, Heller*, 580 S.W.3d at 90 ("In a contested case, an agency is required to issue a written decision containing specific findings of fact and conclusions of law.") "Absent specific findings of fact, a reviewing court cannot conduct meaningful review." *Id.*

[9] In this case, the Board's findings of fact and conclusions of law are inadequate. While the Board set out in detail the evidence before it, Ordinance 64832 § 5 enumerates eight criteria the Board shall apply when the agency considers an application for a demolition permit. "Decisions of the Board or [Cultural Resources] Office shall be in writing, shall be mailed to the applicant immediately upon completion and **shall** indicate the application by the Board or Office of the following criteria, which are listed in order of importance, as the basis for the decision[.]" Ordinance 64832 § 5 (emphasis added). The eight criteria are as follows:

(A) approved redevelopment plans;

(B) architectural quality and merit classification of the structure;

(C) condition of the structure, specifically whether an exterior inspection reveals it to be sound;

(D) the neighborhood effect and potential for reuse, including a consideration of the economic hardship that the present owner of the structure may experience if the demolition permit is denied;

(E) urban design, including the integrity of the existing block face and the impact of the proposed demolition on the integrity, rhythm, balance, and density of the block;

(F) proposed subsequent construction, including whether a proposal to create vacant land by the demolition in question is appropriate on that particular site, within that specific block;

(G) commonly controlled property; and

(H) accessory structures.

Similarly, Ordinance 64689 § 61 identifies seven of the same criteria, and likewise requires a written decision that "shall indicate the application by the Preservation Board or Cultural Resources Office of the following criteria, which are listed in order of importance, as the basis for the decision[.]"[2] The last factor identified in each ordinance regards demolition of accessory structures such as garages and sheds, and is not pertinent to this appeal.

In upholding the CRO's denial, the Board did not make specific findings as required regarding each of the enumerated criteria as the basis for its decision, but rather found only that: (1) the building "is a Merit building under Ordinance ***608** #64832"; (2) "[t]he building is a contributing resource to the Benton Park National Register District and the Benton Park Local Historic District"; (3) "[t]he building suffered a collapse while a demolition contractor was working on site to demolish a garage, for which there was an approved demolition permit;" (4) "[t]he contractor also demolished a gazebo near the south façade of the house for which there was no approved permit;" and (5) "[a]n application for State and Federal Historic Tax Credits would be available to assist in the economics of the rehabilitation of the historic building." The Board's conclusions of law stated that "[t]he Preservation Board upheld the Director's denial of the demolition because the application does not satisfy the criteria of the ordinances that were entered into the record. 3243 Indiana is a Merit building and contributing resource to the Benton Park Local Historic District."

"Absent specific findings of fact, a reviewing court cannot conduct meaningful review." *Heller*, 580 S.W.3d at 90. Here, the Board's statements do not comprise sufficient findings of fact because they are general and conclusory, and as such, insufficient for this Court—and for the circuit court—to use to conduct judicial review of the Board's decision. Most notably, the Board did not identify and make essential findings of fact regarding its application of the eight criteria set forth in Ordinance 64832 § 5. Of the seven applicable criteria enumerated in the Ordinance, the Board made no findings regarding: (A) any redevelopment plan; (C) the precise condition of the building, and specifically whether an exterior inspection revealed the building to be structurally sound; (D) the neighborhood effect and potential for the building's reuse, including findings—other than the general availability of tax credits—regarding Nighbert's estimated rehabilitation costs and economic hardship surrounding rehabilitation; (E) urban design, including the integrity of the existing block face and the impact of the proposed demolition on the integrity, rhythm, balance, and density of the block; (F) proposed subsequent construction, including whether Nighbert's plan to use the property as a side yard would equal or exceed the contribution of the existing building; and (G) Nighbert's common control of the building and the adjoining property, many of which were contested issues at the hearing. **Furthermore, the Board made no express credibility determinations as a basis for its decision.**

[10] [11] We should be able to review the Board's decision intelligently without resorting to the evidence. *Conlon Group*, 944 S.W.2d at 959. While the Board set out in detail the evidence before it, we cannot infer that the agency found facts in accordance with the ultimate

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decision reached. *Heller*, 580 S.W.3d at 90; *Schwartz v. City of St. Louis*, 274 S.W.3d 509, 514 (Mo. App. E.D. 2008). Therefore, judicial review is inappropriate without findings of fact and conclusions of law explaining the basis for the administrative decision. *Id.* Here, the Board's findings of fact are conclusory and incomplete, making it impossible for us to determine whether the Board properly considered all of the criteria identified in the Ordinance; how it evaluated and applied each criterion; and whether its decision is supported by competent and substantial evidence on the whole record, is arbitrary, capricious or unreasonable, or is an abuse of discretion. As a result, we do not have an administrative decision to review, and we are obligated to remand the case. *Conlon Group*, 944 S.W.2d at 959.

Conclusion

The Board's failure to include in its decision specific findings of fact and conclusions ***609** of law as required by section 536.090 is error requiring reversal. We reverse the circuit court's judgment, and remand this case with instructions that the circuit court remand the case to the Board. Upon such remand, the Board is to make specific findings and conclusions indicating application of the eight criteria in Ordinance 64832 § 5 on which it based its decision to deny Nighbert a demolition permit and in sufficient detail to allow judicial review.

Sherri B. Sullivan, J., and Robert M. Clayton III, J., concur.

All Citations

658 S.W.3d 603

Footnotes

1 All statutory references are to RSMo. (2016).

2 Ordinance 64689 § 61 does not specify proposed subsequent construction as a criterion analogous to criterion (F) of Ordinance 64832 § 5.

End of Document

LO Management, LLC v. Office of Administration

Missouri Court of Appeals, Western District. | December 20, 2022 | 658 S.W.3d 228 | 2022 WL 17814038

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Outline

Disappointed bidders and poor administration of the bid process

658 S.W.3d 228
Missouri Court of Appeals, Western District.

LO MANAGEMENT, LLC, et al.,
Respondents,
v.
OFFICE OF ADMINISTRATION, et al.,
Appellants.

WD 84954 Consolidated with WD 84956
|
Filed: December 20, 2022

Synopsis

Background: Disappointed bidder and one of its co-owners brought action for declaratory judgment and injunctive relief against **Office** of **Administration**, alleging that it violated state procurement laws through procedures used to award a contract to operate a license fee **office**. The Circuit Court, Cole County, S. Cotton Walker, J., entered judgment in favor of disappointed bidder and co-owner, permanently enjoined **Office** from taking action to implement the contract, and granted disappointed bidder and co-owner's motion for attorney's fees. **Office** appealed.

Holdings: The Court of Appeals, Hardwick, P.J., held that:

[1] co-owner of disappointed bidder lacked taxpayer standing to challenge **Office's** actions;

[2] disappointed bidder was required to exhaust its administrative remedies for circuit court to entertain its claim;

[3] substantial evidence supported determination that **Office** acted arbitrarily, capriciously, and unlawfully; and

[4] **Office** was not precluded from contacting disappointed bidder during procurement process to clarify its principal place of business.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment.

West Headnotes (23)

[1] **Administrative Law and Procedure**⇐ Trial on Review

Upon judicial review of a non-contested administrative decision, circuit court conducts de novo review in which it hears evidence on merits of case, makes record, determines facts, and decides whether, in view of those facts, agency's decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves abuse of discretion. Mo. Ann. Stat. § 536.150.

[2] **Administrative Law and Procedure**⇐ Decision reviewed

On appeal from circuit court's review of an administrative decision, Court of Appeals reviews the circuit court's judgment and not the administrative agency's decision.

[3] **Appeal and Error**⇐Declarations of law
Appeal and Error⇐Judge as factfinder below
Appeal and Error⇐Against Weight of Evidence

Court of Appeals will affirm circuit court's decision in court-tried case unless it is not supported by substantial evidence, is against weight of evidence, or erroneously declares or applies law.

[4] **Public Contracts**⇐Parties; standing
States⇐Standing

Co-owner of disappointed bidder failed to demonstrate that **Office** of **Administration's** actions impacted a

direct expenditure of public funds generated through taxation, as required for him to have taxpayer standing to challenge **Office's** decision to award a contract to operate a license fee **office** to successful bidder, where funds that state would have been obligated to expend to implement contract would have been expended regardless of whether contract was awarded to successful bidder, disappointed bidder, or to any other vendor.

[5] **Municipal Corporations**⚖Nature and scope in general

To be entitled to taxpayer standing, a taxpayer must establish that one of three conditions exists: (1) a direct expenditure of funds generated through taxation; (2) an increased levy in taxes; or (3) a pecuniary loss attributable to the challenged transaction of a municipality.

[6] **Municipal Corporations**⚖Nature and scope in general

To establish taxpayer standing, a Missouri taxpayer needs to show only that his or her taxes went or will go to public funds that have or will be expended due to the challenged action.

[7] **Municipal Corporations**⚖Nature and scope in general

For purposes of taxpayer standing, not all uses of governmental revenue are direct expenditures.

[8] **Municipal Corporations**⚖Nature and scope in general

General operating expenses which agency incurs regardless of allegedly illegal activity are not direct expenditures, and are insufficient to establish taxpayer standing.

[9] **Municipal Corporations**⚖Nature and scope in general

Salaries for staff time of agency employees, correspondence and telephone calls used to engage in allegedly unlawful activity are not the type of expenditure of public funds which would give rise to taxpayer standing, as they are general operating expenses which would be incurred whether or not the challenged transaction took place.

[10] **Public Contracts**⚖Conditions precedent; exhaustion of administrative remedies
States⚖Rights and Remedies of Disappointed Bidders

Disappointed bidder was required to exhaust its administrative remedies for circuit court to have authority to entertain its claim that **Office** of **Administration** violated state procurement laws by including a factor for proximity points without first promulgating a rule for awarding location-based points to license **office** vendors in its decision to award a contract to operate a license fee **office**; disappointed bidder's claim was not an additional "legal argument" or "legal theory," but was an entirely new ground for challenging **Office's** award. Mo. Ann. Stat. §§ 34.050, 536.041, 536.150.1.

[11] **Public Contracts**⚖Parties; standing

Bidders for public contracts have a legally protectable interest in a fair and equal bidding process.

[12] **Public Contracts**⚖Good faith; fairness
States⚖Acceptance or rejection in general

Bid documents which require bidders for public contracts to strategically structure bids or offers to receive scores in several categories do not present a fair opportunity to all bidders if one of the scored categories is an unlawful component of the procurement process.

[13] **Administrative Law and Procedure**⇨ Exhaustion of Administrative Remedies

Because statute governing judicial review of administrative decisions provides a right to judicial review when an agency decision is not subject to administrative review, it requires that a party exhaust its administrative remedies prior to seeking judicial review in non-contested cases. Mo. Ann. Stat. § 536.150.1.

[14] **Administrative Law and Procedure**⇨ Nature and purpose

Purpose for requiring the exhaustion of administrative remedies is to preserve the efficiency in the relationships between agencies and the courts.

[15] **Administrative Law and Procedure**⇨ Nature and purpose

Exhaustion of administrative remedies is generally required as matter of preventing premature interference with agency processes, so that agency may function efficiently and so that it may have opportunity to correct its own errors, to afford parties and courts benefit of its experience and expertise, and to compile record which is adequate for judicial review.

[16] **Public Contracts**⇨Conditions precedent; exhaustion of administrative remedies
States⇨Rights and Remedies of Disappointed Bidders

Disappointed bidder's claim did not fall under exception to requirement to exhaust administrative remedies for issues that posed no factual questions or issues requiring special expertise within agency's responsibility, but proffered only question of law, as required for circuit court to have authority to entertain disappointed bidder's claim that **Office** of **Administration** violated state procurement laws by including a factor for proximity points without first promulgating a rule for awarding location-based points to license **office** vendors in its decision to award a contract to operate a license fee **office**; **Office** was statutorily vested with responsibility to make initial determination as to whether a rule needed to be promulgated and prescribed administrative procedure for doing so. Mo. Ann. Stat. §§ 34.050, 536.041, 536.175.4.

[17] **Administrative Law and Procedure**⇨ Constitutional or legal questions

Exhaustion of administrative remedies is not required when issue poses no factual questions or issues requiring special expertise within scope of administrative agency's responsibility but instead proffers only questions of law clearly within realm of courts.

[18] **Administrative Law and Procedure**⇨ Constitutional or legal questions

Failure to exhaust administrative remedies may be justified when only or controlling question is one of law, at least where there is no issue essentially administrative, involving agency expertise and discretion, which is in its nature peculiarly administrative.

[19] **Administrative Law and Procedure**⇨ Review for arbitrary, capricious, unreasonable, or illegal actions in general

For purposes of judicial review, an agency acts arbitrarily if there is no rational basis for its decision.

[20] **Administrative Law and Procedure**⇨ Review for arbitrary, capricious, unreasonable, or illegal actions in general

For purposes of judicial review, capriciousness of an agency decision concerns whether the agency's action was whimsical, impulsive, or unpredictable.

[21] **Administrative Law and Procedure**⚖Procedure in General

An agency must not act in a totally subjective manner without any guidelines or criteria.

[22] **Public Contracts**⚖Good faith; fairness
States⚖Acceptance or rejection in general

Substantial evidence supported trial court's determination that **Office** of **Administration** acted arbitrarily, capriciously, and unlawfully in taking away proximity points and customer-service-experience points from disappointed bidder, and thus, **Office's** contract that it awarded to successful bidder to operate a license fee **office** was void; court found "no rhyme or reason" for **Office's** approach in addressing issue regarding disappointed bidder's address for its principal place of business because instead of choosing to investigate all vendors' addresses, it only singled out disappointed bidder, and **Office** permitted successful bidder to violate bid procurement rules, but did not give disappointed bidder an opportunity to clarify whether its principal place of business was truly a vacant lot. Mo. Ann. Stat. § 34.150.

[23] **Public Contracts**⚖Evaluation process
States⚖Acceptance or rejection in general

Office of **Administration** was not precluded from contacting disappointed bidder to clarify address of its principal place of business that was allegedly a vacant lot in connection with **Office's** procurement process for contract to operate a license fee **office**; **Office** allowed successful bidder to have inappropriate contacts with state employees, a ground for suspension or exclusion from the procurement process, and then used information gleaned from those inappropriate contacts to take away proximity points from disappointed bidder without giving it an opportunity to clarify its intent in listing that address.

***231 APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, The Honorable Cotton Walker, Judge**

Attorneys and Law Firms

Charles W. Hatfield, Alexander C. Barrett, Jefferson City; Renee E. Henson, Kansas City, for Respondent.

Craig H. Jacobs, Jefferson City for Appellant.

Robert R. Harding, Lowell D. Peaerson, Jefferson City, for Intervenor.

Before Division Two: Lisa White Hardwick, Presiding Judge, Thomas N. Chapman, Judge and Janet Sutton, Judge

Opinion

Lisa White Hardwick, Judge

Office of **Administration**, Division of Purchasing and Materials **Management** ("OA") appeals the judgment in favor of **LO Management** LLC and David Koester on their petition for declaratory judgment and injunctive relief alleging OA violated state procurement laws in awarding a license **office** contract to a competing vendor. OA contends the circuit court erred in granting **LO Management** and Koester relief on one of their claims because they failed to exhaust their administrative remedies. Additionally, OA asserts the court erred in finding: (1) OA needed to promulgate a rule before using proximity as one of the criteria in evaluating bids; (2) OA was required to allow **LO Management** to submit additional information to correct and supplement its proposal after the contract was awarded to the competing vendor; (3) OA acted arbitrarily, capriciously, and unlawfully in awarding proximity points and customer service experience points to **LO Management**; and (4) **LO Management**

and Koester were entitled to attorneys' fees. For reasons explained herein, we affirm, in part, and reverse, in part.

Factual and Procedural History

In October 2019, OA issued a request for proposal ("October RFP") to elicit bids to operate the license **office** in Troy for the Department of Revenue ("DOR"). The October RFP provided that, in evaluating the applications, up to 10 proximity points would be given to vendors whose principal place of business was near the Troy license **office**.

When the October RFP was issued, the Troy license **office** was operated by Koester & Koester, LLC, which was owned by Koester and his father. Before the deadline for submitting proposals to the October RFP, Koester and his uncle formed **LO Management** for the purpose of submitting a proposal. **LO Management's** Articles of Organization, filed with the Secretary of State, identified Koester's home address in O'Fallon as **LO Management's** business address.

LO Management submitted a proposal in response to the October RFP. The proposal listed Koester's home address in O'Fallon as **LO Management's** principal place of business. The Troy Chamber of Commerce, which had operated the Troy ***232** license **office** prior to Koester & Koester, also submitted a proposal in response to the October RFP. OA elected not to award the contract to any vendors under the October RFP.

Instead, in May 2020, OA issued a new RFP for operation of the Troy license **office** ("May RFP"). Proposals were due on June 4, 2020. Under the May RFP, vendors could earn up to 205 total evaluation points, split between several evaluation criteria and bidding preferences, including up to 24 points for proximity points and up to eight points for customer service experience. The contract was to be awarded to the vendor with the highest total evaluation score. Portions of the bids were to be evaluated and scored by OA, while other portions, including the proximity points and customer service experience points, were to be evaluated and scored by a three-person evaluation committee comprised of DOR employees.

Proximity points were based on the distance of the vendor's principal place of business from the current Troy license **office** as measured by Google Maps. A principal place of business within five miles of the license **office** would be given the full 24 points, with fewer points given as the distance increased up to 100 miles, over which no points would be given.

The May RFP defined the vendor's principal place of business as "the bona fide place of business for the contractor as declared by the contractor and indicated in any organizational documents for the contractor's business organization." It required that a principal place of business: (1) "Include a permanent, enclosed building or structure owned or leased by the contractor"; (2) "Be actually occupied by the contractor as a place of business"; and (3) "Be located where the public may contact [the] owner or operator of the contractor, or his or her representative, in person or by phone at any reasonable time."

To receive proximity points, the May RFP required the vendor to include documentary proof, such as a deed, mortgage or loan document, lease agreement, or property tax receipt, of its interest in the property located at the address of its principal place of business. The May RFP instructed that the address a vendor listed for its principal place of business had to be a street address and not a post **office** box. The May RFP further provided that, if the vendor had a business address that it had filed with the Secretary of State's **office**, it had to use this address as its principal place of business address. If the vendor did not indicate any principal place of business address, it would not receive any proximity points.

Other general terms of the May RFP included a provision advising that it was the vendor's responsibility to ask questions and advise OA if the vendor believed that any language, specifications, or requirements violated any state or federal law or regulations. Any questions or issues regarding the May RFP were to be submitted to an identified "buyer" no

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later than 10 calendar days prior to the due date of the proposals. In fact, the May RFP emphasized that all questions or comments from vendors regarding the May RFP were to be directed *only* to the buyer:

> Vendors and their agents (including subcontractors, employees, consultants, or anyone else acting on their behalf) must direct all of their questions or comments regarding the RFP, the evaluation, etc. to the buyer of record indicated on the first page of this RFP. *Vendors and their agents may not contact any other state employee regarding any of these matters during the solicitation and evaluation process. Inappropriate contacts are grounds for suspension and/or* ***233** *exclusion from specific procurements.* Vendors and their agents who have questions regarding this matter should contact the buyer of record.

(Emphasis added.)

The May RFP further provided that OA was "under no obligation to solicit information if it is not included with the proposal." Vendors were warned that "ambiguous responses" may result in an "unfavorable evaluation" of the proposal, but OA "reserve[d] the right to request clarification of any portion of the vendor's response in order to verify the intent of the vendor." The vendor was cautioned that its response "may be subject to acceptance or rejection without further clarification." In evaluating a proposal, OA "reserve[d] the right to consider relevant information and fact, whether gained from a proposal, from a vendor, from vendor's references, or from any other source."

After OA issued the May RFP and increased the number of possible proximity points, **LO Management** decided to obtain **office** space in Troy. Through a real estate agent, **LO Management** rented a unit in the back of a building located at 499 Main Street in Troy. The space had previously been rented to other businesses and was within five miles of the current Troy license **office**. **LO Management's** commercial lease agreement stated that the unit was commonly known as 491 West Wood Street, and **LO Management's** real estate agent told Koester that this was the correct address for the unit. **LO Management** updated its address with the Secretary of State to reflect 491 West Wood Street as its business address. At the time the commercial lease was drafted, however, the **office** space did not have an address formally assigned to it by the Lincoln County 911 Mapping and Addressing Department, which is the entity responsible for assigning addresses to properties in Lincoln County. In fact, the address of 491 West Wood Street was assigned on most common mapping systems to a vacant lot several blocks down the street from the **office** space.

Six vendors, including the Troy Chamber of Commerce and **LO Management**, submitted proposals in response to the May RFP. In its proposal, submitted on June 3, 2020, **LO Management** requested proximity points, listing 491 West Wood Street as the address of its principal place of business. **LO Management** did not include a copy of the commercial lease with its proposal but stated that a copy of the lease was available upon request. **LO Management** also requested customer service experience points.

Two days after **LO Management** submitted its proposal, Rachel South, the Executive Director for the Troy Chamber of Commerce, emailed the buyer and the **office** of OA's Commissioner notifying them that **LO Management's** principal place of business address was "nothing but a fake address, empty lot at best." South copied her email to several other people, including State Senator Jeanie Riddle; Mary Cotton, Riddle's assistant; and State Representative Randy Pietzman. Riddle's **office** contacted DOR about the Troy license **office** and the bidding process.

On August 27, 2020, the DOR evaluation committee authorized OA to award the contract for the Troy license **office** to **LO Management**. In scoring **LO Management's** proposal, the DOR evaluation committee gave **LO Management** 24 proximity points based on the address of 491 West Wood Street for its principal place of business. The committee gave **LO Management** zero points for customer service

experience. **LO Management's** overall point total was almost 20 points higher than the point total of the next highest vendor, which was Troy Chamber of Commerce.

*234 The same day that the DOR evaluation committee authorized OA to award the Troy license **office** contract to **LO Management**, Riddle began contacting the **office** of Sarah Steelman, then OA's Commissioner. Steelman's executive assistant sent an email to Steelman on August 27, 2020, advising her, "Sen. Riddle [stated Riddle's cell phone number] called yesterday and today regarding fee **office** contracts. She said that the contract is supposed to go into effect tomorrow. It is her understanding that it is in OA's court. She would like for you to call her about it. She has thoughts to share." Steelman's **office** was aware that Riddle was calling about the Troy license **office**. Steelman talked to Riddle, who expressed concern that **LO Management's** principal place of business address was a vacant lot.

According to Joseph Plaggenberg, the Director of the Motor Vehicle and Driver Licensing Division, there was no reason for Riddle, or anyone else, to be aware that an award was about to be made, because that information should have been kept confidential until the award was actually made. Furthermore, Plaggenberg believed it was improper for the Troy Chamber of Commerce to be communicating with DOR instead of the buyer, and it was improper for the Troy Chamber of Commerce to use a state official to contact DOR on its behalf.

Nevertheless, in response to Riddle's contact, Steelman suggested to Ken Zeller, then DOR's Director, that the physical address of the bids be checked to ensure the addresses were accurate. DOR checked Google Maps, contacted the Lincoln County Assessor, and sent an employee to 491 West Wood Street. Each confirmed that the address was a vacant lot. DOR did not contact **LO Management** as part of its investigation. DOR did not check the physical addresses of any of the other proposals submitted for the Troy license **office**.

Following DOR's investigation into **LO Management's** address, the DOR evaluation committee completed a new evaluation report. The committee gave **LO Management** zero proximity points on the basis that the location of its principal place of business "is a vacant lot." The committee also changed **LO Management's** customer service experience rating to award it one point.

As a result of the revised scoring, the Troy Chamber of Commerce received an overall evaluation score that was 1.5 points higher than **LO Management's** score. The DOR evaluation committee authorized OA to award the contract to the Troy Chamber of Commerce. On October 6, 2020, OA awarded the contract to the Troy Chamber of Commerce.

LO Management subsequently filed a bid protest with OA, asserting that it should have received 24 proximity points because its listing of the incorrect address for its principal place of business was "due to an unfortunate misunderstanding, outside **LO Management's** control." As an attachment to its bid protest, **LO Management** submitted the lease on its principal place of business, an affidavit from its realtor explaining that the unit **LO Management** rented was commonly known to everyone, including the building's owner, as 491 West Wood Street, and a letter from the Lincoln County 911 Mapping and Addressing Department issuing a new address of 195 West Wood Street for the property on October 7, 2020, the day after OA awarded the contract to the Troy Chamber of Commerce. **LO Management** also asserted in its bid protest that it should have received more than one point for customer service experience.

OA denied **LO Management's** bid protest. OA rejected **LO Management's** request *235 for more proximity points on the basis that it could not "allow a vendor to supplement their proposal after the scoring with material that was not available to the evaluation committee." Additionally, OA declined to change **LO Management's** customer service experience score.

LO Management and Koester subsequently filed a petition for declaratory judgment and injunctive relief

in Cole County Circuit Court challenging OA's denial of its protest. They alleged that OA violated procurement laws by: refusing to award **LO Management** any proximity points for the location of its principal place of business (Count I); awarding **LO Management** fewer customer service experience points than it merited (Count II); and including the proximity points factor in the May RFP because OA did not validly promulgate a rule for awarding location-based points to license **office** vendors (Count III).

Trial was held in June 2021. On October 4, 2021, the circuit court ruled in **LO Management** and Koester's favor on all counts, concluding that OA acted arbitrarily, capriciously, and unlawfully in awarding the contract to the Troy Chamber of Commerce and that the contract award was unlawful and void. The court permanently enjoined OA from taking any action to implement the contract awarded to the Troy Chamber of Commerce as a result of the May RFP and from awarding any other contract based on the May RFP. On October 27, 2021, **LO Management** and Koester filed a motion for attorneys' fees under Section 536.021.9.[1] The court issued an amended judgment awarding **LO Management** and Koester $114,013 in attorneys' fees. OA appeals.

Standard of Review

[1] Section 536.150 governs judicial review of non-contested administrative decisions. *Mo. Nat. Educ. Ass'n v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 274 (Mo. App. 2000). In non-contested cases, the circuit court conducts a "de novo review in which it hears evidence on the merits of the case, makes a record, determines the facts, and decides whether, in view of those facts, the agency's decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion." *Id.*

[2] [3] On appeal, we review the circuit court's judgment and not the administrative agency's decision. *Id.* Our review of the circuit court's judgment is "essentially the same as the review for a court-tried case" and, therefore, "is governed by Rule 73.01 as construed in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976)." *Id.* at 274-75. We will affirm the circuit court's decision unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Tri-Cty. Counseling Servs., Inc. v. **Office** of Admin.*, 595 S.W.3d 555, 563 (Mo. App. 2020).

Analysis

In Point I, OA contends the circuit court erred in granting **LO Management** and Koester relief on their claim in Count III that OA violated state procurement laws by including the proximity points factor in the May RFP without first promulgating a rule for awarding location-based points to license **office** vendors. OA argues **LO Management** and Koester failed to exhaust their administrative remedies by not asserting ***236** this claim prior to filing their petition in the circuit court.[2]

[4] Koester contends he had no administrative remedies to exhaust because he was challenging the award of the Troy license **office** contract to the Troy Chamber of Commerce in his standing as a taxpayer. He argues that, because he was merely a taxpayer and not the bidder, he could not have submitted a bid protest raising this claim.

[5] To be entitled to taxpayer standing, "a taxpayer must establish that one of three conditions exists: (1) a direct expenditure of funds generated through taxation; (2) an increased levy in taxes; or (3) a pecuniary loss attributable to the challenged transaction of a municipality." *Lee's Summit License, LLC v. **Office** of Admin.*, 486 S.W.3d 409, 418 (Mo. App. 2016) (quoting *Manzara v. State*, 343 S.W.3d 656, 659 (Mo. banc 2011)).

[6] Koester asserts he had taxpayer standing under subdivision (1). The Supreme Court has interpreted "a direct expenditure of funds generated through taxation" to mean "a sum paid out, without any intervening agency or step, of money or other liquid assets that come into existence through the means by which the

state obtains revenue required for its activities." *Manzara*, 343 S.W.3d at 660. To establish standing under this subdivision, "a Missouri taxpayer needs to show only that his or her taxes went or will go to public funds that have or will be expended due to the challenged action." *State ex rel. Mo. Auto. Dealers Ass'n v. Mo. Dep't of Revenue & Its Dir.*, 541 S.W.3d 585, 593 (Mo. App. 2017) (citation omitted).

[7] [8] [9] "However, not all uses of governmental revenue are 'direct' expenditures under these standards." *Id.* (internal quotation marks and citation omitted). "[G]eneral operating expenses which an agency incurs regardless of the allegedly illegal activity are not direct expenditures, and are insufficient to establish taxpayer standing." *Id.* (internal quotation marks and citation omitted). "Thus, salaries for staff time of [agency] employees, correspondence and telephone calls used to engage in the allegedly unlawful activity are not the type of expenditure of public funds which would give standing, as they are general operating expenses which would be incurred whether or not the challenged transaction took place." *Id.* (citations omitted).

Koester alleged in the petition that he was aggrieved as a taxpayer because, "[i]f the Troy Chamber of Commerce is permitted to proceed with the contract, the State will be obligated to expend State funds generated through taxation in connection with the implementation of the contract." The funds that the State would be obligated to expend to implement the contract to operate a license fee **office** in Troy would be expended regardless of whether the contract was awarded, allegedly illegally, to the Troy Chamber of Commerce, or whether it was awarded, allegedly legally, to **LO Management** or to any other vendor. Because the State is obligated to expend funds to operate license **offices**, this is the type of general operating expense that would be incurred whether or not the challenged transaction of awarding the contract to the Troy Chamber of Commerce took place. *See id.* Thus, Koester has not demonstrated that OA's actions "impacted the direct expenditure of public *237 funds of the nature sufficient to establish taxpayer standing." *Id.* (citation omitted). Where, as in this case, the "tenor" of the plaintiff's challenge "is as [a] competitor seeking to avoid competition and not as [a] vindicator of a larger public interest," the plaintiff does not have standing to bring the action as a taxpayer. *Id.* (internal quotation marks and citation omitted). Koester did not have taxpayer standing to assert the claim in Count III that the inclusion of proximity points as a factor in the May RFP was unlawful because it was not promulgated as a rule. Because Koester did not have standing, the circuit court had no authority to entertain his claim in Count III of the petition.

[10] [11] [12] We turn next to whether the court had the authority to entertain **LO Management's** claim in Count III by looking at whether **LO Management** exhausted its administrative remedies prior to asserting this claim.[3] To seek administrative review of a state-awarded contract, 1 CSR § 40-1.050(12) requires that a bid protest "be submitted in writing to the director or designee and received by the division within ten (10) days after the date of the award." The protest must include, among other things, a "[d]etailed statement describing the grounds for the protest." 1 CSR § 40-1.050(12)(D). The director or designee will review the protest and "will only issue a determination on the issues asserted in the protest." 1 CSR § 40-1.050(12).

[13] If the protesting party disagrees with the director or designee's decision, then Section 536.150.1 provides for judicial review of the decision. "Because section 536.150.1 provides a right to judicial review when an agency decision is 'not subject to administrative review,' it requires that a party exhaust its administrative remedies prior to seeking judicial review in non-contested cases." *Tri-Cty. Counseling*, 595 S.W.3d at 568 (quoting *State ex rel. Robison v. Lindley-Myers*, 551 S.W.3d 468, 472 (Mo. banc 2018)).

[14] [15] The purpose for requiring the exhaustion of administrative remedies is to preserve "the efficiency in the relationships between agencies and the courts." *Id.* (citation omitted). The exhaustion requirement recognizes the agency's ability not only to develop a factual record, but also to address issues within its purview and expertise:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Boot Heel Nursing Ctr., Inc. v. Mo. Dep't of Soc. Servs., 826 S.W.2d 14, 16 (Mo. App. 1992).

LO Management acknowledges that it did not assert in its bid protest that the inclusion of proximity points was unlawful because it was not promulgated as a rule ***238** but argues it was not required to do so because the issue was merely an additional "legal argument" or "legal theory." We disagree. In its bid protest, **LO Management** argued it was entitled to the full 24 proximity points under the May RFP. Thus, while the bid protest challenged the number of proximity points **LO Management** was awarded under the May RFP, Count III challenged the lawfulness of the inclusion of proximity points as a factor in the first place and, consequently, the validity of the May RFP. This was not simply an additional "legal argument" or "legal theory" to support the grounds asserted in the bid protest; it was an entirely new ground for challenging the award.

[16] [17] [18] Nevertheless, **LO Management** insists that its claim in Count III falls under an exception to the exhaustion requirement. Exhaustion of administrative remedies is not required when an issue "poses no factual questions or issues requiring the special expertise within the scope of the administrative agency's responsibility, but instead proffers only questions of law clearly within the realm of the courts." *Premium Std. Farms, Inc. v. Lincoln Twp. of Putnam Cty.*, 946 S.W.2d 234, 238 (Mo. banc 1997) (citation omitted). "A failure to exhaust administrative remedies may be justified when the only or controlling question is one of law, at least where there is no issue essentially administrative, involving agency expertise and discretion, which is in its nature peculiarly administrative." *Id.* (citations omitted). **LO Management** argues that whether the inclusion of the proximity points factor in the May RFP was unlawful because it was not promulgated as a rule was a purely legal issue that needed no factual development or OA's specialized expertise. We disagree.

LO Management's claim in Count III did not present a purely legal issue outside the realm of OA's responsibility and expertise. The legislature provides the commissioner of **administration** the authority to make rules concerning procurements:

> The commissioner of **administration** shall make and adopt such rules and regulations, not contrary to the provisions of this chapter, for the purchase of supplies and prescribing the purchasing policy of the state as may be necessary. No rule or portion of a rule promulgated under the authority of this chapter shall become effective unless it has been promulgated pursuant to the provisions of section 536.024.

§ 34.050. The legislature's use of the phrase "as may be necessary" indicates that the commissioner of **administration** has discretion to determine when to make and adopt rules.

This is consistent with Section 536.041, which allows for persons to file a petition with any administrative agency requesting the adoption of a rule. Section 536.041 provides that, after such a petition is filed, the decision as to whether to the proposed rule should be adopted is to be made by the agency. Along with its decision, the agency is required to submit a "concise summary of the state agency's specific facts and findings with respect to the criteria in Section 536.175.4." The criteria in Section 536.175.4 are:

> (1) Whether the rule continues to be necessary, taking into consideration the purpose, scope, and intent of the statute under which the rule was adopted;

(2) Whether the rule is obsolete, taking into consideration the length of time since the rule was modified and the degree to which technology, economic conditions, or other relevant factors have changed in the subject area affected by the rule;

(3) Whether the rule overlaps, duplicates, or conflicts with other state rules, *239 and to the extent feasible, with federal and local governmental rules;

(4) Whether a less restrictive, more narrowly tailored, or alternative rule could adequately protect the public or accomplish the same statutory purpose;

(5) Whether the rule needs amendment or rescission to reduce regulatory burdens on individuals, businesses, or political subdivisions or eliminate unnecessary paperwork;

(6) Whether the rule incorporates a text or other material by reference and, if so, whether the text or other material incorporated by reference meets the requirements of section 536.031;

(7) For rules that affect small business, the specific public purpose or interest for adopting the rules and any other reasons to justify its continued existence; and

(8) The nature of the comments received by the agency under subsection 2 of this section, a summary of which shall be attached to the report as an appendix and shall include the agency's responses thereto.

Section 536.041 further provides for the joint committee on administrative rules and the commissioner of **administration** to be involved in this process.

These statutes indicate that the legislature has vested the responsibility of making the initial determination as to whether a rule needs to be promulgated with OA and prescribed the administrative procedure for doing so. **LO Management's** attempt to take this decision away from OA and bypass the administrative procedure entirely by seeking relief first from the court prematurely interferes with agency processes, deprives OA of an opportunity to correct its own errors if it were to determine that promulgating a rule was required, and deprives the parties and the courts of the benefit of OA's experience and expertise in applying the criteria set forth in Section 536.175.4 in making its decision. **LO Management** was required to exhaust its administrative remedies on its claim that OA violated state procurement laws by including the proximity points factor in the May RFP without first promulgating a rule for awarding location-based points to license **office** vendors. Point I is granted.

Because Koester lacked standing to assert the claim in Count III and **LO Management** failed to exhaust its administrative remedies with regard to this claim, the court had no authority to entertain Count III of the petition. Therefore, the judgment in favor of **LO Management** and Koester on Count III is reversed. We deny as moot Point II, in which OA challenges the merits of the court's award in favor of **LO Management** and Koester on Count III. Lastly, because the court was without the authority to entertain Count III of the petition, and the judgment of $114,013 in attorneys' fees was premised entirely on the court's finding in favor of **LO Management** and Koester on Count III,[4] we reverse the attorneys' fees award in favor of **LO Management** and Koester. In light of *240 this reversal, we need not further address Point V, in which OA challenges the merits of the court's award of attorneys' fees in favor of **LO Management** and Koester.

[19] [20] [21] In Points III and IV, OA challenges the court's conclusion that it acted arbitrarily, capriciously, and unlawfully in awarding proximity points and customer service experience points to **LO Management**. An agency acts arbitrarily if there is no rational basis for its decision. *Mo. Nat. Educ. Ass'n*, 34 S.W.3d at 281. "Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable." *Id.* "An agency must not act in a totally subjective manner without any guidelines or criteria." *Id.*

[22] Looking first at the proximity points award, the court concluded that OA's "handling of the entire series

of events that resulted in DOR taking the proximity points away from **LO Management** was arbitrary and capricious." In particular, the court noted that DOR's usual practice of evaluating proximity points by simply inserting the listed address into Google Maps to determine the distance would have resulted in **LO Management's** receiving the full 24 proximity points. The court found that OA's decision to deviate from that practice based on communication on behalf of and from a competing vendor was arbitrary. The court further found "no rhyme or reason" for OA's approach to the address issue, because instead of choosing to investigate all vendors' addresses, OA singled out one vendor, **LO Management**, "against whom vendor, Troy Chamber, engaged in improper communication." Specifically, the court explained that OA permitted the Troy Chamber of Commerce to violate, without repercussion, the May RFP's rules, but OA did not give **LO Management** the opportunity to clarify whether its principal place of business was truly a vacant lot. The court found that seeking this clarification from **LO Management** "would have been the most reasonable response—it is absurd to believe a vendor would intentionally list a vacant lot as its address in both its proposal and with the Secretary of State." The court concluded, "These disparate approaches resulted in **LO Management** being treated unfairly." Substantial evidence supports these findings.

[23] OA argues, however, that it was not allowed to contact **LO Management** to clarify its principal place of business address because *State ex rel. Stricker v. Hanson*, 858 S.W.2d 771 (Mo. App. 1993), does not allow vendors to supplement their proposals after the close of the bid process. In *Stricker*, a vendor submitted a bid that failed to include information necessary for its bid to even be considered. *Id.* at 772-76. After all of the other bids were submitted, and the vendor knew it had been deemed the lowest bidder, OA allowed the vendor to supply the missing information. *Id.* We found that the vendor's initial bid was non-responsive, in that it contained a material variance from the awarding authority's specifications. *Id.* at 776. We further found that the non-responsive initial bid should have been rejected because "a bid which contains a material variance may not be corrected after the bids have been opened in order to make it responsive." *Id.* As OA's consideration of the corrected bid afforded the vendor "a substantial advantage or benefit not enjoyed by the other bidders," we held that the award of the contract to that vendor was unlawful. *Id.* at 777-78.

Stricker is inapposite. The OA's Director of the Division of Purchasing testified that there was not a responsiveness issue with **LO Management's** bid. The circuit court found that **LO Management** actually leased an **office** space that qualified under the May RFP as a principal place of business *241 within five miles of the license **office** in Troy. The court further found that this **office** space did not have an address formally assigned to it by the Lincoln County 911 Mapping and Addressing Department when **LO Management** submitted its bid and that the only address for the **office** space was its "commonly known address" of 491 West Wood Street. Asking **LO Management** to clarify its principal place of business address under these circumstances is not comparable to allowing the bidder in *Stricker* to supply a material term that it had previously left blank in its initial bid. The May RFP expressly provided that OA "reserve[d] the right to request clarification of any portion of the vendor's response in order to verify the intent of the vendor." If OA believed *Stricker* precluded it from seeking clarification from vendors, it should not have included this provision in the May RFP.

While the May RFP may not have required OA to seek clarification on **LO Management's** principal place of business address, it did not preclude OA from doing so, and OA should have sought clarification under the circumstances. OA allowed a competing bidder, the Troy Chamber of Commerce, to have inappropriate contacts with state employees—a ground for suspension and/or exclusion from specific procurements under the May RFP—and then used the information gleaned from those inappropriate contacts to award **LO Management** zero proximity points without giving **LO Management** the opportunity to clarify its intent in listing that address. There was no rational basis for OA's actions, which appear to have been entirely subjective and unpredictable. The circuit

Commented [ER2]: Not much new law here but you must play fair with everyone involved. This case can be used to discipline a recalcitrant client who is thinking about "putting their thumb on the scale."

court did not err in finding that OA acted arbitrarily, capriciously, and unlawfully in awarding proximity points to **LO Management**.[5] The portion of Point III alleging error in the court's judgment regarding the proximity points award is denied.

Because we are affirming the circuit court's determination that OA acted arbitrarily, capriciously, and unlawfully in awarding proximity points to **LO Management**, we find, pursuant to Section 34.150,[6] that the court correctly declared that the contract awarded to the Troy Chamber of Commerce was void on this basis. Therefore, there is no need for us to address, and we deny as moot, the remaining portion of Point III and the entirety of Point IV, both of which allege error in the court's determination that OA acted unlawfully in awarding customer service experience points to **LO Management**.

Conclusion

The court's ruling in favor of **LO Management** and Koester on their claim in Count III of their petition that OA's inclusion of proximity points in the May RFP was unlawful because it was not promulgated as a rule is reversed. The award of attorneys' fees to **LO Management** and *242 Koester is reversed. The court's declaration that the license **office** contract awarded to the Troy Chamber of Commerce was void because OA acted arbitrarily, capriciously, and unlawfully in awarding proximity points to **LO Management** is affirmed.

All Concur.

All Citations

658 S.W.3d 228

Footnotes

1 All statutory references are to the Revised Statutes of Missouri 2016, as updated by the 2019 Cumulative Supplement.

2 After the petition was filed, OA filed a motion to dismiss Count III on this basis. The court denied the motion.

3 The parties do not dispute on appeal that **LO Management** had standing to assert Count III. Bidders have a legally protectable interest in a fair and equal bidding process. *Byrne & Jones Enters., Inc. v. Monroe City R-1 Sch. Dist.*, 493 S.W.3d 847, 854 (Mo. banc 2016). **LO Management** asserted in its petition that the unlawful inclusion of proximity points as a factor deprived it of a fair opportunity to compete in the bidding process. "[B]id documents which require bidders to strategically structure bids or offers to receive scores in several categories do not present a 'fair opportunity' to all bidders if one of the scored categories is an unlawful component of the procurement process." *Lee's Summit License*, 486 S.W.3d at 417.

4 The court awarded attorneys' fees under Section 536.021.9, which provides, in pertinent part:

> If it is found in a contested case by an administrative or judicial fact finder that a state agency's action was based upon a statement of general applicability which should have been adopted as a rule, as required by sections 536.010 to 536.050, and that agency was put on notice in writing of such deficiency prior to the administrative or judicial hearing on such matter, then the administrative or judicial fact finder shall award the prevailing nonstate agency party its reasonable attorney's fees incurred prior to the award, not to exceed the amount in controversy in the original action.

5 OA argues that its decision to award **LO Management** zero proximity points could also be supported by **LO Management's** failure to follow the May RFP's instructions to provide a copy of the lease agreement or other documentation for its principal place of business with its bid. While OA could have denied **LO Management** proximity points on this basis, the evidence shows that it did not. Moreover, OA awarded a competing bidder who also did not provide any documentation for its principal place of business 22 proximity points, so denying **LO Management** proximity points on this basis would have been arbitrary and capricious.

6 Section 34.150 states, in pertinent part, "Whenever any department or agency of the state government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions of this chapter or the rules and regulations made thereunder, such order or contract shall be void and of no effect."

Wilson v. City of St. Louis

Missouri Court of Appeals, Eastern District, Division Two. | October 29, 2013 | 418 S.W.3d 501 | 2013 WL 5798953

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Outline

Political activity by public employee at work.

418 S.W.3d 501
Missouri Court of Appeals,
Eastern District,
Division Two.

Gilbert **WILSON**, Plaintiff/Appellant,
v.
The **CITY** OF **ST. LOUIS**, Missouri, the Civil Service Commission of the **City** of **St. Louis** by Steven M. Barney, John H. Clark and Stanley Newsome, Sr.,
Defendants/Respondents.

No. ED 99288.
|
Oct. 29, 2013.
|
Motion for Rehearing and/or Transfer to Supreme Court Denied Dec. 5, 2013.
|
Application for Transfer Denied Feb. 4, 2014.

Synopsis

Background: **City** employee petitioned for administrative review of Civil Service Commission's decision affirming employee's termination as a financial analyst, and filed a separate motion for an evidentiary hearing. The Circuit Court, **City** of **St. Louis**, Joan L. Moriarty, J., denied employee's motion for an evidentiary hearing, and affirmed the Commission's decision, Employee appealed.

Holdings: The Court of Appeals, Sherri B. Sullivan, J., held that:

[1] provisions of **city** charter and civil service rules that prohibited any **city** employee in the classified service from distributing or forwarding through the **city's** e-mail system any e-mail that had an attachment containing a political message, or from taking part in a partisan political campaign, including any attempt to influence voters by distributing any indicia favoring or opposing a candidate for election or nomination to a public office, did not impinge on employee's rights to due process, free speech, or equal protection;

[2] provisions of **city** charter and civil service rules prohibiting the distribution of e-mails were not unconstitutionally overbroad and vague, failing to give fair notice of what was prohibited;

[3] provisions of **city** charter and civil service rules encompassed the sending of an e-mail that encouraged support of a candidate for mayor in an upcoming mayoral election;

[4] the Director of Personnel was not precluded from delegating investigation of alleged rules violations to someone else;

[5] the ten-day period for employee to file an appeal of his forced leave began to run on the date he was informed that he was being placed on forced leave pending a pre-termination hearing;

[6] **city** employee had no right to representation pursuant to regulation that provided union employees were entitled to have an employee representative present during a pre-termination review; and

[7] Circuit Court's denial of employee's request for an evidentiary hearing did not constitute an abuse of discretion.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (13)

[1] **Public Employment**⇨Questions of law and fact in general: findings and conclusions in general

Upon review of a Circuit court decision affirming a decision of the Civil Service Commission, an appellate court reviews

the decision of the Commission, not the judgment of the circuit court. V.A.M.S. § 536.140.

[2] **Public Employment**⇐Questions of law and fact in general; findings and conclusions in general

Upon review of a decision of the Civil Service Commission, an appellate court determines whether the Commission's findings are supported by competent and substantial evidence on the record as a whole, whether the decision is arbitrary, capricious, unreasonable, involves an abuse of discretion, or is unauthorized by law.

1 Case that cites this headnote

[3] **Public Employment**⇐Standard of Review in General

Upon review of a decision of the Civil Service Commission, an appellate court reviews the entire record, not just the evidence supporting the Commission's decisions, and where the evidence supports opposing findings, an appellate court affords deference to the Commission's decision.

[4] **Public Employment**⇐Questions of law and fact in general; findings and conclusions in general

An appellate court does not defer to the Civil Service Commission's findings on questions of law.

[5] **Constitutional Law**⇐Political speech, beliefs, or activities
Constitutional Law⇐Restrictions on political activity
Constitutional Law⇐Particular issues and applications
Election Law⇐In general; eligibility for office

Provisions of **city** charter and civil service rules that prohibited any **city** employee in the classified service from distributing or forwarding through the **city's** e-mail system any e-mail that had an attachment containing a political message, or from taking part in a partisan political campaign, including any attempt to influence voters by distributing any indicia favoring or opposing a candidate for election or nomination to a public office, did not impinge on employee's rights to due process, free speech, or equal protection, since they served the legitimate goal of increasing efficiency in public service. U.S.C.A. Const.Amends. 1, 5, 14.

[6] **Constitutional Law**⇐Public employees and officials
Constitutional Law⇐Public employees and officials
Election Law⇐In general; eligibility for office

Provisions of **city** charter and civil service rules that prohibited any **city** employee in the classified service from distributing or forwarding through the **city's** e-mail system any e-mail that had an attachment containing a political message, or from taking part in a partisan political campaign, including any attempt to influence voters by distributing any indicia favoring or opposing a candidate for election or nomination to a public office, were not unconstitutionally overbroad and vague, failing to give fair notice of what was prohibited; the charter and rules provisions were quite clear and sufficiently concise in their prohibitive language.

[7] **Election Law**⇐In general; eligibility for office

City charter and civil service rule provisions that prohibited the distribution of any indicia favoring or opposing a candidate for election or nomination to a public office by any **city** employee in the classified service encompassed the sending

of an e-mail by any such employee that encouraged support of a candidate for mayor in an upcoming mayoral election.

[8] **Election Law**⇨Proceedings and review

Civil service rule that provided the Director of Personnel "shall" conduct an investigation into any violations of civil service rules that prohibited the distribution of political e-mails through the **city** e-mail system did not preclude the Director from delegating any such investigation to someone such as the Deputy Director.

[9] **Municipal Corporations**⇨Proceedings
Public Employment⇨Accrual, computation, and tolling

The ten-day period for **city** employee to file an appeal of his forced leave began to run on the date he was informed that he was being placed on forced leave pending a pre-termination hearing.

[10] **Municipal Corporations**⇨Proceedings
Public Employment⇨Requisites and sufficiency of hearing

City employee who was not a member of a collective bargaining agreement had no right to representation pursuant to a Department of Personnel Administrative Regulation that provided covered **city** employees were entitled to have an employee representative present during a pre-termination review.

[11] **Municipal Corporations**⇨Review
Public Employment⇨Standard of Review in General

Trial court's denial of **city** employee's request for an evidentiary hearing upon review of the Civil Service Commission's affirmation of employee's termination did not constitute an abuse of discretion; the Commission indicated in its decision that it had reviewed and considered the full record and was presumed to have made its decision in compliance with applicable statutes, employee was advised in writing of the pre-termination review and provided a summary of the charges and his right to representation, and the Commission based its decision on the actions of employee, and not upon the actions of other employees. V.A.M.S. §§ 536.080(2), 536.140(4).

[12] **Administrative Law and Procedure**⇨Evidence and Witnesses

An appellate court interferes with a trial court's refusal to take additional evidence in its review of an administrative agency decision only where there is an abuse of the trial court's discretion in refusing to delve further into the matter.

[13] **Administrative Law and Procedure**⇨Presumptions and Burdens on Review

There is a presumption that administrative decisions are made in compliance with applicable statutes.

Attorneys and Law Firms

***504** Charles W. Bobinette, **St. Louis**, MO, for Plaintiff/Appellant.

Patricia A. Hageman, Christine L. Hodzic, **St. Louis**, MO, for Defendants/Respondents.

SHERRI B. SULLIVAN, Judge.

Introduction

Gilbert **Wilson** (Appellant) seeks appellate review of a contested case whereby the Civil Service Commission (Commission) affirmed his termination of employment as a financial analyst in the **City** of **St. Louis's** (**City**) Office of the Comptroller Financial Reporting Section, Tax Increment Financing, and the circuit court denied his request for an evidentiary hearing. We affirm.

Factual and Procedural Background

On February 11, 2009, Appellant forwarded an email from fellow **City** worker Percy Green (Green) whose subject line read, "For Your Information and Circulation!" The email included an attachment, which Appellant claims not to have opened before forwarding the email to approximately forty-five to sixty people, including coworkers. One coworker, Candice Gordon (Gordon), called Appellant to express her concern that the email was political. The attachment, in fact, solicited support for a candidate for a partisan election, to-wit: Irene J. Smith for Mayor of the **City** of **St. Louis** in the March 3, 2009, Democratic primary election, as well as three candidates for the **St. Louis** Board of Education. Appellant opened the email's attachment and then deleted the email. Appellant also sent the email to coworker Vanessa Carter (Carter), who told Appellant's immediate supervisor Beverly Fitzsimmons (Fitzsimmons) that he had sent an email that was against the Civil Service Rules and forwarded her a copy. Upon learning of the email, Deputy Comptroller John Zakibe (Zakibe) notified Deputy Director of Personnel Linda Thomas (Thomas). Appellant was directed to meet with Fitzsimmons and Zakibe regarding the email. At the meeting, Appellant claimed he was not aware of the contents of the attachment when he forwarded the email and believed it was religious in nature.

On February 27, 2009, Appellant was notified that he was being placed on leave pending a pre-termination hearing scheduled for March 6, 2009. The notice of pre-termination review provided him with written notice of a summary of the charges, a brief description of the offending behavior, and his rights to representation at the review. It notified him he was entitled to explain his actions, dispute any facts and/or present any mitigating circumstances. At the hearing, Appellant declined representation but responded to the allegations. Appellant testified he was not aware of the contents of the email's attachment and believed the email "was one of those emails [that] tells you to send it to a group of 20 people in a certain amount of time."

***505** On March 6, 2009, after consultation with Zakibe, Legal Advisor and Chief of Staff Elaine Spearman (Spearman) terminated Appellant from his employment for having "distributed/forwarded through the **City's** Group Wise e-mail system an e-mail, which contained an attachment soliciting support for a candidate for a partisan election ... a violation of the provisions of the Code of Conduct, Rule XV, § 2 of the Civil Service Rules, Article XVIII, § 19 of the **City** Charter and a memorandum issued November 19, 2007 by ... Spearman, all pertaining to prohibited political activity and a violation of the **City** of **St. Louis** Information Systems E–Mail Policy." Appellant received a copy of the Code of Conduct for **St. Louis City** employees prior to February 11, 2009.

On June 17, 2009, the Commission held an evidentiary hearing on Appellant's appeal of his termination. Appellant introduced testimony and evidence of other employees charged with violating the **City's** prohibitions on political activity who had not been terminated. Appellant also testified he was unaware of the contents of the attachment and forwarded the email to people he thought may be interested in it because he thought it was probably religious in nature. The Commission made a finding that Appellant's testimony was not credible.

On September 10, 2010, the Commission issued its Decision including Findings of Fact and Conclusions of Law upholding Appellant's dismissal. The Commission determined Appellant's action in distributing the email and forwarding it through the **City's** Group–Wise email system was in violation of the **City** Charter, Article XVIII, Section 19; Civil Service Rule XV, Section 2; and a memorandum issued by Appellant's Appointing Authority, Darlene Green, on November 19, 2007, because the email contained an attachment soliciting support for a candidate in a partisan political election. The Commission found Appellant was dismissed from **City** Service for good and just cause as set forth in Rule IX, Section 3(a)(5) of the Civil Service Rules, which reads, in part, as follows:

> Employees in the competitive service may be dismissed, demoted, reduced in pay, suspended without pay, or reprimanded for just cause.
>
> (a) Appointing authorities may take one of the following disciplinary actions for just cause:
>
> ...
>
> (5) Dismiss the employee from City Service.

The Commission also took note of Section VIII of the Department of Personnel Administrative Regulation No. 117, which contains the following "Dismissal" exception for the Commission's general policy of progressive discipline[4]:

> Exceptions to Progressive Discipline
>
> ***506** There are some actions which are so serious that progressive discipline is inappropriate or insufficient and, therefore, immediate dismissal is warranted. Listed below are some examples of actions which may be exceptions to progressive discipline. These examples are not intended to be all inclusive
>
> ....
>
> Participation in any political activity prohibited by the Charter of the **City** of **St. Louis** or Civil Service Rules.

On October 1, 2010, Appellant filed a petition for administrative review of the Commission's decision with the circuit court and a separate motion for evidentiary hearing. On May 5, 2011, Appellant argued his motion for evidentiary hearing, which the circuit court denied on October 4, 2011. On July 23, 2012, Appellant filed an amended motion for evidentiary hearing, which merely added another allegation of a civil service worker sending a political email from a **city** account, as published in the ***St. Louis*** *Post–Dispatch* on April 17, 2012, and thus not available at the time of the hearing before the Commission. On October 18, 2012, the circuit court issued its order and judgment denying the motion and affirming the Commission's decision. This appeal follows. Appellant raises six points on appeal, the first five of which claim error in the Commission's decision affirming his termination of employment and the sixth which challenges the circuit court's denial of his motion for evidentiary hearing.

Commission's Decision

Appellant first contends Article XVIII of the **City** Charter and Civil Service Rule XV prohibiting political emails are unconstitutional. Second, he claims the Commission misconstrued the **City** Charter and Civil Service Rule as prohibiting political emails. Third, he asserts his superiors committed procedural irregularities prior to the Commission's decision. Fourth, he argues he was not advised of his right to representation. Fifth, he claims the Commission did not have authority to delegate the hearing to a non-Commission member.

[1] [2] [3] [4] We review the decision of the Commission, not the judgment of the circuit court. *Coffer v. Wasson–Hunt,* 281 S.W.3d 308, 310 (Mo.banc 2009); Section 536.140.2.[5] We determine whether the Commission's findings are supported by competent and substantial evidence on the record as a whole, whether the decision is arbitrary, capricious, unreasonable, or involves an abuse of discretion, or whether the decision is unauthorized by law. *Coffer,* 281 S.W.3d at 310. We review the entire record, not just the evidence supporting the Commission's decisions. *Id.* Where the evidence supports opposing findings, we afford deference to the Commission's decision. *Id.* However, we do not defer to the Commission's findings on questions of law. *Vivona v. Zobrist,* 290 S.W.3d 167, 170 (Mo.App.W.D.2009).

Point I—Constitutionality

[5] **City** Charter Article XVIII, Section 19, prohibits persons holding a position in the classified service from taking an active part in a political campaign and distributing indicia favoring or opposing a candidate

for election or nomination to a municipal public office. In its entirety, Section 19 provides:

> Political activity of classified employees.
>
> No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take ***507** an active part in a political campaign, or shall seek or accept nomination, election, or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color, or indicia favoring or opposing a candidate for election or nomination to a public office, whether federal, state, county, or municipal. But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his vote, from expressing privately his opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employee unless he shall first resign from his position.

Similarly, Civil Service Rule XV, Section 2[5] prohibits persons in a competitive position ***508** in the classified service from taking part in a partisan political campaign, including any attempts to influence voters to vote for a particular candidate and distributing any indicia favoring or opposing a candidate for election or nomination to a public office, including a municipal office.

These same prohibitions were at issue in *State ex inf. McKittrick ex rel. Ham v. Kirby*, 349 Mo. 988, 163 S.W.2d 990 (1942), where the relator complained they deprived civil service members of their constitutional rights. The Court stated:

> Section 19 prohibits any person in the classified service from ... taking an active part in [a] political campaign, or from serving as an officer of a political club or organization, or from circulating political petitions, working at the polls, distributing badges, favoring or opposing political candidates. This section, however, carefully safeguards the rights of **city** employees to belong to political organizations, to cast their votes as they please and to express privately their opinions upon political questions. **City** employees may become candidates for public office but only after resigning their employment.

Id. at 995. As such, the Court found Section 19's restrictions on civil service employees do not impinge on said workers' rights to due process or free speech, or equal protection since they serve the legitimate goal of increasing efficiency in public service. *Id.* at 994–96.

[6] Nor are the provisions cited by Appellant unconstitutionally overbroad and vague, failing to give him fair notice of what was prohibited. Section 19 and Rule XV are quite clear and sufficiently concise in their prohibitive language. Furthermore, Appellant's email to at least forty people, and possibly as many as sixty, was not a "private expression" on a political matter, as he contends. He claims to have been unaware of the attachment's political character or of its contents at all. Such a claim belies his assertion that by forwarding the email and its attachment he was expressing his political views to his chosen recipients. Based on the foregoing, Point I is denied.

Point II—Misconstruction

[7] Appellant claims the Commission misconstrued both the **City** Charter and Civil Service Rule to prohibit sending an email that had an attachment containing a political message. We disagree. Article XVIII, Section 19, of the **City** Charter and Civil Service Rule XV both prohibit the distribution of any indicia favoring or

Commented [ER1]: Approved language respecting the rights of employees and the public drawing a line about political involvement by public servants.

Commented [ER2]: You can't do this at work.

opposing a candidate for election or nomination to a public office. A normal construction and common understanding of the English language and its parlance would dictate that this prohibition encompasses sending an email that encourages support of a candidate for mayor in an upcoming mayoral election.

Appellant also maintains the Commission did not make a finding that Appellant *knew* the content of the attachment prior to forwarding the email. However, the Commission found Appellant's contention ***509** that he did not read the attachment and was therefore unaware that it advocated Irene Smith to replace Mayor Francis Slay as mayor of the **City** of **St. Louis** to be not credible. Accordingly, Point II is denied.

Point III—Pre-Commission Procedure

[8] Appellant asserts that because the Director of Personnel failed to investigate his conduct and make a report to the Commission as mandated by Civil Service Rule XV, Section 5, the Commission's decision should be reversed. Civil Service Rule XV, Section 5, provides that the Director of Personnel shall conduct an investigation into Rule XV violations when they come to his attention.[4] However, it does not provide that the Director is the *only* individual that can conduct such investigation and report. It also contains the provision "when it comes to his attention." Such provision indicates that it is one of many duties that may be, as is commonplace in all directorial and managerial capacities, delegated by the Director to someone such as the Deputy Director, as it was in this case to Deputy Director of Personnel Linda Thomas.

[9] Appellant also claims since the Appointing Authority put him on forced leave pending the pre-termination hearing and then terminated him prior to the Commission's decision, the Commission's decision affirming his termination should be reversed. Under Department of Personnel Administrative Regulation No. 117, Section VI, "Forced Leave," Appellant was required to file an appeal of his forced leave within ten calendar days of the date he was informed of the forced leave, which was February 27, 2009. Appellant did not file an appeal and thus has waived that right. In any event, Regulation No. 117, Section VI, allows the Appointing Authority to place an employee on forced leave if he may pose a threat to the worksite. Deputy Comptroller Zakibe testified that Appellant worked in an area with access to sensitive financial information that could be compromised if he became upset after he received notice of his pre-termination review. Further, Appellant's forced leave pending his pre-termination hearing was not a suspension without pay; rather, his last day of pay was his day of dismissal, March 6, 2009.

Because no procedural errors were committed by the Director of Personnel or Appointing Authority prior to the Commission's determination, Point III is denied.

Point IV—Right to Representation

[10] Appellant complains the Appointing Authority failed to advise him of his right to representation under Department of Personnel Administrative Regulation No. 143. However, Regulation No. 143 does not give non-union employees the right to representation at the investigation ***510** stage. Rather, Regulation No. 143 provides: "Covered employees may have an Employee Representative present under the circumstances described below if they so choose ..." and "[c]overed employee means any **city** employee within a bargaining unit represented by a union recognized by the State Board of Mediation and/or the **City**." Accordingly, because Appellant is not a member of a collective bargaining unit, i.e., not a union employee, he had no right to the representation he claims in this point.

Appellant was, however, advised in writing of the charges against him, given an explanation of the charges and evidence in support of them, given a full opportunity to respond to the charges and evidence at his pre-termination review, and advised of his right to have a representative present at that review. Appellant also appealed his termination to the Commission, which conducted a full evidentiary hearing where Appellant was represented by counsel.

Based on the foregoing, Point IV is denied.

Point V—Hearing Officer

Appellant accuses the Commission of acting in excess of its authority by delegating its duty to conduct the hearing to a non-Commission member. Appellant made no objection at the time of the hearing, thereby waiving this complaint. See, e.g., *Vivona*, 290 S.W.3d at 171; *Coffer*, 281 S.W.3d at 309. In any event, Civil Service Rule XIII, Section 1(d)[5] provides that the Commission may engage a hearing officer for the purpose of conducting a hearing. Point V is therefore denied.

Circuit Court Proceeding

Point VI—Evidentiary Hearing

[11] Appellant's sixth point claims error on the part of the circuit court. He complains the circuit court erred in failing to hold an evidentiary hearing under Section 536.140.4 because he alleged he had evidence showing the Commission a) failed to read the full record; b) refused to produce the report of the hearing officer and allow Appellant to comment; and c) unreasonably, arbitrarily and capriciously terminated Appellant as compared to similarly-situated employees who actively participated in partisan politics.

[12] By statute a court may hear and consider evidence of alleged irregularities in the Commission's proceedings or unfairness not shown in the record. Section 536.140.4; ***511** *Madden v. Poplar Bluff R–1 School Dist.*, 399 S.W.3d 843, 847 (Mo.App. S.D.2013); *Boyer v. City of Potosi*, 38 S.W.3d 430, 434 (Mo.App. E.D.2000). This language is merely permissive and does not compel the trial court to hear additional evidence. *Madden*, 399 S.W.3d at 847; *Jerry–Russell Bliss, Inc. v. Hazardous Waste Management Comm'n*, 702 S.W.2d 77, 82 (Mo.banc 1985). " 'We interfere with a trial court's refusal to take additional evidence in its review of an administrative agency decision *only* where there is an abuse of the trial court's discretion in refusing to delve further into the matter.' " *Madden*, 399 S.W.3d at 847, quoting *Nenninger v. Dep't of Soc. Servs.*, 898 S.W.2d 112, 116 (Mo.App.S.D.1995) (emphasis in original). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Madden*, 399 S.W.3d at 847. If reasonable persons could differ as to the propriety of the trial court's action, there is no abuse of discretion. *Id.*

We find the circuit court did not abuse its discretion in denying an evidentiary hearing, for the following reasons.

a) Commission's Consideration of Record

Appellant claims the Commission failed to read the whole record of the proceedings before the hearing officer. Section 536.080.2 provides:

> In contested cases, each official of an agency who renders or joins in rendering a final decision shall, prior to such final decision, either hear all the evidence, read the full record including all the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs. The parties to a contested case may by written stipulation or by oral stipulation in the record at a hearing waive compliance with the provisions of this section.

In the instant case, the Commission stated:

> The Civil Service Commission, having reviewed and considered all submitted material, and being fully advised in the premises, makes and enters the following findings of fact, conclusions of law and decision.

The Commission's statement that it reviewed and considered the record of the proceedings is sufficient to satisfy the requirements of Section 536.080.2. *Stith v. Lakin*, 129 S.W.3d 912, 920 (Mo.App.S.D.2004); *Burgdorf v. Bd. of Police Comm'rs*, 936 S.W.2d 227, 232 (Mo.App.E.D.1996).

[13] Furthermore, we will not presume the Commission failed to comply with Section 536.080.2, but rather " 'there is a presumption that administrative decisions are made in compliance with applicable statutes.' " *Stith*, 129 S.W.3d at 920, quoting *Burgdorf*, 936 S.W.2d at 232. Appellant has the burden of demonstrating by clear and convincing evidence that the Commission failed to fulfill the statutory requirements. *Stith*, 129 S.W.3d at 920. Here, Appellant did not present clear and convincing evidence to the circuit court or to this Court that the Commission did not have the complete record before it in rendering its decision.

b) Report of Hearing Officer

Appellant maintains the Commission refused to produce the hearing officer's report and recommendation to Appellant for his commentary. However, Appellant cites no rule, regulation, statute or case law that requires this production or allows Appellant such an opportunity for review and comment.

Appellant was initially advised in writing of the pre-termination review, such notice providing a description of the offending ***512** behavior, a summary of the charges, and his right to representation at the review. Appellant responded to the allegations at the pre-termination review prior to the decision to terminate him. Then Appellant had the opportunity to appeal his termination to the Commission. The hearing officer did not render the decision which ultimately terminated Appellant's employment. Rather, the hearing officer made recommendations to the Commission, which then rendered the decision, supported by its own specific findings of fact and conclusions of law. Appellant appealed these findings of fact, conclusions of law and decision to the circuit court for its review. Appellant then appealed the Commission's decision to this Court. Appellant had ample and fair opportunity to rebut the allegations and evidence in support of such allegations against him and the ultimate decision of his termination.

c) Other Employees

Appellant claims the Commission unreasonably, arbitrarily and capriciously terminated him *as compared to* similarly-situated employees who participated in partisan politics. The Commission's decision with regard to Appellant's actions and consequences thereof is not based upon what other employees did. Regulation No. 117 states, "*All employees* are expected to conduct themselves in accordance with department/division policies, Administrative Regulations of the Department of Personnel, Civil Service Rules and Regulations, Ordinances, the Charter of the **City** of **St. Louis**, and generally acceptable work behaviors including the **City's** Employee Code of Conduct." (Emphasis added.) Furthermore, Regulation No. 117 provides that "[e]ach offense must be judged on a case-by-case basis" with regard to disciplinary measures. The Commission's decision involved the exercise of discretion in light of the particular facts of Appellant's case. Regulation No. 117 states, "Some offenses may be so severe that immediate suspension, reduction in pay, disciplinary demotion or dismissal is warranted."

The circuit court did not abuse its discretion in denying Appellant's request for an evidentiary hearing. Point VI is denied.

Conclusion

The Commission's decision affirming Appellant's termination of employment and the circuit court's denial of an evidentiary hearing are affirmed.

ROBERT M. CLAYTON III, C.J., and LAWRENCE E. MOONEY, J., concur.

All Citations

418 S.W.3d 501

Footnotes

[1] Regulation 17's general progressive discipline policy provides:

> Disciplinary actions shall be administered on a uniform basis by an appointing authority or his/her designee and should normally be expected to be progressive in nature; failure to adhere to this policy could result in disapproval of such action. The Department of Personnel shall review all proposed discipline to ensure that said proposed discipline is appropriate and progressive in nature, excluding those instances that warrant an exception to progressive discipline. Progressive discipline places an employee on notice that his or her actions will not be tolerated and, if continued, will result in more serious discipline up to and including dismissal. Each offense must be judged on a case-by-case basis and consideration given to the employee's entire work history when determining the appropriate action to take. Some offenses may be so severe that immediate suspension, reduction in pay, disciplinary demotion or dismissal is warranted.

[2] All statutory references are to RSMo 2006, unless otherwise indicated.

[3] Rule XV, Section 2, provides in its entirety:
POLITICAL SPEECHES, CAMPAIGNING AND ACTIVITY:
(a) No person holding an excepted position or a competitive position in the classified service shall use his or her official authority or influence to coerce or influence the political action of a person in the competitive service, or to coerce or influence the political action of any other person. In addition, no such person shall threaten to use his official authority or influence to coerce or influence the political action of any other person. And, further, no such person shall use his office, or official time, or **City** facilities in an active partisan campaign.
(b) No person holding an excepted position or competitive position in the classified service shall seek or accept nomination, election or appointment as an officer of a political party elected by popular ballot. No such person shall conduct any active campaign for elective office without first resigning his or her position. However, nothing shall prevent such person from seeking or accepting election or appointment to public office, short of an active campaign for elective office. An active campaign is defined to include, among other things, the act of officially filing for election to public office and/or publicly announcing the intention to run for public office.
(c) No person in a competitive position in the classified service shall take an active part in a partisan political campaign, and no such person shall take vacation leave or a leave of absence to work on political campaigns in the manner herein prohibited. An active part is defined as those activities which essentially attempt to influence voters to vote for a particular candidate or party, including serving on a campaign committee as Chairman, Treasurer, or other officer, circulating petitions provided for by any primary or election law for any candidate or party, acting as a worker at the polls or phone banks, distributing badges, bumper stickers, handbills, or other indicia favoring or opposing a candidate for election or nomination to a public office whether Federal, state, county, or municipal, or erecting signs favoring or opposing any such candidate.
(d) No person holding an excepted position in the classified service shall work on a political campaign while on duty, but shall devote the entire time to the duties of their office.
(e) Any person in a competitive position in the classified service shall have the right to become a member of a political club or organization, and to attend political meetings, and to freely express his or her opinions,

short of expressions designed to influence others to cast their vote in a certain way in a partisan election. Such expressions by the employee may include opinions on political questions, including the quality of a political candidate; erecting yard signs on property owned or leased by the employee; affixing bumper stickers to an automobile owned or leased by the employee, provided the automobile is not used while the employee is engaged in official duties; wearing campaign buttons so long as they are not worn while the employee is officially on duty, or making a contribution to a political campaign within existing election laws.

(f) Members of the Civil Service Commission shall comply with the rules regarding campaigning and activity in accordance with the provisions of these rules applicable to persons occupying competitive positions in the classified service.

(g) Nothing in this section, however, shall prevent an employee in the competitive service from participation in non-partisan political campaigns, including non-partisan election campaigns for school boards, bond issues, tax measures, constitutional or charter amendments, referendums, initiatives, and petitions in pursuit of such measures.

(h) For the purposes of this rule, a competitive position in the classified service shall mean any position that is not excepted, whether the incumbent has received a competitive, provisional, temporary transient or limited-term appointment.

[4] Rule XV, Section 5 provides in its entirety:

VIOLATIONS; PENALTIES:

In every case where it shall come to the attention of the Director that any employee in the classified service, subject to Article XVIII and these rules, has engaged in political or other activities forbidden under these rules and Article XVIII, he shall conduct an investigation and upon the completion of the same present his findings to the Commission at its next regular meeting thereafter. The Commission, following a review of the findings, may conduct a complete investigation and hearing; if the Commission finds that the employee has been guilty of a violation of the act and these rules, it shall order immediate dismissal of the employee, or such other disciplinary action authorized by these Rules deemed appropriate, and shall instruct the Director to so inform the Comptroller. In any case where an employee of the classified service has been coerced into taking unwanted political action by those in authority over him, he may report such circumstances directly to the Commission who will investigate and take such action as is indicated.

[5] Rule XIII, Section 1, titled "APPEALS," subsection (d) provides:

The Commission shall have power, and it shall be its duty to consider and determine any matter involved in the administration and enforcement of Article XVIII and the rules and ordinances adopted in accordance therewith that may be referred to it for decision by the Director, or on appeal by any appointing authority, employee, or taxpayer of the **City**, from any act of the Director or of any appointing authority ...

(d) Decision of the Commission: After hearing and/or reviewing and considering the evidence for and against the employee, the Commission shall prepare a report of its findings and conclusions of law, approving or disapproving the disciplinary action. In the case of approval, the disciplinary action shall stand as made by the appointing authority. In the case of disapproval or modification, the employee shall be restored to his or her former status or the action shall be modified as ordered by the Commission. In reviewing any appeal made under these rules, the Commission may in its discretion adjudicate the appeal based on written submissions or engage a hearing officer for the purpose of conducting a hearing with regard to said appeal. Said hearing officer shall be empowered to do all things the Commission is authorized to do in connection with such a hearing, except for rendering a decision on the appeal at issue.

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Ehlers v. University of Minnesota

United States Court of Appeals, Eighth Circuit. | May 19, 2022 | 34 F.4th 655 | 2022 WL 1572397

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Outline

GOOD FAITH EFFFORT TO ACCOMMODATE UNDER ADA

34 F.4th 655
United States Court of Appeals, Eighth Circuit.

Jessica EHLERS, Plaintiff - Appellant
v.
UNIVERSITY OF MINNESOTA, Defendant - Appellee

No. 21-1606
|
Submitted: March 17, 2022
|
Filed: May 19, 2022

Synopsis

Background: Former employee brought action brought action against university under Americans with Disabilities Act (ADA) alleging discrimination based on her disability, failure to provide reasonable accommodation for her disability, and retaliation. The United States District Court for the District of Minnesota, Patrick J. Schiltz, J., 2021 WL 663730, entered summary judgment in university's favor, and employee appealed.

Holdings: The Court of Appeals, Gruender, Circuit Judge, held that:

[1] employee's identification of eight jobs for which she claimed she was qualified was insufficient to state prima facie failure-to-accommodate claim, and

[2] university satisfied its obligation to engage in interactive process with respect to reasonable accommodations.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (14)

[1] **Federal Courts**⚖Summary judgment
Court of Appeals reviews district court's grant of summary judgment de novo.

1 Case that cites this headnote

[2] **Civil Rights**⚖Practices prohibited or required in general; elements
To establish prima facie claim of disability discrimination under ADA, plaintiff make facial showing that he or she (1) is disabled within meaning of ADA, (2) is qualified, and (3) has suffered adverse employment decision because of disability. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[3] **Civil Rights**⚖Employment qualifications, requirements, or tests
To be "qualified individual" within meaning of ADA, employee must (1) possess requisite skill, education, experience, and training for his position, and (2) be able to perform essential job functions, with or without reasonable accommodation. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[4] **Civil Rights**⚖Discrimination by reason of handicap, disability, or illness
If employee asserting disability discrimination claim under ADA cannot perform job's essential functions without accommodation, he must only make facial showing that reasonable accommodation is possible, and if employee otherwise makes facial showing, burden of production then shifts to employer to show that it is unable to accommodate employee. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. §§ 12112(a), 12112(b)(5)(A).

1 Case that cites this headnote

[5] **Civil Rights**⇐Discrimination by reason of handicap, disability, or illness

If employer meets its burden of production to show that employee asserting disability discrimination claim under ADA cannot perform job's essential functions even with reasonable accommodation, then employee must rebut that showing with evidence of his individual capabilities, at which point employee's burden merges with his ultimate burden of persuading trier of fact that he has suffered unlawful discrimination. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. §§ 12112(a), 12112(b)(5)(A).

[6] **Civil Rights**⇐What are reasonable accommodations; factors considered

In certain situations, reassignment to vacant position can be reasonable accommodation under ADA. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

1 Case that cites this headnote

[7] **Civil Rights**⇐What are reasonable accommodations; factors considered

Reassignment is not required of employers in every instance, and is accommodation of last resort under ADA when employee cannot be accommodated in his existing position. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

1 Case that cites this headnote

[8] **Civil Rights**⇐What are reasonable accommodations; factors considered

Employer is not required under ADA to create new position or move other employees from their jobs in order to open up position as accommodation for employee's disability; rather, reassignment to another position is required accommodation only if there is vacant position for which employee is otherwise qualified. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

2 Cases that cite this headnote

[9] **Civil Rights**⇐What are reasonable accommodations; factors considered

To show that reassignment is possible accommodation under ADA, plaintiff must make facial showing that position is available for which he qualifies. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

1 Case that cites this headnote

[10] **Civil Rights**⇐Requesting and choosing accommodations; interactive process; cooperation

Plaintiff can survive summary judgment on reasonable accommodation claim under ADA by showing that employer failed to engage in interactive process, even though failing to do so does not itself give rise to liability under ADA. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

1 Case that cites this headnote

[11] **Civil Rights**⇐Requesting and choosing accommodations; interactive process; cooperation

University employee's identification of eight jobs for which she claimed she was qualified, but to which she was not reassigned, was insufficient to state prima facie failure-to-accommodate claim against university under ADA; employee claimed extensive work restrictions and multiple disabilities, but she failed to provide job posting, job title, or any evidence of duties

or requirements of any position. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

[12] **Civil Rights**⇨Requesting and choosing accommodations; interactive process; cooperation

To establish that employer failed to participate in interactive process with respect to reasonable accommodations, as required by ADA, disabled employee must show that: (1) employer knew about employee's disability; (2) employee requested accommodation or assistance for his or her disability; (3) employer did not make good faith effort to assist employee in seeking accommodation; and (4) employee could have been reasonably accommodated but for employer's lack of good faith. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

2 Cases that cite this headnote

[13] **Civil Rights**⇨Requesting and choosing accommodations; interactive process; cooperation

To satisfy its obligation under ADA to engage in interactive process with respect to reasonable accommodations, employer is not required to find job for employee that meets his restrictions; it only needs to make good faith effort to assist employee in seeking accommodation. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

1 Case that cites this headnote

[14] **Civil Rights**⇨Requesting and choosing accommodations; interactive process; cooperation

University satisfied its obligation under ADA to engage in interactive process with respect to reasonable accommodations for employee's disabilities; university offered to help employee find new job many times and considered adopting technologies to help her perform her job duties, once university realized she could not be accommodated in her current position, employee from university's job center reached out to employee to schedule meeting about vacant positions, but she cancelled it, and rescheduled meeting could not take place because employee went on full-time medical leave, and job center worked with her to develop lengthy questionnaire, which it forwarded to relevant hiring supervisors. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

1 Case that cites this headnote

*657 Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

Michael Ajiawung Fondungallah, Fondungallah & Kigham, Roseville, MN, for Plaintiff-Appellant.

Brent P. Benrud, Associate General Counsel, Carrie Ryan Gallia, University of Minnesota, Office of the General Counsel, Minneapolis, MN, for Defendant-Appellee.

Before GRUENDER, BENTON, and ERICKSON, Circuit Judges.

Opinion

GRUENDER, Circuit Judge.

Jessica Ehlers sued her former employer, the University of Minnesota, under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, for discrimination based on her disability, failure to provide a reasonable accommodation for her disability, and retaliation. The district court[1] granted summary judgment to the University. Ehlers appeals, and we affirm.

I.

Jessica Ehlers began working at the University of Minnesota's Boynton Health Service ("Boynton") in 2012. In 2014, Ehlers was diagnosed with Temporomandibular Joint Syndrome ("TMJ"), a condition that can affect the jaw by causing popping, clicking, muscular dysfunction, and pain. It can also affect the ability to speak. In 2015, Ehlers was transferred to an administrative position in Boynton's Office of Student Health Benefits ("OSHB"). Ehlers's new position was primarily a customer-service position that involved answering customer questions by phone, in person, and by email, and resolving customer issues.

In the summer of 2016, due to the speaking involved in Ehlers's job, she requested almost six weeks of Family and Medical Leave Act ("FMLA") leave and accommodations when she returned, including a reduced schedule with a four-hour workday one to two times per week for medical appointments and for TMJ flare-ups. The University approved the leave request and accommodations. Additionally, Ehlers, through her doctor, asked for the University to grant two more accommodations: (1) reduce the need for constant speaking, such as by providing breaks from speaking, either every other hour or fifteen minutes of each hour; and (2) reassign her to a different job. Soon after, she also requested nonspeaking work for fifteen minutes before her lunch break or reassignment to a job that could accommodate these restrictions. ***658** The University denied the requests because Ehlers's customer-service job required extensive interaction with customers and "cannot be restructured to a non-speaking or reduced speaking position." The University told Ehlers that there were no jobs in Boynton that could accommodate her restrictions but that she could talk to the University's Disability Resource Center to discuss a transfer outside of Boynton. Ehlers did not want to participate in the job-transfer process because it would require her first to quit her Boynton job.

When Ehlers returned from FMLA leave, she had a reduced schedule and time off for flare-ups and medical appointments. The University considered adopting two technologies that would reduce Ehlers's need to speak, but one was not compatible with Boynton's phone system, and Ehlers rejected the other one because her doctor advised her to limit eye and facial movements.

In December 2016, Ehlers asked the University to grant three more accommodations: (1) allow additional nonspeaking breaks as needed, (2) not reduce her lunch period because of her additional breaks, and (3) provide her with a phone that can manage and record break times. The University agreed to schedule fifteen-minute nonspeaking breaks every hour, without reducing her lunch period, and investigate new phones, and it reiterated its offer to help Ehlers find a different position. In January 2017, Ehlers asked the University to grant more accommodations: (1) provide an ergonomic evaluation of her workstation to ensure that her chair supports her neck, a monitor adjustment, and a sit-to-stand workstation; (2) not require her to use devices controlled by facial and eye movement; (3) minimize the need for her to use facial expressions; and (4) provide a quiet work environment.

In March 2017, Ehlers requested time off to attend medical appointments and therapies one to two times per week and to be reassigned to a job with no more than four hours of speaking per day. She also asked the University to grant new accommodations: (1) restrict lifting to no more than twenty pounds, and (2) arrange for an occupational-medicine consultation. In response, the University again offered to help Ehlers find a different position and invited her to visit the University's job center to identify jobs of interest and talk with a job counselor. Ehlers also notified the University that she had been diagnosed with acute neck-muscle strain, upper-back pain, bilateral hand pain, tendonitis of the elbow or forearm, head and face pain, anxiety, and PTSD, and she told the University that she experienced "overuse injuries" from "constant typing" in the OSHB position.

In March, Ehlers informed the human resources coordinator of four jobs in which she was interested

and requested information about them. When the University responded twelve days later, it said that it was "contacting the units where the jobs identified by Ms. Ehlers are posted" to get "information relating to her work restrictions." That same day, Ehlers requested information about two more jobs. Two days later, Ehlers identified four more jobs of interest to her.

In late March and early April, Ehlers, her attorney, and the University prepared a lengthy questionnaire to collect information about the jobs, but by the time it was forwarded to the hiring supervisors, two of the positions had been filled. One hiring supervisor returned the information, but the position was inconsistent with Ehlers's work restrictions because it was a forward-facing front-desk position in a loud, fast-paced, demanding, and stressful work environment; it required more than four hours ***659** of speaking per day; it could not accommodate speaking restricted to every other hour; and it required "a lot" of typing.

While Ehlers was inquiring about reassignment, she requested full-time medical leave for three weeks and reduced hours for an additional five weeks. The University approved Ehlers's request, but in April after she requested an extension of her leave, the University denied the extension request. It explained that because Ehlers could not work a full schedule, an essential function of her job, it was firing her.

After Ehlers was fired, she filed two Equal Employment Opportunity Commission ("EEOC") charges against the University. The EEOC dismissed the charges and notified Ehlers of her right to sue. Ehlers sued the University under the ADA for discrimination based on her disability, failure to provide a reasonable accommodation for her disability, and retaliation. Ehlers and the University each moved for summary judgment. The district court granted summary judgment to the University, and Ehlers appeals, raising only the reasonable-accommodation issue.

II.

[1] We review a district court's grant of summary judgment *de novo*. *Whittington v. Tyson Foods, Inc.*, 21 F.4th 997, 1000 (8th Cir. 2021). "Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Id.* (quoting Fed. R. Civ. P. 56(a)).

The ADA prohibits employers from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Discrimination includes "not making reasonable accommodations." § 12112(b)(5)(A).

[2] [3] When evaluating claims of failure to provide reasonable accommodations, we apply a modified burden-shifting analysis. *Peebles v. Potter*, 354 F.3d 761, 766 (8th Cir. 2004); *Fenney v. Dakota, Minn. & E. R.R.*, 327 F.3d 707, 712 (8th Cir. 2003). The plaintiff must first make a facial showing "that he or she (1) is disabled within the meaning of the ADA, (2) is qualified ..., and (3) has suffered an adverse employment decision because of the disability." *Cravens v. Blue Cross & Blue Shield of Kan. City*, 214 F.3d 1011, 1016 (8th Cir. 2000). "To be a 'qualified individual' within the meaning of the ADA, an employee must (1) possess the requisite skill, education, experience, and training for his position, and (2) be able to perform the essential job functions, with or without reasonable accommodation." *Fenney*, 327 F.3d at 712 (internal quotation marks and brackets omitted); *see* § 12111(8) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

[4] "[I]f the employee cannot perform the essential functions of the job without an accommodation, he must only make a facial showing that a reasonable accommodation is possible." *Id.* (internal quotation

marks and emphasis omitted). And if the employee otherwise makes a facial showing, "[t]he burden of production then shifts to the employer to show that it is unable to accommodate the employee." *Id.* (brackets omitted).

[5] If the employer meets its burden of production to "show that the employee cannot perform the essential functions of the job even with reasonable accommodation, ***660** then the employee must rebut that showing with evidence of his individual capabilities." *Id.* (brackets omitted). "At that point, the employee's burden merges with his ultimate burden of persuading the trier of fact that he has suffered unlawful discrimination." *Id.*

[6] [7] [8] [9] "[I]n certain situations, reassignment to a vacant position can be a reasonable accommodation." *Minnihan v. Mediacom Commc'ns Corp.*, 779 F.3d 803, 814 (8th Cir. 2015). "Reassignment is not required of employers in every instance ... and is an accommodation of last resort when the employee cannot be accommodated in his existing position." *Id.* (internal quotation marks omitted). For "reassignment, the employer is not required to create a new position or move other employees from their jobs in order to open up a position. Rather, reassignment to another position is a required accommodation only if there is a vacant position for which the employee is otherwise qualified." *Id.* (citation omitted). To show that reassignment is a possible accommodation, *see Fenney*, 327 F.3d at 712, the plaintiff must make a facial showing that a position is available for which he qualifies. *See Cravens*, 214 F.3d at 1020 (disagreeing with the district court's conclusion that the employee "had not facially demonstrated that reassignment ... would have been a reasonable accommodation"); *Benson v. Nw. Airlines, Inc.*, 62 F.3d 1108, 1114-15 (8th Cir. 1995).

[10] Apart from making a facial showing under the modified burden-shifting framework, a plaintiff can survive summary judgment on a reasonable-accommodation claim by showing that the employer failed to engage in an interactive process, even though failing to do so does not itself give rise to liability under the ADA. *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999).

A.

First, we address whether Ehlers has met her burden to show that the University failed to provide a reasonable accommodation. The parties do not dispute that (1) Ehlers has a disability, suffered adverse employment action, and has the requisite skill, education, experience, and training for her administrative position, *see Fenney*, 327 F.3d at 712, and that (2) Ehlers could not perform the essential functions of her OSHB position without an accommodation of reassignment. Thus, the dispute is whether Ehlers qualified for any alternative positions.

Determining whether reassignment was possible requires Ehlers to make a facial showing that she satisfied the legitimate prerequisites for an alternative position and would "be able to perform the essential functions of that position with or without reasonable accommodations." *See Cravens*, 214 F.3d at 1019; *Fenney*, 327 F.3d at 712. Ehlers contends that she has met her burden by identifying eight jobs that she claims were clerical or administrative jobs for which she qualified and about which she had requested more information. Though Ehlers did not provide the titles, postings, or descriptions of these jobs, she says that identifying the job numbers and general job types is sufficient to shift the burden to the University "to show that it is unable to accommodate the employee," *see Fenney*, 327 F.3d at 712, because she "cannot identify open positions without the assistance of the employer."

We disagree. We have previously found a genuine dispute of material fact about whether reassignment was possible when a plaintiff testified that she qualified for certain jobs, could perform the essential job functions, competently performed her job duties for close to twenty years, and provided ***661** the job postings. *Cravens*, 214 F.3d at 1020. Similarly, we have held that there was a genuine dispute of

material fact about whether a plaintiff could be reassigned to a shift-manager position from a unit-manager position when (1) the plaintiff was able to work thirty-five to forty hours per week "with no more than three consecutive days at work" and (2) there was evidence that the plaintiff "competently performed her duties as a unit manager for close to twenty years." *Fjellestad*, 188 F.3d at 947, 950-51.

[11] Here, Ehlers did not submit the job posting, the job title, or any evidence of the duties or requirements of any position. And by the time Ehlers was fired, she had extensive work restrictions that would greatly limit her ability to perform clerical or administrative jobs. Specifically, Ehlers had asked that the University: (1) reduce the need for constant speaking, such as by providing breaks from speaking, either every other hour or for fifteen minutes of each hour; (2) provide nonspeaking work for fifteen minutes before her lunch break; (3) allow additional nonspeaking breaks as needed; (4) not reduce her lunch period because of her additional breaks; (5) provide her with a phone that can manage and record her break times; (6) provide an ergonomic evaluation of her work station and a chair to support her neck, a monitor adjustment, and a sit-to-stand work station; (7) not require her to use devices controlled by facial and eye movement; (8) allow her to minimize facial expressions; (9) provide a quiet work environment; (10) restrict lifting to no more than twenty pounds; and (11) arrange for an occupational-medicine consultation. Besides her specific work restrictions, Ehlers had notified the University that she had been diagnosed with acute neck-muscle strain, upper-back pain, bilateral hand pain, tendonitis of the elbow or forearm, head and face pain, anxiety, and PTSD. Ehlers had also told the University that she experienced "overuse injuries" from "constant typing" in the OSHB position. Given these extensive work restrictions and new diagnoses, to "make a facial showing" that she possessed the requisite skill, education, experience, and training for the position and could perform the positions' essential duties with or without a reasonable accommodation, Ehlers needed to do more than provide job numbers, testimony that the identified jobs were clerical or administrative jobs, and her unsupported testimony that she qualified for them. *See Fenney*, 327 F.3d at 712; *Cravens*, 214 F.3d at 1020; *Fjellestad*, 188 F.3d at 950-51.

B.

[12] [13] Next, we address whether the University failed to engage in the interactive process because it did not help Ehlers determine if she was qualified for the jobs she identified. "To establish that an employer failed to participate in an interactive process, a disabled employee must show: (1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith." *Cravens*, 214 F.3d at 1021. An employer is not required to find a job for the employee that meets his restrictions—it only needs to "make a good faith effort to assist the employee in seeking accommodation." *See id.*; *Treanor v. MCI Telecomm. Corp.*, 200 F.3d 570, 575 (8th Cir. 2000). We have previously found a genuine dispute of material fact about whether an employer acted in good faith when it discontinued discussing accommodations, did not investigate the employee's ***662** abilities, did not contact a manager about available positions, and waited until after the district court's ruling to offer the employee a position that would accommodate his disabilities. *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 899, 902-03 (8th Cir. 2006).

Commented [ER1]: Plaintiff's requested accommodations

[14] Here, only the third and fourth requirements are at issue: good-faith effort and but-for causation. We conclude that there is no genuine dispute of material fact about whether the University acted in good faith to make reasonable accommodations for Ehlers. The University offered to help Ehlers find a new job many times and considered adopting technologies to help Ehlers perform her job duties. Once the University realized Ehlers could not be accommodated in her current position, an employee from the job center reached out to Ehlers to schedule a meeting about vacant positions. But Ehlers cancelled it, and the

rescheduled meeting could not take place because Ehlers went on full-time medical leave. In March 2017, Ehlers asked the University whether four jobs would be "within [her] restrictions and if there are any working conditions that would ... cause and trigger pain." Though the University did not respond for eleven days and did not provide additional information about the positions, the University told an employee at the job center to collect information about the positions.

When Ehlers informed the University of four more jobs she was interested in, it worked with her to develop a lengthy questionnaire, which it forwarded to the relevant hiring supervisors. One hiring supervisor returned the information, but the position's duties were inconsistent with Ehlers's work restrictions. The University also told Ehlers that if she was concerned about positions being filled before it could obtain information about the positions, she should apply for the jobs and withdraw her application if she did not qualify.

Based on these actions, no reasonable jury could find that the University did not make good-faith efforts to make reasonable accommodations for Ehlers. *Cf.* *Canny*, 439 F.3d at 899, 902-03; *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 862-64 (8th Cir. 2006) (refusing to grant judgment as a matter of law to the employer on the good-faith issue when the jury could conclude that the employee needed accommodation only for "a marginal function that easily could have been eliminated"). The University's failure to inform Ehlers immediately whether she qualified for the jobs she identified is not evidence of bad faith. The University had to reach out to each department to obtain the information, and it is likely that determining whether a job was consistent with Ehlers's extensive work restrictions would have been difficult and time consuming.

Furthermore, even if the University did not use good-faith efforts, Ehlers needs to show that she "could have been reasonably accommodated but for the employer's lack of good faith." *Cravens*, 214 F.3d at 1021. We already determined that Ehlers has not shown that she was qualified for any jobs based on the lack of evidence about the duties and requirements of the positions and whether she could perform them in light of her extensive work restrictions. *See Faulkner v. Douglas Cnty. Neb.*, 906 F.3d 728, 734 (8th Cir. 2018) (finding no liability for failure to engage in a good-faith interactive process when the plaintiff "was not a qualified employee"). Thus, we conclude that there is no genuine dispute of material fact about whether the University failed to engage in the interactive process and the University is entitled to judgment as a matter of law.

Commented [ER2]: This is a good example of a well-executed good faith response the gave employer Summary Judgment

***663 III.**

For the foregoing reasons, we affirm the district court's grant of summary judgment to the University.

All Citations

34 F.4th 655, 402 Ed. Law Rep. 593, 2022 A.D. Cases 172,972, 65 NDLR P 88

Footnotes

1 The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

MMAA CASE LAW UPDATE

July 2023

RELIGION, SPEECH, RACE AND THE SUPREMES

You don't have time to read all this but these can hurt you when you least expect it!

Groff v. DeJoy

Supreme Court of the United States. | June 29, 2023 | 600 U.S. ---- | --- S.Ct. ----

Document Details

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Outline

Reasonable accommodation for religious worship as an undue hardship now means substantially increased costs to employer.

--- S.Ct. ----
Only the Westlaw citation is currently available.
Supreme Court of the United States.

Gerald E. GROFF, Petitioner
v.
Louis DEJOY, Postmaster General

No. 22-174
|
Argued April 18, 2023
|
Decided June 29, 2023

Synopsis

Background: Former United States Postal Service (USPS) employee, an Evangelical Christian who believed for religious reasons that Sunday should be devoted to worship and rest, brought action against the Postmaster General under Title VII, alleging the Postal Service failed to make reasonable accommodations for his Sunday Sabbath practice and instead disciplined him for failing to work as a letter carrier on Sundays. The United States District Court for the Eastern District of Pennsylvania, Jeffrey L. Schmehl, J., 2021 WL 1264030, granted summary judgment to the Postmaster, and employee appealed. The United States Court of Appeals for the Third Circuit, Shwartz, Circuit Judge, 35 F.4th 162, affirmed. Certiorari was granted.

[Holding:] In a unanimous opinion, the Supreme Court, Justice Alito, held that to defend denial of a religious accommodation under Title VII, an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business; abrogating *Equal Employment Opportunity Commission v. Walmart Stores East, L.P.*, 992 F.3d 656; *Tagore v. U.S.*, 735 F.3d 324; *Wagner v. Saint Joseph's/Candler Health System, Inc.*, 2022 WL 905551; *Camara v. Epps Air Service, Inc.*, 292 F. Supp. 3d 1314; *El-Amin v. First Transit, Inc.*, 2005 WL 1118175; *E.E.O.C. v. Sambo's of Georgia, Inc.*, 530 F.Supp. 86.

Vacated and remanded.

Commented [ER1]: Note this is Unanimous

Justice Sotomayor filed a concurring opinion, in which Justice Jackson joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Summary Judgment.

West Headnotes (14)

[1] **Civil Rights**⚖Practices prohibited or required in general; elements

Title VII does not demand mere neutrality with regard to religious practices but instead gives them favored treatment in order to ensure religious persons' full participation in the workforce. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[2] **Civil Rights**⚖Accommodations

Showing more than a de minimis cost, as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII provision requiring employers to accommodate the religious practice of their employees unless doing so would impose an undue hardship on the conduct of the employer's business. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

1 Case that cites this headnote

[3] **Civil Rights**⚖Accommodations

"Undue hardship," within the meaning of Title VII provision requiring employers to accommodate the religious practice of their employees unless doing so would impose an undue hardship on the conduct of the

employer's business, is shown when a burden is substantial in the overall context of an employer's business, which involves a fact-specific inquiry. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

1 Case that cites this headnote

[4] **Statutes**⇐Language

Statutory interpretation must begin with, and ultimately heed, what a statute actually says.

[5] **Civil Rights**⇐Defenses in general

For an employer to defend a denial of a religious accommodation under Title VII, the employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business; abrogating *Equal Employment Opportunity Commission v. Walmart Stores East, L.P.*, 992 F.3d 656; *Tagore v. U.S.*, 735 F.3d 324; *Wagner v. Saint Joseph's/Candler Health System, Inc.*, 2022 WL 905551; *Camara v. Epps Air Service, Inc.*, 292 F. Supp. 3d 1314; *El-Amin v. First Transit, Inc.*, 2005 WL 1118175; *E.E.O.C. v. Sambo's of Georgia, Inc.*, 530 F.Supp. 86. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[6] **Civil Rights**⇐Accommodations

Courts must apply the test for determining under Title VII whether providing a religious accommodation to an employee would result in an undue hardship to the employer in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[7] **Civil Rights**⇐Accommodations

The term "undue hardship," in Title VII provision requiring employers to accommodate the religious practice of their employees unless doing so would impose an undue hardship on the conduct of the employer's business, means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the common-sense manner that it would use in applying any such test. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[8] **Civil Rights**⇐Accommodations

Not all impacts on coworkers are relevant for determining whether under Title VII an employer need not provide a religious accommodation to an employee because doing so would result in an undue hardship on the conduct of the employer's business, but only coworker impacts that go on to affect the conduct of the business. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[9] **Civil Rights**⇐Accommodations

A religious accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but a court cannot stop its analysis of whether under Title VII providing the accommodation to an employee would result in an undue hardship on the conduct of the employer's business without examining whether that further logical step is shown in a particular case. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[10] **Civil Rights**⇐Accommodations

A coworker's dislike of religious practice and expression in the workplace or the mere fact of a religious accommodation is not cognizable to factor into the inquiry

into whether under Title VII an employer need not provide a religious accommodation to an employee because doing so would result in an undue hardship on the conduct of the employer's business. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[11] **Civil Rights**⇨Defenses in general

An employer who fails to provide a religious accommodation to an employee has a defense under Title VII only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered undue. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

1 Case that cites this headnote

[12] **Civil Rights**⇨Defenses in general

If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim under Title VII, Title VII would be at war with itself. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[13] **Civil Rights**⇨Accommodations

Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[14] **Civil Rights**⇨Accommodations

Faced with an accommodation request under Title VII not to work on the Sabbath for religious reasons, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship; consideration of other options, such as voluntary shift swapping, would also be necessary before denying the accommodation. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

Syllabus[*]

***1** Petitioner Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. In 2012, Groff took a mail delivery job with the United States Postal Service. Groff's position generally did not involve Sunday work, but that changed after USPS agreed to begin facilitating Sunday deliveries for Amazon. To avoid the requirement to work Sundays on a rotating basis, Groff transferred to a rural USPS station that did not make Sunday deliveries. After Amazon deliveries began at that station as well, Groff remained unwilling to work Sundays, and USPS redistributed Groff's Sunday deliveries to other USPS staff. Groff received "progressive discipline" for failing to work on Sundays, and he eventually resigned.

Groff sued under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U.S.C. § 2000e(j). The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F.4th 162, 174, n. 18 (quoting 432 U.S. at 84, 97 S.Ct. 2264). The Third Circuit found the *de minimis* cost standard met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." 35 F.4th at 175.

Held: Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. Pp. ——— – ———.

(a) This case presents the Court's first opportunity in nearly 50 years to explain the contours of *Hardison*. The background of that decision helps to explain the Court's disposition of this case. Pp. ——— – ———.

(1) Title VII of the Civil Rights Act of 1964 made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's ... religion." § 2000e–2(a)(1). As originally enacted, Title VII did not spell out what it meant by discrimination "because of ... religion." Subsequent regulations issued by the EEOC obligated employers "to make reasonable accommodations to the religious needs of employees" whenever doing so would not create "undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1968). In 1970, however, the Sixth Circuit held that Title VII did not require an employer "to accede to or accommodate" a Sabbath religious practice because to do so "would raise grave" Establishment Clause questions. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334. This Court affirmed *Dewey* by an evenly divided vote. See 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267. Congress responded by amending Title VII in 1972 to track the EEOC's regulatory language and to clarify that employers must "reasonably accommodate... an employee's or prospective employee's religious observance or practice" unless the employer is "unable" to do so "without undue hardship on the conduct of the employer's business." § 2000e(j). Pp. ——— – ———.

*2 (2) *Hardison* concerned an employment dispute that arose prior to the 1972 amendments to Title VII. In 1967, Trans World Airlines hired Larry Hardison to work in a department that operated "24 hours per day, 365 days per year" and played an "essential role" for TWA by providing parts needed to repair and maintain aircraft. *Hardison*, 432 U.S. at 66, 97 S.Ct. 2264. Hardison later underwent a religious conversion and began missing work to observe the Sabbath. Initial conflicts with Hardison's work schedule were resolved, but conflicts resurfaced when he transferred to another position in which he lacked the seniority to avoid work during his Sabbath. Attempts at accommodation failed, and TWA discharged Hardison for insubordination.

Hardison sued TWA and his union, and the Eighth Circuit sided with Hardison. The Eighth Circuit found that reasonable accommodations were available to TWA, and rejected the defendants' Establishment Clause arguments. *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42–44. This Court granted certiorari. TWA's petition for certiorari asked this Court to decide whether the 1972 amendment of Title VII violated the Establishment Clause as applied by the Eighth Circuit, particularly insofar as that decision had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement. At the time, some thought that the Court's now-abrogated decision in *Lemon* v. *Kurtzman*, 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745—which adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional, *id.*, at 612–613, 91 S.Ct. 2105—posed a serious problem for the 1972 amendment of Title VII. Ultimately, however, constitutional concerns played no on-stage role in the Court's decision in *Hardison*. Instead, the Court's opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." *Hardison*, 432 U.S. at 83, and n. 14, 97 S.Ct. 2264. The Court held that Title VII imposed no such requirement. *Id.*, at 83, and n. 14, 97 S.Ct. 2264. This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." *Id.*, at 81, 97 S.Ct. 2264. Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which

Commented [ER2]: Now "undue hardship" the statutory language is really evidence of substantial increased costs

TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath.

The parties had not focused on determining when increased costs amount to "undue hardship" under Title VII separately from the seniority issue. But the Court's opinion in *Hardison* contained this oft-quoted sentence: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Although many lower courts later viewed this line as the authoritative interpretation of the statutory term "undue hardship," the context renders that reading doubtful. In responding to Justice Marshall's dissent, the Court described the governing standard quite differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." *Id.*, at 83, n. 14, 97 S.Ct. 2264. Pp. ——–——.

(3) Even though *Hardison*'s reference to "*de minimis*" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "*de minimis*" as the governing standard. To be sure, many courts have understood that the protection for religious adherents is greater than "more than ... *de minimis*" might suggest when read in isolation. But diverse religious groups tell the Court that the "*de minimis*" standard has been used to deny even minor accommodations. The EEOC has also accepted *Hardison* as prescribing a "more than a *de minimis* cost" test, 29 C.F.R. § 1605.2(e)(1), though it has tried to soften its impact, cautioning against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§ 1605.2(e)(1), (2). Yet some courts have rejected even the EEOC's gloss on "*de minimis*," rejecting accommodations the EEOC's guidelines consider to be ordinarily required. The Court agrees with the Solicitor General that *Hardison* does not compel courts to read the "more than *de minimis*" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost. Tr. of Oral Arg. 107. Pp. ——–——.

*3 (b) **The Court holds that showing "more than a *de minimis* cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. The Court understands *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context of an employer's business. This fact-specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech. Pp. ——–——.**

(1) To determine what an employer must prove to defend a denial of a religious accommodation under Title VII, the Court begins with Title VII's text. The statutory term, "hardship," refers to, at a minimum, "something hard to bear" and suggests something more severe than a mere burden. If Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Adding the modifier "undue" means that the requisite burden or adversity must rise to an "excessive" or "unjustifiable" level. Understood in this way, "undue hardship" means something very different from a burden that is merely more than *de minimis*, *i.e.*, "very small or trifling." The ordinary meaning of "undue hardship" thus points toward a standard closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U.S. at 83, n. 14, 97 S.Ct. 2264. Further, the Court's reading of the statutory term comports with pre-1972 EEOC decisions, so nothing in that history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use. Cf. *George* v. *McDonough*, 596 U. S. ——, ——, 142 S.Ct. 1953, 1959, 213 L.Ed.2d 265. And no support exists in other factors discussed by the parties for reducing *Hardison* to its "more than a *de minimis* cost" line. Pp. ——–——.

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(2) The parties agree that the "*de minimis*" test is not right, but they differ in the alternative language they propose. The Court thinks it is enough to say that what an employer must show is that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Hardison*, 432 U.S. at 83, n. 14, 97 S.Ct. 2264. Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer. Pp. ——.

(3) The Court declines to adopt the elaborations of the applicable standard that the parties suggest, either to incorporate Americans with Disabilities Act case law or opine that the EEOC's construction of *Hardison* has been basically correct. A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision. But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification the Court adopts today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test. Pp. ——.

(4) The Court also clarifies several recurring issues. First, as the parties agree, Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." § 2000e(j). Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business. A court must analyze whether that further logical step is shown. Further, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered "undue." Bias or hostility to a religious practice or accommodation cannot supply a defense.

*4 Second, Title VII requires that an employer "reasonably accommodate" an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. Faced with an accommodation request like Groff 's, an employer must do more that conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options would also be necessary. Pp. ——.

(c) Having clarified the Title VII undue-hardship standard, the Court leaves the context-specific application of that clarified standard in this case to the lower courts in the first instance. Pp. ——.

35 F.4th 162, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which JACKSON, J., joined.

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Opinion

Justice ALITO delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practice of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business." 78 Stat. 253, as amended, 42 U.S.C. § 2000e(j). Based on a line in this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), many lower courts, including the Third Circuit below, have interpreted "undue hardship" to mean any effort or cost that is "more than ... *de minimis*." In this case, however, both parties—the plaintiff-petitioner, Gerald Groff, and the defendant-respondent, the Postmaster General, represented by the Solicitor General—agree that the *de minimis* reading of *Hardison* is a mistake. With the benefit of thorough briefing and oral argument, we today clarify what Title VII requires.

I

Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest, not "secular labor" and the "transport[ation]" of worldly "goods." App. 294. In 2012, Groff began his employment with the United States Postal Service (USPS), which has more than 600,000 employees. He became a Rural Carrier Associate, a job that required him to assist regular carriers in the delivery of mail. When he took the position, it generally did not involve Sunday work. But within a few years, that changed. In 2013, USPS entered into an agreement with Amazon to begin facilitating Sunday deliveries, and in 2016, USPS signed a memorandum of understanding with the relevant union (the National Rural Letter Carriers' Association) that set out how Sunday and holiday parcel delivery would be handled. During a 2-month peak season, each post office would use its own staff to deliver packages. At all other times, Sunday and holiday deliveries would be carried out by employees (including Rural Carrier Associates like Groff) working from a "regional hub." For Quarryville, Pennsylvania, where Groff was originally stationed, the regional hub was the Lancaster Annex.

The memorandum specifies the order in which USPS employees are to be called on for Sunday work outside the peak season. First in line are each hub's "Assistant Rural Carriers"— part-time employees who are assigned to the hub and cover only Sundays and holidays. Second are any volunteers from the geographic area, who are assigned on a rotating basis. And third are all other carriers, who are compelled to do the work on a rotating basis. Groff fell into this third category, and after the memorandum of understanding was adopted, he was told that he would be required to work on Sunday. He then sought and received a transfer to Holtwood, a small rural USPS station that had only seven employees and that, at the time, did not make Sunday deliveries. But in March 2017, Amazon deliveries began there as well.

***5** With Groff unwilling to work on Sundays, USPS made other arrangements. During the peak season, Sunday deliveries that would have otherwise been performed by Groff were carried out by the rest of the Holtwood staff, including the postmaster, whose job ordinarily does not involve delivering mail. During other months, Groff 's Sunday assignments were redistributed to other carriers assigned to the regional hub.[1] Throughout this time, Groff continued to receive "progressive discipline" for failing to work on Sundays. 35 F.4th 162, 166 (C.A.3 2022). Finally, in January 2019, he resigned.[2]

A few months later, Groff sued under Title VII, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U.S.C. § 2000e(j). The District Court granted summary judgment to USPS, 2021 WL 1264030 (ED Pa., Apr. 6, 2021), and the Third Circuit affirmed. The panel majority felt that it was "bound by [the] ruling" in *Hardison*, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F.4th at 174, n. 18 (quoting 432

U.S. at 84, 97 S.Ct. 2264). Under Circuit precedent, the panel observed, this was "not a difficult threshold to pass," 35 F.4th at 174 (internal quotation marks omitted), and it held that this low standard was met in this case. Exempting Groff from Sunday work, the panel found, had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." *Id.*, at 175. Judge Hardiman dissented, concluding that adverse "effects on USPS employees in Lancaster or Holtwood" did not alone suffice to show the needed hardship "on the employer's *business*." *Id.*, at 177 (emphasis in original).

We granted Groff 's ensuing petition for a writ of certiorari. 598 U. S. ——, 143 S.Ct. 646, 214 L.Ed.2d 382 (2023).

II

Because this case presents our first opportunity in nearly 50 years to explain the contours of *Hardison*, we begin by recounting the legal backdrop to that case, including the development of the Title VII provision barring religious discrimination and the Equal Employment Opportunity Commission's (EEOC's) regulations and guidance regarding that prohibition. We then summarize how the *Hardison* case progressed to final decision, and finally, we discuss how courts and the EEOC have understood its significance. This background helps to explain the clarifications we offer today.

A

Since its passage, Title VII of the Civil Rights Act of 1964 has made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's ... religion." 42 U.S.C. § 2000e–2(a)(1) (1964 ed.). As originally enacted, Title VII did not spell out what it meant by discrimination "because of ... religion," but shortly after the statute's passage, the EEOC interpreted that provision to mean that employers were sometimes required to "accommodate" the "reasonable religious needs of employees." 29 C.F.R. § 1605.1(a)(2) (1967). After some tinkering, the EEOC settled on a formulation that obligated employers "to make reasonable accommodations to the religious needs of employees" whenever that would not work an "undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1968).

***6** Between 1968 and 1972, the EEOC elaborated on its understanding of "undue hardship" in a "long line of decisions" addressing a variety of policies. *Hardison*, 432 U.S. at 85, 97 S.Ct. 2264 (Marshall, J., dissenting); see Brief for General Conference of Seventh-day Adventists as *Amicus Curiae* 10–22 (collecting decisions). Those decisions addressed many accommodation issues that still arise frequently today, including the wearing of religious garb[3] and time off from work to attend to religious obligations.[4]

EEOC decisions did not settle the question of undue hardship. In 1970, the Sixth Circuit held (in a Sabbath case) that Title VII as then written did not require an employer "to accede to or accommodate" religious practice because that "would raise grave" Establishment Clause questions. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334. This Court granted certiorari, 400 U.S. 1008, 91 S.Ct. 566, 27 L.Ed.2d 621, but then affirmed by an evenly divided vote, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971).

Responding to *Dewey* and another decision rejecting any duty to accommodate an employee's observance of the Sabbath, Congress amended Title VII in 1972. *Hardison*, 432 U.S. at 73–74, 97 S.Ct. 2264; *id.*, at 88–89, 97 S.Ct. 2264 (Marshall, J., dissenting). Tracking the EEOC's regulatory language, Congress provided that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1970 ed., Supp. II).

B

The *Hardison* case concerned a dispute that arose during the interval between the issuance of the EEOC's "undue hardship" regulation and the 1972 amendment to Title VII. In 1967, Larry Hardison was hired as a clerk at the Stores Department in the Kansas City base of Trans World Airlines (TWA). The Stores Department was responsible for providing parts needed to repair and maintain aircraft. *Hardison v. Trans World Airlines*, 375 F.Supp. 877, 889 (WD Mo. 1974). It played an "essential role" and operated "24 hours per day, 365 days per year." *Hardison*, 432 U.S. at 66, 97 S.Ct. 2264. After taking this job, Hardison underwent a religious conversion. He began to observe the Sabbath by absenting himself from work from sunset on Friday to sunset on Saturday, and this conflicted with his work schedule. The problem was solved for a time when Hardison, who worked in Building 1, switched to the night shift, but it resurfaced when he sought and obtained a transfer to the day shift in Building 2 so that he could spend evenings with his wife. 375 F.Supp. at 889. In that new building, he did not have enough seniority to avoid work during his Sabbath. Attempts at accommodation failed, and he was eventually "discharged on grounds of insubordination." 432 U.S. at 69, 97 S.Ct. 2264.

*7 Hardison sued TWA and his union, the International Association of Machinists and Aerospace Workers (IAM).[5] The Eighth Circuit found that reasonable accommodations were available, and it rejected the defendants' Establishment Clause arguments. *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42–44 (1975).

Both TWA and IAM then filed petitions for certiorari, with TWA's lead petition asking this Court to decide whether the 1972 amendment of Title VII violated the Establishment Clause as applied in the decision below, particularly insofar as that decision had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement.[6] The Court granted both petitions. 429 U. S. 958, 97 S.Ct. 381, 50 L.Ed.2d 325 (1976).

When the Court took that action, all counsel had good reason to expect that the Establishment Clause would figure prominently in the Court's analysis. As noted above, in June 1971, the Court, by an equally divided vote, had affirmed the Sixth Circuit's decision in *Dewey*, which had heavily relied on Establishment Clause avoidance to reject the interpretation of Title VII set out in the EEOC's reasonable-accommodation guidelines. Just over three weeks later, the Court had handed down its (now abrogated)[7] decision in *Lemon* v. *Kurtzman*, 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) which adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional. *Id.*, at 612–613, 91 S.Ct. 2105. Because it could be argued that granting a special accommodation to a religious practice had just such a purpose and effect, some thought that *Lemon* posed a serious problem for the 1972 amendment of Title VII. And shortly before review was granted in *Hardison*, the Court had announced that the Justices were evenly divided in a case that challenged the 1972 amendment as a violation of the Establishment Clause. *Parker Seal Co. v. Cummins*, 429 U.S. 65, 97 S.Ct. 342, 50 L.Ed.2d 223 (1976) (*per curiam*).

Against this backdrop, both TWA and IAM challenged the constitutionality of requiring any accommodation for religious practice. The Summary of Argument in TWA's brief began with this categorical assertion: "The religious accommodation requirement of Title VII violates the Establishment Clause of the First Amendment." Brief for Petitioner TWA in O. T. 1976, No. 75–1126, p. 19. Applying the three-part *Lemon* test, TWA argued that any such accommodation has the primary purpose and effect of advancing religion and entails "pervasive" government "entanglement ... in religious issues." Brief for Petitioner TWA in No. 75–1126, at 20. The union's brief made a similar argument, Brief for Petitioner IAM, O. T. 1976, No. 75–1126, pp. 21–24, 50–72, but stressed the special status of seniority rights under Title VII, *id.*, at 24–36.

[1] Despite the prominence of the Establishment Clause in the briefs submitted by the parties and their *amici*,[8] constitutional concerns played no on-stage role in the Court's opinion, which focused instead on seniority rights.[9] The opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." 432 U.S. at 83, and n. 14, 97 S.Ct. 2264. The Court held that Title VII imposed no such requirement. *Ibid.* This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." *Id.*, at 81, 97 S.Ct. 2264. It noted that Title VII expressly provides special protection for " 'bona fide seniority ... system[s],' " *id.*, at 81–82, 97 S.Ct. 2264 (quoting 42 U.S.C. § 2000e–2(h)), and it cited precedent reading the statute " 'to make clear that the routine application of a bona fide seniority system [is] not ... unlawful under Title VII.' " 432 U.S. at 82, 97 S.Ct. 2264 (quoting *Teamsters v. United States*, 431 U.S. 324, 352, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). Invoking these authorities, the Court found that the statute did not require an accommodation that involuntarily deprived employees of seniority rights. 432 U.S. at 80, 97 S.Ct. 2264.[10]

***8** Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath. The Court found that not enough co-workers were willing to take Hardison's shift voluntarily, that compelling them to do so would have violated their seniority rights, and that leaving the Stores Department short-handed would have adversely affected its "essential" mission. *Id.*, at 68, 80, 97 S.Ct. 2264.

The Court also rejected two other options offered in Justice Marshall's dissent: (1) paying other workers overtime wages to induce them to work on Saturdays and making up for that increased cost by requiring Hardison to work overtime for regular wages at other times and (2) forcing TWA to pay overtime for Saturday work for three months, after which, the dissent thought, Hardison could transfer back to the night shift in Building 1. The Court dismissed both of these options as not "feasible," *id.*, at 83, n. 14, 97 S.Ct. 2264, but it provided no explanation for its evaluation of the first. In dissent, Justice Marshall suggested one possible reason: that the collective bargaining agreement might have disallowed Hardison's working overtime for regular wages. *Id.*, at 95, 97 S.Ct. 2264 (dissenting opinion). But the majority did not embrace that explanation.

As for the second, the Court disputed the dissent's conclusion that Hardison, if he moved back to Building 1, would have had enough seniority to choose to work the night shift. *Id.*, at 83, n. 14, 97 S.Ct. 2264. That latter disagreement was key. The dissent thought that Hardison could have resumed the night shift in Building 1 after just three months, and it therefore calculated what it would have cost TWA to pay other workers' overtime wages on Saturdays for that finite period of time. According to that calculation, TWA's added expense for three months would have been $150 (about $1,250 in 2022 dollars).[11] *Id.*, at 92, n. 6, 97 S.Ct. 2264. But the Court doubted that Hardison could have regained the seniority rights he had enjoyed in Building 1 prior to his transfer, and if that were true, TWA would have been required to pay other workers overtime for Saturday work indefinitely. Even under Justice Marshall's math, that would have worked out to $600 per year at the time, or roughly $5,000 per year today.

In the briefs and at argument, little space was devoted to the question of determining when increased costs amount to an "undue hardship" under the statute, but a single, but oft-quoted, sentence in the opinion of the Court, if taken literally, suggested that even a pittance might be too much for an employer to be forced to endure. The line read as follows: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.*, at 84, 97 S.Ct. 2264.

Although this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term "undue hardship," it is doubtful that it was meant to take on that large role. In responding to Justice Marshall's dissent, the Court described the governing standard quite differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." *Id.*, at 83, n. 14, 97 S.Ct. 2264. This formulation suggests that an employer may be required to bear costs and make expenditures that are not "substantial." Of course, there is a big difference between costs and expenditures that are not "substantial" and those that are "de minimis," which is to say, so "very small or trifling" that that they are not even worth noticing. Black's Law Dictionary 388 (5th ed. 1979).

*9 The Court's response to Justice Marshall's estimate of the extra costs that TWA would have been required to foot is also telling. The majority did not argue that Justice Marshall's math produced considerably "more than a *de minimis* cost" (as it certainly did). Instead, the Court responded that Justice Marshall's calculation involved assumptions that were not "feasible under the circumstances" and would have produced a different conflict with "the seniority rights of other employees." 432 U.S. at 83, n. 14, 97 S.Ct. 2264; see Brief for United States 29, n. 4 (noting that *Hardison* "specifically rejected" the dissent's calculations and that it is "wrong to assert" that *Hardison* held that a $150 cost was an undue hardship).

Ultimately, then, it is not clear that any of the possible accommodations would have actually solved Hardison's problem without transgressing seniority rights. The *Hardison* Court was very clear that those rights were off-limits. Its guidance on "undue hardship" in situations not involving seniority rights is much less clear.

C

Even though *Hardison*'s reference to "*de minimis*" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "*de minimis*" as the governing standard.

To be sure, as the Solicitor General notes, some lower courts have understood that the protection for religious adherents is greater than "more than ... *de minimis*" might suggest when read in isolation. But a bevy of diverse religious organizations has told this Court that the *de minimis* test has blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market. See, *e.g.*, Brief for The Sikh Coalition et al. as *Amici Curiae* 15, 19–20 ("the de minimis standard eliminates any meaningful mandate to accommodate Sikh practices in the workplace" and "emboldens employers to deny reasonable accommodation requests"); Brief for Council on American-Islamic Relations as *Amicus Curiae* 3 (Muslim women wearing religiously mandated attire "have lost employment opportunities" and have been excluded from "critical public institutions like public schools, law enforcement agencies, and youth rehabilitation centers"); Brief for Union of Orthodox Jewish Congregations of America as *Amicus Curiae* 14–15 (because the "*de minimis* cost" test "can be satisfied in nearly any circumstance," "Orthodox Jews once again [are] left at the mercy of their employers' good graces"); Brief for Seventh-day Adventist Church in Canada et al. as *Amici Curiae* 8 (joint brief of Sabbatarian faiths arguing that Sabbath accommodation under the *de minimis* standard is left to "their employers' and coworkers' goodwill").

The EEOC has also accepted *Hardison* as prescribing a " 'more than a *de minimis* cost' " test, 29 C.F.R. § 1605.2(e)(1) (2022), but has tried in some ways to soften its impact. It has specifically cautioned (as has the Solicitor General in this case) against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§ 1605.2(e)(1), (2).

Nevertheless, some courts have rejected even the EEOC's gloss on "*de minimis*."[12] And in other cases,

courts have rejected accommodations that the EEOC's guidelines consider to be ordinarily required, such as the relaxation of dress codes and coverage for occasional absences.[13] Members of this Court have warned that, if the *de minimis* rule represents the holding of *Hardison*, the decision might have to be reconsidered. *Small* v. *Memphis Light, Gas & Water*, 593 U. S. ——, 141 S.Ct. 1227, 209 L.Ed.2d 538 (2021) (GORSUCH, J., dissenting from denial of certiorari); *Patterson* v. *Walgreen Co.*, 589 U. S. ——, 140 S.Ct. 685, 206 L.Ed.2d 230 (2020) (ALITO, J., concurring in denial of certiorari). Four years ago, the Solicitor General—joined on its brief by the EEOC—likewise took that view. Brief for United States as *Amicus Curiae* in *Patterson v. Walgreen Co.*, O. T. 2019, No. 18349, p. 20 ("Contrary to *Hardison*, therefore, an 'undue hardship' is not best interpreted to mean 'more than a *de minimis* cost' ").

***10** Today, the Solicitor General disavows its prior position that *Hardison* should be overruled—but only on the understanding that *Hardison* does not compel courts to read the "more than *de minimis*" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost.[14] Tr. of Oral Arg. 107. With the benefit of comprehensive briefing and oral argument, we agree.[15]

III

[2] [3] We hold that showing "more than a *de minimis* cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. We therefore, like the parties, understand *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context of an employer's business. See Tr. of Oral Arg. 61–62 (argument of Solicitor General). This fact-specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech.

A

[4] As we have explained, we do not write on a blank slate in determining what an employer must prove to defend a denial of a religious accommodation, but we think it reasonable to begin with Title VII's text. After all, as we have stressed over and over again in recent years, statutory interpretation must "begi[n] with," and ultimately heed, what a statute actually says. *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. 109, ——, 138 S.Ct. 617, 631, 199 L.Ed.2d 501 (2018) (internal quotation marks omitted); see *Bartenwerfer* v. *Buckley*, 598 U. S. 69, 74, 143 S.Ct. 665, 214 L.Ed.2d 434 (2023); *Intel Corp. Investment Policy Comm.* v. *Sulyma*, 589 U. S. ——, ——, ——, 140 S.Ct. 768, 775–776, 777–778, 206 L.Ed.2d 103 (2020).Here, the key statutory term is "undue hardship." In common parlance, a "hardship" is, at a minimum, "something hard to bear." Random House Dictionary of the English Language 646 (1966) (Random House). Other definitions go further. See, *e.g.*, Webster's Third New International Dictionary 1033 (1971) (Webster's Third) ("something that causes or entails suffering or privation"); American Heritage Dictionary 601 (1969) (American Heritage) ("[e]xtreme privation; adversity; suffering"); Black's Law Dictionary, at 646 ("privation, suffering, adversity"). But under any definition, a hardship is more severe than a mere burden. So even if Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. Random House 1547; see, *e.g.*, Webster's Third 2492 ("inappropriate," "unsuited," or "exceeding or violating propriety or fitness"); American Heritage 1398 ("excessive"). The Government agrees, noting that " 'undue hardship means something greater than hardship.' " Brief for United States 30; see *id.*, at 39 (arguing that "accommodations should be assessed while 'keep[ing]

in mind both words in the key phrase of the actual statutory text: "undue" and "hardship" ' " (quoting *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (C.A.7 2013)).

*11 When "undue hardship" is understood in this way, it means something very different from a burden that is merely more than *de minimis, i.e.*, something that is "very small or trifling." Black's Law Dictionary, at 388. So considering ordinary meaning while taking *Hardison* as a given, we are pointed toward something closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U.S. at 83, n. 14, 97 S.Ct. 2264.

Similarly, while we do not rely on the pre-1972 EEOC decisions described above to define the term, we do observe that these decisions often found that accommodations that entailed substantial costs were required. See *supra*, at ——, nn. 3–4. Nothing in this history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use. Cf. *George* v. *McDonough*, 596 U. S. ——, ——, 142 S.Ct. 1953, 1959, 213 L.Ed.2d 265 (2022) (a "robust regulatory backdrop" can "fil[l] in the details" of a statutory scheme's use of a specific term).

In short, no factor discussed by the parties—the ordinary meaning of "undue hardship," the EEOC guidelines that *Hardison* concluded that the 1972 amendment " 'ratified,' " 432 U.S. at 76, n. 11, 97 S.Ct. 2264 (internal quotation marks omitted), the use of that term by the EEOC prior to those amendments, and the common use of that term in other statutes—supports reducing *Hardison* to its "more than a *de minimis* cost" line. See Brief for United States 39 (arguing that "the Court could emphasize that *Hardison*'s language does not displace the statutory standard").

B

[5] In this case, both parties agree that the "*de minimis*" test is not right, but they differ slightly in the alternative language they prefer. Groff likes the phrase "significant difficulty or expense." Brief for Petitioner 15; Reply Brief 2. The Government, disavowing its prior position that Title VII's text requires overruling *Hardison*, points us to *Hardison*'s repeated references to "substantial expenditures" or "substantial additional costs." Brief for United States 28–29 (citing 432 U.S. at 83–84, and n. 14, 97 S.Ct. 2264); see Brief for United States 39. We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Hardison*, 432 U.S. at 83, n. 14, 97 S.Ct. 2264.

[6] What matters more than a favored synonym for "undue hardship" (which is the actual text) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating cost of [an] employer." Brief for United States 40 (internal quotation marks omitted).

C

The main difference between the parties lies in the further steps they would ask us to take in elaborating upon their standards. Groff would not simply borrow the phrase "significant difficulty or expense" from the Americans with Disabilities Act (ADA) but would have us instruct lower courts to "draw upon decades of ADA caselaw." Reply Brief 13. The Government, on the other hand, requests that we opine that the EEOC's construction of *Hardison* has been basically correct. Brief for United States 39.

[7] Both of these suggestions go too far. We have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today. After all, as a public advocate for employee

rights, much of the EEOC's guidance has focused on what should be accommodated. Accordingly, today's clarification may prompt little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs. See 29 C.F.R. § 1605.2(d). But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification we adopt today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the common-sense manner that it would use in applying any such test.

D

***12** The erroneous *de minimis* interpretation of *Hardison* may have had the effect of leading courts to pay insufficient attention to what the actual text of Title VII means with regard to several recurring issues. Since we are now brushing away that mistaken view of *Hardison*'s holding, clarification of some of those issues—in line with the parties' agreement in this case—is in order.

[8] [9] First, on the second question presented, both parties agree that the language of Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." 42 U.S.C. § 2000e(j); see 35 F.4th at 177–178 (Hardiman, J., dissenting). As the Solicitor General put it, not all "impacts on coworkers ... are relevant," but only "coworker impacts" that go on to "affec[t] the conduct of the business." Tr. of Oral Arg. 102–104. So an accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but a court cannot stop its analysis without examining whether that further logical step is shown in a particular case.

[10] [11] [12] On this point, the Solicitor General took pains to clarify that some evidence that occasionally is used to show "impacts" on coworkers is "off the table" for consideration. *Id.*, at 102. Specifically, a coworker's dislike of "religious practice and expression in the workplace" or "the mere fact [of] an accommodation" is not "cognizable to factor into the undue hardship inquiry." *Id.*, at 89–90. To the extent that this was not previously clear, we agree. An employer who fails to provide an accommodation has a defense only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue." If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself. See *id.*, at 89 (argument of Solicitor General) (such an approach would be "giving effect to religious hostility"); contra, *EEOC v. Sambo's of Georgia, Inc.*, 530 F.Supp. 86, 89 (ND Ga. 1981) (considering as hardship "[a]dverse customer reaction" from "a simple aversion to, or discomfort in dealing with, bearded people").

[13] [14] Second, as the Solicitor General's authorities underscore, Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. See *Adeyeye*, 721 F.3d at 455; see also Brief for United States 30, 33, 39. This distinction matters. Faced with an accommodation request like Groff 's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.

IV

Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test, 35 F.4th at 175, and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or

the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

* * *

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

It is so ordered.

Justice SOTOMAYOR, with whom Justice JACKSON joins, concurring.

As both parties here agree, the phrase "more than a *de minimis* cost" from *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), was loose language. An employer violates Title VII if it fails "to reasonably accommodate" an employee's religious observance or practice, unless the employer demonstrates that accommodation would result in "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). The statutory standard is "undue hardship," not trivial cost.

Hardison, however, cannot be reduced to its "*de minimis*" language. Instead, that case must be understood in light of its facts and the Court's reasoning. The *Hardison* Court concluded that the plaintiff 's proposed accommodation would have imposed an undue hardship on the conduct of the employer's business because the accommodation would have required the employer either to deprive other employees of their seniority rights under a collective-bargaining agreement, or to incur substantial additional costs in the form of lost efficiency or higher wages. 432 U.S. at 79–81, 83–84, and n. 14, 97 S.Ct. 2264. The Equal Employment Opportunity Commission has interpreted Title VII's undue-hardship standard in this way for seven consecutive Presidential administrations, from President Reagan to President Biden. See 29 C.F.R. § 1605.2(e) (2022) (citing *Hardison*, 432 U.S. at 80, 84, 97 S.Ct. 2264).

Petitioner Gerald Groff asks this Court to overrule *Hardison* and to replace it with a "significant difficulty or expense" standard. Brief for Petitioner 17–38. The Court does not do so. That is a wise choice because *stare decisis* has "enhanced force" in statutory cases. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015). Congress is free to revise this Court's statutory interpretations. The Court's respect for Congress's decision not to intervene promotes the separation of powers by requiring interested parties to resort to the legislative rather than the judicial process to achieve their policy goals. This justification for statutory *stare decisis* is especially strong here because "Congress has spurned multiple opportunities to reverse [*Hardison*]—openings as frequent and clear as this Court ever sees." *Id.*, at 456–457, 135 S.Ct. 2401.[1] Moreover, in the decades since *Hardison* was decided, Congress has revised Title VII multiple times in response to other decisions of this Court,[2] yet never in response to *Hardison*. See *Kimble*, 576 U.S. at 457, 135 S.Ct. 2401.

***14** Groff also asks the Court to decide that Title VII requires the United States Postal Service to show "undue hardship to [its] *business*," not to Groff 's co-workers. Brief for Petitioner 42 (emphasis added); see 35 F.4th 162, 176 (C.A.3 2022) (Hardiman, J., dissenting). The Court, however, recognizes that Title VII requires "undue hardship on the *conduct* of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added). Because the "conduct of [a] business" plainly includes the management and performance of the business's employees, undue hardship on the conduct of a business may include undue hardship on the business's employees. See, *e.g.*, *Hardison*, 432 U.S. at 79–81, 97 S.Ct. 2264 (deprivation of employees' bargained-for seniority rights constitutes undue hardship). There is no basis in the text of the statute, let alone in economics or common sense, to conclude otherwise. Indeed, for many businesses, labor is more important to the conduct of the business than any other factor.

To be sure, some effects on co-workers will not constitute "undue hardship" under Title VII. For example, animus toward a protected group is not a cognizable "hardship" under any antidiscrimination statute. Cf. *ante*, at ——. In addition, some hardships, such as the labor costs of coordinating voluntary shift swaps, are not "undue" because they are too insubstantial. See 29 C.F.R. §§ 1605.2(d)(1)(i), (e)(1). Nevertheless, if there is an undue hardship on "the conduct of the employer's business," 42 U.S.C. § 2000e(j), then such hardship is sufficient, even if it consists of hardship on employees. With these observations, I join the opinion of the Court.

All Citations

600 U.S. ----, --- S.Ct. ----, 2023 WL 4239256

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Other employees complained about the consequences of Groff 's absences. While the parties dispute some of the details, it appears uncontested that at least one employee filed a grievance asserting a conflict with his contractual rights. After disputing any conflict with contract rights, USPS eventually settled that claim, with the settlement reaffirming USPS's commitment to the Memorandum of Understanding. App. 118, 125–126.

2 Groff represents that his resignation was in light of expected termination, and the District Court found "a genuine issue of material fact" foreclosed summary judgment as to whether Groff suffered an adverse employment action. 2021 WL 1264030,*8 (ED Pa., Apr. 6, 2021). The Government does not dispute the point in this Court.

3 See, *e.g.*, EEOC Dec. No. 71–779, 1970 WL 3550, *2 (Dec. 21, 1970) (no undue hardship in permitting nurse to wear religious headscarf).

4 See EEOC Dec. No. 71–463, 1970 WL 3544, *1–*2 (Nov. 13, 1970) (no "undue hardship" or "unreasonable burde[n]" for employer to train co-worker to cover two-week religious absence); EEOC Dec. No. 70–580, 1970 WL 3513, *1–*2 (Mar. 2, 1970) (manufacturing employer asked to accommodate sundown-to-sundown Sabbath observance did not carry "burden ... to demonstrate undue hardship" where it did not address "whether another employee could be trained to substitute for the Charging Party during Sabbath days, or whether already qualified personnel ha[d] been invited to work a double shift"); EEOC Dec. No. 70–670, 1970 WL 3518, *2 (Mar. 30, 1970) (no "undue 'hardship' " in having other employees take on a few more on-call Saturdays per year); see also EEOC Dec. No. 70–110, 1969 WL 2908, *1–*2 (Aug. 27, 1969) (employer could not deny employee all Sunday "overtime opportunities" on basis of employee's religious inability to work Saturday, where others not working the full weekend had been accommodated, notwithstanding employer's claim of "considerable expense"); EEOC Dec. No. 70–99, 1969 WL 2905, *1 (Aug. 27, 1969) (no obligation to accommodate seasonal employee unavailable for Saturday work, where employer showed both "no available pool of qualified employees" to substitute and a "practical impossibility of obtaining and training an employee" to cover one day a week for six weeks).

5 "Labor organization[s]" themselves were and are bound by Title VII's nondiscrimination rules. 42 U.S.C. § 2000e–2(c) (1964 ed.).

6 See Pet. for Cert. in *Trans World Airlines, Inc.* v. *Hardison*, O. T. 1975, No. 75–1126, pp. 2–3, 17–22.

7 See *Kennedy* v. *Bremerton School Dist.*, 597 U. S. ——, ——, 142 S.Ct. 2407, 2427, 213 L.Ed.2d 755 (2022).

8 See, *e.g.*, Brief for Chrysler Corporation as *Amicus Curiae* 6–20 (arguing an Establishment Clause violation), and Brief for State of Michigan as *Amicus Curiae* 20–25 (arguing no conflict with the Establishment Clause), in *Trans World Airlines, Inc.* v. *Hardison*, O. T. 1976, No. 75–1126 etc.

9 The background summarized above and the patent clash between the ordinary meaning of "undue hardship" and "more than ... de minimis" led some to interpret the decision to rest on Establishment Clause concerns. Justice Marshall observed in his *Hardison* dissent that the majority opinion "ha[d] the singular advantage of making consideration of petitioners' constitutional challenge unnecessary." 432 U.S. at 89, 97 S.Ct. 2264. A few courts assumed that *Hardison* actually was an Establishment Clause decision. See, *e.g.*, *Gibson v. Missouri Pacific R.*, 620 F.Supp. 85, 88–89 (ED Ark. 1985) (concluding that requiring an employer to "incur greater than de minimis costs" related to accommodating a Sabbath "would therefore violate the establishment clause"); see also *Massachusetts Bay Transp. Auth. v. Massachusetts Comm'n Against Discrimination*, 450 Mass. 327, 340–341, and n. 15, 879 N.E.2d 36, 46–48, and n.15 (2008) (construing state law narrowly on premise that *Hardison* might state outer constitutional bounds). Some constitutional scholars also suggested that *Hardison* must have been based on constitutional avoidance. See, *e.g.*, P. Karlan & G. Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L. J. 1, 6–7 (1996); M. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685, 704 (1992); cf. *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 829 (C.A.6 2020) (Thapar, J., concurring). In doing so, some have pointed to *Hardison*'s passing reference to a need to avoid "unequal treatment of employees on the basis of their religion." 432 U.S. at 84, 97 S.Ct. 2264. But the Court later clarified that "Title VII does not demand mere neutrality with regard to religious practices" but instead "gives them favored treatment" in order to ensure religious persons' full participation in the workforce. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775, 135 S.Ct. 2028, 192 L.Ed.2d 35 (2015).

10 We do not understand Groff to challenge the continued vitality of *Hardison*'s core holding on its "principal issue" (bracketing his disputes that the memorandum of understanding set forth a seniority system). 432 U.S. at 83, and n. 14, 97 S.Ct. 2264.

11 The dissent appears to have drawn its estimate from Hardison's daily rate at the time of termination ($3.37/hour) and deposition testimony on typical overtime rates and shift lengths. See App. in No. 75–1126 etc., at pp. 40, 126.

12 For example, two years ago, the Seventh Circuit told the EEOC that it would be an undue hardship on Wal-Mart (the Nation's largest private employer, with annual profits of over $11 billion) to be required to facilitate voluntary shift-trading to accommodate a prospective assistant manager's observance of the Sabbath. *EEOC v. Walmart Stores East, L. P.*, 992 F.3d 656, 659–660 (2021). See Walmart Inc., Wall Street Journal Markets (June 4, 2023).

13 See, *e.g.*, *Wagner v. Saint Joseph's/Candler Health System, Inc.*, 2022 WL 905551, *4–*5 (SD Ga., Mar. 28, 2022) (Orthodox Jew fired for taking off for High Holy Days); *Camara v. Epps Air Serv., Inc.*, 292 F.Supp.3d 1314, 1322, 1331–1332 (ND Ga., 2017) (Muslim woman who wore a hijab fired because the sight of her might harm the business in light of "negative stereotypes and perceptions about Muslims"); *El-Amin v. First Transit, Inc.*, 2005 WL 1118175, *7–*8 (SD Ohio, May 11, 2005) (Muslim employee terminated where religious services conflicted with "two hours" of training a week during a month of daily training); *EEOC v. Sambo's of Ga., Inc.*, 530 F.Supp. 86, 91 (ND Ga., 1981) (hiring a Sikh man as a restaurant manager would be an undue hardship because his beard would have conflicted with "customer preference").

14 At the certiorari stage, the Government argued against review by noting that Government employees receive "at least as much protection for religious-accommodation claims [under the Religious Freedom

Restoration Act (RFRA)] as [under] any interpretation of Title VII." Brief in Opposition 9. Courts have not always agreed on how RFRA's cause of action—which does not rely on employment status—interacts with Title VII's cause of action, and the Third Circuit has treated Title VII as exclusively governing at least some employment-related claims brought by Government employees. Compare *Francis v. Mineta*, 505 F.3d 266, 271 (C.A.3 2007), with *Tagore v. United States*, 735 F.3d 324, 330–331 (C.A.5 2013) (federal employee's RFRA claim could proceed even though *de minimis* standard foreclosed Title VII claim). Because Groff did not bring a RFRA claim, we need not resolve today whether the Government is correct that RFRA claims arising out of federal employment are not displaced by Title VII.

15 In addition to suggesting that *Hardison* be revisited, some Justices have questioned whether *Hardison* (which addresses the pre-1972 EEOC Guidelines) binds courts interpreting the current version of Title VII. See *Abercrombie*, 575 U.S. at 787, n. *, 135 S.Ct. 2028 (THOMAS, J., concurring in part and dissenting in part). As explained below, because we—like the Solicitor General—construe *Hardison* as consistent with the ordinary meaning of "undue hardship," we need not reconcile any divergence between *Hardison* and the statutory text.

1 See, *e.g.*, H. R. 1440, 117th Cong., 1st Sess., § 4(a)(4) (2021); H. R. 5331, 116th Cong., 1st Sess., § 4(a)(4) (2019); S. 3686, 112th Cong., 2d Sess., § 4(a)(3) (2012); S. 4046, 111th Cong., 2d Sess., § 4(a)(3) (2010); S. 3628, 110th Cong., 2d Sess., § 2(a)(1)(B) (2008); H. R. 1431, 110th Cong., 1st Sess., § 2(a)(4) (2007); H. R. 1445, 109th Cong., 1st Sess., § 2(a)(4) (2005); S. 677, 109th Cong., 1st Sess., § 2(a)(4) (2005); S. 893, 108th Cong., 1st Sess., § 2(a)(4) (2003); S. 2572, 107th Cong., 2d Sess., § 2(a)(4) (2002); H. R. 4237, 106th Cong., 2d Sess., § 2(a)(4) (2000); S. 1668, 106th Cong., 1st Sess., § 2(a)(4) (1999); H. R. 2948, 105th Cong., 1st Sess., § 2(a)(4) (1997); S. 1124, 105th Cong., 1st Sess., § 2(a)(4) (1997); S. 92, 105th Cong., 1st Sess., § 2(a)(3) (1997); H. R. 4117, 104th Cong., 2d Sess., § 2(a)(3) (1996).

2 See Civil Rights Act of 1991, 105 Stat. 1071 (overruling *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)); Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. 5 (overruling *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007)).

Kennedy v. Bremerton School District

Supreme Court of the United States. | June 27, 2022 | 142 S.Ct. 2407 | 2022 WL 2295034

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Outline

Free speech, private prayer, and public forum

142 S.Ct. 2407
Supreme Court of the United States.

Joseph A. KENNEDY, Petitioner
v.
BREMERTON SCHOOL DISTRICT

No. 21-418
|
Argued April 25, 2022
|
Decided June 27, 2022

Synopsis

Background: School employee, who lost his job as a high school football coach after he knelt at midfield after games to offer a quiet personal prayer, brought § 1983 action against school district, alleging violations of his rights under the First Amendment's Free Speech and Free Exercise Clauses. The United States District Court for the Western District of Washington, Ronald B. Leighton, Senior District Judge, 443 F.Supp.3d 1223, granted summary judgment to school district, and employee appealed. The United States Court of Appeals for the Ninth Circuit, Milan D. Smith, Circuit Judge, 991 F.3d 1004, affirmed, and rehearing en banc was later denied, 4 F.4th 910. Certiorari was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that:

[1] school district burdened employee's rights under Free Exercise Clause by suspending him for his decision to persist in praying quietly at midfield;

[2] employee engaged in private speech, not government speech attributable to school district, when he uttered prayers quietly at midfield without his players;

[3] school district's burdening of employee's rights under Free Exercise and Free Speech Clauses could not be justified on ground his suspension was essential to avoid an Establishment Clause violation; and

[4] employee's private religious exercise was not impermissible government coercion of students to pray.

Reversed.

Justice Thomas filed a concurring opinion.

Justice Alito filed a concurring opinion.

Justice Sotomayor filed a dissenting opinion, in which Justice Breyer and Justice Kagan joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Summary Judgment.

West Headnotes (33)

[1] **Constitutional Law**⇨Free Exercise of Religion
Constitutional Law⇨Religious speech or activities

The Free Exercise and Free Speech Clauses of the First Amendment work in tandem: where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. U.S. Const. Amend. 1.

18 Cases that cite this headnote

[2] **Constitutional Law**⇨Freedom of religion and conscience
Constitutional Law⇨Freedom of speech, expression, and press

A plaintiff bears certain burdens to demonstrate an infringement of his rights under the First Amendment's Free Exercise and Free Speech Clauses, and if the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of the Supreme Court's case law. U.S. Const. Amend. 1.

1 Case that cites this headnote

[3] **Constitutional Law**⇨Beliefs protected; inquiry into beliefs

The Free Exercise Clause of the First Amendment protects not only the right to harbor religious beliefs inwardly and secretly. U.S. Const. Amend. 1.

5 Cases that cite this headnote

[4] **Constitutional Law**⇨Free Exercise of Religion

The First Amendment's Free Exercise Clause does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts. U.S. Const. Amend. 1.

10 Cases that cite this headnote

[5] **Constitutional Law**⇨Neutrality; general applicability

A plaintiff may carry the burden of proving a free exercise violation under the First Amendment in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not neutral or generally applicable. U.S. Const. Amend. 1.

21 Cases that cite this headnote

[6] **Constitutional Law**⇨Freedom of religion and conscience
Constitutional Law⇨Strict scrutiny; compelling interest

Should a plaintiff make a showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not neutral or generally applicable, the Supreme Court will find a First Amendment violation unless the government can satisfy strict scrutiny by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. U.S. Const. Amend. 1.

27 Cases that cite this headnote

[7] **Constitutional Law**⇨Burden on religion

A plaintiff may prove a free exercise violation under the First Amendment by showing that official expressions of hostility to religion accompany laws or policies burdening religious exercise. U.S. Const. Amend. 1.

2 Cases that cite this headnote

[8] **Constitutional Law**⇨Prayer or silence in general
Education⇨Protected activities in general
Public Employment⇨Protected activities

School district burdened high school football coach's rights under First Amendment's Free Exercise Clause by suspending him for his decision to persist in praying quietly at midfield without his players after three games, pursuant to a district rule that was neither neutral nor generally applicable; coach's sincerely motivated religious exercise did not involve leading prayers with the team or before any other captive audience, the district sought to restrict coach's actions at least in part because of their religious character, and the district's

recommendation against rehiring the coach for not supervising student-athletes after games was a bespoke requirement specifically addressed to his religious exercise. U.S. Const. Amend. 1.

1 Case that cites this headnote

[9] **Constitutional Law**⚖Neutrality; general applicability

A government policy will not qualify as "neutral" under the First Amendment's Free Exercise Clause if it is specifically directed at religious practice; a policy can fail this test if it discriminates on its face, or if a religious exercise is otherwise its object. U.S. Const. Amend. 1.

5 Cases that cite this headnote

[10] **Constitutional Law**⚖Neutrality; general applicability

A government policy will fail the general applicability requirement, for purposes of showing a Free Exercise Clause violation through the burdening of a plaintiff's sincere religious practice pursuant to a policy that is not generally applicable, if the policy prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it provides a mechanism for individualized exemptions. U.S. Const. Amend. 1.

21 Cases that cite this headnote

[11] **Constitutional Law**⚖Strict scrutiny; compelling interest

Failing either the neutrality or general applicability test for a violation of the First Amendment's Free Exercise Clause is sufficient to trigger strict scrutiny. U.S. Const. Amend. 1.

[12] **Constitutional Law**⚖Student Speech or Conduct

Constitutional Law⚖Employees

The First Amendment's protections extend to teachers and students, neither of whom shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. U.S. Const. Amend. 1.

1 Case that cites this headnote

[13] **Constitutional Law**⚖Employees

The First Amendment speech rights of public school employees are not so boundless that they may deliver any message to anyone anytime they wish. U.S. Const. Amend. 1.

3 Cases that cite this headnote

[14] **Constitutional Law**⚖Public Employees and Officials

To account for the complexity associated with the interplay between free speech rights and government employment, the Supreme Court's decisions in *Pickering*, *Garcetti*, and related cases suggest proceeding in two steps, and the first step involves a threshold inquiry into the nature of the speech at issue. U.S. Const. Amend. 1.

4 Cases that cite this headnote

[15] **Constitutional Law**⚖Balancing of interests

When a public employee speaks as a citizen addressing a matter of public concern, the First Amendment may be implicated and courts should proceed to a second step of the *Pickering*-*Garcetti* framework, under which courts should attempt to engage in a delicate balancing of the competing interests surrounding the speech and its consequences. U.S. Const. Amend. 1.

4 Cases that cite this headnote

[16] **Constitutional Law**⚖Coaches and other athletic department employees
Education⚖Protected activities in general
Public Employment⚖Protected activities

Public high school football coach engaged in "private speech," not government speech attributable to school district employer, when he uttered prayers quietly at midfield without his players after three games, for purposes of determining whether his resulting suspension from his coaching position by the district violated the First Amendment's Free Speech Clause; the coach did not offer his prayers while acting within the scope of his duties as a coach, as his actual job description left time for a private moment after games to engage in any manner of secular activities, he did not speak pursuant to government policy, he did not seek to convey a government-created message, and he did not instruct players or engage in any other speech the district paid him to produce as a coach. U.S. Const. Amend. 1.

4 Cases that cite this headnote

[17] **Constitutional Law**⚖Public or private concern; speaking as "citizen"
Constitutional Law⚖Balancing of interests

Under the second step of the *Pickering-Garcetti* framework for analyzing a government employee's claims the government violated the employee's free speech rights under the First Amendment, the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern. U.S. Const. Amend. 1.

8 Cases that cite this headnote

[18] **Constitutional Law**⚖Strict scrutiny; compelling interest

Under the Free Exercise Clause of the First Amendment, a government entity normally must satisfy at least strict scrutiny, showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. U.S. Const. Amend. 1.

7 Cases that cite this headnote

[19] **Constitutional Law**⚖Prayer or silence in general
Constitutional Law⚖Coaches and other athletic department employees
Education⚖Protected activities in general
Public Employment⚖Protected activities

School district's burdening of high school football coach's rights under First Amendment's Free Exercise and Free Speech Clauses, by suspending him for engaging in the private speech of praying quietly at midfield without his players after three games, could not be justified on the ground the coach's suspension was essential to avoid a violation of the Establishment Clause because a reasonable observer could mistakenly infer the district endorsed the coach's message; the district effectively created its own vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other, placed itself in the middle, and then chose its preferred way out of its self-imposed trap. U.S. Const. Amend. 1.

4 Cases that cite this headnote

[20] **Constitutional Law**⚖Establishment of Religion
Constitutional Law⚖Free Exercise of Religion
Constitutional Law⚖Purpose of constitutional protection

The Establishment Clause, the Free Exercise Clause, and the Free Speech Clause have complementary purposes, not

warring ones where one Clause is always sure to prevail over the others. U.S. Const. Amend. 1.

11 Cases that cite this headnote

[21] **Constitutional Law**⚖Establishment of Religion

The Establishment Clause of the First Amendment does not include anything like a modified heckler's veto, in which religious activity can be proscribed based on perceptions or discomfort. U.S. Const. Amend. 1.

[22] **Constitutional Law**⚖Establishment of Religion
Constitutional Law⚖Public Education

An Establishment Clause violation does not automatically follow whenever a public school or other government entity fails to censor private religious speech. U.S. Const. Amend. 1.

[23] **Constitutional Law**⚖Establishment of Religion
Constitutional Law⚖Advancement, endorsement, or sponsorship of religion; favoring or preferring religion

The First Amendment's Establishment Clause does not compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious. U.S. Const. Amend. 1.

[24] **Constitutional Law**⚖Establishment of Religion

The First Amendment's Establishment Clause must be interpreted by reference to historical practices and understandings. U.S. Const. Amend. 1.

13 Cases that cite this headnote

[25] **Constitutional Law**⚖Establishment of Religion

The line that courts and governments must draw between the permissible and the impermissible under the First Amendment's Establishment Clause has to accord with history and faithfully reflect the understanding of the Founding Fathers. U.S. Const. Amend. 1.

2 Cases that cite this headnote

[26] **Constitutional Law**⚖Prayer or silence in general
Education⚖Protected activities in general
Public Employment⚖Protected activities

Public high school football coach's private religious exercise for which he was suspended by school district, namely kneeling at midfield after three games to offer a quiet personal prayer, did not come close to crossing any line separating protected private expression from impermissible government coercion of students to pray, as would have violated the Establishment Clause; although some people would have seen the coach's religious exercise, and those close at hand might have heard him too, his prayers were not publicly broadcast or recited to a captive audience, his plan was to wait to pray until athletes were occupied, students were not required or expected to participate, and none of the coach's students participated in any of the three prayers. U.S. Const. Amend. 1.

[27] **Constitutional Law**⚖Inhibiting, interfering with, or coercing religion

Government may not, consistent with a historically sensitive understanding of the Establishment Clause, make a religious observance compulsory. U.S. Const. Amend. 1.

13 Cases that cite this headnote

[28] **Constitutional Law**⚖Inhibiting, interfering with, or coercing religion

Under the Establishment Clause, government may not coerce anyone to attend church, nor may it force citizens to engage in a formal religious exercise. U.S. Const. Amend. 1.

4 Cases that cite this headnote

[29] **Constitutional Law**⚖Inhibiting, interfering with, or coercing religion

While some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection, offense does not equate to impermissible government coercion under the Establishment Clause. U.S. Const. Amend. 1.

1 Case that cites this headnote

[30] **Constitutional Law**⚖Employees in general

Visible religious conduct by a public school teacher or coach may not be deemed—without more and as a matter of law—impermissibly coercive on students, in violation of the Establishment Clause. U.S. Const. Amend. 1.

[31] **Constitutional Law**⚖First Amendment in General

In no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights. U.S. Const. Amend. 1.

[32] **Constitutional Law**⚖First Amendment in General

Government justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented post hoc in response to litigation. U.S. Const. Amend. 1.

1 Case that cites this headnote

[33] **Constitutional Law**⚖Free Exercise of Religion

Constitutional Law⚖Heckler's veto

Under the Constitution protected speech and religious exercise do not readily give way to a heckler's veto. U.S. Const. Amend. 1.

***2411** *Syllabus**

Petitioner Joseph Kennedy lost his job as a high school football coach in the Bremerton School District after he knelt at midfield after games to offer a quiet personal prayer. Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion, and the Ninth Circuit affirmed. After the parties engaged in discovery, they filed cross-motions for summary judgment. The District Court found that the " 'sole reason' " for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after three games in October 2015. 443 F.Supp.3d 1223, 1231. The District Court granted summary judgment to the District and the Ninth Circuit affirmed. The Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. 4 F.4th 910, 911. Several dissenters argued that the panel applied a flawed understanding of the Establishment Clause reflected in *Lemon v. Kurtzman*, 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, and that this Court has abandoned *Lemon*'s "ahistorical, atextual" approach to discerning Establishment Clause violations. 4 F.4th at 911, and n. 3.

Held: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. Pp. 2421 - 2433.

(a) Mr. Kennedy contends that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. Where the Free Exercise Clause protects religious exercises, the Free Speech Clause provides overlapping protection for expressive religious activities. See, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269, n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440. A plaintiff must demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries his or her burden, the defendant must show that its actions were nonetheless justified and appropriately tailored. Pp. 2421 - 2432 1.

(1) Mr. Kennedy discharged his burden under the Free Exercise Clause. The Court's precedents permit a plaintiff to demonstrate a free exercise violation multiple ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879–881, 110 S.Ct. 1595, 108 L.Ed.2d 876. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny, under which the government must demonstrate its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. See, *e.g.*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472.

Here, no one questions that Mr. Kennedy seeks to engage in a sincerely motivated religious exercise involving giving "thanks through prayer" briefly "on the playing field" at the conclusion of each game he coaches. App. 168, 171. The contested exercise here does not involve leading prayers with the team; the District disciplined Mr. Kennedy *only* for his decision to persist in praying quietly without his students after three games in October 2015. In forbidding Mr. Kennedy's brief prayer, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. Prohibiting a religious practice was thus the District's unquestioned "object." The District explained that it could not allow an on-duty employee to engage in *religious* conduct even though it allowed other on-duty employees to engage in personal secular conduct. The District's performance evaluation after the 2015 football season also advised against rehiring Mr. Kennedy on the ground that he failed to supervise student-athletes after games, but any sort of postgame supervisory requirement was not applied in an evenhanded way. Pp. 2421 - 2423. The District thus conceded that its policies were neither neutral nor generally applicable.

(2) Mr. Kennedy also discharged his burden under the Free Speech Clause. The First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731. But teachers and coaches are also government employees paid in part to speak on the government's behalf and to convey its intended messages. To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, and *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689, and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. When an employee "speaks as a citizen addressing a matter of public concern," the Court's cases indicate that the First Amendment may be implicated and courts should proceed to a second step. *Id.*, at 423, 126 S.Ct. 1951. At this step, courts should engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." *Ibid.* At the first step of the *Pickering–Garcetti* inquiry, the parties'

Commented [ER1]: Personal religious observance at issue... bad facts for the separation of church and state crowd.

Commented [ER2]: For teachers and coaches a two step process.

disagreement centers on one question: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. *Lane v. Franks*, 573 U.S. 228, 240, 134 S.Ct. 2369, 189 L.Ed.2d 312. He did not speak pursuant to government policy and was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee. *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951. The timing and circumstances of Mr. Kennedy's prayers—during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities—confirms that Mr. Kennedy did not offer his prayers while acting within the scope of his duties as a coach. It is not dispositive that Coach Kennedy served as a role model and remained on duty after games. To hold otherwise is to posit an "excessively broad job descriptio[n]" by treating everything teachers and coaches say in the workplace as government speech subject to government control. *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951. That Mr. Kennedy used available time to pray does not transform his speech into government speech. Acknowledging that Mr. Kennedy's prayers represented his own private speech means he has carried his threshold burden. Under the *Pickering–Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern. See *Lane*, 573 U.S. at 242, 134 S.Ct. 2369. Pp. 2423 - 2426.

(3) Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. See *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. A similar standard generally obtains under the Free Speech Clause. See *Reed v. Town of Gilbert*, 576 U.S. 155, 171, 135 S.Ct. 2218, 192 L.Ed.2d 236. The District asks the Court to apply to Mr. Kennedy's claims the more lenient second-step *Pickering–Garcetti* test, or alternatively, intermediate scrutiny. The Court concludes, however, that the District cannot sustain its burden under any standard. Pp. 2425 - 2432.

i. The District, like the Ninth Circuit below, insists Mr. Kennedy's rights to religious exercise and free speech must yield to the District's interest in avoiding an Establishment Clause violation under *Lemon* and its progeny. The *Lemon* approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. *Lemon*, 403 U. S., at 612–613, 91 S.Ct. 2105. In time, that approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. See, *e.g.*, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593, 109 S.Ct. 3086, 106 L.Ed.2d 472. But—given the apparent "shortcomings" associated with *Lemon*'s "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause—this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion v. American Humanist Assn.*, 588 U. S. ——, ——, 139 S.Ct. 2067, ——, 204 L.Ed.2d 452 (plurality opinion).

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by " 'reference to historical practices and understandings.' " *Town of Greece v. Galloway*, 572 U.S. 565, 576, 134 S.Ct. 1811, 188 L.Ed.2d 835. A natural reading of the First Amendment suggests that the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13, 15, 67 S.Ct. 504, 91 L.Ed. 711. An analysis focused on original meaning and

history, this Court has stressed, has long represented the rule rather than some " 'exception' " within the "Court's Establishment Clause jurisprudence." *Town of Greece*, at 575, 134 S.Ct. 1811. The District and the Ninth Circuit erred by failing to heed this guidance. Pp. 2425 - 2432.

ii. The District next attempts to justify its suppression of Mr. Kennedy's religious activity by arguing that **doing otherwise would coerce students to pray.** The Ninth Circuit did not adopt this theory in proceedings below and evidence of coercion in this record is absent. The District suggests that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. A rule that the only acceptable government role models for students are those who eschew any visible religious expression would undermine a long constitutional tradition in which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." *Lee v. Weisman*, 505 U.S. 577, 590, 112 S.Ct. 2649, 120 L.Ed.2d 467. No historically sound understanding of the Establishment Clause begins to "mak[e] it necessary for government to be hostile to religion" in this way. *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954. Pp. 2428 - 2432.

iii. There is no conflict between the constitutional commands of the First Amendment in this case. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 308, 83 S.Ct. 1560, 10 L.Ed.2d 844 (Goldberg, J., concurring). A government entity's concerns about phantom constitutional violations do not justify actual violations of an individual's First Amendment rights. Pp. 2431 - 2433.

(c) *Respect for religious expressions is indispensable to life in a free and diverse Republic. Here, a government entity sought to punish an individual for engaging in a personal religious observance, based on a mistaken view that it has a duty to suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.* Mr. Kennedy is entitled to summary judgment on his religious exercise and free speech claims. Pp. 2432 - 2433.

991 F.3d 1004, reversed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and BARRETT, JJ., joined, and in which KAVANAUGH, J., joined, except as to Part III–B. THOMAS, J., and ALITO, J., filed concurring opinions. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER and KAGAN, JJ., joined.

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Opinion

Justice GORSUCH delivered the opinion of the Court.

***2415** Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He

offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It ***2416** did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I

A

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades of service in the Marine Corps. App. 167. Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. *Id.*, at 168, 171. In his prayers, Mr. Kennedy sought to express gratitude for "what the players had accomplished and for the opportunity to be part of their lives through the game of football." *Id.*, at 168. Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quiet[ly]" for "approximately 30 seconds." *Id.*, at 168–169.

Initially, Mr. Kennedy prayed on his own. See *ibid.* But over time, some players asked whether they could pray alongside him. 991 F.3d 1004, 1010 (C.A.9 2021); App. 169. Mr. Kennedy responded by saying, " 'This is a free country. You can do what you want.' " *Ibid.* The number of players who joined Mr. Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players to join. Other times Mr. Kennedy still prayed alone. See *ibid.* Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. See *id.*, at 170. Separately, the team at times engaged in pregame or postgame prayers in the locker room. It seems this practice was a "school tradition" that predated Mr. Kennedy's tenure. *Ibid.* Mr. Kennedy explained that he "never told any student that it was important they participate in any religious activity." *Ibid.* In particular, he "never pressured or encouraged any student to join" his postgame midfield prayers. *Ibid.*

For over seven years, no one complained to the Bremerton School District (District) about these practices. See *id.*, at 63–64. It seems the District's superintendent first learned of them only in September 2015, after an employee from another school commented positively on the school's practices to Bremerton's principal. See *id.*, at 109, 229. At that point, the District reacted quickly. On September 17, the superintendent sent Mr. Kennedy a letter. In it, the superintendent identified "two problematic practices" in which Mr. Kennedy had engaged. App. 40. First, Mr. Kennedy had provided "inspirational talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of ... game[s]." *Ibid.* Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program." *Id.*, at 41.

Commented [ER3]: Facts start here

The District explained that it sought to establish "clear parameters" "going forward." *Ibid.* It instructed Mr. Kennedy to avoid any motivational "talks with students" that "include[d] religious expression, including prayer," and to avoid "suggest[ing], encourag[ing] (or discourag[ing]), ***2417** or supervis[ing]" any prayers of students, which students remained free to "engage in." *Id.*, at 44. The District also explained that any religious activity on Mr. Kennedy's part must be "nondemonstrative (*i.e.*, not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement." *Id.*, at 45. In offering these directives, the District appealed to

what it called a "direct tension between" the "Establishment Clause" and "a school employee's [right to] free[ly] exercise" his religion. *Id.*, at 43. To resolve that "tension," the District explained, an employee's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities." *Ibid.*

After receiving the District's September 17 letter, Mr. Kennedy ended the tradition, predating him, of offering locker-room prayers. *Id.*, at 40–41, 77, 170–172. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. See *ibid.* Mr. Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. See *id.*, at 172. Driving home after a game, however, Mr. Kennedy felt upset that he had "broken [his] commitment to God" by not offering his own prayer, so he turned his car around and returned to the field. *Ibid.* By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks. See *ibid.*

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. *Id.*, at 62–63, 172. He asked the District to allow him to continue that "private religious expression" alone. *Id.*, at 62. Consistent with the District's policy, see *id.*, at 48, Mr. Kennedy explained that he "neither requests, encourages, nor discourages students from participating in" these prayers, *id.*, at 64. Mr. Kennedy emphasized that he sought only the opportunity to "wai[t] until the game is over and the players have left the field and then wal[k] to mid-field to say a short, private, personal prayer." *Id.*, at 69. He "told everybody" that it would be acceptable to him to pray "when the kids went away from [him]." *Id.*, at 292. He later clarified that this meant he was even willing to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. *Id.*, at 280–282; see also *id.*, at 59. However, Mr. Kennedy objected to the logical implication of the District's September 17 letter, which he understood as banning him "from bowing his head" in the vicinity of students, and as requiring him to "flee the scene if students voluntarily [came] to the same area" where he was praying. *Id.*, at 70. After all, District policy prohibited him from "discourag[ing]" independent student decisions to pray. *Id.*, at 44.

On October 16, shortly before the game that day, the District responded with another letter. See *id.*, at 76. The District acknowledged that Mr. Kennedy "ha[d] complied" with the "directives" in its September 17 letter. *Id.*, at 77. Yet instead of accommodating Mr. Kennedy's request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District issued an ultimatum. It forbade Mr. Kennedy from engaging in "any overt actions" that could "appea[r] to a reasonable observer to endorse ... prayer ... while he is on duty as a District-paid coach." *Id.*, at 81. The District did so because it judged that anything ***2418** less would lead it to violate the Establishment Clause. *Ibid.*

B

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. See *id.*, at 90. When he bowed his head at midfield after the game, "most [Bremerton] players were ... engaged in the traditional singing of the school fight song to the audience." *Ibid.* Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. See *id.*, at 82, 297.

This event spurred media coverage of Mr. Kennedy's dilemma and a public response from the District. The District placed robocalls to parents to inform them that public access to the field is forbidden; it posted signs and made announcements at games saying the same thing; and it had the Bremerton Police secure the field in future games. *Id.*, at 100–101, 354–355. Subsequently, the District superintendent explained in an October 20 email to the leader of a state association of school administrators that "the coach moved on from

leading prayer with kids, to taking a silent prayer at the 50 yard line." *Id.*, at 83. The official with whom the superintendent corresponded acknowledged that the "use of a silent prayer changes the equation a bit." *Ibid.* On October 21, the superintendent further observed to a state official that "[t]he issue is quickly changing as it has shifted from leading prayer with student athletes, to a coaches [*sic*] right to conduct" his own prayer "on the 50 yard line." *Id.*, at 88.

On October 23, shortly before that evening's game, the District wrote Mr. Kennedy again. It expressed "appreciation" for his "efforts to comply" with the District's directives, including avoiding "on-the-job prayer with players in the ... football program, both in the locker room prior to games as well as on the field immediately following games." *Id.*, at 90. The letter also admitted that, during Mr. Kennedy's recent October 16 postgame prayer, his students were otherwise engaged and not praying with him, and that his prayer was "fleeting." *Id.*, at 90, 93. Still, the District explained that a "reasonable observer" could think government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." *Id.*, at 91, 93. The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a "private location" behind closed doors and "not observable to students or the public." *Id.*, at 93–94.

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." 991 F.3d at 1019; App. 173, 236–239. The superintendent informed the District's board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional." *Id.*, at 96. After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. 443 F.Supp.3d 1223, 1231 (W.D. Wash. 2020); App. to Pet. for Cert. 182. While he was praying, other adults gathered around him on the field. See 443 F.Supp.3d at 1231; App. 97. Later, Mr. Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song. 443 F.Supp.3d at 1231; App. 103.

C

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative ***2419** leave and prohibited him from "participat[ing], in any capacity, in ... football program activities." *Ibid.* In a letter explaining the reasons for this disciplinary action, the superintendent criticized Mr. Kennedy for engaging in "public and demonstrative religious conduct while still on duty as an assistant coach" by offering a prayer following the games on October 16, 23, and 26. *Id.*, at 102. The letter did not allege that Mr. Kennedy performed these prayers with students, and it acknowledged that his prayers took place while students were engaged in unrelated postgame activities. *Id.*, at 103. Additionally, the letter faulted Mr. Kennedy for not being willing to pray behind closed doors. *Id.*, at 102.

In an October 28 Q&A document provided to the public, the District admitted that it possessed "no evidence that students have been directly coerced to pray with Kennedy." *Id.*, at 105. The Q&A also acknowledged that Mr. Kennedy "ha[d] complied" with the District's instruction to refrain from his "prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games." *Ibid.* But the Q&A asserted that the District could not allow Mr. Kennedy to "engage in a public religious display." *Id.*, at 105, 107, 110. Otherwise, the District would "violat[e] the ... Establishment Clause" because "reasonable ... students and attendees" might perceive the "district [as] endors[ing] ... religion." *Id.*, at 105.

While Mr. Kennedy received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. *Kennedy v. Bremerton School Dist.*, 869 F.3d 813, 820 (C.A.9 2017). The evaluation advised against rehiring Mr. Kennedy on the grounds that he " 'failed to follow

district policy' " regarding religious expression and " 'failed to supervise student-athletes after games.' " *Ibid.* Mr. Kennedy did not return for the next season. *Ibid.*

II

A

After these events, Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. App. 145, 160–164. He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion, concluding that a "reasonable observer ... would have seen him as ... leading an orchestrated session of faith." App. to Pet. for Cert. 303. Indeed, if the District had not suspended him, the court agreed, it might have violated the Constitution's Establishment Clause. See *id.*, at 302–303. On appeal, the Ninth Circuit affirmed. *Kennedy*, 869 F.3d at 831.

Following the Ninth Circuit's ruling, Mr. Kennedy sought certiorari in this Court. The Court denied the petition. But Justice ALITO, joined by three other Members of the Court, issued a statement stressing that "denial of certiorari does not signify that the Court necessarily agrees with the decision ... below." *Kennedy v. Bremerton School Dist.*, 586 U. S. ——, ——, 139 S.Ct. 634, 635, 203 L.Ed.2d 137 (2019). Justice ALITO expressed concerns with the lower courts' decisions, including the possibility that, under their reasoning, teachers might be "ordered not to engage in any 'demonstrative' conduct of a religious nature" within view of students, even to the point of being forbidden from "folding their hands or bowing their heads in prayer" before lunch. *Id.*, at ——, 139 S.Ct., at 636.

***2420** B

After the case returned to the District Court, the parties engaged in discovery and eventually brought cross-motions for summary judgment. At the end of that process, the District Court found that the " 'sole reason' " for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after the October 16, 23, and 26 games. 443 F.Supp.3d at 1231.

The court found that reason persuasive too. Rejecting Mr. Kennedy's free speech claim, the court concluded that because Mr. Kennedy "was hired precisely to occupy" an "influential role for student athletes," any speech he uttered was offered in his capacity as a government employee and unprotected by the First Amendment. *Id.*, at 1237. Alternatively, even if Mr. Kennedy's speech qualified as private speech, the District Court reasoned, the District properly suppressed it. Had it done otherwise, the District would have invited "an Establishment Clause violation." *Ibid.* Turning to Mr. Kennedy's free exercise claim, the District Court held that, even if the District's policies restricting his religious exercise were not neutral toward religion or generally applicable, the District had a compelling interest in prohibiting his postgame prayers, because, once more, had it "allow[ed]" them it "would have violated the Establishment Clause." *Id.*, at 1240.

Commented [ER4]: District's influence argument

C

The Ninth Circuit affirmed. It agreed with the District Court that Mr. Kennedy's speech qualified as government rather than private speech because "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." 991 F.3d at 1015. Like the District Court, the Ninth Circuit further reasoned that, "even if we were to assume ... that Kennedy spoke as a private citizen," the District had an "adequate justification" for its actions. *Id.*, at 1016. According to the court, "Kennedy's on-field religious activity," coupled with what the court

called "his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities," were enough to lead an "objective observer" to conclude that the District "endorsed Kennedy's religious activity by not stopping the practice." *Id.*, at 1017–1018. And that, the court held, would amount to a violation of the Establishment Clause. *Ibid.*

The Court of Appeals rejected Mr. Kennedy's free exercise claim for similar reasons. The District "concede[d]" that its policy that led to Mr. Kennedy's suspension was not "neutral and generally applicable" and instead "restrict[ed] Kennedy's religious conduct because the conduct [was] religious." *Id.*, at 1020. Still, the court ruled, the District "had a compelling state interest to avoid violating the Establishment Clause," and its suspension was narrowly tailored to vindicate that interest. *Id.*, at 1020–1021.

Later, the Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. 4 F.4th 910, 911 (2021). Among other things, the dissenters argued that the panel erred by holding that a failure to discipline Mr. Kennedy would have led the District to violate the Establishment Clause. Several dissenters noted that the panel's analysis rested on *Lemon v. Kurtzman*, 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and its progeny for the proposition that the Establishment Clause is implicated whenever a hypothetical reasonable observer could conclude the government endorses religion. ***2421** 4 F.4th at 945–947 (opinion of R. Nelson, J.). These dissenters argued that this Court has long since abandoned that "ahistorical, atextual" approach to discerning "Establishment Clause violations"; they observed that other courts around the country have followed suit by renouncing it too; and they contended that the panel should have likewise "recognized *Lemon*'s demise and wisely left it dead." *Ibid.*, and n. 3. We granted certiorari. 595 U. S. ——, 142 S.Ct. 857, 211 L.Ed.2d 533 (2022).

III

[1] Now before us, Mr. Kennedy renews his argument that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. See, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269, n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. See, *e.g.*, A Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 25 (R. Ketcham ed. 2006). "[I]n Anglo–American history, ... government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995).

[2] Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. See, *e.g.*, *Fulton v. Philadelphia*, 593 U. S. ——, ——–——, ——, 141 S.Ct. 1868, 1876–1877, 1881, 210 L.Ed.2d 137 (2021); *Reed v. Town of Gilbert*, 576 U.S. 155, 171, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015); *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). We begin by examining whether Mr. Kennedy has discharged his burdens, first under the Free Exercise Clause, then under the Free Speech Clause.

A

[3] [4] The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise" of religion. Amdt. 1. This Court has held the Clause applicable to the States under the terms of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

[5] [6] [7] Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including ***2422** by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Id.*, at 879–881, 110 S.Ct. 1595. Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217.

[8] That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving "thanks through prayer" briefly and by himself "on the playing field" at the conclusion of each game he coaches. App. 168, 171. Mr. Kennedy has indicated repeatedly that he is willing to "wai[t] until the game is over and the players have left the field" to "wal[k] to mid-field to say [his] short, private, personal prayer." *Id.*, at 69; see also *id.*, at 280, 282. The contested exercise before us does not involve leading prayers with the team or before any other captive audience. Mr. Kennedy's "religious beliefs do not require [him] to lead any prayer ... involving students." *Id.*, at 170. At the District's request, he voluntarily discontinued the school tradition of locker-room prayers and his postgame religious talks to students. The District disciplined him *only* for his decision to persist in praying quietly without his players after three games in October 2015. See Parts I–B and I–C, *supra*.

[9] [10] [11] Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is "specifically directed at ... religious practice." *Smith*, 494 U.S. at 878, 110 S.Ct. 1595. A policy can fail this test if it "discriminate[s] on its face," or if a religious exercise is otherwise its "object." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217; see also *Smith*, 494 U.S. at 878, 110 S.Ct. 1595. A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." *Fulton*, 593 U. S., at ——, 141 S.Ct., at 1877. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. See *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217.

In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. As it put it in its September 17 letter, the District prohibited "any overt actions on Mr. Kennedy's part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer." App. 81. The District further explained ***2423** that it could not allow "an employee, while still on duty, to engage in *religious* conduct." *Id.*, at 106 (emphasis added). Prohibiting a religious practice was thus the District's unquestioned "object." The District candidly acknowledged as much below, conceding that its policies were "not neutral" toward religion. 991 F.3d at 1020.

The District's challenged policies also fail the general applicability test. The District's performance

evaluation after the 2015 football season advised against rehiring Mr. Kennedy on the ground that he "failed to supervise student-athletes after games." App. 114. But, in fact, this was a bespoke requirement specifically addressed to Mr. Kennedy's religious exercise. The District permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls. App. 205; see also Part I–B, *supra*. Thus, any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way. Again recognizing as much, the District conceded before the Ninth Circuit that its challenged directives were not "generally applicable." 991 F.3d at 1020.

B

[12] [13] When it comes to Mr. Kennedy's free speech claim, our precedents remind us that the First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); see also *Lane v. Franks*, 573 U.S. 228, 231, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014). Of course, none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages.

[14] To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), *Garcetti*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689, and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks "pursuant to [his or her] official duties," this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech. *Id.*, at 421, 126 S.Ct. 1951.

[15] At the same time and at the other end of the spectrum, when an employee "speaks as a citizen addressing a matter of public concern," our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. *Id.*, at 423, 126 S.Ct. 1951. At this second step, our cases suggest that courts should attempt to engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." *Ibid.* Among other things, courts at this second step have sometimes considered whether an employee's speech interests are outweighed by " 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.*, at 417, 126 S.Ct. 1951 ***2424** (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731).

[16] Both sides ask us to employ at least certain aspects of this *Pickering*–*Garcetti* framework to resolve Mr. Kennedy's free speech claim. They share additional common ground too. They agree that Mr. Kennedy's speech implicates a matter of public concern. See App. to Pet. for Cert. 183; Brief for Respondent 44. They also appear to accept, at least for argument's sake, that Mr. Kennedy's speech does not raise questions of academic freedom that may or may not involve "additional" First Amendment "interests" beyond those captured by this framework. *Garcetti*, 547 U.S. at 425, 126 S.Ct. 1951; see also *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Brief for Petitioner 26, n. 2. At the first step of the *Pickering*–*Garcetti* inquiry, the parties' disagreement thus turns out to center on one question alone: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

Our cases offer some helpful guidance for resolving this question. In *Garcetti*, the Court concluded that a prosecutor's internal memorandum to a supervisor was made "pursuant to [his] official duties," and thus ineligible for First Amendment protection. 547 U.S. at 421, 126 S.Ct. 1951. In reaching this conclusion, the Court relied on the fact that the prosecutor's speech "fulfill[ed] a responsibility to advise his supervisor about how best to proceed with a pending case." *Ibid.* In other words, the prosecutor's memorandum was government speech because it was speech the government "itself ha[d] commissioned or created" and speech the employee was expected to deliver in the course of carrying out his job. *Id.*, at 422, 126 S.Ct. 1951.

By contrast, in *Lane* a public employer sought to terminate an employee after he testified at a criminal trial about matters involving his government employment. 573 U.S. at 233, 134 S.Ct. 2369. The Court held that the employee's speech was protected by the First Amendment. *Id.*, at 231, 134 S.Ct. 2369. In doing so, the Court held that the fact the speech touched on matters related to public employment was not enough to render it government speech. *Id.*, at 239–240, 134 S.Ct. 2369. Instead, the Court explained, the "critical question ... is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Id.*, at 240, 134 S.Ct. 2369. It is an inquiry this Court has said should be undertaken "practical[ly]," rather than with a blinkered focus on the terms of some formal and capacious written job description. *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951. To proceed otherwise would be to allow public employers to use "excessively broad job descriptions" to subvert the Constitution's protections. *Ibid.*

Applying these lessons here, it seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. *Lane*, 573 U.S. at 240, 134 S.Ct. 2369. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. See Part I–B, *supra*. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee. *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951.

***2425** The timing and circumstances of Mr. Kennedy's prayers confirm the point. During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. App. 205; see Part I–B, *supra*. We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office" environment—here, on the field of play. *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

In reaching its contrary conclusion, the Ninth Circuit stressed that, as a coach, Mr. Kennedy served as a role model "clothed with the mantle of one who imparts knowledge and wisdom." 991 F.3d at 1015. The court emphasized that Mr. Kennedy remained on duty after games. *Id.*, at 1016. Before us, the District presses the same arguments. See Brief for Respondent 24. And no doubt they have a point. Teachers and coaches often serve as vital role models. But this argument commits the error of positing an "excessively broad job descriptio[n]" by treating everything teachers and coaches say in the workplace as government

speech subject to government control. *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951. On this understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria. Likewise, this argument ignores the District Court's conclusion (and the District's concession) that Mr. Kennedy's actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. App. 205; see Part I–B, *supra*. That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech and eviscerate this Court's repeated promise that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506, 89 S.Ct. 733.

[17] Of course, acknowledging that Mr. Kennedy's prayers represented his own private speech does not end the matter. So far, we have recognized only that Mr. Kennedy has carried his threshold burden. Under the *Pickering*–*Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern. See *Lane*, 573 U.S. at 236, 242, 134 S.Ct. 2369.[2]

***2426 IV**

[18] Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiff 's protected rights serve a compelling interest and are narrowly tailored to that end. See *Lukumi*, 508 U.S. at 533, n. 1, 113 S.Ct. 2217, *supra*. A similar standard generally obtains under the Free Speech Clause. See *Reed*, 576 U.S. at 171, 135 S.Ct. 2218. The District, however, asks us to apply to Mr. Kennedy's claims the more lenient second-step *Pickering*–*Garcetti* test, or alternatively intermediate scrutiny. See Brief for Respondent 44–48. Ultimately, however, it does not matter which standard we apply. The District cannot sustain its burden under any of them.[3]

A

[19] As we have seen, the District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. *Id.*, at 35–42. On its account, Mr. Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in "direct tension" with the competing demands of the Establishment Clause. App. 43. To resolve that clash, the District reasoned, Mr. Kennedy's rights had to "yield." *Ibid.* The Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation " 'trump[ed]' " Mr. Kennedy's rights to religious exercise and free speech. 991 F.3d at 1017; see also *id.*, at 1020–1021.

[20] But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." Amdt. 1. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others. See *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

The District arrived at a different understanding this way. It began with the premise that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorse[d]" religion. App. 81. The District then took the view that a "reasonable observer" could think it "endorsed

Kennedy's religious activity by not stopping the practice." 991 F.3d at 1018; see also App. 80–81; Parts I and II, *supra*. On the District's account, it did not matter whether the Free Exercise Clause protected Mr. Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never actually endorsed Mr. Kennedy's prayer, no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy's prayer. ***2427** Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other," placed itself in the middle, and then chose its preferred way out of its self-imposed trap. See *Pinette*, 515 U.S. at 768, 115 S.Ct. 2440 (plurality opinion); *Shurtleff v. Boston*, 596 U. S. ——, ——– ——, 142 S.Ct. 1583, 1605–1606, — L.Ed.2d —— (2022) (GORSUCH, J., concurring in judgment).

To defend its approach, the District relied on *Lemon* and its progeny. See App. 43–45. In upholding the District's actions, the Ninth Circuit followed the same course. See Part II–C, *supra*. And, to be sure, in *Lemon* this Court attempted a "grand unified theory" for assessing Establishment Clause claims. *American Legion v. American Humanist Assn.*, 588 U. S. ——, ——, 139 S.Ct. 2067, 2101, 204 L.Ed.2d 452 (2019) (plurality opinion). That approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. *Lemon*, 403 U. S., at 612–613, 91 S.Ct. 2105. In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. See, *e.g.*, *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 593, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); *id.*, at 630, 109 S.Ct. 3086 (O'Connor, J., concurring in part and concurring in judgment); *Shurtleff*, 596 U. S., at ——, 142 S.Ct., at 1604–1605 (opinion of GORSUCH, J.)

[21] [22] [23] What the District and the Ninth Circuit overlooked, however, is that the "shortcomings" associated with this "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion*, 588 U. S., at —— – ——, 139 S.Ct., at 2079–2081 (plurality opinion); see also *Town of Greece v. Galloway*, 572 U.S. 565, 575–577, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "minefield" for legislators. *Pinette*, 515 U.S. at 768–769, n. 3, 115 S.Ct. 2440 (plurality opinion) (emphasis deleted). This Court has since made plain, too, that the Establishment Clause does not include anything like a "modified heckler's veto, in which ... religious activity can be proscribed" based on " 'perceptions' " or " 'discomfort.' " *Good News Club v. Milford Central School*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) (emphasis deleted). An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion). Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden v. Perry*, 545 U.S. 677, 699, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). In fact, just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test. See *Shurtleff*, 596 U. S., at ——– ——, 142 S.Ct., at 1587–1588; *id.*, at ——, 142 S.Ct., at 1595 (ALITO, J., concurring ***2428** in judgment); *id.*, at ——, —— – ——, 142 S.Ct., at 1587, 1588–1589 (opinion of GORSUCH, J.).[4]

Commented [ER5]: Lemon abandonded

[24] [25] In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by " 'reference to historical practices and understandings.' " *Town of Greece*, 572 U.S. at 576, 134 S.Ct. 1811; see also *American Legion*, 588 U. S., at ——, 139 S.Ct., at 2087 (plurality opinion). " '[T]he line' " that courts and governments "must draw between the permissible and the impermissible" has to " 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.' " *Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some " 'exception' " within the "Court's Establishment Clause jurisprudence." 572 U.S. at 575, 134 S.Ct. 1811; see *American Legion*, 588 U. S., at ——, 139 S.Ct., at 2087 (plurality opinion); *Torcaso v. Watkins*, 367 U.S. 488, 490, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420, 437–440, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (analyzing Sunday closing laws by looking to their "place ... in the First Amendment's history"); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (analyzing the "history and uninterrupted practice" of church tax exemptions). The District and the Ninth Circuit erred by failing to heed this guidance.

B

[26] Perhaps sensing that the primary theory it pursued below rests on a mistaken understanding of the Establishment Clause, the District offers a backup argument in this Court. It still contends that its Establishment Clause concerns trump Mr. Kennedy's free exercise and free speech rights. But the District now seeks to supply different reasoning for that result. Now, it says, it was justified in suppressing Mr. Kennedy's religious activity because ***2429** otherwise it would have been guilty of coercing students to pray. See Brief for Respondent 34–37. And, the District says, coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning.

[27] [28] As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it. To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952). Government "may not coerce anyone to attend church," *ibid.*, nor may it force citizens to engage in "a formal religious exercise," *Lee v. Weisman*, 505 U.S. 577, 589, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.[5] Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. Compare *Lee*, 505 U.S. at 593, 112 S.Ct. 2649, with *id.*, at 640–641, 112 S.Ct. 2649 (Scalia, J., dissenting). But in this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.

Begin with the District's own contemporaneous description of the facts. In its correspondence with Mr. Kennedy, the District never raised coercion concerns. To the contrary, the District conceded in a public 2015 document that there was "no evidence that students [were] directly coerced to pray with Kennedy." App. 105. This is consistent with Mr. Kennedy's account too. He has repeatedly stated that he "never coerced, required, or asked any student to pray," and that he never "told any student that it was important that they participate in any religious activity." *Id.*, at 170.

Consider, too, the actual requests Mr. Kennedy made. The District did not discipline Mr. Kennedy for

engaging in prayer while presenting locker-room speeches to students. That tradition predated Mr. Kennedy at the school. App. 170. And he willingly ended it, as the District has acknowledged. *Id.*, at 77, 170. He also willingly ended his practice of postgame religious talks with his team. *Id.*, at 70, 77, 170–172. The only prayer Mr. Kennedy sought to continue was the kind he had "started out doing" at the beginning of his tenure—the prayer he gave alone. *Id.*, at 293–294. He made clear that he could pray "while the kids were doing the fight song" and "take a knee by [him]self and give thanks and continue on." *Id.*, at 294. Mr. Kennedy even considered it "acceptable" to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. *Id.*, at 280, 282; see also *id.*, at 59 (proposing the team leave the field for the prayer). In short, Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate. ***2430** His plan was to wait to pray until athletes were occupied, and he "told everybody" that's what he wished "to do." *Id.*, at 292. It was for three prayers of this sort alone in October 2015 that the District suspended him. See Parts I–B and I–C, *supra*.

[29] Naturally, Mr. Kennedy's proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is "part of learning how to live in a pluralistic society," a trait of character essential to "a tolerant citizenry." *Lee*, 505 U.S. at 590, 112 S.Ct. 2649. This Court has long recognized as well that "secondary school students are mature enough ... to understand that a school does not endorse," let alone coerce them to participate in, "speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250, 110 S.Ct. 2356 (plurality opinion). Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But "[o]ffense ... does not equate to coercion." *Town of Greece*, 572 U.S. at 589, 134 S.Ct. 1811 (plurality opinion).

The District responds that, as a coach, Mr. Kennedy "wielded enormous authority and influence over the students," and students might have felt compelled to pray alongside him. Brief for Respondent 37. To support this argument, the District submits that, after Mr. Kennedy's suspension, a few parents told District employees that their sons had "participated in the team prayers only because they did not wish to separate themselves from the team." App. 356.

This reply fails too. Not only does the District rely on hearsay to advance it. For all we can tell, the concerns the District says it heard from parents were occasioned by the locker-room prayers that predated Mr. Kennedy's tenure or his postgame religious talks, all of which he discontinued at the District's request. There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers. To the contrary, and as we have seen, not a single Bremerton student joined Mr. Kennedy's quiet prayers following the three October 2015 games for which he was disciplined. On October 16, those students who joined Mr. Kennedy were " 'from the opposing team,' " 991 F.3d at 1012–1013, and thus could not have "reasonably fear[ed]" that he would decrease their "playing time" or destroy their "opportunities" if they did not "participate," Brief for Respondent 43. As for the other two relevant games, "no one joined" Mr. Kennedy on October 23. 991 F.3d at 1019. And only a few members of the public participated on October 26. App. 97, 314–315; see also Part I–B, *supra*.[6]

[30] The absence of evidence of coercion in this record leaves the District to its ***2431** final redoubt. Here, the District suggests that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression. See also *post*, at 2442 - 2443 (SOTOMAYOR, J., dissenting). If the argument sounds familiar, it should. Really, it is just another way of repackaging the District's earlier submission that

government may script everything a teacher or coach says in the workplace. See Part III–B, *supra*. The only added twist here is the District's suggestion not only that it *may* prohibit teachers from engaging in any demonstrative religious activity, but that it *must* do so in order to conform to the Constitution.

Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. See *Town of Greece*, 572 U.S. at 589, 134 S.Ct. 1811 (plurality opinion). It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." *Lee*, 505 U.S. at 590, 112 S.Ct. 2649. We are aware of no historically sound understanding of the Establishment Clause that begins to "mak[e] it necessary for government to be hostile to religion" in this way. *Zorach*, 343 U.S. at 314, 72 S.Ct. 679.

Our judgments on all these scores find support in this Court's prior cases too. In *Zorach*, for example, challengers argued that a public school program permitting students to spend time in private religious instruction off campus was impermissibly coercive. *Id.*, at 308, 311–312, 72 S.Ct. 679. The Court rejected that challenge because students were not required to attend religious instruction and there was no evidence that any employee had "us[ed] their office to persuade or force students" to participate in religious activity. *Id.*, at 311, and n. 6, 72 S.Ct. 679. What was clear there is even more obvious here—where there is no evidence anyone sought to persuade or force students to participate, and there is no formal school program accommodating the religious activity at issue.

Meanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In *Lee*, this Court held that school officials violated the Establishment Clause by "including [a] clerical membe[r]" who publicly recited prayers "as part of [an] official school graduation ceremony" because the school had "in every practical sense compelled attendance and participation in" a "religious exercise." 505 U.S. at 580, 598, 112 S.Ct. 2649. In *Santa Fe Independent School Dist. v. Doe*, the Court held that a school district violated the Establishment Clause by broadcasting a prayer "over the public address system" before each football game. 530 U.S. 290, 294, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). The Court observed that, while students generally were not required to attend games, attendance *was* required for "cheerleaders, members of the band, and, of course, the team ***2432** members themselves." *Id.*, at 311, 120 S.Ct. 2266. None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline. See App. 90, 97, 173, 236–239; Parts I–B and I–C, *supra*.[7]

C

[31] [32] [33] In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should " 'trum[p]' " the other two. 991 F.3d at 1017; App. 43. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the "mere shadow" of a

conflict, a false choice premised on a misconstruction of the Establishment Clause. *Schempp*, 374 U.S. at 308, 83 S.Ct. 1560 (Goldberg, J., concurring). And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights. See, *e.g.*, *Rosenberger*, 515 U.S. at 845–846, 115 S.Ct. 2510; *Good News Club*, 533 U.S. at 112–119, 121 S.Ct. 2093; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394–395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Widmar*, 454 U.S. at 270–275, 102 S.Ct. 269.[8]

V

Respect for religious expressions is indispensable to life in a free and diverse ***2433** Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is

Reversed.

Justice THOMAS, concurring.

I join the Court's opinion because it correctly holds that Bremerton School District violated Joseph Kennedy's First Amendment rights. I write separately to emphasize that the Court's opinion does not resolve two issues related to Kennedy's free-exercise claim.

First, the Court refrains from deciding whether or how public employees' rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public. See *ante*, at 2425, n. 2. In "striking the appropriate balance" between public employees' constitutional rights and "the realities of the employment context," we have often "consider[ed] whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). In the free-speech context, for example, that inquiry has prompted us to distinguish between different kinds of speech; we have held that "the First Amendment protects public employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern." *Ibid.* It remains an open question, however, if a similar analysis can or should apply to free-exercise claims in light of the "history" and "tradition" of the Free Exercise Clause. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 406, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011) (Scalia, J., concurring in judgment in part and dissenting in part); see also *id.*, at 400, 131 S.Ct. 2488 (THOMAS, J., concurring in judgment).

Second, the Court also does not decide what burden a government employer must shoulder to justify restricting an employee's religious expression because the District had no constitutional basis for reprimanding Kennedy under any possibly applicable standard of scrutiny. See *ante*, at 2426. While we have many public-employee precedents addressing how the interest-balancing test set out in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), applies under the Free Speech Clause, the Court has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause. A government employer's burden therefore might differ depending on which First Amendment guarantee a public employee invokes.

Justice ALITO, concurring.

The expression at issue in this case is unlike that in any of our prior cases involving the free-speech rights of

public employees. Petitioner's expression occurred while at work but during a time when a brief lull in his duties apparently gave him a few free moments to engage in private ***2434** activities. When he engaged in this expression, he acted in a purely private capacity. The Court does not decide what standard applies to such expression under the Free Speech Clause but holds only that retaliation for this expression cannot be justified based on any of the standards discussed. On that understanding, I join the opinion in full.

Justice SOTOMAYOR, with whom Justice BREYER and Justice KAGAN join, dissenting.

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.

The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. See *Carson v. Makin*, 596 U. S. ——, ——, 142 S.Ct. 1987, —— L.Ed.2d —— (2022) (BREYER, J., dissenting). To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the Court assesses only the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.

Today's decision goes beyond merely misreading the record. The Court overrules *Lemon v. Kurtzman*, 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. *Ante*, at 2427. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new "history and tradition" test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent.

Commented [ER6]: Argument for the old order

***2435** I

As the majority tells it, Kennedy, a coach for the District's football program, "lost his job" for "pray[ing] quietly while his students were otherwise occupied." *Ante*, at 2415. The record before us, however, tells a different story.

A

The District serves approximately 5,057 students and employs 332 teachers and 400 nonteaching personnel in Kitsap County, Washington. The county is home to Bahá'ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated. See Brief for Religious and Denominational Organizations et al. as *Amici Curiae* 4.

The District first hired Kennedy in 2008, on a renewable annual contract, to serve as a part-time assistant coach for the varsity football team and head coach for the junior varsity team at Bremerton High School (BHS). Kennedy's job description required him to "[a]ccompany and direct" all home and out-of-town games to which he was assigned, overseeing preparation and transportation before games, being "[r]esponsible for player behavior both on and off the field," supervising dressing rooms, and "secur[ing] all facilities at the close of each practice." App. 32–34, 36. His duties encompassed "supervising student activities immediately following the completion of the game" until the students were released to their parents or otherwise allowed to leave. *Id.*, at 133.

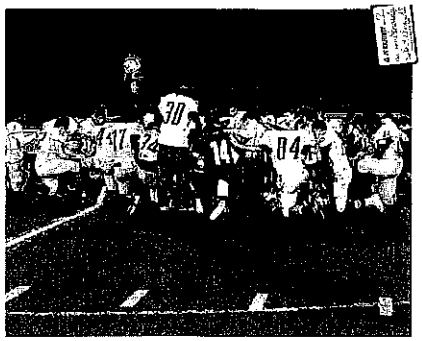
The District also set requirements for Kennedy's interactions with players, obliging him, like all coaches, to "exhibit sportsmanlike conduct at all times," "utilize positive motivational strategies to encourage athletic performance," and serve as a "mentor and role model for the student athletes." *Id.*, at 56. In addition, Kennedy's position made him responsible for interacting with members of the community. In this capacity, the District required Kennedy and other coaches to "maintain positive media relations," "always approach officials with composure" with the expectation that they were "constantly being observed by others," and "communicate effectively" with parents. *Ibid.*

Finally, District coaches had to "[a]dhere to [District] policies and administrative regulations" more generally. *Id.*, at 30–31. As relevant here, the District's policy on "Religious-Related Activities and Practices" provided that "[s]chool staff shall neither encourage or discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity" and that "[r]eligious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity." *Id.*, at 26–28.

B

In September 2015, a coach from another school's football team informed BHS' principal that Kennedy had asked him and his team to join Kennedy in prayer. The other team's coach told the principal that he thought it was " 'cool' " that the District " 'would allow [its] coaches to go ahead and invite other teams' coaches and players to pray after a game.' " *Id.*, at 229.

The District initiated an inquiry into whether its policy on Religious-Related Activities and Practices had been violated. It learned that, since his hiring in 2008, Kennedy had been kneeling on the 50-yard line to pray immediately after shaking hands with the opposing team. Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of ***2436** the team came to join him, with the numbers varying from game to game. Kennedy's practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with "overtly religious references," which Kennedy described as prayers, while the players kneeled around him. *Id.*, at 40. The District also learned that students had prayed in the past in the locker room prior to games, before Kennedy was hired, but that Kennedy subsequently began leading those prayers too.



Photograph of J. Kennedy standing in group of kneeling players.

While the District's inquiry was pending, its athletic director attended BHS' September 11, 2015, football game and told Kennedy that he should not be conducting prayers with players. After the game, while the athletic director watched, Kennedy led a prayer out loud, holding up a player's helmet as the players kneeled around him. While riding the bus home with the team, Kennedy posted on Facebook that he thought he might have just been fired for praying.

On September 17, the District's superintendent sent Kennedy a letter informing him that leading prayers with students on the field and in the locker room would likely be found to violate the Establishment Clause, exposing the District to legal liability. The District acknowledged that Kennedy had "not actively encouraged, or required, participation" but emphasized that "school staff may not indirectly encourage students to engage in religious activity" or "endors[e]" religious activity; rather, the District explained, staff "must remain neutral" "while performing their job duties." *Id.*, at 41–43. The District instructed Kennedy that any motivational talks to students must remain secular, "so as to avoid alienation of any team member." *Id.*, at 44.

The District reiterated that "all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities." *Id.*, at 45. To avoid endorsing student religious exercise, the District instructed that such activity must be nondemonstrative or conducted ***2437** separately from students, away from student activities. *Ibid.* The District expressed concern that Kennedy had continued his midfield prayer practice at two games after the District's athletic director and the varsity team's head coach had instructed him to stop. *Id.*, at 40–41.

Kennedy stopped participating in locker room prayers and, after a game the following day, gave a secular speech. He returned to pray in the stadium alone after his duties were over and everyone had left the stadium, to which the District had no objection. Kennedy then hired an attorney, who, on October 14, sent a letter explaining that Kennedy was "motivated by his sincerely-held religious beliefs to pray following each football game." *Id.*, at 63. The letter claimed that the District had required that Kennedy "flee from students if they voluntarily choose to come to a place where he is privately praying during personal time," referring to the 50-yard line of the football field immediately following the conclusion of a game. *Id.*, at 70. Kennedy requested that the District simply issue a "clarif[ication] that the prayer is [Kennedy's] private speech" and that the District not "interfere" with students joining Kennedy in prayer. *Id.*, at 71. The letter further announced that Kennedy would resume his 50-yard-line prayer practice the next day after the October 16 homecoming game.[1]

Before the homecoming game, Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line, leading to an article in the Seattle News and a local television broadcast about the upcoming homecoming game. In the wake of this media coverage, the District began receiving a large number of emails, letters, and calls, many of them threatening.

The District responded to Kennedy's letter before the game on October 16. It emphasized that Kennedy's letter evinced "materia[l] misunderstand[ings]" of many of the facts at issue. *Id.*, at 76. For instance, Kennedy's letter asserted that he had not invited anyone to pray with him; the District noted that that might be true of Kennedy's September 17 prayer specifically, but that Kennedy had acknowledged inviting others to join him on many previous occasions. The District's September 17 letter had explained that Kennedy traditionally held up helmets from the BHS and opposing teams while players from each team kneeled around him. While Kennedy's letter asserted that his

prayers "occurr[ed] 'on his own time,' after his duties as a District employee had ceased," the District pointed out that Kennedy "remain[ed] on duty" when his prayers occurred "immediately following completion of the football game, when students are still on the football field, in uniform, under the stadium lights, with the audience still in attendance, and while Mr. Kennedy is still in his District-issued and District-logoed attire." *Id.*, at 78 (emphasis deleted). The District further noted that "[d]uring the time following completion of the game, until players are released to their parents or otherwise allowed to leave the event, Mr. Kennedy, like all coaches, is clearly on duty and paid to continue supervision of students." *Id.*, at 79.

***2438** The District stated that it had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line, nor with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District's endorsement of religion. The District explained that its establishment concerns were motivated by the specific facts at issue, because engaging in prayer on the 50-yard line immediately after the game finished would appear to be an extension of Kennedy's "prior, long-standing and well-known history of leading students in prayer" on the 50-yard line after games. *Id.*, at 81. The District therefore reaffirmed its prior directives to Kennedy.

On October 16, after playing of the game had concluded, Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most BHS players were singing the school's fight song. He quickly was joined by coaches and players from the opposing team. Television news cameras surrounded the group.[2] Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who " 'intended to conduct ceremonies on the field after football games if others were allowed to.' " *Id.*, at 181. To secure the field and enable subsequent games to continue safely, the District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.

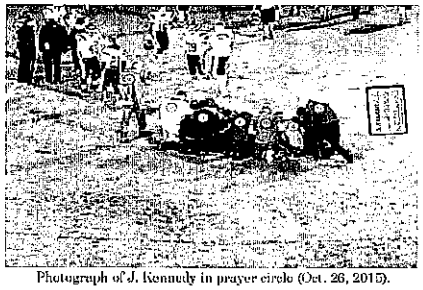
Photograph of J. Kennedy in prayer circle (Oct. 16, 2015).

The District sent Kennedy another letter on October 23, explaining that his conduct at the October 16 game was inconsistent with the District's requirements for two reasons. First, it "drew [him] away from [his] work"; Kennedy had, "until recently, ***2439** ... regularly c[o]me to the locker room with the team and other coaches following the game" and had "specific responsibility for the supervision of players in the locker room following games." *Id.*, at 92–93. Second, his conduct raised Establishment Clause concerns, because "any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given [his] prior public conduct, overtly religious conduct." *Id.*, at 93.

Again, the District emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement. Stressing that "[d]evelopment of accommodations is an interactive process," it invited Kennedy to reach out to discuss accommodations that might be mutually satisfactory, offering proposed accommodations and inviting Kennedy to raise others. *Id.*, at 93–94. The District noted, however, that "further violations of [its] directives" would be grounds for discipline or termination. *Id.*, at 95.

Kennedy did not directly respond or suggest a satisfactory accommodation. Instead, his attorneys told the media that he would accept only demonstrative prayer on the 50-yard line immediately after games. During the October 23 and October 26 games, Kennedy

again prayed at the 50-yard line immediately following the game, while postgame activities were still ongoing. At the October 23 game, Kennedy kneeled on the field alone with players standing nearby. At the October 26 game, Kennedy prayed surrounded by members of the public, including state representatives who attended the game to support Kennedy. The BHS players, after singing the fight song, joined Kennedy at midfield after he stood up from praying.



Photograph of J. Kennedy in prayer circle (Oct. 26, 2015).

In an October 28 letter, the District notified Kennedy that it was placing him on paid administrative leave for violating its directives at the October 16, October 23, and October 26 games by kneeling on the field and praying immediately following the games before rejoining the players for postgame talks. The District recounted that it had offered accommodations to, and offered to engage in further discussions ***2440** with, Kennedy to permit his religious exercise, and that Kennedy had failed to respond to these offers. The District stressed that it remained willing to discuss possible accommodations if Kennedy was willing.

After the issues with Kennedy arose, several parents reached out to the District saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team. No BHS students appeared to pray on the field after Kennedy's suspension.

In Kennedy's annual review, the head coach of the varsity team recommended Kennedy not be rehired because he "failed to follow district policy," "demonstrated a lack of cooperation with administration," "contributed to negative relations between parents, students, community members, coaches, and the school district," and "failed to supervise student-athletes after games due to his interactions with media and community" members. *Id.*, at 114. The head coach himself also resigned after 11 years in that position, expressing fears that he or his staff would be shot from the crowd or otherwise attacked because of the turmoil created by Kennedy's media appearances. Three of five other assistant coaches did not reapply.

C

Kennedy then filed suit. He contended, as relevant, that the District violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment. Kennedy moved for a preliminary injunction, which the District Court denied based on the circumstances surrounding Kennedy's prayers. The court concluded that Kennedy had "chose[n] a time and event," the October 16 homecoming game, that was "a big deal" for students, and then "used that opportunity to convey his religious views" in a manner a reasonable observer would have seen as a "public employee ... leading an orchestrated session of faith." App. to Pet. for Cert. 303. The Court of Appeals affirmed, again emphasizing the specific context of Kennedy's prayers. The court rejected Kennedy's contention that he had been "praying on the fifty-yard line 'silently and alone.' " *Kennedy v. Bremerton School Dist.*, 869 F.3d 813, 825 (C.A.9 2017). The court noted that he had in fact refused "an accommodation permitting him to pray ... after the stadium had emptied," "indicat[ing] that it is essential that his speech be delivered in the presence of students and spectators." *Ibid.* This Court denied certiorari.

Following discovery, the District Court granted summary judgment to the District. The court concluded that Kennedy's 50-yard-line prayers were not entitled to protection under the Free Speech Clause because his speech was made in his capacity as a public employee, not as a private citizen. 443 F.Supp.3d 1223, 1237 (W.D. Wash. 2020). In addition, the court held that

Kennedy's prayer practice violated the Establishment Clause, reasoning that "speech from the center of the football field immediately after each game ... conveys official sanction." *Id.*, at 1238. That was especially true where Kennedy, a school employee, initiated the prayer; Kennedy was "joined by students or adults to create a group of worshippers in a place the school controls access to"; and Kennedy had a long "history of engaging in religious activity with players" that would have led a familiar observer to believe that Kennedy was "continuing this tradition" with prayer at the 50-yard line. *Id.*, at 1238–1239. The District Court further found that players had reported "feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time," and that the "slow accumulation of players joining Kennedy suggests ***2441** exactly the type of vulnerability to social pressure that makes the Establishment Clause vital in the high school context." *Id.*, at 1239. The court rejected Kennedy's free exercise claim, finding the District's directive narrowly tailored to its Establishment Clause concerns and citing Kennedy's refusal to cooperate in finding an accommodation that would be acceptable to him. *Id.*, at 1240.

The Court of Appeals affirmed, explaining that "the facts in the record utterly belie [Kennedy's] contention that the prayer was personal and private." 991 F.3d 1004, 1017 (C.A.9 2021). The court instead concluded that Kennedy's speech constituted government speech, as he "repeatedly acknowledged that—and behaved as if—he was a mentor, motivational speaker, and role model to students specifically at the conclusion of the game." *Id.*, at 1015 (emphasis deleted). In the alternative, the court concluded that Kennedy's speech, even if in his capacity as a private citizen, was appropriately regulated by the District to avoid an Establishment Clause violation, emphasizing once more that this conclusion was tied to the specific "evolution of Kennedy's prayer practice with students" over time. *Id.*, at 1018. The court rejected Kennedy's free exercise claim for the reasons stated by the District Court. *Id.*, at 1020. The Court of Appeals denied rehearing en banc, and this Court granted certiorari.

II

Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

A

The Establishment Clause prohibits States from adopting laws "respecting an establishment of religion." Amdt. 1; see *Wallace v. Jaffree*, 472 U.S. 38, 49, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (recognizing the Clause's incorporation against the States). The First Amendment's next Clause prohibits the government from making any law "prohibiting the free exercise thereof." Taken together, these two Clauses (the Religion Clauses) express the view, foundational to our constitutional system, "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). Instead, "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere," which has the "freedom to pursue that mission." *Ibid.*

The Establishment Clause protects this freedom by "command[ing] a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). At its core, this means forbidding "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). In the

context of public schools, it means that a State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." ***2442** *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U.S. 203, 211, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

Indeed, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583–584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). The reasons motivating this vigilance inhere in the nature of schools themselves and the young people they serve. Two are relevant here.

First, government neutrality toward religion is particularly important in the public school context given the role public schools play in our society. " 'The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny,' " meaning that " '[i]n no activity of the State is it more vital to keep out divisive forces than in its schools.' " *Id.* at 584, 107 S.Ct. 2573. Families "entrust public schools with the education of their children ... on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Ibid.* Accordingly, the Establishment Clause "proscribes public schools from 'conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred' " or otherwise endorsing religious beliefs. *Lee*, 505 U.S. at 604–605, 112 S.Ct. 2649 (Blackmun, J., concurring) (emphasis deleted).

Second, schools face a higher risk of unconstitutionally "coerc[ing] ... support or participat[ion] in religion or its exercise" than other government entities. *Id.*, at 587, 112 S.Ct. 2649 (opinion of the Court). The State "exerts great authority and coercive power" in schools as a general matter "through mandatory attendance requirements." *Edwards*, 482 U.S. at 584, 107 S.Ct. 2573. Moreover, the State exercises that great authority over children, who are uniquely susceptible to "subtle coercive pressure." *Lee*, 505 U.S. at 588, 112 S.Ct. 2649; cf. *Town of Greece v. Galloway*, 572 U.S. 565, 590, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) (plurality opinion) ("[M]ature adults," unlike children, may not be " 'readily susceptible to religious indoctrination or peer pressure' "). Children are particularly vulnerable to coercion because of their "emulation of teachers as role models" and "susceptibility to peer pressure." *Edwards*, 482 U.S. at 584, 107 S.Ct. 2573. Accordingly, this Court has emphasized that "the State may not, consistent with the Establishment Clause, place primary and secondary school children" in the dilemma of choosing between "participating, with all that implies, or protesting" a religious exercise in a public school. *Lee*, 505 U.S. at 593, 112 S.Ct. 2649.

Given the twin Establishment Clause concerns of endorsement and coercion, it is unsurprising that the Court has consistently held integrating prayer into public school activities to be unconstitutional, including when student participation is not a formal requirement or prayer is silent. See *Wallace*, 472 U.S. 38, 105 S.Ct. 2479 (mandatory moment of silence for prayer); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (nonmandatory recitation of Bible verses and prayer); *Engel*, 370 U.S. at 424, 82 S.Ct. 1261 (nonmandatory recitation of one-sentence prayer). The Court also has held that incorporating a nondenominational general benediction into a graduation ceremony is unconstitutional. *Lee*, 505 U.S. 577, 112 S.Ct. 2649. Finally, this Court has held that including prayers in student football games is unconstitutional, even when delivered by students rather than staff and even when students themselves initiated the prayer. ***2443** *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

B

Under these precedents, the Establishment Clause violation at hand is clear. This Court has held that a

"[s]tate officia[l] direct[ing] the performance of a formal religious exercise" as a part of the "ceremon[y]" of a school event "conflicts with settled rules pertaining to prayer exercises for students." *Lee*, 505 U.S. at 586–587, 112 S.Ct. 2649. Kennedy was on the job as a school official "on government property" when he incorporated a public, demonstrative prayer into "government-sponsored school-related events" as a regularly scheduled feature of those events. *Santa Fe*, 530 U.S. at 302, 120 S.Ct. 2266.

Kennedy's tradition of a 50-yard line prayer thus strikes at the heart of the Establishment Clause's concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games. The timing and location Kennedy selected for his prayers were "clothed in the traditional indicia of school sporting events." *Id.*, at 308, 120 S.Ct. 2266. Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game itself had ended, the football game events had not; Kennedy himself acknowledged that his responsibilities continued until the players went home. Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game. Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring "with the approval of the school administration." *Ibid.*

Kennedy's prayer practice also implicated the coercion concerns at the center of this Court's Establishment Clause jurisprudence. This Court has previously recognized a heightened potential for coercion where school officials are involved, as their "effort[s] to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject." *Lee*, 505 U.S. at 590, 112 S.Ct. 2649. The reasons for fearing this pressure are self-evident. This Court has recognized that students face immense social pressure. Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face "immense social pressure" from their peers in the "extracurricular event that is American high school football." *Santa Fe*, 530 U.S. at 311, 120 S.Ct. 2266.

The record before the Court bears this out. The District Court found, in the evidentiary record, that some students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates. Kennedy told the District that he began his prayers alone and that players followed each other over time until a majority of the team joined him, an evolution showing coercive pressure at work.

Kennedy does not defend his longstanding practice of leading the team in prayer out loud on the field as they kneeled around him. Instead, he responds, and the Court accepts, that his highly visible and ***2444** demonstrative prayer at the last three games before his suspension did not violate the Establishment Clause because these prayers were quiet and thus private. This Court's precedents, however, do not permit isolating government actions from their context in determining whether they violate the Establishment Clause. To the contrary, this Court has repeatedly stated that Establishment Clause inquiries are fact specific and require careful consideration of the origins and practical reality of the specific practice at issue. See, *e.g.*, *id.*, at 315, 120 S.Ct. 2266; *Lee*, 505 U.S. at 597, 112 S.Ct. 2649. In *Santa Fe*, the Court specifically addressed how to determine whether the implementation of a new policy regarding prayers at football games "insulates the continuation of such prayers from constitutional scrutiny." 530 U.S. at 315, 120 S.Ct. 2266. The Court held that "inquiry into this question not only can, but must, include an examination of the circumstances surrounding" the change in policy, the "long-established tradition" before the change, and the " 'unique circumstances' " of the school in question. *Ibid.* This Court's

precedent thus does not permit treating Kennedy's "new" prayer practice as occurring on a blank slate, any more than those in the District's school community would have experienced Kennedy's changed practice (to the degree there was one) as erasing years of prior actions by Kennedy.

Like the policy change in *Santa Fe,* Kennedy's "changed" prayers at these last three games were a clear continuation of a "long-established tradition of sanctioning" school official involvement in student prayers. *Ibid.* Students at the three games following Kennedy's changed practice witnessed Kennedy kneeling at the same time and place where he had led them in prayer for years. They witnessed their peers from opposing teams joining Kennedy, just as they had when Kennedy was leading joint team prayers. They witnessed members of the public and state representatives going onto the field to support Kennedy's cause and pray with him. Kennedy did nothing to stop this unauthorized access to the field, a clear dereliction of his duties. The BHS players in fact joined the crowd around Kennedy after he stood up from praying at the last game. That BHS students did not join Kennedy in these last three specific prayers did not make those events compliant with the Establishment Clause. The coercion to do so was evident. Kennedy himself apparently anticipated that his continued prayer practice would draw student participation, requesting that the District agree that it would not "interfere" with students joining him in the future. App. 71.

Finally, Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved. To the contrary, this Court's Establishment Clause jurisprudence establishes that " 'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.' " *Santa Fe,* 530 U.S. at 312, 120 S.Ct. 2266. Thus, the Court has held that the Establishment Clause "will not permit" a school " 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." *Ibid.* To uphold a coach's integration of prayer into the ceremony of a football game, in the context of an established history of the coach inviting student involvement in prayer, is to exact precisely this price from students.

C

As the Court explains, see *ante,* at 2423, Kennedy did not "shed [his] constitutional rights ... at the schoolhouse gate" while on duty as a coach. ***2445** *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Constitutional rights, however, are not absolutes. Rights often conflict and balancing of interests is often required to protect the separate rights at issue. See *Dobbs v. Jackson Women's Health Organization,* 597 U. S. ——, ——, 142 S.Ct. 2228, 2322-2323, —— L.Ed.2d —— (2022) (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (noting that "the presence of countervailing interests ... is what ma[kes]" a constitutional question "hard, and what require[s] balancing").

The particular tensions at issue in this case, between the speech interests of the government and its employees and between public institutions' religious neutrality and private individuals' religious exercise, are far from novel. This Court's settled precedents offer guidance to assist courts, governments, and the public in navigating these tensions. Under these precedents, the District's interest in avoiding an Establishment Clause violation justified both its time and place restrictions on Kennedy's speech and his exercise of religion.

First, as to Kennedy's free speech claim, Kennedy "accept[ed] certain limitations" on his freedom of speech when he accepted government employment. *Garcetti v. Ceballos,* 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). The Court has recognized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions" to ensure "the efficient provision of public services." *Ibid.* Case

law instructs balancing "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" to determine whose interests should prevail. *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

As the Court of Appeals below outlined, the District has a strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all. See *Garcetti*, 547 U.S. at 418, 126 S.Ct. 1951; 991 F.3d at 1014–1016 (applying *Garcetti*).[3] It is unnecessary to resolve this question, however, because, even assuming that Kennedy's speech was in his capacity as a private citizen, the District's responsibilities under the Establishment Clause provided "adequate justification" for restricting it. *Garcetti*, 547 U.S. at 418, 126 S.Ct. 1951.

Similarly, Kennedy's free exercise claim must be considered in light of the fact that he is a school official and, as such, his ***2446** participation in religious exercise can create Establishment Clause conflicts. Accordingly, his right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute. See *Lee*, 505 U.S. at 587, 112 S.Ct. 2649 (noting that a school official's choice to integrate a prayer is "attributable to the State"). As the Court explains, see *ante*, at 2422 - 2423, the parties agree (and I therefore assume) that for the purposes of Kennedy's claim, the burden is on the District to establish that its policy prohibiting Kennedy's public prayers was the least restrictive means of furthering a compelling state interest. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Here, the District's directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation. The District's suspension of Kennedy followed a long history. The last three games proved that Kennedy did not intend to pray silently, but to thrust the District into incorporating a religious ceremony into its events, as he invited others to join his prayer and anticipated in his communications with the District that students would want to join as well. Notably, the District repeatedly sought to work with Kennedy to develop an accommodation to permit him to engage in religious exercise during or after his game-related responsibilities. Kennedy, however, ultimately refused to respond to the District's suggestions and declined to communicate with the District, except through media appearances. Because the District's valid Establishment Clause concerns satisfy strict scrutiny, Kennedy's free exercise claim fails as well.

III

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.

A

This case involves three Clauses of the First Amendment. As a threshold matter, the Court today proceeds from two mistaken understandings of the way the protections these Clauses embody interact.

First, the Court describes the Free Exercise and Free Speech Clauses as "work[ing] in tandem" to "provid[e] overlapping protection for expressive religious

activities," leaving religious speech "doubly protect[ed]." *Ante,* at 2421. This narrative noticeably (and improperly) sets the Establishment Clause to the side. The Court is correct that certain expressive religious activities may fall within the ambit of both the Free Speech Clause and the Free Exercise Clause, but "the First Amendment protects speech and religion by quite different mechanisms." *Lee,* 505 U.S. at 591, 112 S.Ct. 2649. The First Amendment protects speech "by ensuring its full expression even when the government participates." *Ibid.* Its "method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse," however, based on the understanding that "the government is not a prime participant" in "religious debate or expression," whereas government is the "object of some of our most important ***2447** speech." *Ibid.* Thus, as this Court has explained, while the Free Exercise Clause has "close parallels in the speech provisions of the First Amendment," the First Amendment's protections for religion diverge from those for speech because of the Establishment Clause, which provides a "specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Ibid.* Therefore, while our Constitution "counsel[s] mutual respect and tolerance," the Constitution's vision of how to achieve this end does in fact involve some "singl[ing] out" of religious speech by the government. *Ante,* at 2415 – 2416. This is consistent with "the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Lee,* 505 U.S. at 591–592, 112 S.Ct. 2649.

Second, the Court contends that the lower courts erred by introducing a false tension between the Free Exercise and Establishment Clauses. See *ante,* at 2426 - 2427. The Court, however, has long recognized that these two Clauses, while "express[ing] complementary values," "often exert conflicting pressures." *Cutter,* 544 U.S. at 719, 125 S.Ct. 2113. See also *Locke v. Davey,* 540 U.S. 712, 718, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (describing the Clauses as "frequently in tension"). The "absolute terms" of the two Clauses mean that they "tend to clash" if "expanded to a logical extreme." *Walz,* 397 U.S. at 668–669, 90 S.Ct. 1409.

The Court inaccurately implies that the courts below relied upon a rule that the Establishment Clause must always "prevail" over the Free Exercise Clause. *Ante,* at 2426. In focusing almost exclusively on Kennedy's free exercise claim, however, and declining to recognize the conflicting rights at issue, the Court substitutes one supposed blanket rule for another. The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis of "whether [the] particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz,* 397 U.S. at 669, 90 S.Ct. 1409. As discussed above, that inquiry leads to the conclusion that permitting Kennedy's desired religious practice at the time and place of his choosing, without regard to the legitimate needs of his employer, violates the Establishment Clause in the particular context at issue here. *Supra,* at 2442- 2445.

B

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools." *Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266 (internal quotation marks omitted). The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon,* 403 U.S. 602, 91 S.Ct. 2105. *Ante,* at 2427 - 2429. Both of these moves are erroneous and, despite the Court's assurances, novel.

Start with endorsement. The Court reserves particular criticism for the longstanding understanding that government action that appears to endorse religion violates the Establishment Clause, which it describes as an "offshoot" of *Lemon* and ***2448** paints as a " 'modified heckler's veto, in which ... religious activity can be proscribed' " based on " ' "perceptions" ' " or " ' "discomfort." ' " *Ante,* at 2426 - 2427 (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001)). This is a strawman. Precedent long has recognized that endorsement concerns under the Establishment Clause, properly understood, bear no relation to a " 'heckler's veto.' " *Ante*, at 2427. *Good News Club* itself explained the difference between the two: The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of " 'the reasonable observer' " who is " 'aware of the history and context of the community and forum in which the religious [speech takes place].' " 533 U.S. at 119, 121 S.Ct. 2093. That is because " 'the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from ... discomfort' " but concern " 'with the political community writ large.' " *Ibid.* (emphasis deleted).

Given this concern for the political community, it is unsurprising that the Court has long prioritized endorsement concerns in the context of public education. See, *e.g.*, *Santa Fe*, 530 U.S. at 305, 120 S.Ct. 2266; *Wallace*, 472 U.S. at 60–61, 105 S.Ct. 2479; *Edwards*, 482 U.S. at 578, 593, 107 S.Ct. 2573; see also *Lee*, 505 U.S. at 618–619, 112 S.Ct. 2649 (Souter, J., concurring) (explaining that many of the Court's Establishment Clause holdings in the school context are concerned not with whether the policy in question "coerced students to participate in prayer" but with whether it " 'convey[ed] a message of state approval of prayer activities in the public schools' " (quoting *Wallace*, 472 U.S. at 61, 105 S.Ct. 2479)).[4] No subsequent decisions in other contexts, including the cases about monuments and legislative meetings on which the Court relies, have so much as questioned the application of this core Establishment Clause concern in the context of public schools. In fact, *Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835, which held a prayer during a town meeting permissible, specifically distinguished *Lee* because *Lee* considered the Establishment Clause in the context of schools. 572 U.S. at 590, 134 S.Ct. 1811 (plurality opinion).

Paying heed to these precedents would not " 'purge from the public sphere' anything an observer could reasonably infer endorses" religion. *Ante,* at 2427. To the contrary, the Court has recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Lee*, 505 U.S. at 598–599, 112 S.Ct. 2649. These instances, the Court has said, are "often questions of accommodat[ing]" religious practices to the degree possible while respecting the Establishment Clause. *Id.*, at 599, 112 S.Ct. 2649.[5] In short, the endorsement ***2449** inquiry dictated by precedent is a measured, practical, and administrable one, designed to account for the competing interests present within any given community.

Despite all of this authority, the Court claims that it "long ago abandoned" both the "endorsement test" and this Court's decision in *Lemon*, 403 U.S. 602, 91 S.Ct. 2105. *Ante,* at 2427. The Court chiefly cites the plurality opinion in *American Legion v. American Humanist Assn.*, 588 U. S. ——, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019) to support this contention. That plurality opinion, to be sure, criticized *Lemon*'s effort at establishing a "grand unified theory of the Establishment Clause" as poorly suited to the broad "array" of diverse establishment claims. 588 U. S., at ——, ——, 139 S.Ct., at 2080, 2087. All the Court in *American Legion* ultimately held, however, was that application of the *Lemon* test to "longstanding monuments, symbols, and practices" was ill-advised for reasons specific to those contexts. 588 U. S., at ——, 139 S.Ct., at 2082; see also *id.*, at ——– ——, 139 S.Ct., at 2081–2085 (discussing at some length why the *Lemon* test was a poor fit for those circumstances). The only categorical rejection of *Lemon* in *American Legion* appeared in separate

writings. See 588 U. S., at ——, 139 S.Ct., at 2092 (KAVANAUGH, J., concurring); *id.*, at ——, 139 S.Ct., at 2098 (THOMAS, J., concurring in judgment); *id.*, at ——, 139 S.Ct., at 2101 (GORSUCH, J., concurring in judgment); see *ante*, at 2428, n. 4.[6]

The Court now goes much further, overruling *Lemon* entirely and in all contexts. It is wrong to do so. *Lemon* summarized "the cumulative criteria developed by the Court over many years" of experience "draw[ing] lines" as to when government engagement with religion violated the Establishment Clause. 403 U.S. at 612, 91 S.Ct. 2105. *Lemon* properly concluded that precedent generally directed consideration of whether the government action had a "secular legislative purpose," whether its "principal or primary effect must be one that neither advances nor inhibits religion," and whether in practice it "foster[s] 'an excessive government entanglement with religion.' " *Id.*, at 612–613, 91 S.Ct. 2105. It is true "that rigid application of the *Lemon* test does not solve every Establishment Clause problem," but that does not mean that the test has no value. *American Legion*, 588 U. S., at ——, 139 S.Ct., at 2094 (KAGAN, J., concurring in part).

*2450 To put it plainly, the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents beyond *Lemon* instruct in the particular context of public schools. See *supra*, at 2441 - 2443, 2443 - 2444. Neither the critiques of *Lemon* as setting out a dispositive test for all seasons nor the fact that the Court has not referred to *Lemon* in all situations support this Court's decision to dismiss that precedent entirely, particularly in the school context.

C

Upon overruling one "grand unified theory," the Court introduces another: It holds that courts must interpret whether an Establishment Clause violation has occurred mainly "by 'reference to historical practices and understandings.' " *Ante*, at 2428 (quoting *Town of Greece*, 572 U.S. at 576, 134 S.Ct. 1811 (internal quotation marks omitted)). Here again, the Court professes that nothing has changed. In fact, while the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus. *American Legion*, 588 U. S., at —— – ——, 139 S.Ct., at 2091 (BREYER, J., concurring) (noting that the Court was "appropriately 'look[ing] to history for guidance' " but was not "adopt[ing] a 'history and tradition test' ").

The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority's new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented. See *Dobbs*, 597 U. S., at ——, 142 S.Ct. at 2325-2326 (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (explaining that the Framers "defined rights in general terms to permit future evolution in their scope and meaning"); *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U. S. ——, —— – ——, 142 S.Ct. 2111, 2175-2179, —— L.Ed.2d —— (2022) (BREYER, J., dissenting) (explaining the pitfalls of a "near-exclusive reliance on history" and offering examples of when this Court has "misread" history in the past); *Brown v. Davenport*, 596 U. S. ——, —— – – ——, 142 S.Ct. 1510, 1535, —— L.Ed.2d —— (2022) (KAGAN, J., dissenting) (noting the inaccuracies risked when courts "play amateur historian").

For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals'

rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

D

Finally, the Court acknowledges that the Establishment Clause prohibits the government from coercing people to engage in religion practice, *ante*, at 2428 - 2429, but its analysis of coercion misconstrues both the record and this Court's precedents.

The Court claims that the District "never raised coercion concerns" simply because ***2451** the District conceded that there was " 'no evidence that students [were] *directly* coerced to pray with Kennedy.' " *Ante*, at 2429 (emphasis added). The Court's suggestion that coercion must be "direc[t]" to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns, and that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592, 112 S.Ct. 2649 (opinion of the Court); see also *supra*, at 2442 - 2443. Tellingly, *none* of this Court's major cases involving school prayer concerned school practices that required students to do any more than listen silently to prayers, and some did not even formally require students to listen, instead providing that attendance was not mandatory. See *Santa Fe*, 530 U.S. at 296–298, 120 S.Ct. 2266; *Lee*, 505 U.S. at 593, 112 S.Ct. 2649; *Wallace*, 472 U.S. at 40, 105 S.Ct. 2479; *School Dist. of Abington Township*, 374 U.S. at 205, 83 S.Ct. 1560; *Engel*, 370 U.S. at 422, 82 S.Ct. 1261. Nevertheless, the Court concluded that the practices were coercive as a constitutional matter.

Today's Court quotes the *Lee* Court's remark that enduring others' speech is " 'part of learning how to live in a pluralistic society.' " *Ante*, at 2430 (quoting *Lee*, 505 U.S. at 590, 112 S.Ct. 2649). The *Lee* Court, however, expressly concluded, in the very same paragraph, that "[t]his argument cannot prevail" in the school-prayer context because the notion that being subject to a "brief " prayer in school is acceptable "overlooks a fundamental dynamic of the Constitution": its "specific prohibition on ... state intervention in religious affairs." *Id.*, at 591, 112 S.Ct. 2649; see also *id.*, at 594, 112 S.Ct. 2649 ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means").[7]

The Court also distinguishes *Santa Fe* because Kennedy's prayers "were not publicly broadcast or recited to a captive audience." *Ante*, at 2432. This misses the point. In *Santa Fe*, a student council chaplain delivered a prayer over the public-address system before each varsity football game of the season. 530 U.S. at 294, 120 S.Ct. 2266. Students were not required as a general matter to attend the games, but "cheerleaders, members of the band, and, of course, the team members themselves" were, and the Court would have found an "improper effect of coercing those present" even if it "regard[ed] every high school student's decision to attend ... as purely voluntary." *Id.*, at 311–312, 120 S.Ct. 2266. Kennedy's prayers raise precisely the same concerns. His prayers did not need to be broadcast. His actions spoke louder than his words. His prayers were intentionally, visually demonstrative to an audience aware of their history and no less captive than the audience in *Santa Fe*, with spectators watching and some players perhaps engaged in a song, but all waiting to rejoin their coach for a postgame talk. Moreover, Kennedy's prayers had a greater coercive potential because they were delivered not by a student, but by their coach, who was still on active duty for postgame events.

***2452** In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because "Kennedy did not seek to direct any prayers to students or require anyone else to participate." *Ante*, at 2429; see also *ante*, at

2432, n. 7 (contending that the fact that "students might choose, unprompted, to participate" in their coach's on-the-field prayers does not "necessarily prove them coercive"). But nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players.[8]

In any event, the Court makes this assertion only by drawing a bright line between Kennedy's yearslong practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which BHS students did not join, but student peers from the other teams did. See *ante*, at 2429 - 2430 (distinguishing Kennedy's prior practice and focusing narrowly on "three prayers ... in October 2015"). As discussed above, see *supra*, at 2443 - 2444, this mode of analysis contravenes precedent by "turn[ing] a blind eye to the context in which [Kennedy's practice] arose," *Santa Fe*, 530 U.S. at 315, 120 S.Ct. 2266.[9] This Court's precedents require a more nuanced inquiry into the realities of coercion in the specific school context concerned than the majority recognizes today. The question before the Court is not whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances. It is whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner, which led students to feel compelled to join him, violates the Establishment Clause. It does.

Having disregarded this context, the Court finds Kennedy's three-game practice distinguishable from precedent because the prayers were "quie[t]" and the students were otherwise "occupied." *Ante*, at 2429 - 2430. The record contradicts this narrative. Even on the Court's myopic framing of the facts, at two of the three games on which the Court focuses, players witnessed student peers from the other team and other authority figures surrounding Kennedy and joining him in ***2453** prayer. The coercive pressures inherent in such a situation are obvious. Moreover, Kennedy's actual demand to the District was that he give "verbal" prayers specifically at the midfield position where he traditionally led team prayers, and that students be allowed to join him "voluntarily" and pray. App. 64, 69–71. Notably, the Court today does not embrace this demand, but it nonetheless rejects the District's right to ensure that students were not pressured to pray.

To reiterate, the District did not argue, and neither court below held, that "*any* visible religious conduct by a teacher or coach should be deemed ... impermissibly coercive on students." *Ante*, at 2431. Nor has anyone contended that a coach may never visibly pray on the field. The courts below simply recognized that Kennedy continued to initiate prayers visible to students, while still on duty during school events, under the exact same circumstances as his past practice of leading student prayer. It is unprecedented for the Court to hold that this conduct, taken as a whole, did not raise cognizable coercion concerns. Importantly, nothing in the Court's opinion should be read as calling into question that Kennedy's conduct may have raised other concerns regarding disruption of school events or misuse of school facilities that would have separately justified employment action against Kennedy.

* * *

The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society. The first serves as "a promise from our government," while the second erects a "backstop that disables our government from breaking it" and "start[ing] us down the path to the past, when [the right to free exercise] was routinely abridged." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. ——, ——, 137 S.Ct. 2012, 2041, 198 L.Ed.2d 551 (2017) (SOTOMAYOR, J., dissenting).

Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public

employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty. I respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 A plaintiff may also prove a free exercise violation by showing that "official expressions of hostility" to religion accompany laws or policies burdening religious exercise; in cases like that we have "set aside" such policies without further inquiry. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ——, ——, 138 S.Ct. 1719, 1732, 201 L.Ed.2d 35 (2018). To resolve today's case, however, we have no need to consult that test. Likewise, while the test we do apply today has been the subject of some criticism, see, *e.g.*, *Fulton v. Philadelphia*, 593 U. S. ——, ——, 141 S.Ct. 1868, 1876–1877, 210 L.Ed.2d 137 (2021), we have no need to engage with that debate today because no party has asked us to do so.

2 Because our analysis and the parties' concessions lead to the conclusion that Mr. Kennedy's prayer constituted private speech on a matter of public concern, we do not decide whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering*–*Garcetti* framework.

3 It seems, too, that it is only here where our disagreement with the dissent begins in earnest. We do not understand our colleagues to contest that Mr. Kennedy has met his burdens under either the Free Exercise or Free Speech Clause, but only to suggest the District has carried its own burden "to establish that its policy prohibiting Kennedy's public prayers was the least restrictive means of furthering a compelling state interest." *Post*, at 2446 (opinion of SOTOMAYOR, J.).

4 Nor was that decision an outlier. In the last two decades, this Court has often criticized or ignored *Lemon* and its endorsement test variation. See, *e.g.*, *Espinoza v. Montana Dept. of Revenue*, 591 U. S. ——, 140 S.Ct. 2246, 207 L.Ed.2d 679 (2020); *American Legion v. American Humanist Assn.*, 588 U. S. ——, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019); *Trump v. Hawaii*, 585 U. S. ——, 138 S.Ct. 2392, 201 L.Ed.2d 775 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. ——, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017); *Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011); *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007); *id.*, at 618, 127 S.Ct. 2553 (Scalia, J., concurring in judgment); *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005); *id.*, at 689, 125 S.Ct. 2854 (BREYER, J., concurring in judgment). A vast number of Justices have criticized those tests over an even longer period. See *Shurtleff v. Boston*, 596 U. S. ——, at —— – ——, and nn. 9–10, 142 S.Ct. 1583, at 1607-1608, and nn. 9–10, —— L.Ed.2d —— (2022) (GORSUCH, J., concurring in judgment) (collecting opinions authored or joined by ROBERTS and Rehnquist, C. J., and THOMAS, BREYER, ALITO, KAVANAUGH, Stevens, O'Connor, Scalia, and Kennedy, JJ.). The point has not been lost on our lower court colleagues. See, *e.g.*, 4 F.4th 910, 939–941 (2021) (O'Scannlain, J., respecting denial of rehearing en banc); *id.*, at 945 (R. Nelson, J., dissenting from denial of rehearing en

banc); *id.*, at 947, n. 3 (collecting lower court cases from "around the country" that "have recognized *Lemon*'s demise").

5 See, *e.g.*, *Lee v. Weisman*, 505 U.S. 577, 640–642, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (Scalia, J. dissenting); *Shurtleff*, 596 U. S., at ——— – ———, 142 S.Ct., at 1608-1610 (opinion of GORSUCH, J.) (discussing coercion and certain other historical hallmarks of an established religion); 1 Annals of Cong. 730–731 (1789) (Madison explaining that the First Amendment aimed to prevent one or multiple sects from "establish[ing] a religion to which they would compel others to conform"); M. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2144–2146 (2003).

6 The dissent expresses concern that looking to "histor[y] an[d] tradition" to guide Establishment Clause inquiries will not afford "school administrators" sufficient guidance. *Post*, at 2450 - 24511. But that concern supplies no excuse to adorn the Constitution with rules not supported by its terms and the traditions undergirding them. Nor, in any event, is there any question that the District understands that coercion can be a hallmark of an Establishment Clause violation. See App. 105. The District's problem isn't a failure to identify coercion as a crucial legal consideration; it is a lack of evidence that coercion actually occurred.

7 Even if the personal prayers Mr. Kennedy sought to offer after games are not themselves coercive, the dissent suggests that they bear an indelible taint of coercion by association with the school's past prayer practices—some of which predated Mr. Kennedy, and all of which the District concedes he ended on request. But none of those abandoned practices formed the basis for Mr. Kennedy's suspension, and he has not sought to claim First Amendment protection for them. See *Town of Greece*, 572 U.S. at 585, 134 S.Ct. 1811 (other past practices do not permanently "despoil a practice" later challenged under the Establishment Clause). Nor, contrary to the dissent, does the possibility that students might choose, unprompted, to participate in Mr. Kennedy's prayers necessarily prove them coercive. See *post*, at 2443 - 2445, 2451 - 2452. For one thing, the District has conceded that no coach may "discourag[e]" voluntary student prayer under its policies. Tr. of Oral Arg. 91. For another, Mr. Kennedy has repeatedly explained that he is willing to conduct his prayer without students—as he did after each of the games that formed the basis of his suspension—and after students head to the locker room or bus. See App. 280, 282, 292–294.

8 Failing under its coercion theory, the District offers still another backup argument. It contends that it had to suppress Mr. Kennedy's protected First Amendment activity to ensure order at Bremerton football games. See also *post*, at 2434 - 2435, 2437 - 2439, 2439 - 2440, 2452 - 2453 (SOTOMAYOR, J., dissenting). But the District never raised concerns along these lines in its contemporaneous correspondence with Mr. Kennedy. And unsurprisingly, neither the District Court nor the Ninth Circuit invoked this rationale to justify the District's actions. Government "justification[s]" for interfering with First Amendment rights "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Nor under our Constitution does protected speech or religious exercise readily give way to a "heckler's veto." *Good News Club v. Milford Central School*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001); *supra*, at 2427 - 2428.

1 The Court recounts that Kennedy was "willing to say his 'prayer while the players were walking to the locker room' or 'bus,' and then catch up with his team." *Ante*, at 2417 (quoting App. 280–282); see also *ante*, at 2417 - 2418. Kennedy made the quoted remarks, however, only during his deposition in the underlying litigation, stating in response to a question that such timing would have been "physically possible" and "possibly" have been acceptable to him, but that he had never "discuss[ed] with the District

whether that was a possibility for [him] to do" and had "no idea" whether his lawyers raised it with the District. App. 280.

2 The Court describes the events of the October 16 game as having "spurred media coverage of Mr. Kennedy's case." *Ante*, at 2418. In fact, the District Court found that Kennedy himself generated the media coverage by publicizing his dispute with the District in his initial Facebook posting and in his media appearances before the October 16 game. 443 F.Supp.3d 1223, 1230 (W.D. Wash. 2020).

3 The Court's primary argument that Kennedy's speech is not in his official capacity is that he was permitted "to call home, check a text, [or] socialize" during the time period in question. *Ante*, at 2425. These truly private, informal communications bear little resemblance, however, to what Kennedy did. Kennedy explicitly sought to make his demonstrative prayer a permanent ritual of the postgame events, at the physical center of those events, where he was present by virtue of his job responsibilities, and after years of giving prayer-filled motivational speeches to students at the same relative time and location. In addition, Kennedy gathered public officials and other members of the public onto the field to join him in the prayer, contrary to school policies controlling access to the field. Such behavior raises an entirely different risk of depriving the employer of "control over what the employer itself has commissioned or created" than an employee making a call home on the sidelines, fleetingly checking email, or pausing to hug a friend in the crowd. *Garcetti*, 547 U.S. at 422, 126 S.Ct. 1951.

4 The Court attempts to recast *Lee* and *Santa Fe* as solely concerning coercion, *ante*, at 2431 - 2432, but both cases emphasized that it was important to avoid appearances of " 'state endorsement of prayer in public schools.' " *Santa Fe*, 530 U.S. at 308, 120 S.Ct. 2266; see *Lee*, 505 U.S. at 590, 112 S.Ct. 2649 (finding that the "degree of school involvement" indicated that the "prayers bore the imprint of the State").

5 The notion that integration of religious practices into the workplace may require compromise and accommodation is not unique to the public-employer context where Establishment Clause concerns arise. The Court's precedents on religious discrimination claims similarly recognize that the employment context requires balancing employer and employee interests, and that religious practice need not always be accommodated. See *Kennedy v. Bremerton School Dist.*, 586 U. S. ——, ——, 139 S.Ct. 634, 637, 203 L.Ed.2d 137 (2019) (ALITO, J., statement respecting denial of certiorari) (noting that "Title VII's prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden"). Surely, an employee's religious practice that forces a school district to engage in burdensome measures to stop spectators from rushing onto a field and knocking people down imposes much more than a *de minimis* burden.

6 The Court also cites *Shurtleff v. Boston*, 596 U. S. ——, 142 S.Ct. 1583, —— L.Ed.2d —— (2022), as evidence that the *Lemon* test has been rejected. See *ante*, at 2427 - 2428. Again, while separate writings in *Shurtleff* criticized *Lemon*, the Court did not. The opinion of the Court simply applied the longstanding rule that, when the government does not speak for itself, it cannot exclude speech based on the speech's " 'religious viewpoint.' " *Shurtleff*, 596 U. S., at ——, 142 S.Ct., at 1593 (quoting *Good News Club*, 533 U.S. at 112, 121 S.Ct. 2093). The Court further infers *Lemon*'s implicit overruling from recent decisions that do not apply its test. See *ante*, at 2428, n. 4. As explained above, however, not applying a test in a given case is a different matter from overruling it entirely and, moreover, the Court has never before questioned the relevance of endorsement in the school-prayer context.

[7] The Court further claims that *Lee* is distinguishable because it involved prayer at an event in which the school had " 'in every practical sense compelled attendance and participation in [a] religious exercise.' " *Ante*, at 2431 (quoting *Lee*, 505 U.S. at 598, 112 S.Ct. 2649). The Court in *Lee*, however, recognized expressly that attendance at the graduation ceremony was not mandatory and that students who attended only had to remain silent during and after the prayers. *Id.*, at 583, 593, 112 S.Ct. 2649.

[8] Puzzlingly, the Court goes a step further and suggests that Kennedy may have been in violation of the District policy on Religious-Related Activities and Practices if he did not permit the players to join his prayers because the policy prohibited staff from "discourag[ing]" student prayer. *Ante*, at 2417, 2432, n. 7. The policy, however, specifically referred to student prayer of the student's "own volition" and equally prohibited staff from "encourag[ing]" student prayer. App. 28.

[9] The Court claims that Kennedy's "past prayer practices" should not be seen to "taint" his current ones by again turning to *Town of Greece v. Galloway*, the town assembly prayer case. *Ante*, at 2432, n. 7. In the passage the Court cites, *Town of Greece* concluded that "two remarks" by two different "guest minister[s]" on two isolated occasions did not constitute a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose." 572 U.S. at 585, 134 S.Ct. 1811. As *Town of Greece* itself emphasizes, the school context presents Establishment Clause concerns distinct from those raised in a town meeting for "mature adults." *Id.*, at 590, 134 S.Ct. 1811 (plurality opinion). See *supra*, at 2442. In any event, Kennedy's yearslong "past prayer practices" constituted an established pattern, not an isolated occasion, and he hardly "abandoned" the practice. *Ante*, at 2432, n. 7. As his October 14 letter and subsequent actions made clear, Kennedy attempted to hew as closely to his past practice as possible, taking a knee at the same time and place as previously, and in the same manner that initially drew students to join him and by improperly permitting spectators to join him on the field.

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Supreme Court of the United States | May 5, 2014 | 572 U.S. 565 | 134 S.Ct. 1811

Document Details

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Outline

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Legislative prayer

Consider this approach:

Offer an Invocation,
an invitation to consider the
public business before the body in
a serious and thoughtful manner

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Bormuth v. County of Jackson, 6th Cir.(Mich.), February 15, 2017

134 S.Ct. 1811
Supreme Court of the United States

TOWN OF GREECE, NEW YORK, Petitioner
v.
Susan GALLOWAY et al.

No. 12–696
|
Argued Nov. 6, 2013.
|
Decided May 5, 2014.

Synopsis
Background: Residents brought civil rights action against town, alleging town's practice of opening town board **meetings** with **prayer** violated First Amendment's Establishment Clause. The United States District Court for the Western District of New York, Charles J. Siragusa, J., 732 F.Supp.2d 195, granted summary judgment for town. Residents appealed. The United States Court of Appeals for the Second Circuit, Calabresi, Circuit Judge, 681 F.3d 20, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

[1] **prayer** opening town board **meetings** did not have to be nonsectarian to comply with the Establishment Clause, abrogating *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472;

[2] town did not violate First Amendment by opening town board **meetings** with **prayer** that comported with tradition of the United States; and

[3] **prayer** at opening of town board **meetings** did not compel its citizens to engage in a religious observance, in violation of the Establishment Clause.

Reversed.

Justice Alito filed a concurring opinion in which Justice Scalia joined.

Justice Thomas filed an opinion concurring in part and concurring in judgment in which Justice Scalia joined in part.

Justice Breyer filed a dissenting opinion.

Justice Kagan filed a dissenting opinion in which Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (12)

[1] **Constitutional Law**⚖Establishment of Religion
The Establishment Clause must be interpreted by reference to historical practices and understandings. U.S.C.A. Const.Amend. 1.

37 Cases that cite this headnote

[2] **Constitutional Law**⚖Establishment of Religion
It is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted; any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. U.S.C.A. Const.Amend. 1.

21 Cases that cite this headnote

[3] **Constitutional Law**⇨Local governmental entities
Towns⇨Town board in general

Prayer opening town board **meetings** did not have to be nonsectarian, or not identifiable with any one religion, in order to comply with the Establishment Clause; abrogating *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472.U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[4] **Constitutional Law**⇨Particular Issues and Applications

The United States government is prohibited under the Establishment Clause from prescribing **prayers** to be recited in **public** institutions in order to promote a preferred system of belief or code of moral behavior. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[5] **Constitutional Law**⇨Establishment of Religion

Government may not mandate a civic religion that stifles any but the most generic reference to the sacred under the Establishment Clause, any more than it may prescribe a religious orthodoxy. U.S.C.A. Const.Amend. 1.

30 Cases that cite this headnote

[6] **Constitutional Law**⇨First Amendment in General
Constitutional Law⇨Particular Issues and Applications
Constitutional Law⇨Religious speech or activities

The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech; once it invites **prayer** into the **public** sphere, government must permit a **prayer** giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian. U.S.C.A. Const.Amend. 1.

15 Cases that cite this headnote

[7] **Constitutional Law**⇨Legislature

The relevant constraint on legislative **prayer** under the Establishment Clause derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage; **prayer** that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. U.S.C.A. Const.Amend. 1.

33 Cases that cite this headnote

[8] **Constitutional Law**⇨Local governmental entities
Towns⇨Town board in general

Town did not violate the First Amendment by opening its town board **meetings** with **prayer** that comported with the tradition of the United States; although a number of the **prayers** did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[9] **Constitutional Law**⇨Particular Issues and Applications

Absent a pattern of **prayers** that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a **prayer** will not likely establish a constitutional violation under the Establishment Clause. U.S.C.A. Const.Amend. 1.

31 Cases that cite this headnote

[10] **Constitutional Law**⇐Local governmental entities
Towns⇐Town board in general

Town did not contravene the Establishment Clause by inviting a predominantly Christian set of ministers to lead the **prayer** opening its town board **meetings**, where the town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a **prayer** by any minister or layman who wished to give one; that nearly all of the congregations in town turned out to be Christian did not reflect an aversion or bias on the part of town leaders against minority faiths. U.S.C.A. Const.Amend. 1.

16 Cases that cite this headnote

[11] **Constitutional Law**⇐Local governmental entities

So long as a town maintains a policy of nondiscrimination in inviting ministers and laymen to lead a **prayer** at its **meetings**, the Establishment Clause does not require it to search beyond its borders for non-Christian **prayer** givers in an effort to achieve religious balancing. U.S.C.A. Const.Amend. 1.

17 Cases that cite this headnote

[12] **Constitutional Law**⇐Local governmental entities
Towns⇐Town board in general

Town, through the act of offering a brief, solemn, and respectful **prayer** to open its monthly town board **meetings**, did not compel its citizens to engage in a religious observance, in violation of the Establishment Clause. (Per Justice Kennedy with two Justices concurring and two Justices concurring in result.) U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

1813 *Syllabus

***565** Since 1999, the monthly town board **meetings** in Greece, New York, have opened with a roll call, a recitation of the Pledge of Allegiance, and a **prayer** given by clergy selected from the congregations listed in a local directory. While the **prayer** program is open to all creeds, nearly all of the local congregations are Christian; thus, nearly all of the participating **prayer** givers have been too. Respondents, citizens who attend **meetings** to speak on local issues, filed suit, alleging that the town violated the First Amendment's Establishment Clause by preferring Christians over other **prayer** givers and by sponsoring sectarian **prayers**. They sought to limit the town to " inclusive and ecumenical" **prayers** that referred only to a "generic God." The District Court upheld the **prayer** practice on summary judgment, finding no impermissible preference for Christianity; concluding that the Christian identity of most of the **prayer** givers reflected the predominantly Christian character of the town's congregations, not an official policy or practice of discriminating against minority faiths; finding that the First Amendment did not require Greece to invite clergy from congregations beyond its borders to achieve religious diversity; and rejecting the theory that legislative **prayer** must be nonsectarian. The Second Circuit reversed, holding that some aspects of the **prayer** program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity.

Held: The judgment is reversed.

681 F.3d 20, reversed.

Justice KENNEDY delivered the opinion of the Court, except as to Part II–B, concluding that the town's **prayer** practice does not violate the Establishment Clause. Pp. 1818 – 1825.

(a) Legislative **prayer**, while religious in nature, has long been understood as compatible with the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019. In *Marsh*, the Court concluded that it was not necessary to define the Establishment Clause's precise boundary in order to uphold Nebraska's practice of employing a legislative chaplain because history supported the conclusion that the specific practice was permitted. The First Congress voted to appoint and pay official chaplains shortly after approving language for the First Amendment, and both Houses have maintained the office virtually uninterrupted since ***566** then. See *id.*, at 787–789, and n. 10, 103 S.Ct. 3330. A majority of the States have also had a consistent practice of legislative **prayer**. *Id.*, at 788–790, and n. 11, 103 S.Ct. 3330. There is historical precedent for the practice of opening local legislative **meetings** with **prayer** as well. *Marsh* teaches that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670, 109 S.Ct. 3086, 106 L.Ed.2d 472 (opinion of KENNEDY, J.). Thus, any test must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. The Court's inquiry, then, must be to determine whether the **prayer** practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Pp. 1818 – 1820.

(b) Respondents' insistence on nonsectarian **prayer** is not consistent with this ****1814** tradition. The **prayers** in *Marsh* were consistent with the First Amendment not because they espoused only a generic theism but because the Nation's history and tradition have shown that **prayer** in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U.S., at 786, 103 S.Ct. 3330. Dictum in *County of Allegheny* suggesting that *Marsh* permitted only **prayer** with no overtly Christian references is irreconcilable with the facts, holding, and reasoning of *Marsh*, which instructed that the "content of the **prayer** is not of concern to judges," provided "there is no indication that the **prayer** opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S., at 794–795, 103 S.Ct. 3330. To hold that invocations must be nonsectarian would force the legislatures sponsoring **prayers** and the courts deciding these cases to act as supervisors and censors of religious speech, thus involving government in religious matters to a far greater degree than is the case under the town's current practice of neither editing nor approving **prayers** in advance nor criticizing their content after the fact. Respondents' contrary arguments are unpersuasive. It is doubtful that consensus could be reached as to what qualifies as a generic or nonsectarian **prayer**. It would also be unwise to conclude that only those religious words acceptable to the majority are permissible, for the First Amendment is not a majority rule and government may not seek to define permissible categories of religious speech. In rejecting the suggestion that legislative **prayer** must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from the **prayer's** place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. From the Nation's earliest days, invocations have been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths may be united in a community of tolerance and devotion, ***567** even if they disagree as to religious doctrine. The **prayers** delivered in Greece do not fall outside this tradition. They may have invoked, *e.g.*, the name of Jesus, but they also invoked universal themes, *e.g.*, by calling for a "spirit of cooperation." Absent a pattern of **prayers** that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular **prayer** will not likely establish a constitutional violation. See 463

Commented [ER1]: Legislative prayer is a tradition

U.S., at 794–795, 103 S.Ct. 3330. Finally, so long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian **prayer** givers in an effort to achieve religious balancing. Pp. 1819 – 1825.

Justice KENNEDY, joined by THE CHIEF JUSTICE and Justice ALITO, concluded in Part II–B that a fact-sensitive inquiry that considers both the setting in which the **prayer** arises and the audience to whom it is directed shows that the town is not coercing its citizens to engage in a religious observance. The **prayer** opportunity is evaluated against the backdrop of a historical practice showing that **prayer** has become part of the Nation's heritage and tradition. It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to **public** proceedings and to acknowledge the place religion holds in the lives of many private citizens. Furthermore, the principal audience for these invocations is not the **public**, but the lawmakers themselves. And those lawmakers did not direct the **public** to participate, single out dissidents for opprobrium, ****1815** or indicate that their decisions might be influenced by a person's acquiescence in the **prayer** opportunity. Respondents claim that the **prayers** gave them offense and made them feel excluded and disrespected, but offense does not equate to coercion. In contrast to *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467, where the Court found coercive a religious invocation at a high school graduation, *id.*, at 592–594, 112 S.Ct. 2649, the record here does not suggest that citizens are dissuaded from leaving the **meeting** room during the **prayer**, arriving late, or making a later protest. That the **prayer** in Greece is delivered during the opening ceremonial portion of the town's **meeting**, not the policymaking portion, also suggests that its purpose and effect are to acknowledge religious leaders and their institutions, not to exclude or coerce nonbelievers. Pp. 1824 – 1828.

Justice THOMAS, joined by Justice SCALIA as to Part II, agreed that the town's **prayer** practice does not violate the Establishment Clause, but concluded that, even if the Establishment Clause were properly incorporated against the States through the Fourteenth Amendment, the Clause is not violated by the kind of subtle pressures respondents allegedly suffered, which do not amount to actual legal coercion. The municipal **prayers** in this case bear no resemblance to the coercive state establishments that existed at the founding, which exercised government ***568** power in order to exact financial support of the church, compel religious observance, or control religious doctrine. Pp. 1815 – 1819.

KENNEDY, J., delivered the opinion of the Court, except as to Part II–B. ROBERTS, C.J., and ALITO, J., joined the opinion in full, and SCALIA and THOMAS, JJ., joined except as to Part II–B. ALITO, J., filed a concurring opinion, in which SCALIA, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined as to Part II. BREYER, J., filed a dissenting opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

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Opinion

Justice KENNEDY delivered the opinion of the Court, except as to Part II–B.*

***569** The Court must decide whether the town of Greece, New York, imposes an impermissible

establishment of religion by *570 opening its monthly board **meetings** with a **prayer**. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), that no violation of the Constitution has been shown.

**1816 I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board **meetings** with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the **prayer** practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the **prayer**, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The **prayer** was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures. App. 22a–25a.

*571 The town followed an informal method for selecting **prayer** givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's **meeting**. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be **prayer** giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the **prayers** in advance of the **meetings** nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the **prayers** would infringe both the free exercise and speech rights of the ministers. *Id.*, at 22a. The town instead left the guest clergy free to compose their own devotions. The resulting **prayers** often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the **meeting** and bestow blessings on the community:

> *572 "Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility.... Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." *Id.*, at 45a.

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following **prayer**:

> "Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter.... We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan.... Praise and glory be yours, O Lord, now **1817 and forever more. Amen." *Id.*, at 88a–89a.

Respondents Susan Galloway and Linda Stephens attended town board **meetings** to speak about issues of local concern, and they objected that the **prayers** violated their religious or philosophical views. At one **meeting**, Galloway admonished board members that

she found the **prayers** "offensive," "intolerable," and an affront to a "diverse community." Complaint in No. 08–cv–6088 (WDNY), ¶ 66. After respondents complained that Christian themes pervaded the **prayers**, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver **prayers**. A Wiccan priestess who had read press reports about the **prayer** controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other **prayer** givers and by sponsoring sectarian **prayers**, such as those given "in Jesus' name." 732 F.Supp.2d 195, 203 (2010). They did not seek an end to the **prayer** practice, but rather requested an injunction that would limit the town to "inclusive ***573** and ecumenical" **prayers** that referred only to a "generic God" and would not associate the government with any one faith or belief. *Id.*, at 210, 241.

The District Court on summary judgment upheld the **prayer** practice as consistent with the First Amendment. It found no impermissible preference for Christianity, noting that the town had opened the **prayer** program to all creeds and excluded none. Although most of the **prayer** givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths. The District Court found no authority for the proposition that the First Amendment required Greece to invite clergy from congregations beyond its borders in order to achieve a minimum level of religious diversity.

The District Court also rejected the theory that legislative **prayer** must be nonsectarian. The court began its inquiry with the opinion in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, which permitted **prayer** in state legislatures by a chaplain paid from the **public** purse, so long as the **prayer** opportunity was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief," *id.*, at 794–795, 103 S.Ct. 3330. With respect to the **prayer** in Greece, the District Court concluded that references to Jesus, and the occasional request that the audience stand for the **prayer**, did not amount to impermissible proselytizing. It located in *Marsh* no additional requirement that the **prayers** be purged of sectarian content. In this regard the court quoted recent invocations offered in the U.S. House of Representatives "in the name of our Lord Jesus Christ," *e.g.*, 156 Cong Rec. H5205 (June 30, 2010), and situated **prayer** in this context as part a long tradition. Finally, the trial court noted this Court's statement in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 603, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), that the **prayers** in *Marsh* did not offend the Establishment Clause "because the particular chaplain had 'removed all references to ***574** Christ.' " But the District Court did not read that statement to mandate that legislative **prayer** be nonsectarian, at least in circumstances where the town permitted clergy from a variety of faiths to give invocations. By welcoming many viewpoints, the District ****1818** Court concluded, the town would be unlikely to give the impression that it was affiliating itself with any one religion.

The Court of Appeals for the Second Circuit reversed. 681 F.3d 20, 34 (2012). It held that some aspects of the **prayer** program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The town's failure to promote the **prayer** opportunity to the **public**, or to invite ministers from congregations outside the town limits, all but "ensured a Christian viewpoint." *Id.*, at 30–31. Although the court found no inherent problem in the sectarian content of the **prayers**, it concluded that the "steady drumbeat" of Christian **prayer**, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity. *Id.*, at 32. Finally, the court found it relevant that guest clergy sometimes spoke on behalf of all present at the **meeting**, as by saying "let us pray," or by asking audience members to stand and bow their heads: "The invitation ... to participate in the **prayer** ... placed audience members who are nonreligious or adherents

of non-Christian religion in the awkward position of either participating in **prayers** invoking beliefs they did not share or appearing to show disrespect for the invocation." *Ibid.* That board members bowed their heads or made the sign of the cross further conveyed the message that the town endorsed Christianity. The Court of Appeals emphasized that it was the "interaction of the facts present in this case," rather than any single element, that rendered the **prayer** unconstitutional. *Id.*, at 33.

Having granted certiorari to decide whether the town's **prayer** practice violates the Establishment Clause, *575 569 U.S. ——, 133 S.Ct. 2388, 185 L.Ed.2d 1103 (2013), the Court now reverses the judgment of the Court of Appeals.

II

In *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a **prayer** delivered by a chaplain paid from state funds. The decision concluded that legislative **prayer**, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative **prayer** lends gravity to **public** business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. See *Lynch v. Donnelly*, 465 U.S. 668, 693, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring); cf. A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 83 (1990). The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," *Marsh*, 463 U.S., at 792, 103 S.Ct. 3330, rather than a first, treacherous step towards establishment of a state church.

Marsh is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative **prayer** without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. *Id.*, at 796, 813, 103 S.Ct. 3330 (Brennan, J., dissenting). The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time. See *id.*, at 787–789, and n. 10, 103 S.Ct. 3330; N. Feldman, Divided **1819 by God 109 (2005). But see *Marsh, supra*, at 791–792, and n. 12, 103 S.Ct. 3330 (noting dissenting views among the Framers); Madison, "Detached Memoranda", 3 Wm. & Mary *576 Quarterly 534, 558–559 (1946) (hereinafter Madison's Detached Memoranda). When *Marsh* was decided, in 1983, legislative **prayer** had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. 463 U.S., at 788–790, and n. 11, 103 S.Ct. 3330. Although no information has been cited by the parties to indicate how many local legislative bodies open their **meetings** with **prayer**, this practice too has historical precedent. See Reports of Proceedings of the City Council of Boston for the Year Commencing Jan. 1, 1909, and Ending Feb. 5, 1910, pp. 1–2 (1910) (Rev. Arthur Little) ("And now we desire to invoke Thy presence, Thy blessing, and Thy guidance upon those who are gathered here this morning ..."). "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a **prayer** has become part of the fabric of our society." *Marsh, supra*, at 792, 103 S.Ct. 3330.

[1][2] Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny*, 492 U.S., at 670, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered

legislative **prayer** a benign acknowledgment of religion's role in society. D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 12–13 (1997). In the 1850's, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily **prayer**, S.Rep. No. 376, 32d Cong., 2d Sess., 2 (1853); no faith was excluded by law, nor any favored, ***577***id.*, at 3; and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers, H. Rep. No. 124, 33d Cong., 1st Sess., 6 (1854). *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. *County of Allegheny, supra,* at 670, 109 S.Ct. 3086 (opinion of KENNEDY, J.); see also *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers"). A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent. See *Van Orden v. Perry,* 545 U.S. 677, 702–704, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment).

The Court's inquiry, then, must be to determine whether the **prayer** practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the ****1820*** town's **prayer** exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve **prayers** containing sectarian language or themes, such as the **prayers** offered in Greece that referred to the "death, resurrection, and ascension of the Savior Jesus Christ," App. 129a, and the "saving sacrifice of Jesus Christ on the cross," *id.*, at 88a. Second, they argue that the setting and conduct of the town board **meetings** create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the **prayer** and will vote on matters citizens bring before the board. The sectarian content of the **prayers** compounds the ***578*** subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical **prayer** is forced to do the same for **prayer** that might be inimical to his or her beliefs.

A

[3] Respondents maintain that **prayer** must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver **prayers** that "use overtly Christian terms" or "invoke specifics of Christian theology." Brief for Respondents 20. A **prayer** is fitting for the **public** sphere, in their view, only if it contains the " 'most general, nonsectarian reference to God,' " *id.*, at 33 (quoting M. Meyerson, Endowed by Our Creator: The Birth of Religious Freedom in America 11–12 (2012)), and eschews mention of doctrines associated with any one faith, Brief for Respondents 32–33. They argue that **prayer** which contemplates "the workings of the Holy Spirit, the events of Pentecost, and the belief that God 'has raised up the Lord Jesus' and 'will raise us, in our turn, and put us by His side' " would be impermissible, as would any **prayer** that reflects dogma particular to a single faith tradition. *Id.*, at 34 (quoting App. 89a and citing *id.*, at 56a, 123a, 134a).

An insistence on nonsectarian or ecumenical **prayer** as a single, fixed standard is not consistent with the tradition of legislative **prayer** outlined in the Court's cases. The Court found the **prayers** in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that **prayer** in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U.S., at 786, 103 S.Ct. 3330. The Congress that drafted the

First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first chaplains, the Rev. William White, gave **prayers** in a series that included the Lord's **Prayer**, the Collect for Ash Wednesday, **prayers** for peace ***579** and grace, a general thanksgiving, St. Chrysostom's **Prayer**, and a **prayer** seeking "the grace of our Lord Jesus Christ, &c." Letter from W. White to H. Jones (Dec. 29, 1830), in B. Wilson, Memoir of the Life of the Right Reverend William White, D. D., Bishop of the Protestant Episcopal Church in the State of Pennsylvania 322 (1839); see also New Hampshire Patriot & State Gazette, Dec. 15, 1823, p. 1 (describing a Senate **prayer** addressing the "Throne of Grace"); Cong. Globe, 37th Cong., 1st Sess., 2 (1861) (reciting the Lord's **Prayer**). The decidedly Christian nature of these **prayers** must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ****1821** ministers of many creeds. See, *e.g.*, 160 Cong. Rec. S1329 (Mar. 6, 2014) (Dalai Lama) ("I am a Buddhist monk—a simple Buddhist monk—so we pray to Buddha and all other Gods"); 159 Cong. Rec. H7006 (Nov. 13, 2013) (Rabbi Joshua Gruenberg) ("Our God and God of our ancestors, Everlasting Spirit of the Universe ..."); 159 Cong. Rec. H3024 (June 4, 2013) (Satguru Bodhinatha Veylanswami) ("Hindu scripture declares, without equivocation, that the highest of high ideals is to never knowingly harm anyone"); 158 Cong. Rec. H5633 (Aug. 2, 2012) (Imam Nayyar Imam) ("The final prophet of God, Muhammad, peace be upon him, stated: 'The leaders of a people are a representation of their deeds' ").

The contention that legislative **prayer** must be generic or nonsectarian derives from dictum in *County of Allegheny*, 492 U.S. 573, 109 S.Ct. 3086, that was disputed when written and has been repudiated by later cases. There the Court held that a crèche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had "the effect of endorsing a patently Christian message." *Id.*, at 601, 109 S.Ct. 3086. Four dissenting Justices disputed that endorsement could be the proper test, as it ***580** likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative **prayer** and the "forthrightly religious" Thanksgiving proclamations issued by nearly every President since Washington. *Id.*, at 670–671, 109 S.Ct. 3086. The Court sought to counter this criticism by recasting *Marsh* to permit only **prayer** that contained no overtly Christian references:

> "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.... The legislative **prayers** involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.' " *Id.*, at 603 [109 S.Ct. 3086] (quoting *Marsh, supra*, at 793, n. 14 [103 S.Ct. 3330]; footnote omitted).

This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative **prayer** turns on the neutrality of its content. The opinion noted that Nebraska's chaplain, the Rev. Robert E. Palmer, modulated the "explicitly Christian" nature of his **prayer** and "removed all references to Christ" after a Jewish lawmaker complained. 463 U.S., at 793, n. 14, 103 S.Ct. 3330. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her **prayers** to appeal to more members, or at least to give less offense to those who object. See Mallory, "An Officer of the House Which Chooses Him, and Nothing More": How Should *Marsh v. Chambers* Apply to Rotating Chaplains?, 73 U. Chi. L.Rev. 1421, 1445 (2006). *Marsh* did not suggest that Nebraska's **prayer** practice would have failed had the chaplain not acceded to the legislator's request. Nor did the Court imply the rule that **prayer** violates the Establishment Clause any time it is given in the name of a figure deified by only one ***581** faith or creed. See

Van Orden, 545 U.S., at 688, n. 8, 125 S.Ct. 2854 (recognizing that the **prayers** in *Marsh* were "often explicitly Christian" and rejecting the view that this gave rise to an establishment violation). To the contrary, the Court instructed that the "content of the **prayer** is not of concern to judges," provided "there is no indication that the **prayer** opportunity has been exploited to proselytize or ****1822** advance any one, or to disparage any other, faith or belief." 463 U.S., at 794–795, 103 S.Ct. 3330.

[4][5] To hold that invocations must be nonsectarian would force the legislatures that sponsor **prayers** and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving **prayers** in advance nor criticizing their content after the fact. Cf. *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. ——, ——, 132 S.Ct. 694, 705–706, 181 L.Ed.2d 650 (2012). Our Government is prohibited from prescribing **prayers** to be recited in our **public** institutions in order to promote a preferred system of belief or code of moral behavior. *Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the **public** sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy. See *Lee v. Weisman,* 505 U.S. 577, 590, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted"); *Schempp,* 374 U.S., at 306, 83 S.Ct. 1560 (Goldberg, J., concurring) (arguing that "untutored devotion to the concept of neutrality" must not lead to "a brooding and pervasive devotion to the secular").

[6] ***582** Respondents argue, in effect, that legislative **prayer** may be addressed only to a generic God. The law and the Court could not draw this line for each specific **prayer** or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. Honorifics like "Lord of Lords" or "King of Kings" might strike a Christian audience as ecumenical, yet these titles may have no place in the vocabulary of other faith traditions. The difficulty, indeed the futility, of sifting sectarian from nonsectarian speech is illustrated by a letter that a lawyer for the respondents sent the town in the early stages of this litigation. The letter opined that references to "Father, God, Lord God, and the Almighty" would be acceptable in **publicprayer,** but that references to "Jesus Christ, the Holy Spirit, and the Holy Trinity" would not. App. 21a. Perhaps the writer believed the former grouping would be acceptable to monotheists. Yet even seemingly general references to God or the Father might alienate nonbelievers or polytheists. *McCreary County v. American Civil Liberties Union of Ky.,* 545 U.S. 844, 893, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (SCALIA, J., dissenting). Because it is unlikely that **prayer** will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. *Torcaso v. Watkins,* 367 U.S. 488, 495, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites **prayer** into the **public** sphere, government must permit a **prayer** giver to address his or her own God or gods as conscience dictates, ****1823** unfettered by what an administrator or judge considers to be nonsectarian.

[7] In rejecting the suggestion that legislative **prayer** must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from ***583** its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. **Prayer** that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and

common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the **prayer** to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a **prayer** is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. **Prayer** that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S., at 794–795, 103 S.Ct. 3330.

It is thus possible to discern in the **prayers** offered to Congress a commonality of theme and tone. While these **prayers** vary in their degree of religiosity, they often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws. The first **prayer** delivered to the Continental Congress by the Rev. Jacob Duché on Sept. 7, 1774, provides an example:

> "Be Thou present O God of Wisdom and direct the counsel of this Honorable Assembly; enable them to settle all things on the best and surest foundations; that ***584** the scene of blood may be speedily closed; that Order, Harmony, and Peace be effectually restored, and the Truth and Justice, Religion and Piety, prevail and flourish among the people.
>
> "Preserve the health of their bodies, and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Saviour, Amen." W. Federer, America's God and Country 137 (2000).

From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial **prayers** strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial **prayer** delivered by a person of a different faith. See Letter from John Adams to Abigail Adams (Sept. 16, 1774), in C. ****1824** Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37–38 (1876).

[8] The **prayers** delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the **prayers** did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. App. 31a, 38a. Among numerous examples of such **prayer** in the record is the invocation given by the Rev. Richard Barbour at the September 2006 board **meeting**:

> "Gracious God, you have richly blessed our nation and this community. Help us to remember your generosity ***585** and give thanks for your goodness. Bless the elected leaders of the Greece Town Board as they conduct the business of our town this evening. Give them wisdom, courage, discernment and a single-minded desire to serve the common good. We ask your blessing on all **public** servants, and especially on our police force, firefighters, and emergency medical personnel.... Respectful of every religious tradition, I offer this **prayer** in the name of

God's only son Jesus Christ, the Lord, Amen." *Id.*, at 98a–99a.

[9] Respondents point to other invocations that disparaged those who did not accept the town's **prayer** practice. One guest minister characterized objectors as a "minority" who are "ignorant of the history of our country," *id.*, at 108a, while another lamented that other towns did not have "God-fearing" leaders, *id.*, at 79a. Although these two remarks strayed from the rationale set out in *Marsh,* they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of **prayers** that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a **prayer** will not likely establish a constitutional violation. *Marsh,* indeed, requires an inquiry into the **prayer** opportunity as a whole, rather than into the contents of a single **prayer**. 463 U.S., at 794–795, 103 S.Ct. 3330.

[10][11] Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the **prayer**. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a **prayer** by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution ***586** does not require it to search beyond its borders for non-Christian **prayer** givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," *Lee,* 505 U.S., at 617, 112 S.Ct. 2649 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach.

B

[12] Respondents further seek to distinguish the town's **prayer** practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some *amici* contend that **prayer** conducted in the intimate setting of a town board **meeting** differs in ****1825** fundamental ways from the invocations delivered in Congress and state legislatures, where the **public** remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town **meetings**, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the **public** may feel subtle pressure to participate in **prayers** that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny,* 492 U.S., at 659, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *Van Orden,* 545 U.S., at 683, 125 S.Ct. 2854 (plurality opinion) (recognizing that our "institutions must ***587** not press religious observances upon their citizens"). On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful **prayer** to open its monthly **meetings**, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the **prayer** arises and the audience to whom it is directed.

The **prayer** opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative **prayer** has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural **prayer**, or the recitation of "God save the United States and this honorable Court" at the opening

of this Court's sessions. See *Lynch*, 465 U.S., at 693, 104 S.Ct. 1355 (O'Connor, J., concurring). It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to **public** proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. See *Salazar v. Buono*, 559 U.S. 700, 720–721, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010) (plurality opinion); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). That many appreciate these acknowledgments of the divine in our **public** institutions does not suggest that those who disagree are compelled to join the expression or approve its content. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

The principal audience for these invocations is not, indeed, the **public** but lawmakers themselves, who may find that a moment of **prayer** or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. The District Court in *Marsh* described the **prayer** exercise as "an internal act" directed at the Nebraska Legislature's "own members," ***588** *Chambers v. Marsh*, 504 F.Supp. 585, 588 (D.Neb.1980), rather than an effort to promote religious observance among the **public**. See also *Lee*, 505 U.S., at 630, n. 8, 112 S.Ct. 2649 (Souter, J., concurring) (describing *Marsh* as a case "in which government officials invoke[d] spiritual inspiration entirely for their own benefit"); *Atheists of Fla., Inc. v. Lakeland*, 713 F.3d 577, 583 (C.A.11 2013) (quoting a city resolution providing for **prayer** "for the benefit and blessing of" elected leaders); Madison's ****1826** Detached Memoranda 558 (characterizing **prayer** in Congress as "religious worship for national representatives"); Brief for U.S. Senator Marco Rubio et al. as *Amici Curiae* 30–33; Brief for 12 Members of Congress as *Amici Curiae* 6. To be sure, many members of the **public** find these **prayers** meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial **prayer** may also reflect the values they hold as private citizens. The **prayer** is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the **public** to participate in the **prayers**, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the **prayer** opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the **prayer**, they at no point solicited similar gestures by the **public**. Respondents point to several occasions where audience members were asked to rise for the **prayer**. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. See App. 69a ("Would you bow your heads with me as we invite the Lord's presence ***589** here tonight?"); *id.*, at 93a ("Let us join our hearts and minds together in **prayer**"); *id.*, at 102a ("Would you join me in a moment of **prayer**?"); *id.*, at 110a ("Those who are willing may join me now in **prayer**"). Respondents suggest that constituents might feel pressure to join the **prayers** to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the **prayer**, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the **prayers** gave them offense and made them feel excluded and disrespected. Offense,

however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the **public** is welcome in turn to offer an invocation reflecting his or her own convictions. See *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 44, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (O'Connor, J., concurring) ("The compulsion of which Justice Jackson was concerned ... was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree"). If circumstances arise in which the pattern and practice of ceremonial, legislative **prayer** is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here, where the **prayers** neither chastised dissenters nor attempted lengthy disquisition on ***590** religious dogma. Courts remain free to review ****1827** the pattern of **prayers** over time to determine whether they comport with the tradition of solemn, respectful **prayer** approved in *Marsh*, or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to **prayer** they would rather not hear and in which they need not participate. See *County of Allegheny*, 492 U.S., at 670, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part).

This case can be distinguished from the conclusions and holding of *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. *Id.*, at 592–594, 112 S.Ct. 2649; see also *Santa Fe Independent School Dist.*, 530 U.S., at 312, 120 S.Ct. 2266. Four Justices dissented in *Lee*, but the circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the **public** are dissuaded from leaving the **meeting** room during the **prayer**, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh*, board members and constituents are "free to enter and leave with little comment and for any number of reasons." *Lee, supra*, at 597, 112 S.Ct. 2649. Should nonbelievers choose to exit the room during a **prayer** they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure." *Marsh*, 463 U.S., at 792, 103 S.Ct. 3330 (internal quotation marks and citations omitted).

***591** In the town of Greece, the **prayer** is delivered during the ceremonial portion of the town's **meeting**. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs. See App. 31a (thanking a pastor for his "community involvement"); *id.*, at 44a (thanking a deacon "for the job that you have done on behalf of our community"). The inclusion of a brief, ceremonial **prayer** as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.

Ceremonial **prayer** is but a recognition that, since this Nation was founded and until the present day, many

Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher **1828 power, always with due respect for those who adhere to other beliefs. The **prayer** in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

* * *

The town of Greece does not violate the First Amendment by opening its **meetings** with **prayer** that comports with our *592 tradition and does not coerce participation by nonadherents. The judgment of the U.S. Court of Appeals for the Second Circuit is reversed.

It is so ordered.

Justice ALITO, with whom Justice SCALIA joins, concurring.

I write separately to respond to the principal dissent, which really consists of two very different but intertwined opinions. One is quite narrow; the other is sweeping. I will address both.

I

First, however, since the principal dissent accuses the Court of being blind to the facts of this case, *post,* at 1851 – 1852 (opinion of KAGAN, J.), I recount facts that I find particularly salient.

The town of Greece is a municipality in upstate New York that borders the city of Rochester. The town decided to emulate a practice long established in Congress and state legislatures by having a brief **prayer** before sessions of the town board. The task of lining up clergy members willing to provide such a **prayer** was given to the town's office of constituent services. 732 F.Supp.2d 195, 197–198 (W.D.N.Y.2010). For the first four years of the practice, a clerical employee in the office would randomly call religious organizations listed in the Greece "Community Guide," a local directory published by the Greece Chamber of Commerce, until she was able to find somebody willing to give the invocation. *Id.,* at 198. This employee eventually began keeping a list of individuals who had agreed to give the invocation, and when a second clerical employee took over the task of finding **prayer**-givers, the first employee gave that list to the second. *Id.,* at 198, 199. The second employee then randomly called organizations on that list—and possibly others in the Community Guide—until she found someone who agreed to provide the **prayer**. *Id.,* at 199.

*593 Apparently, all the houses of worship listed in the local Community Guide were Christian churches. *Id.,* at 198–200, 203. That is unsurprising given the small number of non-Christians in the area. Although statistics for the town of Greece alone do not seem to be available, statistics have been compiled for Monroe County, which includes both the town of Greece and the city of Rochester. According to these statistics, of the county residents who have a religious affiliation, about 3% are Jewish, and for other non-Christian faiths, the percentages are smaller.[1] There are no synagogues within the borders of the town of Greece, *id.,* at 203, but there are several not far away across the Rochester border. Presumably, Jewish residents of the town worship at one or more of those synagogues, but because these synagogues fall outside the town's borders, they were not listed in the town's local directory, and the responsible town employee did not include them on her list. *Ibid.* Nor did she include any other non-Christian house of worship. *Id.,* at 198–200.[2]

1829 As a result of this procedure, for some time all the **prayers at the beginning of town board **meetings** were offered by Christian clergy, and many of these **prayers** were distinctively Christian. But respondents do not claim that the list was attributable to religious bias or favoritism, and the Court of Appeals acknowledged that the town had "no religious animus." 681 F.3d 20, 32 (C.A.2 2012).

For some time, the town's practice does not appear to have elicited any criticism, but when complaints were received, *594 the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. *Id.*, at 23, 25; 732 F.Supp.2d, at 197. The most recent list in the record of persons available to provide an invocation includes representatives of many non-Christian faiths. App. in No. 10–3635 (CA2), pp. A1053–A1055 (hereinafter CA2 App.).

Meetings of the Greece Town Board appear to have been similar to most other town council **meetings** across the country. The **prayer** took place at the beginning of the **meetings**. The board then conducted what might be termed the "legislative" portion of its agenda, during which residents were permitted to address the board. After this portion of the **meeting**, a separate stage of the **meetings** was devoted to such matters as formal requests for variances. See Brief for Respondents 5–6; CA2 App. A929–A930; *e.g.*, CA2 App. A1058, A1060.

No **prayer** occurred before this second part of the proceedings, and therefore I do not understand this case to involve the constitutionality of a **prayer** prior to what may be characterized as an adjudicatory proceeding. The **prayer** preceded only the portion of the town board **meeting** that I view as essentially legislative. While it is true that the matters considered by the board during this initial part of the **meeting** might involve very specific questions, such as the installation of a traffic light or stop sign at a particular intersection, that does not transform the nature of this part of the **meeting**.

II

I turn now to the narrow aspect of the principal dissent, and what we find here is that the principal dissent's objection, in the end, is really quite niggling. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways.

*595 A

First, the principal dissent writes, "[i]f the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint." *Post,* at 1851. "Priests and ministers, rabbis and imams," the principal dissent continues, "give such invocations all the time" without any great difficulty. *Post,* at 1851.

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that **1830 nonsectarian **prayer** is constitutionally required runs headlong into a long history of contrary congressional practice. From the beginning, as the Court notes, many Christian **prayers** were offered in the House and Senate, see *ante,* at 1818, and when rabbis and other non-Christian clergy have served as guest chaplains, their **prayers** have often been couched in terms particular to their faith traditions.[3]

Not only is there no historical support for the proposition that only generic **prayer** is allowed, but as our country has become more diverse, composing a **prayer** that is acceptable to all members of the community who hold religious beliefs has become harder and harder. It was one thing to compose a **prayer** that is acceptable to both Christians and Jews; it is much harder to compose a **prayer** that is also acceptable to followers of Eastern religions that are now well represented *596 in this country. Many local clergy may find the project daunting, if not impossible, and some may feel that they cannot in good faith deliver such a vague **prayer**.

In addition, if a town attempts to go beyond simply *recommending* that a guest chaplain deliver a **prayer**

that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit **prayers** before they are given? If prescreening is not required, must the town review **prayers** after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

B

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may "invit[e] clergy of many faiths." *Post,* at 1851. "When one month a clergy member refers to Jesus, and the next to Allah or Jehovah," the principal dissent explains, "the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian **prayer** is transformed." *Ibid.*

If, as the principal dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains. For that is really the only difference between what the town did and what the principal dissent is willing to accept. The Greece clerical employee drew up her list using the town directory instead of a directory covering the entire greater Rochester area. If the task of putting together the list had been handled in a more sophisticated ***597** way, the employee in charge would have realized that the town's Jewish residents attended synagogues on the Rochester side of the border and would have added one or more synagogues to the list. ****1831** But the mistake was at worst careless, and it was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.)

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. In such places, the members of the governing body almost always have day jobs that occupy much of their time. The town almost never has a legal office and instead relies for legal advice on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts. When a municipality like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), was largely based, that municipality should not be held to have violated the Constitution simply because its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal.

The effect of requiring such exactitude would be to pressure towns to forswear altogether the practice of having a **prayer** before **meetings** of the town council. Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone. Indeed, the Court of Appeals' opinion in this case advised towns that constitutional difficulties "may well prompt municipalities to pause and think carefully before adopting legislative **prayer**." 681 F.3d, at 34. But if, as precedent and historic practice make clear (and the principal dissent concedes), **prayer** before a legislative session is not inherently inconsistent with the First Amendment, ***598** then a unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a "best practices" standard.

III

While the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed, much of the rhetoric in that opinion sweeps more broadly. Indeed, the logical thrust of many of its arguments is that **prayer** is *never* permissible prior to **meetings** of local government legislative bodies. At Greece Town Board **meetings**, the principal dissent pointedly notes, ordinary citizens (and even children!) are often present. *Post,* at 1846 – 1847. The guest chaplains stand in front of the room facing the **public**. "[T]he setting is intimate," and ordinary citizens are permitted to speak and to ask the board to address problems that have a direct effect on their lives. *Post,* at 1846 – 1847. The **meetings** are "occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters." *Post,* at 1845. Before a session of this sort, the principal dissent argues, any **prayer** that is not acceptable to all in attendance is out of bounds.

The features of Greece **meetings** that the principal dissent highlights are by no means unusual.[4] It is common for residents ****1832** to attend such **meetings**, either to speak on matters on the agenda or to request that the town address other issues ***599** that are important to them. Nor is there anything unusual about the occasional attendance of students, and when a **prayer** is given at the beginning of such a **meeting**, I expect that the chaplain generally stands at the front of the room and faces the **public**. To do otherwise would probably be seen by many as rude. Finally, although the principal dissent, *post,* at 1847 – 1848, attaches importance to the fact that guest chaplains in the town of Greece often began with the words "Let us pray," that is also commonplace and for many clergy, I suspect, almost reflexive.[5] In short, I see nothing out of the ordinary about any of the features that the principal dissent notes. Therefore, if **prayer** is not allowed at **meetings** with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their **meetings** with a **prayer**. I see no sound basis for drawing such a distinction.

IV

The principal dissent claims to accept the Court's decision in *Marsh v. Chambers,* which upheld the constitutionality of the Nebraska Legislature's practice of **prayer** at the beginning of legislative sessions, but the principal dissent's acceptance of *Marsh* appears to be predicated on the view that the **prayer** at issue in that case was little more than a formality to which the legislators paid scant attention. The principal dissent describes this scene: A session of the state legislature begins with or without most members present; a strictly nonsectarian **prayer** is recited while some legislators remain seated; and few members of the **public** are exposed to the experience. *Post,* at 1845 – 1846. This sort of perfunctory and hidden-away **prayer**, the principal dissent implies, is all that *Marsh* and the First Amendment can tolerate.

***600** It is questionable whether the principal dissent accurately describes the Nebraska practice at issue in *Marsh,*[6] but what is important is not so much what happened in Nebraska in the years prior to *Marsh,* but what happened before congressional sessions during the period leading up to the adoption of the First Amendment. By that time, **prayer** before legislative sessions already had an impressive pedigree, and it is important to recall that history and the events that led to the adoption of the practice.

The principal dissent paints a picture of "morning in Nebraska" circa 1983, see *post,* at 1846, but it is more instructive to consider "morning in Philadelphia," September 1774. The First Continental Congress convened in Philadelphia, and the need for the 13 colonies to unite was imperative. ****1833** But "[m]any things set colony apart from colony," and prominent among these sources of division was religion.[7] "Purely as a practical matter," however, the project of bringing the colonies together required that these divisions be overcome.[8]

Samuel Adams sought to bridge these differences by prodding a fellow Massachusetts delegate to move to open the session with a **prayer**.[9] As John Adams later recounted, this motion was opposed on the ground that the delegates were "so divided in religious sentiments, some Episcopalians, ***601** some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that [they] could not join in the same act of worship."[10] In response, Samuel Adams proclaimed that "he was no bigot, and could hear a **prayer** from a gentleman of piety and virtue, who was at the same time a friend to his country."[11] Putting aside his personal prejudices,[12] he moved to invite a local Anglican minister, Jacob Duché, to lead the first **prayer**.[13]

The following morning, Duché appeared in full "pontificals" and delivered both the Anglican **prayers** for the day and an extemporaneous **prayer**.[14] For many of the delegates—members of religious groups that had come to America to escape persecution in Britain—listening to a distinctively Anglican **prayer** by a minister of the Church of England represented an act of notable ecumenism. But Duché's **prayermet** with wide approval—John Adams wrote that it "filled the bosom of every man" in attendance[15]—and the practice was continued. This first congressional **prayer** was emphatically Christian, and it was neither an empty formality nor strictly nondenominational.[16] But one of its purposes, and presumably one of its effects, was not to divide, but to unite.

It is no wonder, then, that the practice of beginning congressional sessions with a **prayer** was continued after the ***602** Revolution ended and the new Constitution was adopted. One of the first actions taken by the new Congress when it convened in 1789 was to appoint chaplains for both Houses. The first Senate chaplain, an Episcopalian, was appointed on April 25, 1789, and the first House chaplain, a Presbyterian, was appointed on May 1.[17] Three days later, Madison announced that he planned to introduce proposed constitutional amendments to protect individual rights; ****1834** on June 8, 1789, those amendments were introduced; and on September 26, 1789, the amendments were approved to be sent to the States for ratification.[18] In the years since the adoption of the First Amendment, the practice of **prayer** before sessions of the House and Senate has continued, and opening **prayers** from a great variety of faith traditions have been offered.

This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, see, *e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 980, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), *Carroll v. United States*, 267 U.S. 132, 150–152, 45 S.Ct. 280, 69 L.Ed. 543 (1925), and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision. Thus, in *Marsh*, when the Court was called upon to decide whether **prayer** prior to sessions of a state legislature was consistent with the Establishment Clause, we relied heavily on the history of **prayer** before sessions of Congress and held that a state legislature may follow a similar practice. See 463 U.S., at 786–792, 103 S.Ct. 3330.

There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment. It is virtually inconceivable that the First Congress, having appointed ***603** chaplains whose responsibilities prominently included the delivery of **prayers** at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause. And since this practice was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding. In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause " tests" set out in the opinions of this Court, see 681 F.3d, at 26, 30, but if there is any inconsistency between any of those tests and the historic practice of legislative **prayer**, the inconsistency calls into question the validity of the test, not the historic practice.

V

This brings me to my final point. I am troubled by the message that some readers may take from the principal dissent's rhetoric and its highly imaginative hypotheticals. For example, the principal dissent conjures up the image of a litigant awaiting trial who is asked by the presiding judge to rise for a Christian **prayer**, of an official at a polling place who conveys the expectation that citizens wishing to vote make the sign of the cross before casting their ballots, and of an immigrant seeking naturalization who is asked to bow her head and recite a Christian **prayer**. Although I do not suggest that the implication is intentional, I am concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads—to a country in which religious minorities are denied the equal benefits of citizenship.

Nothing could be further from the truth. All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures. In seeming to suggest otherwise, the principal dissent goes far astray.

**1835 Justice THOMAS, with whom Justice SCALIA joins as to Part II, concurring in part and concurring in the judgment.

*604 Except for Part II–B, I join the opinion of the Court, which faithfully applies *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 50, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (THOMAS, J., concurring in judgment), and to state my understanding of the proper "coercion" analysis.

I

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., Amdt. 1. As I have explained before, the text and history of the Clause "resis[t] incorporation" against the States. *Newdow*, *supra*, at 45–46, 124 S.Ct. 2301; see also *Van Orden v. Perry*, 545 U.S. 677, 692–693, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (THOMAS, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–680, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (same). If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.

As an initial matter, the Clause probably prohibits Congress from establishing a national religion. Cf. D. Drakeman, Church, State, and Original Intent 260–262 (2010). The text of the Clause also suggests that Congress "could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause." *Newdow*, *supra*, at 50, 124 S.Ct. 2301 (opinion of THOMAS, J.). The language of the First Amendment ("Congress shall make no law") "precisely tracked and inverted the exact wording" of the Necessary and Proper Clause ("Congress shall have power ... to make all laws which shall be necessary and proper ..."), which was the subject of fierce criticism by Anti–Federalists at the time of ratification. A. Amar, The Bill of Rights 39 (1998) (hereinafter Amar); see also Natelson, The Framing and Adoption of the Necessary *605 and Proper Clause, in The Origins of the Necessary and Proper Clause 84, 94–96 (G. Lawson, G. Miller, R. Natelson, & G. Seidman eds. 2010) (summarizing Anti–Federalist claims that the Necessary and Proper Clause would aggrandize the powers of the Federal Government). That choice of language—"Congress shall make no law"—effectively denied Congress any power to regulate state establishments.

Construing the Establishment Clause as a federalism provision accords with the variety of church-state arrangements that existed at the Founding. At least six States had established churches in 1789. Amar 32–33. New England States like Massachusetts, Connecticut, and New Hampshire maintained local-rule establishments whereby the majority in each town could select the minister and religious denomination (usually Congregationalism, or "Puritanism").

McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L.Rev. 2105, 2110 (2003); see also L. Levy, The Establishment Clause: Religion and the First Amendment 29–51 (1994) (hereinafter Levy). In the South, Maryland, South Carolina, and Georgia eliminated their exclusive Anglican establishments following the American Revolution and adopted general establishments, which permitted taxation in support of all Christian churches (or, as in South Carolina, all Protestant churches). See Levy 52–58; Amar 32–33. Virginia, by contrast, ****1836** had recently abolished its official state establishment and ended direct government funding of clergy after a legislative battle led by James Madison. See T. Buckley, Church and State in Revolutionary Virginia, 1776–1787, pp. 155–164 (1977). Other States—principally Rhode Island, Pennsylvania, and Delaware, which were founded by religious dissenters—had no history of formal establishments at all, although they still maintained religious tests for office. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L.Rev. 1409, 1425–1426, 1430 (1990).

***606** The import of this history is that the relationship between church and state in the fledgling Republic was far from settled at the time of ratification. See Muñoz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation, 8 U. Pa. J. Constitutional L. 585, 605 (2006). Although the remaining state establishments were ultimately dismantled—Massachusetts, the last State to disestablish, would do so in 1833, see Levy 42—that outcome was far from assured when the Bill of Rights was ratified in 1791. That lack of consensus suggests that the First Amendment was simply agnostic on the subject of state establishments; the decision to establish or disestablish religion was reserved to the States. Amar 41.

The Federalist logic of the original Establishment Clause poses a special barrier to its mechanical incorporation against the States through the Fourteenth Amendment. See *id.*, at 33. Unlike the Free Exercise Clause, which "plainly protects individuals against congressional interference with the right to exercise their religion," the Establishment Clause "does not purport to protect individual rights." *Newdow*, 542 U.S., at 50, 124 S.Ct. 2301 (opinion of THOMAS, J.). Instead, the States are the particular beneficiaries of the Clause. Incorporation therefore gives rise to a paradoxical result: Applying the Clause against the States eliminates their right to establish a religion free from federal interference, thereby "prohibit[ing] exactly what the Establishment Clause protected." *Id.*, at 51, 124 S.Ct. 2301; see Amar 33–34.

Put differently, the structural reasons that counsel against incorporating the Tenth Amendment also apply to the Establishment Clause. *Id.*, at 34. To my knowledge, no court has ever suggested that the Tenth Amendment, which "reserve[s] to the States" powers not delegated to the Federal Government, could or should be applied against the States. To incorporate that limitation would be to divest the States of all powers not specifically delegated to them, thereby inverting the original import of the Amendment. Incorporating ***607** the Establishment Clause has precisely the same effect.

The most cogent argument in favor of incorporation may be that, by the time of Reconstruction, the framers of the Fourteenth Amendment had come to reinterpret the Establishment Clause (notwithstanding its Federalist origins) as expressing an individual right. On this question, historical evidence from the 1860's is mixed. Congressmen who catalogued the personal rights protected by the First Amendment commonly referred to speech, press, petition, and assembly, but not to a personal right of nonestablishment; instead, they spoke only of " 'free exercise' " or " 'freedom of conscience.' " Amar 253, and 385, n. 91 (collecting sources). There may be reason to think these lists were abbreviated, and silence on the issue is not dispositive. See Lash, ****1837**The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085, 1141–1145 (1995); but cf. S. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 50–52 (1995). Given the textual and logical difficulties posed by incorporation,

however, there is no warrant for transforming the meaning of the Establishment Clause without a firm historical foundation. See *Newdow, supra,* at 51, 124 S.Ct. 2301 (opinion of THOMAS, J.). The burden of persuasion therefore rests with those who claim that the Clause assumed a different meaning upon adoption of the Fourteenth Amendment.[1]

***608** II

Even if the Establishment Clause were properly incorporated against the States, the municipal **prayers** at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*" *Lee v. Weisman,* 505 U.S. 577, 640, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (SCALIA, J., dissenting); see also *Perry,* 545 U.S., at 693–694, 125 S.Ct. 2854 (THOMAS, J., concurring); *Cutter v. Wilkinson,* 544 U.S. 709, 729, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (THOMAS, J., concurring); *Newdow, supra,* at 52, 124 S.Ct. 2301 (opinion of THOMAS, J.). In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. McConnell, Establishment and Disestablishment, at 2144–2146, 2152–2159. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. *Id.,* at 2161–2168, 2176–2180.

This is not to say that the state establishments in existence when the Bill of Rights was ratified were uniform. As previously noted, establishments in the South were typically governed through the state legislature or State Constitution, while establishments in New England were administered at the municipal level. See *supra,* at 1835 – 1836. Notwithstanding these variations, both state and local forms of establishment involved "actual legal coercion," *Newdow, supra,* at 52, 124 S.Ct. 2301 (opinion of THOMAS, J.): They exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.

***609** None of these founding-era state establishments remained at the time of Reconstruction. ****1838** But even assuming that the framers of the Fourteenth Amendment reconceived the nature of the Establishment Clause as a constraint on the States, nothing in the history of the intervening period suggests a fundamental transformation in their understanding of *what constituted an establishment.* At a minimum, there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," *ante,* at 1824 – 1825, 1825, or perceives governmental "endors[ement]," *ante,* at 1817 – 1818. For example, of the 37 States in existence when the Fourteenth Amendment was ratified, 27 State Constitutions "contained an explicit reference to God in their preambles." Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L.Rev. 7, 12, 37 (2008). In addition to the preamble references, 30 State Constitutions contained other references to the divine, using such phrases as " 'Almighty God,' " " '[O]ur Creator,' " and " 'Sovereign Ruler of the Universe.' " *Id.,* at 37, 38, 39, n. 104. Moreover, the state constitutional provisions that prohibited religious "comp [ulsion]" made clear that the relevant sort of compulsion was legal in nature, of the same type that had characterized founding-era establishments.[2] These provisions ***610** strongly suggest that, whatever nonestablishment principles existed in 1868, they included no concern for the finer sensibilities of the "reasonable observer."

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the "subtle coercive pressures" allegedly felt by respondents in this case, *ante,* at 1819 – 1820. The majority properly concludes that "[o]ffense ... does not equate to coercion," since "[a]dults often encounter speech they find

disagreeable[,] and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Ante,* at 1826. I would simply add, in light of the foregoing history of the Establishment Clause, that "[p]eer pressure, unpleasant as it may be, is not coercion" either. *Newdow,* 542 U.S., at 49, 124 S.Ct. 2301 (opinion of THOMAS, J.).

Justice BREYER, dissenting.

As we all recognize, this is a "fact-sensitive" case. *Ante,* at 1825 (opinion of KENNEDY, J.); see also *post,* at 1851 – 1852 (KAGAN, J., dissenting); 681 F.3d 20, 34 (C.A.2 2012) (explaining that the Court of Appeals' holding follows from the "totality of the circumstances"). The Court of Appeals did not believe that the Constitution ****1839** forbids legislative **prayers** that incorporate content associated with a particular denomination. *Id.,* at 28. Rather, the court's holding took that content into account simply because it indicated that the town had not followed a sufficiently inclusive "**prayer**-giver selection process." *Id.,* at 30. It also took into account related "actions (and inactions) of **prayer**-givers and town officials." *Ibid.* Those actions and inactions included (1) a selection process ***611** that led to the selection of "clergy almost exclusively from places of worship located within the town's borders," despite the likelihood that significant numbers of town residents were members of congregations that gather just outside those borders; (2) a failure to "infor[m] members of the general **public** that volunteers" would be acceptable **prayer** givers; and (3) a failure to "infor[m] **prayer**-givers that invocations were not to be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker." *Id.,* at 31–32 (internal quotation marks omitted).

The Court of Appeals further emphasized what it was not holding. It did not hold that "the town may not open its **publicmeetings** with a **prayer**," or that "any **prayers** offered in this context must be blandly 'nonsectarian.' " *Id.,* at 33. In essence, the Court of Appeals merely held that the town must do more than it had previously done to try to make its **prayer** practices inclusive of other faiths. And it did not prescribe a single constitutionally required method for doing so.

In my view, the Court of Appeals' conclusion and its reasoning are convincing. Justice KAGAN's dissent is consistent with that view, and I join it. I also here emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's **prayer** practice violated the Establishment Clause.

First, Greece is a predominantly Christian town, but it is not exclusively so. A map of the town's houses of worship introduced in the District Court shows many Christian churches within the town's limits. It also shows a Buddhist temple within the town and several Jewish synagogues just outside its borders, in the adjacent city of Rochester, New York. *Id.,* at 24. Yet during the more than 120 monthly **meetings** at which **prayers** were delivered during the record period (from 1999 to 2010), only four **prayers** were delivered ***612** by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the town's Christian **prayer** practice and nearly a decade after that practice had commenced. See *post,* at 1848, 1852.

To be precise: During 2008, two **prayers** were delivered by a Jewish layman, one by the chairman of a Baha'i congregation, and one by a Wiccan priestess. The Jewish and Wiccan **prayer** givers were invited only after they reached out to the town to inquire about giving an invocation. The town apparently invited the Baha'i chairman on its own initiative. The inclusivity of the 2008 **meetings**, which contrasts starkly with the exclusively single-denomination **prayers** every year before and after, is commendable. But the Court of Appeals reasonably decided not to give controlling weight to that inclusivity, for it arose only in response to the complaints that presaged this litigation, and it did not continue into the following years.

Second, the town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening **prayer**. See *post,* at 1852. Beginning in 1999, when it instituted its practice of opening its monthly board **meetings** with **prayer**, Greece selected ****1840prayer** givers as follows: Initially, the town's employees invited clergy from each religious organization listed in a "Community Guide" published by the Greece Chamber of Commerce. After that, the town kept a list of clergy who had accepted invitations and reinvited those clergy to give **prayers** at future **meetings**. From time to time, the town supplemented this list in response to requests from citizens and to new additions to the Community Guide and a town newspaper called the Greece Post.

The plaintiffs do not argue that the town intentionally discriminated against non-[flag] Christians when choosing whom to invite, 681 F.3d, at 26, and the town claims, plausibly, that it would have allowed anyone who asked to give an invocation ***613** to do so. Rather, the evident reasons why the town consistently chose Christian **prayer** givers are that the Buddhist and Jewish temples mentioned above were not listed in the Community Guide or the Greece Post and that the town limited its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits (again, the Buddhist temple on the map was within those limits, but the synagogues were just outside them).[flag] *Id.,* at 24, 31.

Third, in this context, the fact that nearly all of the **prayers** given reflected a single denomination takes on significance. That significance would have been the same had all the **prayers** been Jewish, or Hindu, or Buddhist, or of any other denomination. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. It could, for example, have posted its policy of permitting anyone to give an invocation on its website, greeceny.gov, which provides dates and times of upcoming town board **meetings** along with minutes of prior **meetings**. It could have announced inclusive policies at the beginning of its board **meetings**, just before introducing the month's **prayer** giver. It could have provided information to those houses of worship of all faiths that lie just outside its borders and include citizens of Greece among their members. Given that the town could easily have made these or similar efforts but chose not to, the fact that all of the **prayers** (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others. And that is what I take to be a major point of Justice KAGAN's related discussion. See *post,* at 1841 – 1843, 1845 – 1846, 1848 – 1849, 1852 – 1853.

Fourth, the fact that the board **meeting** audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations. It does not, however, automatically ***614** change the nature of the **meeting** from one where an opening **prayer** is permissible under the Establishment Clause to one where it is not. Cf. *post,* at 1845 – 1848, 1849 – 1850, 1851 – 1852.

Fifth, it is not normally government's place to rewrite, to parse, or to critique the language of particular **prayers**. And it is always possible that members of one religious group will find that **prayers** of other groups (or perhaps even a moment of silence) are not compatible with their faith. Despite this risk, the Constitution does not forbid opening **prayers**. But neither does the Constitution forbid efforts to explain to those who give the **prayers** the nature of the occasion and the audience.

The U.S. House of Representatives, for example, provides its guest chaplains with the following guidelines, which are designed to encourage the sorts of **prayer** that are consistent with the purpose of an ****1841** invocation for a government body in a religiously pluralistic Nation:

> "The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.
>
> "The length of the **prayer** should not exceed 150 words.

"The **prayer** must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy." App. to Brief for Respondents 2a.

The town made no effort to promote a similarly inclusive **prayer** practice here. See *post,* at 1852 – 1853.

As both the Court and Justice KAGAN point out, we are a Nation of many religions. *Ante,* at 1820 – 1821; *post,* at 1841 – 1842, 1850 – 1851. And the Constitution's Religion Clauses seek to "protec[t] the Nation's social fabric from religious conflict." *Zelman v. Simmons–Harris,* 536 U.S. 639, 717, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (BREYER, J., dissenting). The question in this case is whether the **prayer** practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did ***615** too much, even if unintentionally, to promote the "political division along religious lines" that "was one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman,* 403 U.S. 602, 622, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." *Van Orden v. Perry,* 545 U.S. 677, 700, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). Having applied my legal judgment to the relevant facts, I conclude, like Justice KAGAN, that the town of Greece failed to make reasonable efforts to include **prayer** givers of minority faiths, with the result that, although it is a community of several faiths, its **prayer** givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's **prayer** practice violated the Establishment Clause.

I dissent from the Court's decision to the contrary.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court's opinion because I think the Town of Greece's **prayer** practices violate that ***616** norm of religious equality—the breathtakingly generous constitutional idea that our **public** institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in ****1842***Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's **prayer**. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece's town **meetings** involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each **meeting**, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, **prayers** steeped in only

one faith, addressed toward members of the **public**, commenced **meetings** to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.

I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian **prayer**—taken straight from this case's record—infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy ***617** and is representative of the **prayers** generally offered in the designated setting:

- You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening **prayer**. The clergyman faces those in attendance and says: "Lord, God of all creation,.... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side.... Amen." App. 88a–89a. The judge then asks your lawyer to begin the trial.

- It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in **prayer**. He says: "We pray this [day] for the guidance of the Holy Spirit as [we vote].... Let's just say the Our Father together. 'Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven....' " *Id.*, at 56a. And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.

- You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to ***1843** pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "[F]ather, son, and Holy Spirit—it is with a due ***618** sense of reverence and awe that we come before you [today] seeking your blessing.... You are ... a wise God, oh Lord, ... as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all ... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen." *Id.*, at 99a–100a.

I would hold that the government officials responsible for the above practices—that is, for **prayer** repeatedly invoking a single religion's beliefs in these settings—crossed a constitutional line. I have every confidence the Court would agree. See *ante*, at 1834 (ALITO, J., concurring). And even Greece's attorney conceded that something like the first hypothetical (he was not asked about the others) would violate the First Amendment. See Tr. of Oral Arg. 3–4. Why?

The reason, of course, has nothing to do with Christianity as such. This opinion is full of Christian **prayers**, because those were the only invocations offered in the Town of Greece. But if my hypotheticals involved the **prayer** of some other religion, the outcome would be exactly the same. Suppose, for example, that government officials in a predominantly Jewish community asked a rabbi to begin all **public** functions with a chanting of the Sh'ma and V'ahavta. ("Hear O Israel! The Lord our God, the Lord is One....

Bind [these words] as a sign upon your hand; let them be a symbol before your eyes; inscribe them on the doorposts of your house, and on your gates.") Or assume officials in a mostly Muslim town requested a muezzin to commence such functions, over and over again, with a recitation of the Adhan. ("God is greatest, God is greatest. I bear witness that there is no deity but God. I bear witness that Muhammed is the Messenger of God.") In any instance, the question would be why such government-sponsored **prayer** of a single religion goes beyond the constitutional pale.

***619** One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over non-religion. Compare, *e.g.*, *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) ("[T]he First Amendment mandates governmental neutrality between ... religion and nonreligion"), with, *e.g.*, *id.*, at 885, 125 S.Ct. 2722 (SCALIA, J., dissenting) ("[T]he Court's oft repeated assertion that the government cannot favor religious practice [generally] is false"). But no one has disagreed with this much:

> "[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington ... down to the present day, has ... ruled out of order government-sponsored endorsement of religion ... where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." ****1844** *Lee v. Weisman*, 505 U.S. 577, 641 [112 S.Ct. 2649, 120 L.Ed.2d 467] (1992) (SCALIA, J., dissenting).

See also *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 605, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) ("Whatever else the Establishment Clause may mean[,] ... [it] means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)").[1] By ***620** authorizing and overseeing **prayers** associated with a single religion—to the exclusion of all others—the government officials in my hypothetical cases (whether federal, state, or local does not matter) have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony—and a government official or his hand-picked minister asks her, as the first order of official business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along—to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she ***621** is made of stronger mettle, and she opts not to participate in what she does not believe—indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function of some kind brings religious differences to the fore: That **public** proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs ****1845** do not enter into the picture. See Thomas Jefferson, Virginia Act for Establishing Religious Freedom (Oct. 31, 1785), in 5 The Founders' Constitution 85 (P. Kurland & R. Lerner eds. 1987) ("[O]pinion[s] in matters of religion ... shall in no wise diminish, enlarge, or affect

[our] civil capacities"). The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town **meeting**?

II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves ***622** "the tradition of legislative **prayer** outlined" in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330. *Ante*, at 1820 – 1821. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh*, legislative **prayer** has a distinctive constitutional warrant by virtue of tradition. As the Court today describes, a long history, stretching back to the first session of Congress (when chaplains began to give **prayers** in both Chambers), "ha[s] shown that **prayer** in this limited context could 'coexis[t] with the principles of disestablishment and religious freedom.' " *Ante*, at 1820 (quoting *Marsh*, 463 U.S., at 786, 103 S.Ct. 3330). Relying on that "unbroken" national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's **prayer** as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*, at 792, 103 S.Ct. 3330. And so I agree with the majority that the issue here is "whether the **prayer** practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures." *Ante*, at 1819.

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions, as Congress and state assemblies do—and that means some opening **prayers** are allowed there. But much as in my hypotheticals, the Board's **meetings** are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the **prayers** offered are inclusive—that they respect each and every member of the community as an equal citizen.[2] But the Board, ***623** and the clergy members it selected, made no such effort. Instead, the **prayers** given in Greece, addressed directly to the Town's citizenry, were *more* sectarian, and *less* inclusive, than anything this Court sustained in *Marsh*. For those reasons, the **prayer** in ****1846** Greece departs from the legislative tradition that the majority takes as its benchmark.

A

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council **meetings** in Greece, as revealed in this case's record.

It is morning in Nebraska, and senators are beginning to gather in the State's legislative chamber: It is the beginning of the official workday, although senators may not yet need to be on the floor. See *Chambers v. Marsh*, 504 F.Supp. 585, 590, and n. 12 (D.Neb.1980); *Lee*, 505 U.S., at 597, 112 S.Ct. 2649. The chaplain rises to give the daily invocation. That **prayer**, as the senators emphasized when their case came to this Court, is "directed only at the legislative membership, not at the **public** at large." Brief for Petitioners in *Marsh* 30. Any members of the **public** who happen to be in attendance—not very many at this early hour—watch only from the upstairs visitors' gallery. See App. 72 in *Marsh* (senator's

testimony that "as a practical matter the **public** usually is not there" during the **prayer**).

The longtime chaplain says something like the following (the excerpt is from his own *amicus* brief supporting Greece in this case): "*O God,* who has given all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State." Brief for Robert E. Palmer 9. The chaplain is a Presbyterian minister, and "some of his earlier **prayers**" explicitly invoked Christian beliefs, but he "removed all references to ***624** Christ" after a single legislator complained. *Marsh,* 463 U.S., at 793, n. 14, 103 S.Ct. 3330; Brief for Petitioners in *Marsh* 12. The chaplain also previously invited other clergy members to give the invocation, including local rabbis. See *ibid.*

Now change the channel: It is evening in Greece, New York, and the Supervisor of the Town Board calls its monthly **publicmeeting** to order. Those **meetings** (so says the Board itself) are "the most important part of Town government." See Town of Greece, Town Board, online at http://greeceny. gov/planning/townboard (as visited May 2, 2014 and available in Clerk of Court's case file). They serve assorted functions, almost all actively involving members of the **public**. The Board may swear in new Town employees and hand out awards for civic accomplishments; it always provides an opportunity (called a **Public** Forum) for citizens to address local issues and ask for improved services or new policies (for example, better accommodations for the disabled or actions to ameliorate traffic congestion, see Pl. Exhs. 718, 755, in No. 6:08–cv–6088 (WDNY)); and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.

The Town Supervisor, Town Clerk, Chief of Police, and four Board members sit at the front of the **meeting** room on a raised dais. But the setting is intimate: There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.

As the first order of business, the Town Supervisor introduces a local Christian clergy member—denominated the chaplain of the month—to lead the assembled persons in **prayer**. The pastor steps up to a lectern (emblazoned with the Town's seal) ****1847** at the front of the dais, and with his back to the Town officials, he faces the citizens present. He asks them all to stand and to "pray as we begin this evening's ***625** town **meeting**." App. 134a. (He does not suggest that anyone should feel free not to participate.) And he says:

> "The beauties of spring ... are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so ... [w]e pray this evening for the guidance of the Holy Spirit as the Greece Town Board **meets**." *Ibid.*

After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says "Amen." See 681 F.3d 20, 24 (C.A.2 2012). The Supervisor then announces the start of the **Public** Forum, and a citizen stands up to complain about the Town's contract with a cable company. See App. in No. 10–3635 (CA2), p. A574.

B

Let's count the ways in which these pictures diverge. First, the governmental proceedings at which the **prayers** occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions—like those of the U.S. Congress and other state assemblies—are of, by, and for elected lawmakers. Members of the **public** take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. (In that

respect, note that neither the Nebraska Legislature nor the Congress calls for **prayer** when citizens themselves participate in a hearing—say, by giving testimony relevant to a bill or nomination.) Greece's town **meetings**, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for ***626** Town residents to interact with **public** officials. And the most important parts enable those citizens to petition their government. In the **Public** Forum, they urge (or oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the **meetings**, both by design and in operation, allow citizens to actively participate in the Town's governance—sharing concerns, airing grievances, and both shaping the community's policies and seeking their benefits.

Second (and following from what I just said), the **prayers** in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. Nebraska's senators were adamant on that point in briefing *Marsh*, and the facts fully supported them: As the senators stated, "[t]he activity is a matter of internal daily procedure directed only at the legislative membership, not at [members of] the **public**." Brief for Petitioners in *Marsh* 30; see Reply Brief for Petitioners in *Marsh* 8 ("The **[prayer]** practice involves no function or power of government vis-à-vis the Nebraska citizenry, but merely concerns an internal decision of the Nebraska Legislature as to the daily procedure by which it conducts its own affairs"). The same is true in the U.S. Congress and, I suspect, in every other state legislature. See Brief for Members of Congress as *Amici Curiae* 6 ("Consistent with the fact that attending citizens are mere passive observers, **prayers** in the House are delivered for the Representatives themselves, not those citizens"). ****1848** As several Justices later noted (and the majority today agrees, see *ante*, at 1825 – 1826),[3] *Marsh* involved "government officials invok[ing] spiritual inspiration ***627** entirely for their own benefit without directing any religious message at the citizens they lead." *Lee*, 505 U.S., at 630, n. 8, 112 S.Ct. 2649 (Souter, J., concurring).

The very opposite is true in Greece: Contrary to the majority's characterization, see *ante*, at 1825 – 1826, the **prayers** there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the **public**, perhaps including children. See *supra*, at 1846. And he typically addresses those people, as even the majority observes, as though he is "directing [his] congregation." *Ante*, at 1826. He almost always begins with some version of "Let us all pray together." See, *e.g.*, App. 75a, 93a, 106a, 109a. Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common **prayer** with him. See, *e.g.*, *id.*, at 28a, 42a, 43a, 56a, 77a. He refers, constantly, to a collective "we"—to "our" savior, for example, to the presence of the Holy Spirit in "our" lives, or to "our brother the Lord Jesus Christ." See, *e.g.*, *id.*, at 32a, 45a, 47a, 69a, 71a. In essence, the chaplain leads, as the first part of a town **meeting**, a highly intimate (albeit relatively brief) **prayer** service, with the **public** serving as his congregation.

And third, the **prayers** themselves differ in their content and character. *Marsh* characterized the **prayers** in the Nebraska Legislature as "in the Judeo–Christian tradition," and stated, as a relevant (even if not dispositive) part of its analysis, that the chaplain had removed all explicitly Christian references at a senator's request. 463 U.S., at 793, n. 14, 103 S.Ct. 3330. And as the majority acknowledges, see *ante*, at 1821 – 1822, *Marsh* hinged on the view that "that the **prayer** opportunity ha[d] [not] been exploited to proselytize or advance any one ... faith or belief"; had it been otherwise, the Court would have reached a different decision. 463 U.S., at 794–795, 103 S.Ct. 3330.

But no one can fairly read the **prayers** from Greece's Town **meetings** as anything other than explicitly Christian—constantly ***628** and exclusively so. From the time Greece established its **prayer** practice in 1999 until litigation loomed nine years later, all of its

monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at **meetings**), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. See App. 129a–143a. About two-thirds of the **prayers** given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. See generally *id.*, at 27a–143a. Many **prayers** contained elaborations of Christian doctrine or recitations of scripture. See, *e.g.*, *id.*, at 129a ("And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated"); *id.*, at 94a ("For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder ..."). And the **prayers** usually close with phrases like "in the name of Jesus Christ" or " in the name of Your son." See, *e.g.*, *id.*, at 55a, 65a, 73a, 85a.

****1849** Still more, the **prayers** betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. See *Braunfeld v. Brown*, 366 U.S. 599, 606, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion) (recognizing even half a century ago that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference"). The monthly chaplains appear almost always to assume that everyone in the room is Christian (and of a kind who has no objection to government-sponsored worship[4]). The Town ***629** itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the **public** that they need not participate in the **prayer** session. Indeed, as the majority forthrightly recognizes, see *ante*, at 1824, when the plaintiffs here began to voice concern over **prayers** that excluded some Town residents, one pastor pointedly thanked the Board "[o]n behalf of all God-fearing people" for holding fast, and another declared the objectors "in the minority and ... ignorant of the history of our country." App. 137a, 108a.

C

Those three differences, taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. To recap: *Marsh* upheld **prayer** addressed to legislators alone, in a proceeding in which citizens had no role—and even then, only when it did not "proselytize or advance" any single religion. 463 U.S., at 794, 103 S.Ct. 3330. It was that legislative **prayer** practice (not every **prayer** in a body exercising any legislative function) that the Court found constitutional given its "unambiguous and unbroken history." *Id.*, at 792, 103 S.Ct. 3330. But that approved practice, as I have shown, is not Greece's. None of the history *Marsh* cited—and none the majority details today—supports calling on citizens to pray, in a manner consonant with only a single religion's beliefs, at a participatory **public** proceeding, having both legislative and adjudicative components. Or to use the majority's phrase, no "history shows that th[is] specific practice is permitted." *Ante*, at 1819. And so, contra the majority, Greece's **prayers** cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. The Board's practice must, in its own particulars, **meet** constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I discussed earlier. See ***630***supra*, at 1842 – 1845. The government (whether federal, state, or local) may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance. In performing civic functions and seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief. And for its part, each government must ensure that its participatory processes will not classify those citizens by faith, or make relevant their religious differences.

To decide how Greece fares on that score, think again about how its **prayer** practice works, **meeting** after **meeting**. ****1850** The case, I think, has a fair bit in common with my earlier hypotheticals. See *supra,* at 1841 – 1843, 1844 – 1845. Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. Maybe she wants the Board to put up a traffic light at a dangerous intersection; or maybe she needs a zoning variance to build an addition on her home. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." App. 99a. She must think—it is hardly paranoia, but only the truth—that Christian worship has become entwined with local governance. And now she faces a choice—to pray alongside the majority as one of that group or somehow to register her deeply felt difference. She is a strong person, but that is no easy call—especially given that the room is small and her every action (or inaction) will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge Christ's divinity, any more than many of her neighbors would want to deny that tenet. So assume she declines to participate with the others in the first act of the **meeting**—or even, as the majority proposes, that she stands up and leaves the room altogether, see *ante,* at 1826. At the least, she becomes a different kind of ***631** citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation, I think, infringes the First Amendment. (And of course, as I noted earlier, it would do so no less if the Town's clergy always used the liturgy of some other religion. See *supra,* at 1842 – 1844.) That the Town Board selects, month after month and year after year, prayergivers who will reliably speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian **prayers**, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in a form of worship that may be at odds with their own beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders. That the practice thus divides the citizenry, creating one class that shares the Board's own evident religious beliefs and another (far smaller) class that does not. And that the practice also alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks only to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be religion- or **prayer**-free. "[W]e are a religious people," *Marsh* observed, 463 U.S., at 792, 103 S.Ct. 3330, and **prayer** draws some warrant from tradition in a town hall, as well as in Congress or a state legislature, see *supra,* at 1845 – 1846. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the **prayers** they hear will seek to include, rather than ***632** serve to divide. No more is required—but that much is crucial—to treat every citizen, of whatever religion, as an equal participant in her government.

And contrary to the majority's (and Justice ALITO's) view, see ****1851***ante,* at 1822 – 1823; *ante,* at 1817 – 1819, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint. See *Joyner v. Forsyth County,* 653 F.3d 341, 347 (C.A.4 2011) (Wilkinson, J.) (Such **prayers** show that "those of different creeds are in the end kindred spirits, united by a respect paid higher providence and by a belief in the importance of religious faith"). Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project. (And providing that guidance would hardly have caused the Board to run

afoul of the idea that "[t]he First Amendment is not a majority rule," as the Court (headspinningly) suggests, *ante*, at 1822; what does that is the Board's *refusal* to reach out to members of minority religious groups.) Or if the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. See *ante*, at 1820 – 1821. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah—as the majority hopefully though counterfactually suggests happened here, see *ante*, at 1820 – 1821, 1823—the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian **prayer** is transformed. So Greece had multiple ways of incorporating **prayer** into its town **meetings**—reflecting all the ways that **prayer** (as most of us know from daily life) can forge common bonds, rather than divide. See also *ante*, at 1840 (BREYER, J., dissenting).

But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed—as those who share, and ***633** those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith.

III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian **prayer**? The answer does not lie in first principles: I have no doubt that every member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative **prayer**. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority itself acknowledges that the requisite inquiry—a "fact-sensitive" one—turns on "the setting in which the **prayer** arises and the audience to whom it is directed." *Ante*, at 1825. But then the majority glides right over those considerations—at least as they relate to the Town of Greece. When the majority analyzes the "setting" and "audience" for **prayer**, it focuses almost exclusively on Congress and the Nebraska Legislature, see *ante*, at 1818 – 1819, 1820 – 1821, 1823 – 1824, 1825 – 1826; it does not stop to analyze how far those factors differ in Greece's **meetings**. The majority thus gives short shrift to the gap—more like, ****1852** the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the **prayers** in Greece are mostly ***634** addressed to members of the **public**, rather than (as in the forums it discusses) to the lawmakers. "The District Court in *Marsh*," the majority expounds, "described the **prayer** exercise as 'an internal act' directed at the Nebraska Legislature's 'own members.' " *Ante*, at 1825 (quoting *Chambers v. Marsh*, 504 F.Supp., at 588); see *ante*, at 1825 (similarly noting that Nebraska senators "invoke[d] spiritual inspiration entirely for their own benefit" and that **prayer** in Congress is "religious worship for national representatives" only). Well, yes, so it is in Lincoln, and on Capitol Hill. But not in Greece, where as I have described, the chaplain faces the Town's residents—with the Board watching from on high—and calls on them to pray together. See *supra*, at 1846, 1847.

And of course—as the majority sidesteps as well—to pray in the name of Jesus Christ. In addressing the sectarian content of these **prayers**, the majority again changes the subject, preferring to explain what happens in *other* government bodies. The majority notes, for example, that Congress "welcom[es] ministers of many creeds," who commonly speak of "values that count as universal," *ante*, at 1821, 1823; and in that context, the

majority opines, the fact "[t]hat a **prayer** is given in the name of Jesus, Allah, or Jehovah ... does not remove it from" *Marsh* 's protection, see *ante,* at 1823. But that case is not this one, as I have shown, because in Greece only Christian clergy members speak, and then mostly in the voice of their own religion; no Allah or Jehovah ever is mentioned. See *supra,* at 1847 – 1848. So all the majority can point to in the Town's practice is that the Board "maintains a policy of nondiscrimination," and "represent[s] that it would welcome a **prayer** by any minister or layman who wishe[s] to give one." *Ante,* at 1824. But that representation has never been publicized; nor has the Board (except for a few months surrounding this suit's filing) offered the chaplain's role to any non-Christian clergy or layman, in either Greece or its environs; nor has the Board ever provided its chaplains with guidance about reaching out to members of other faiths, ***635** as most state legislatures and Congress do. See 732 F.Supp.2d 195, 197–203 (W.D.N.Y.2010); National Conference of State Legislatures, Inside the Legislative Process: **Prayer** Practices 5–145, 5–146 (2002); *ante,* at 1840 – 1841 (BREYER, J., dissenting). The majority thus errs in assimilating the Board's **prayer** practice to that of Congress or the Nebraska Legislature. Unlike those models, the Board is determinedly—and relentlessly—noninclusive.[5]

And the month in, month out sectarianism the Board chose for its **meetings** belies the majority's refrain that the **prayers** in Greece were "ceremonial" in nature. *Ante,* at 1823 – 1824, 1825, 1826, 1827 – 1828. Ceremonial references to the divine ****1853** surely abound: The majority is right that "the Pledge of Allegiance, inaugural **prayer**, or the recitation of 'God save the United States and this honorable Court' " each fits the bill. *Ante,* at 1825. But **prayers** evoking "the saving sacrifice of Jesus Christ on the cross," "the plan of redemption that is fulfilled in Jesus Christ," "the life and death, resurrection and ascension of the Savior Jesus Christ," the workings of the Holy Spirit, the events of Pentecost, and the belief that God "has raised up the Lord Jesus" and "will raise us, in our turn, and put us by His side"? See App. 56a, 88a–89a, 99a, 123a, 129a, 134a. No. These are statements of profound belief and deep meaning, subscribed to by many, denied by some. They "speak of the depths of [one's] life, of the source of ***636** [one's] being, of [one's] ultimate concern, of what [one] take[s] seriously without any reservation." P. Tillich, The Shaking of the Foundations 57 (1948). If they (and the central tenets of other religions) ever become mere ceremony, this country will be a fundamentally different—and, I think, poorer—place to live.

But just for that reason, the not-so-implicit message of the majority's opinion—"What's the big deal, anyway?"—is mistaken. The content of Greece's **prayers***is* a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world. And the responses of different individuals, in Greece and across this country, of course vary. Contrary to the majority's apparent view, such sectarian **prayers** are not "part of our expressive idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. *Ante,* at 1825. They express beliefs that are fundamental to some, foreign to others—and because that is so they carry the ever-present potential to both exclude and divide. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry,* 545 U.S. 677, 704, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project—the distinctively American project—of creating one from the many, and governing all as united.

IV

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews. Among the citizens he **met** there was Moses Seixas, one of that congregation's lay officials. The ensuing

exchange between the *637 two conveys, as well as anything I know, the promise this country makes to members of every religion.

Seixas wrote first, welcoming Washington to Newport. He spoke of "a deep sense of gratitude" for the new American Government—"a Government, which to bigotry gives no sanction, to persecution no assistance—but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine." Address from Newport Hebrew Congregation (Aug. 17, 1790), in 6 PGW 286, n. 1 (M. Mastromarino ed. 1996). The first phrase there is the more poetic: a government that to "bigotry gives no sanction, to persecution no assistance." But the second is actually the more startling and transformative: a government that, beyond not aiding persecution, grants "immunities of **1854 citizenship" to the Christian and the Jew alike, and makes them "equal parts" of the whole country.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one—and knew to borrow it too. And so he repeated, word for word, Seixas's phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. "It is now no more," Washington said, "that toleration is spoken of, as if it was by the indulgence of one class of people" to another, lesser one. For "[a]ll possess alike ... immunities of citizenship." Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 PGW 285. That is America's promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone "who live[s] under [the Government's] protection[,] should demean themselves as good citizens." *Ibid.*

For me, that remarkable guarantee means at least this much: When the citizens of this country approach their government, *638 they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.

All Citations

572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835, 82 USLW 4334, 14 Cal. Daily Op. Serv. 4847, 2014 Daily Journal D.A.R. 5589, 24 Fla. L. Weekly Fed. S 736

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* THE CHIEF JUSTICE and Justice ALITO join this opinion in full. Justice SCALIA and Justice THOMAS join this opinion except as to Part II–B.

1 See Assn. of Statisticians of Am. Religious Bodies, C. Grammich et al., 2010 U.S. Religion Census: Religious Congregations & Membership Study 400–401 (2012).

2 It appears that there is one non-Christian house of worship, a Buddhist temple, within the town's borders, but it was not listed in the town directory. 732 F.Supp.2d, at 203. Although located within the town's borders, the temple has a Rochester mailing address. And while the respondents "each lived in the Town more than thirty years, neither was personally familiar with any mosques, synagogues, temples, or other non-Christian places of worship within the Town." *Id.*, at 197.

3 For example, when a rabbi first delivered a **prayer** at a session of the House of Representatives in 1860, he appeared "in full rabbinic dress, 'piously bedecked in a white tallit and a large velvet skullcap,' " and his **prayer** "invoked several uniquely Jewish themes and repeated the Biblical priestly blessing in Hebrew." See Brief for Nathan Lewin as *Amicus Curiae* 9. Many other rabbis have given distinctively Jewish **prayers**, *id.*, at 10, and n. 3, and distinctively Islamic, Buddhist, and Hindu **prayers** have also been delivered, see *ante*, at 1820 – 1821.

4 See, *e.g.*, **prayer** practice of Saginaw City Council in Michigan, described in Letter from Freedom from Religion Foundation to City Manager, Saginaw City Council (Jan. 31, 2014), online at http://media.mlive.com/saginawnews_impact/other/Saginaw% 20prayer% 20at% 20meetings% 20letter.pdf (all Internet materials as visited May 2, 2014, and available in Clerk of Court's case file); **prayer** practice of Cobb County commissions in Georgia, described in *Pelphrey v. Cobb County*, 410 F.Supp.2d 1324 (N.D.Ga.2006).

5 For example, at the most recent Presidential inauguration, a minister faced the assembly of onlookers on the National Mall and began with those very words. 159 Cong. Rec. S183, S186 (Jan. 22, 2013).

6 See generally Brief for Robert E. Palmer as *Amicus Curiae* (Nebraska Legislature chaplain at issue in *Marsh*); *e.g.*, *id.*, at 11 (describing his **prayers** as routinely referring "to Christ, the Bible, [and] holy days"). See also *Chambers v. Marsh*, 504 F.Supp. 585, 590, n. 12 (D.Neb.1980) ("A rule of the Nebraska Legislature requires that 'every member shall be present within the Legislative Chamber during the **meetings** of the Legislature ... unless excused....' Unless the excuse for nonattendance is deemed sufficient by the legislature, the 'presence of any member may be compelled, if necessary, by sending the Sergeant at Arms' " (alterations in original)).

7 G. Wills, Inventing America: Jefferson's Declaration of Independence 46 (1978).

[8] N. Cousins, In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers 4–5, 13 (1958).

[9] M. Puls, Samuel Adams: Father of the American Revolution 160 (2006).

[10] Letter to Abigail Adams (Sept. 16, 1774), in C. Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37 (1876).

[11] *Ibid.*

[12] See G. Wills, *supra,* at 46; J. Miller, Sam Adams 85, 87 (1936); I. Stoll, Samuel Adams: A Life 7, 134–135 (2008).

[13] C. Adams, *supra,* at 37.

[14] *Ibid.*

[15] *Ibid.*; see W. Wells, 2 The Life and **Public** Services of Samuel Adams 222–223 (1865); J. Miller, *supra,* at 320; E. Burnett, The Continental Congress 40 (1941); M. Puls, *supra,* at 161.

[16] First **Prayer** of the Continental Congress, 1774, online at http://chaplain.house.gov/archive/continental.html.

[17] 1 Annals of Cong. 24–25 (1789); R. Cord, Separation of Church and State: Historical Fact and Current Fiction 23 (1982).

[18] 1 Annals of Cong. 247, 424; R. Labunski, James Madison and the Struggle for the Bill of Rights 240–241 (2006).

[1] This Court has never squarely addressed these barriers to the incorporation of the Establishment Clause. When the issue was first presented in *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), the Court casually asserted that "the Fourteenth Amendment [has been] interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." *Id.,* at 15, 67 S.Ct. 504 (footnote omitted). The cases the Court cited in support of that proposition involved the Free Exercise Clause—which had been incorporated seven years earlier, in *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)—not the Establishment Clause. 330 U.S., at 15, n. 22, 67 S.Ct. 504 (collecting cases). Thus, in the space of a single paragraph and a nonresponsive string citation, the *Everson* Court glibly effected a sea change in constitutional law. The Court's inattention to these doctrinal questions might be explained, although not excused, by the rise of popular conceptions about "separation of church and state" as an "American" constitutional right. See generally P. Hamburger, Separation of Church and State 454–463 (2002); see also *id.,* at 391–454 (discussing the role of nativist sentiment in the campaign for "separation" as an American ideal).

[2] See, *e.g.,*Del. Const., Art. I, § 1 (1831) ("[N]o man shall, or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent"); Me. Const., Art. I, § 3 (1820) ("[N]o one shall be hurt, molested or restrained in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience"); Mo. Const., Art. I, § 10 (1865) ("[N]o person can be compelled to erect, support, or attend any place of worship, or maintain any minister of the Gospel or teacher of religion"); R.I. Const., Art. I, § 3 (1842) ("[N]o man shall be compelled to frequent or to support

any religious worship, place, or ministry whatever, except in fulfillment of his own voluntary contract"); Vt. Const., Ch. I, § 3 (1777) ("[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience").

1 That principle meant as much to the founders as it does today. The demand for neutrality among religions is not a product of 21st century "political correctness," but of the 18th century view—rendered no less wise by time—that, in George Washington's words, "[r]eligious controversies are always productive of more acrimony and irreconciliable hatreds than those which spring from any other cause." Letter to Edward Newenham (June 22, 1792), in 10 Papers of George Washington: Presidential Series 493 (R. Haggard & M. Mastromarino eds. 2002) (hereinafter PGW). In an age when almost no one in this country was not a Christian of one kind or another, Washington consistently declined to use language or imagery associated only with that religion. See Brief for Paul Finkelman et al. as *Amici Curiae* 15–19 (noting, for example, that in revising his first inaugural address, Washington deleted the phrase "the blessed Religion revealed in the word of God" because it was understood to denote only Christianity). Thomas Jefferson, who followed the same practice throughout his life, explained that he omitted any reference to Jesus Christ in Virginia's Bill for Establishing Religious Freedom (a precursor to the Establishment Clause) in order "to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination." 1 Writings of Thomas Jefferson 62 (P. Ford ed. 1892). And James Madison, who again used only nonsectarian language in his writings and addresses, warned that religious proclamations might, "if not strictly guarded," express only "the creed of the majority and a single sect." Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 561 (1946).

2 Because Justice ALITO questions this point, it bears repeating. I do not remotely contend that "**prayer** is not allowed" at participatory **meetings** of "local government legislative bodies"; nor is that the "logical thrust" of any argument I make. *Ante,* at 1818 – 1819. Rather, what I say throughout this opinion is that in this citizen-centered venue, government officials must take steps to ensure—as none of Greece's Board members ever did—that opening **prayers** are inclusive of different faiths, rather than always identified with a single religion.

3 For ease of reference and to avoid confusion, I refer to Justice KENNEDY's opinion as "the majority." But the language I cite that appears in Part II–B of that opinion is, in fact, only attributable to a plurality of the Court.

4 Leaders of several Baptist and other Christian congregations have explained to the Court that "many Christians believe ... that their freedom of conscience is violated when they are pressured to participate in government **prayer**, because such acts of worship should only be performed voluntarily." Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae* 18.

5 Justice ALITO similarly falters in attempting to excuse the Town Board's constant sectarianism. His concurring opinion takes great pains to show that the problem arose from a sort of bureaucratic glitch: The Town's clerks, he writes, merely "did a bad job in compiling the list" of chaplains. *Ante,* at 1818; see *ante,* at 1815 – 1817. Now I suppose one question that account raises is why in over a decade, no member of the Board noticed that the clerk's list was producing **prayers** of only one kind. But put that aside. Honest oversight or not, the problem remains: Every month for more than a decade, the Board aligned itself, through its **prayer** practices, with a single religion. That the concurring opinion thinks my objection to that is "really quite niggling," *ante,* at 1829, says all there is to say about the difference between our respective views.

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303 Creative LLC v. Elenis

Supreme Court of the United States. | June 30, 2023 | --- S.Ct. ---- | 2023 WL 4277208

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Outline

Free Speech, religious beliefs, and public accommodations

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Supreme Court of the United States.

303 CREATIVE LLC, et al., Petitioners
v.
Aubrey **ELENIS**, et al.

No. 21-476
|
Argued December 5, 2022
|
Decided June 30, 2023

Synopsis

Background: The sole member-owner of limited liability company (LLC) that provided website and graphic design services and which sought to enter the wedding website business, together with the company, brought pre-enforcement action against members of the Colorado Civil Rights Commission (CCRC) and the Colorado Attorney General, seeking to enjoin the defendants from forcing the plaintiffs, through enforcement of the Colorado Anti-Discrimination Act (CADA), to convey on wedding websites messages inconsistent with the member-owner's religious belief that marriage should be reserved to unions between one man and one woman. The United States District Court for the District of Colorado, Marcia S. Krieger, J., 385 F.Supp.3d 1147, denied the plaintiffs' motion for summary judgment and for a preliminary injunction and subsequently, 405 F.Supp.3d 907, granted summary judgment to defendants. Plaintiffs appealed. The United States Court of Appeals for the Tenth Circuit, Briscoe, Circuit Judge, 6 F.4th 1160, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that:

[1] the wedding websites member-owner sought to create for her customers qualified as pure speech under the First Amendment;

[2] the wedding websites member-owner sought to create involved her speech;

[3] member-owner faced a credible threat of sanctions under the Act, as required to have standing to bring pre-enforcement action; and

[4] it would violate First Amendment for defendants to compel member-owner to create speech she did not believe.

Reversed.

Chief Justice Roberts, and Justices Thomas, Alito, Kavanaugh, and Barrett, joined.

Justice Sotomayor filed dissenting opinion, in which Justices Kagan and Jackson joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Summary Judgment; Motion for Preliminary Injunction.

West Headnotes (31)

[1] **Civil Rights**⚖Injury and Causation

In order for the sole member-owner of limited liability company (LLC) that provided website and graphic design services, and which sought to enter the wedding website business, to have standing to bring pre-enforcement action seeking an injunction to prevent the State of Colorado, through its enforcement of the provisions of the Colorado Anti-Discrimination Act (CADA), from forcing her to create wedding websites celebrating marriages that defied her religious beliefs that marriage should be reserved to unions between one man and one woman, member-owner had to show a credible threat existed that Colorado would, in fact, seek to compel speech from her that she did

not wish to produce. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 24-34-601(2)(a).

[2] **Constitutional Law**⚖Freedom of Speech, Expression, and Press
Constitutional Law⚖Politics and Elections

The framers designed the Free Speech Clause of the First Amendment to protect the freedom to think as you will and to speak as you think; they did so because they saw the freedom of speech both as an end, because the freedom to think and speak is an inalienable human right, and as a means, because the freedom of thought and speech is indispensable to the discovery and spread of political truth. U.S. Const. Amend. 1.

[3] **Constitutional Law**⚖Purpose of constitutional protection

If there is any fixed star in the constitutional constellation of the United States, it is the principle that the government may not interfere with an uninhibited marketplace of ideas, under the Free Speech Clause of the First Amendment. U.S. Const. Amend. 1.

[4] **Constitutional Law**⚖Freedom of Speech, Expression, and Press

The First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided and likely to cause anguish or incalculable grief. U.S. Const. Amend. 1.

[5] **Constitutional Law**⚖Expressive association

The First Amendment protects acts of expressive association. U.S. Const. Amend. 1.

[6] **Constitutional Law**⚖Compelled or forced speech, support, or participation

Generally, under the First Amendment, the government may not compel a person to speak its own preferred messages. U.S. Const. Amend. 1.

[7] **Constitutional Law**⚖Compelled or forced speech, support, or participation

It offends the First Amendment for the government to seek to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. U.S. Const. Amend. 1.

[8] **Constitutional Law**⚖Website content
Telecommunications⚖Internet

The wedding websites sole member-owner of limited liability company (LLC) that provided website and graphic design services sought to create for her customers qualified as pure speech under the First Amendment; the websites promised to contain images, words, symbols, and other modes of expression, every website would be member-owner's original, customized creation, and she would create these websites to communicate ideas—namely, to celebrate and promote a couple's wedding and unique love story and to celebrate and promote what member-owner understood to be a true marriage, a union between one man and one woman. U.S. Const. Amend. 1.

[9] **Constitutional Law**⚖Particular Issues and Applications in General
Constitutional Law⚖Internet

All manner of speech, from pictures, films, paintings, drawings, and engravings to oral utterance and the printed word, qualify for the First Amendment's protections; no less can hold true when it comes to speech

conveyed over the internet. U.S. Const. Amend. 1.

[10] **Civil Rights**⚖Power to enact and validity
Constitutional Law⚖Website content

The wedding websites sole member-owner of limited liability company (LLC) that provided website and graphic design services sought to create for her clients involved her speech under the First Amendment, for purposes of her pre-enforcement action to enjoin State of Colorado, through its enforcement of Colorado Anti-Discrimination Act (CADA), from forcing her to create wedding websites celebrating marriages that defied her religious belief that marriage should be reserved to unions between one man and one woman, even if her speech may combine with the couple's in the final product; member-owner intended to vet each prospective project to determine whether it was one she was willing to endorse, she would consult with clients to discuss their unique stories as source material, and she would produce a final story for each couple using her own words and her own original artwork. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 24-34-601(2)(a).

[11] **Constitutional Law**⚖Particular Issues and Applications in General

An individual does not forfeit constitutional protection under the First Amendment's Free Speech Clause simply by combining multifarious voices in a single communication. U.S. Const. Amend. 1.

[12] **Civil Rights**⚖Injury and Causation

State of Colorado, through its intended enforcement of Colorado Anti-Discrimination Act (CADA), sought to compel speech that sole member-owner of limited liability company (LLC), which provided website and graphic design services, did not wish to provide if she offered wedding websites to clients celebrating marriages she endorsed, which were between one man and one woman, and thus member-owner faced a credible threat of sanctions under the Act, as required to have standing to bring pre-enforcement action to enjoin the State from compelling her speech in violation of First Amendment; State intended to force member-owner to create custom websites celebrating other marriages she did not in order to excise certain ideas or viewpoints from the public dialogue. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 24-34-601(2)(a).

[13] **Civil Rights**⚖Power to enact and validity
Constitutional Law⚖Website content

It would be an impermissible abridgment of First Amendment's right to speak freely for State of Colorado, through its enforcement of Colorado Anti-Discrimination Act (CADA), to compel sole member-owner of limited liability company (LLC) that provided website and graphic design services, and which sought to enter wedding website business, to create speech she did not believe by forcing her to convey on wedding websites messages inconsistent with her religious belief that marriage should be reserved to unions between one man and one woman; member-owner did not seek to sell ordinary commercial good but intended to create customized and tailored speech for each couple, and Colorado sought to put her to choice of either speaking as the State demanded or face sanctions for expressing her own beliefs on matter of major significance. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. §§ 24–34–602(1)(a), 24-34-601(2)(a), 24–34–605, 24–34–306(9).

[14] **Constitutional Law**⇨Trade or Business

The First Amendment does not tolerate the government's compelling anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait; such a principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty, such as, for example, by requiring an unwilling movie director who is Muslim to make a film with a Zionist message, requiring a muralist who is an atheist to accept a commission celebrating Evangelical zeal, or forcing a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. U.S. Const. Amend. 1.

[15] **Constitutional Law**⇨Trade or Business

The First Amendment does not tolerate the government's forcing **creative** professionals to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. U.S. Const. Amend. 1.

[16] **Civil Rights**⇨Public Accommodations

Governments in the United States have a compelling interest in eliminating discrimination in places of public accommodation.

[17] **Civil Rights**⇨Public Accommodations

Public accommodations laws vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.

[18] **Civil Rights**⇨Sexual orientation or identity

Civil Rights⇨Contracts, trade, and commercial activity

States may protect gay persons, just as they can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.

[19] **Civil Rights**⇨Power to enact and validity

No public accommodations law is immune from the demands of the Constitution.

[20] **Civil Rights**⇨Power to enact and validity
Constitutional Law⇨Compelled or forced speech, support, or participation

Public accommodations statutes can sweep too broadly under the First Amendment when deployed to compel speech. U.S. Const. Amend. 1.

[21] **Civil Rights**⇨Federal preemption
States⇨Federal Supremacy; Preemption

When a state public accommodations law and the Constitution collide, there can be no question which must prevail under the Supremacy clause. U.S. Const. art. 6, cl. 2.

[22] **Constitutional Law**⇨Entities protected

Speakers do not shed their First Amendment protections by employing the corporate form to disseminate their speech. U.S. Const. Amend. 1.

[23] **Constitutional Law**⇨Freedom of Speech, Expression, and Press

The First Amendment's protections do not belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive. U.S. Const. Amend. 1.

[24] **Constitutional Law**⇨Freedom of Speech, Expression, and Press

While the Free Speech Clause of the First Amendment does not protect status-based discrimination unrelated to expression, generally it does protect a speaker's right to control her own message—even when others may disapprove of the speaker's motive or the message itself. U.S. Const. Amend. 1.

[25] **Constitutional Law**⚖Religious speech or activities
Constitutional Law⚖Political speech, beliefs, or activity in general
The First Amendment's Free Speech Clause does not tolerate the government forcing an individual to utter what is not in her mind about a question of political and religious significance. U.S. Const. Amend. 1.

[26] **Constitutional Law**⚖Freedom of Speech, Expression, and Press
Under the First Amendment's Free Speech Clause, no government may affect a speaker's message by forcing her to accommodate other views; no government may alter the expressive content of her message; and no government may interfere with her desired message. U.S. Const. Amend. 1.

[27] **Constitutional Law**⚖Compelled or forced speech, support, or participation
There is nothing incidental about an infringement on speech protected by the First Amendment when a public accommodations law is applied peculiarly to compel expressive activity. U.S. Const. Amend. 1.

[28] **Constitutional Law**⚖Freedom of Speech, Expression, and Press
Constitutional Law⚖Trade or Business
The First Amendment extends to all persons engaged in expressive conduct, including those who seek profit, such as speechwriters, artists, and website designers. U.S. Const. Amend. 1.

[29] **Constitutional Law**⚖Freedom of Speech, Expression, and Press
A commitment to speech for only some messages and some persons is no commitment at all under the First Amendment. U.S. Const. Amend. 1.

[30] **Constitutional Law**⚖Particular Issues and Applications in General
Abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider unattractive, misguided, or even hurtful, but tolerance, not coercion, is the Nation's answer. U.S. Const. Amend. 1.

[31] **Constitutional Law**⚖Freedom of Speech, Expression, and Press
The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. U.S. Const. Amend. 1.

West Codenotes

Held Unconstitutional
Colo. Rev. Stat. Ann. § 24-34-601(2)(a)

*Syllabus**

*1 Lorie Smith wants to expand her graphic design business, **303 Creative** LLC, to include services for couples seeking wedding websites. But Ms. Smith worries that Colorado will use the Colorado Anti-Discrimination Act to compel her—in violation of the First Amendment—to create websites celebrating marriages she does not endorse. To clarify her rights, Ms. Smith filed a lawsuit seeking an injunction to prevent the State from forcing her to create websites

celebrating marriages that defy her belief that marriage should be reserved to unions between one man and one woman.

CADA prohibits all "public accommodations" from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. Colo. Rev. Stat. § 24–34–601(2)(a). The law defines "public accommodation" broadly to include almost every public-facing business in the State. § 24–34–601(1). Either state officials or private citizens may bring actions to enforce the law. §§ 24–34–306, 24–34–602(1). And a variety of penalties can follow any violation.

Before the district court, Ms. Smith and the State stipulated to a number of facts: Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender" and "will gladly create custom graphics and websites" for clients of any sexual orientation; she will not produce content that "contradicts biblical truth" regardless of who orders it; Ms. Smith's belief that marriage is a union between one man and one woman is a sincerely held conviction; Ms. Smith provides design services that are "expressive" and her "original, customized" creations "contribut[e] to the overall message" her business conveys "through the websites" it creates; the wedding websites she plans to create "will be expressive in nature," will be "customized and tailored" through close collaboration with individual couples, and will "express Ms. Smith's and **303 Creative's** message celebrating and promoting" her view of marriage; viewers of Ms. Smith's websites "will know that the websites are her original artwork;" and "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services."

Ultimately, the district court held that Ms. Smith was not entitled to the injunction she sought, and the Tenth Circuit affirmed.

***Held*: The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees. Pp. ——– ——.**

(a) The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale*, 530 U. S. 640, 660–661, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (internal quotation marks omitted). The freedom to speak is among our inalienable rights. The freedom of thought and speech is "indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U. S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). For these reasons, "[i]f there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is the principle that the government may not interfere with "an uninhibited marketplace of ideas," *McCullen v. Coakley*, 573 U. S. 464, 476, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted).

***2** This Court has previously faced **cases** where governments have sought to test these foundational principles. In *Barnette*, the Court held that the State of West Virginia's efforts to compel schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance "invad[ed] the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control." 319 U.S. at 642, 63 S.Ct. 1178. State authorities had "transcend[ed] constitutional limitations on their powers." 319 U.S. at 642, 63 S.Ct. 1178. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), the Court held that Massachusetts's public accommodations statute could not be used to force veterans organizing a parade in Boston to include a group of gay, lesbian, and bisexual individuals because the parade was protected speech, and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their parade." *Id.*, at 572–573, 115 S.Ct. 2338. And in *Boy Scouts of America v. Dale*, when the Boy Scouts sought to exclude assistant scoutmaster James Dale from membership after

Commented [ER2]: The majority focuses on this as speech and not public accommodation and an offer of services. So would a similar sole provider be compelled to host a same sex newly married couple at her bed and breakfast???

Commented [ER1]: Raising the question about "What may constitute an active expression of my faith?

learning he was gay, the Court held the Boy Scouts to be "an expressive association" entitled to First Amendment protection. 530 U.S. at 656, 120 S.Ct. 2446. The Court found that forcing the Scouts to include Mr. Dale would undoubtedly "interfere with [its] choice not to propound a point of view contrary to its beliefs." *Id.*, at 654, 120 S.Ct. 2446.

These **cases** illustrate that the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338, and likely to cause "anguish" or "incalculable grief," *Snyder v. Phelps*, 562 U. S. 443, 456, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Generally, too, the government may not compel a person to speak its own preferred messages. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 505, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Pp. ——–——.

(b) Applying these principles to the parties' stipulated facts, the Court agrees with the Tenth Circuit that the wedding websites Ms. Smith seeks to create qualify as pure speech protected by the First Amendment under this Court's precedents. Ms. Smith's websites will express and communicate ideas—namely, those that "celebrate and promote the couple's wedding and unique love story" and those that "celebrat[e] and promot[e]" what Ms. Smith understands to be a marriage. Speech conveyed over the internet, like all other manner of speech, qualifies for the First Amendment's protections. And the Court agrees with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech, a conclusion supported by the parties' stipulations, including that Ms. Smith intends to produce a final story for each couple using her own words and original artwork. While Ms. Smith's speech may combine with the couple's in a final product, an individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication. *Hurley*, 515 U. S., at 569, 115 S.Ct. 2338.

Ms. Smith seeks to engage in protected First Amendment speech; Colorado seeks to compel speech she does not wish to provide. As the Tenth Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to compel her to create custom websites celebrating other marriages she does not. 6 F.4th 1160, 1178. Colorado seeks to compel this speech in order to "excis[e] certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Indeed, the Tenth Circuit recognized that the coercive "[e]liminati[on]" of dissenting ideas about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith. 6 F.4th at 1178. But while the Tenth Circuit thought that Colorado could compel speech from Ms. Smith consistent with the Constitution, this Court's First Amendment precedents teach otherwise. In *Hurley*, *Dale*, and *Barnette*, the Court found that governments impermissibly compelled speech in violation of the First Amendment when they tried to force speakers to accept a message with which they disagreed. Here, Colorado seeks to put Ms. Smith to a similar choice. If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in "remedial ... training," filing periodic compliance reports, and paying monetary fines. That is an impermissible abridgement of the First Amendment's right to speak freely. *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338.

***3** Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the message—if the topic somehow implicates a customer's statutorily protected trait. 6 F.4th at 1199 (Tymkovich, C. J., dissenting). Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The Court's precedents recognize the First Amendment tolerates none of that. To be sure, public accommodations laws play a vital role in realizing the civil rights of all Americans, and

Commented [ER3]: Swastika shaped bagel??

governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts v. United States Jaycees*, 468 U. S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). This Court has recognized that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (internal quotation marks omitted). Over time, governments in this country have expanded public accommodations laws in notable ways. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. *Dale*, 530 U. S., at 656–657, 120 S.Ct. 2446. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings. See, *e.g.*, *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 S.Ct. 469, 32 L.Ed. 788 (1889). Importantly, States have also expanded their laws to prohibit more forms of discrimination. Today, for example, approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation. The Court has recognized this is "unexceptional." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ——, ——, 138 S.Ct. 1719, 1728, 201 L.Ed.2d 35 (2018). States may "protect gay persons, just as [they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment." *Ibid.* At the same time, this Court has also long recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech. See, *e.g.*, *Hurley*, 515 U. S., at 571, 578, 115 S.Ct. 2338; *Dale*, 530 U. S., at 659, 120 S.Ct. 2446. As in those cases, when Colorado's public accommodations law and the Constitution collide, there can be no question which must prevail. U. S. Const. Art. VI, § 2.

As the Tenth Circuit saw it, Colorado has a compelling interest in ensuring "equal access to publicly available goods and services," and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere." 6 F.4th at 1179–1180 (internal quotation marks omitted). In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes. The speaker in *Hurley* had an "enviable" outlet for speech, and the Boy Scouts in *Dale* offered an arguably unique experience, but in both cases this Court held that the State could not use its public accommodations statute to deny a speaker the right "to choose the content of his own message." *Hurley*, 515 U. S., at 573, 115 S.Ct. 2338; see *Dale*, 530 U. S., at 650–656, 120 S.Ct. 2446. A rule otherwise would conscript any unique voice to disseminate the government's preferred messages in violation of the First Amendment. Pp. ——–——.

(c) Colorado now seems to acknowledge that the First Amendment *does* prohibit it from coercing Ms. Smith to create websites expressing any message with which she disagrees. Alternatively, Colorado contends, Ms. Smith must simply provide the same commercial product to all, which she can do by repurposing websites celebrating marriages she does endorse for marriages she does not. Colorado's theory rests on a belief that this case does not implicate pure speech, but rather the sale of an ordinary commercial product, and that any burden on Ms. Smith's speech is purely "incidental." On the State's telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny. Colorado's alternative theory, however, does not sit easily with its stipulation that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create "customized and tailored" expressive speech for each couple "to celebrate and promote the couple's wedding and unique love story." Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond its reach.

Commented [ER4]: Thus this is a case about speech and not 1st amendment freedom of religion.

The State stresses that Ms. Smith offers her speech for pay and does so through **303 Creative** LLC, a company in which she is "the sole member-owner." But many of the world's great works of literature and art were created with an expectation of compensation. And speakers do not shed their First Amendment protections by employing the corporate form to disseminate their speech. Colorado urges the Court to look at the reason Ms. Smith refuses to offer the speech it seeks to compel, and it claims that the reason is that she objects to the "protected characteristics" of certain customers. But the parties' stipulations state, to the contrary, that Ms. Smith will gladly conduct business with those having protected characteristics so long as the custom graphics and websites she is asked to create do not violate her beliefs. Ms. Smith stresses that she does not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments.

***4** The First Amendment's protections belong to all, not just to speakers whose motives the government finds worthy. In this **case**, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. In the past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment's boundaries by seeking to compel speech they thought vital at the time. But abiding the Constitution's commitment to the freedom of speech means all will encounter ideas that are "misguided, or even hurtful." *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338. Consistent with the First Amendment, the Nation's answer is tolerance, not coercion. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Colorado cannot deny that promise consistent with the First Amendment. Pp. ———, ———.

6 F.4th 1160, reversed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, KAVANAUGH, and BARRETT, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN and JACKSON, JJ., joined.

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Opinion

Justice GORSUCH delivered the opinion of the Court.

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

I

Commented [ER5]: Sounds like she would do a wedding site for a daughter of two fathers as long as the young women was marrying a male.

Commented [ER6]: So how does this work if a vegan web designer is asked to create a website for a bar b que contest?

A

Through her business, **303 Creative** LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. As she envisions it, her websites will provide couples with text, graphic arts, and videos to "celebrate" and "conve[y]" the "details" of their "unique love story." App. to Pet. for Cert. 182a, 187a, 198a. The websites will discuss how the couple met, explain their backgrounds, families, and future plans, and provide information about their upcoming wedding. All of the text and graphics on these websites will be "original," "customized," and "tailored" creations. *Id.*, at 187a. The websites will be "expressive in nature," designed "to communicate a particular message." *Id.*, at 181a. Viewers will know, too, "that the websites are [Ms. Smith's] original artwork," for the name of the company she owns and operates by herself will be displayed on every one. *Id.*, at 187a.

While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans. She worries that, if she does so, Colorado will force her to express views with which she disagrees. Ms. Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation. *Id.*, at 184a. But she has never created expressions that contradict her own views for anyone—whether that means generating works that encourage violence, demean another person, or defy her religious beliefs by, say, promoting atheism. See *ibid.*; see also Tr. of Oral Arg. 19–20. Ms. Smith does not wish to do otherwise now, but she worries Colorado has different plans. Specifically, she worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman. App. to Pet. for Cert. 177a–190a. Ms. Smith acknowledges that her views about marriage may not be popular in all quarters. But, she asserts, the First Amendment's Free Speech Clause protects her from being compelled to speak what she does not believe. The Constitution, she insists, protects her right to differ.

B

***5** [1] To clarify her rights, Ms. Smith filed a lawsuit in federal district court. In that suit, she sought an injunction to prevent the State from forcing her to create wedding websites celebrating marriages that defy her beliefs. App. **303**–305. To secure relief, Ms. Smith first had to establish her standing to sue. That required her to show "a credible threat" existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce. *Susan B. Anthony List v. Driehaus*, 573 U. S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

Toward that end, Ms. Smith began by directing the court to the Colorado Anti-Discrimination Act (CADA). That law defines a "public accommodation" broadly to include almost every public-facing business in the State. Colo. Rev. Stat. § 24–34–601(1) (2022). In what some call its "Accommodation Clause," the law prohibits a public accommodation from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. § 24–34–601(2)(a). Either state officials or private citizens may bring actions to enforce the law. §§ 24–34–306, 24–34–602(1). And a variety of penalties can follow. Courts can order fines up to $500 per violation. § 24–34–602(1)(a). The Colorado Commission on Civil Rights can issue cease-and-desist orders, § 24–34–306(9), and require violators to take various other "affirmative action[s]." § 24–34–605; § 24–34–306(9). In the past, these have included participation in mandatory educational programs and the submission of ongoing compliance reports to state officials. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ——, ——, 138 S.Ct. 1719, 1725, 201 L.Ed.2d 35 (2018).[1]

In her lawsuit, Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse. 6 F.4th

1160, 1173–1174 (CA10 2021). As evidence, Ms. Smith pointed to Colorado's record of past enforcement actions under CADA, including one that worked its way to this Court five years ago. See *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1725; see also App. 25–155 (discussing Colorado's other past enforcement actions).

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

- Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," and she "will gladly create custom graphics and websites" for clients of any sexual orientation. App. to Pet. for Cert. 184a.

*6 • She will not produce content that "contradicts biblical truth" regardless of who orders it. *Ibid.*

- Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction. *Id.*, at 179a.

- All of the graphic and website design services Ms. Smith provides are "expressive." *Id.*, at 181a.

- The websites and graphics Ms. Smith designs are "original, customized" creations that "contribut[e] to the overall messages" her business conveys "through the websites" it creates. *Id.*, at 181a–182a.

- Just like the other services she provides, the wedding websites Ms. Smith plans to create "will be expressive in nature." *Id.*, at 187a.

- Those wedding websites will be "customized and tailored" through close collaboration with individual couples, and they will "express Ms. Smith's and **303 Creative's** message celebrating and promoting" her view of marriage. *Id.*, at 186a–187a.

- Viewers of Ms. Smith's websites "will know that the websites are [Ms. Smith's and **303 Creative's**] original artwork." *Id.*, at 187a.

- To the extent Ms. Smith may not be able to provide certain services to a potential customer, "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services." *Id.*, at 190a.

C

Ultimately, the district court ruled against Ms. Smith. 405 F.Supp.3d 907, 912 (Colo. 2019). So did the Tenth Circuit. 6 F.4th at 1168. For its part, the Tenth Circuit held that Ms. Smith had standing to sue. In that court's judgment, she had established a credible threat that, if she follows through on her plans to offer wedding website services, Colorado will invoke CADA to force her to create speech she does not believe or endorse. *Id.*, at 1172–1175. The court pointed to the fact that "Colorado has a history of past enforcement against nearly identical conduct—*i.e.*, *Masterpiece Cakeshop*"; that anyone in the State may file a complaint against Ms. Smith and initiate "a potentially burdensome administrative hearing" process; and that "Colorado [has] decline[d] to disavow future enforcement" proceedings against her. *Id.*, at 1174. Before us, no party challenges these conclusions.

Turning to the merits, however, the Tenth Circuit held that Ms. Smith was not entitled to the injunction she sought. The court acknowledged that Ms. Smith's planned wedding websites qualify as "pure speech" protected by the First Amendment. *Id.*, at 1176. As a result, the court reasoned, Colorado had to satisfy "strict scrutiny" before compelling speech from her that she did not wish to create. *Id.*, at 1178. Under that standard, the court continued, the State had to show both that forcing Ms. Smith to create speech would serve a compelling governmental interest and that no less restrictive alternative exists to secure that interest. *Ibid.* Ultimately, a divided panel concluded that the State had carried these burdens. As the majority saw it, Colorado has a compelling interest in ensuring "equal

access to publicly available goods and services," and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere." *Id.*, at 1179–1180 (internal quotation marks omitted).

*7 Chief Judge Tymkovich dissented. He observed that "ensuring access to a *particular* person's" voice, expression, or artistic talent has never qualified as "a compelling state interest" under this Court's precedents. *Id.*, at 1203. Nor, he submitted, should courts depart from those precedents now. "Taken to its logical end," Chief Judge Tymkovich warned, his colleagues' approach would permit the government to "regulate the messages communicated by *all* artists"—a result he called "unprecedented." *Id.*, at 1204.

We granted certiorari to review the Tenth Circuit's disposition. 595 U. S. ——, 142 S.Ct. 1106, 212 L.Ed.2d 6 (2022).

II

[2] [3] The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale*, 530 U. S. 640, 660–661, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (internal quotation marks omitted). They did so because they saw the freedom of speech "both as an end and as a means." *Whitney v. California*, 274 U. S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring); see also 12 The Papers of James Madison 193–194 (C. Hobson & R. Rutland eds. 1979). An end because the freedom to think and speak is among our inalienable human rights. See, *e.g.*, 4 Annals of Cong. 934 (1794) (Rep. Madison). A means because the freedom of thought and speech is "indispensable to the discovery and spread of political truth." *Whitney*, 274 U. S., at 375, 47 S.Ct. 641 (Brandeis, J., concurring). By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For all these reasons, "[i]f there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is the principle that the government may not interfere with "an uninhibited marketplace of ideas," *McCullen v. Coakley*, 573 U. S. 464, 476, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted).

From time to time, governments in this country have sought to test these foundational principles. In *Barnette*, for example, the Court faced an effort by the State of West Virginia to force schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance. If the students refused, the State threatened to expel them and fine or jail their parents. Some families objected on the ground that the State sought to compel their children to express views at odds with their faith as Jehovah's Witnesses. When the dispute arrived here, this Court offered a firm response. In seeking to compel students to salute the flag and recite a pledge, the Court held, state authorities had "transcend[ed] constitutional limitations on their powers." 319 U.S. at 642, 63 S.Ct. 1178. Their dictates "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control." *Ibid.*

A similar story unfolded in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). There, veterans organizing a St. Patrick's Day parade in Boston refused to include a group of gay, lesbian, and bisexual individuals in their event. The group argued that Massachusetts's public accommodations statute entitled it to participate in the parade as a matter of law. *Id.*, at 560–561, 115 S.Ct. 2338. Lower courts agreed. *Id.*, at 561–566, 115 S.Ct. 2338. But this Court reversed. *Id.*, at 581, 115 S.Ct. 2338. Whatever state law may demand, this Court explained, the parade was constitutionally protected speech and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their parade." *Id.*, at 572–573, 115 S.Ct. 2338. The veterans' choice of what to say (and not say) might have been unpopular,

but they had a First Amendment right to present their message undiluted by views they did not share.

*8 Then there is *Boy Scouts of America* v. *Dale*. In that **case**, the Boy Scouts excluded James Dale, an assistant scoutmaster, from membership after learning he was gay. Mr. Dale argued that New Jersey's public accommodations law required the Scouts to reinstate him. 530 U.S. at 644–645, 120 S.Ct. 2446. The New Jersey Supreme Court sided with Mr. Dale, *id.*, at 646–647, 120 S.Ct. 2446, but again this Court reversed, *id.*, at 661, 120 S.Ct. 2446. The decision to exclude Mr. Dale may not have implicated pure speech, but this Court held that the Boy Scouts "is an expressive association" entitled to First Amendment protection. *Id.*, at 656, 120 S.Ct. 2446. And, the Court found, forcing the Scouts to include Mr. Dale would "interfere with [its] choice not to propound a point of view contrary to its beliefs." *Id.*, at 654, 120 S.Ct. 2446.

[4] [5] [6] [7] As these **cases** illustrate, the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338, and likely to cause "anguish" or "incalculable grief," *Snyder v. Phelps*, 562 U. S. 443, 456, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Equally, the First Amendment protects acts of expressive association. See, *e.g.*, *Dale*, 530 U. S., at 647–656, 120 S.Ct. 2446; *Hurley*, 515 U. S., at 568–570, 579, 115 S.Ct. 2338. Generally, too, the government may not compel a person to speak its own preferred messages. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); see also, *e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 256, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *Wooley v. Maynard*, 430 U. S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ——, ——, 138 S.Ct. 2361, 2371, 201 L.Ed.2d 835 (2018) (*NIFLA*). Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. See *Hurley*, 515 U. S., at 568–570, 576, 115 S.Ct. 2338; see also *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U. S. 47, 63–64, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (*FAIR*) (discussing **cases**). All that offends the First Amendment just the same.

III

[8] Applying these principles to this **case**, we align ourselves with much of the Tenth Circuit's analysis. The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as "pure speech" under this Court's precedents. 6 F.4th at 1176. We agree. It is a conclusion that flows directly from the parties' stipulations. They have stipulated that Ms. Smith's websites promise to contain "images, words, symbols, and other modes of expression." App. to Pet. for Cert. 181a. They have stipulated that every website will be her "original, customized" creation. *Id.*, at 181a–182a. And they have stipulated that Ms. Smith will create these websites to communicate ideas—namely, to "celebrate and promote the couple's wedding and unique love story" and to "celebrat[e] and promot[e]" what Ms. Smith understands to be a true marriage. *Id.*, at 186a–187a.

[9] A hundred years ago, Ms. Smith might have furnished her services using pen and paper. Those services are no less protected speech today because they are conveyed with a "voice that resonates farther than it could from any soapbox." *Reno v. American Civil Liberties Union*, 521 U. S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). All manner of speech—from "pictures, films, paintings, drawings, and engravings," to "oral utterance and the printed word"—qualify for the First Amendment's protections; no less can hold true when it comes to speech like Ms. Smith's conveyed over the Internet. *Kaplan v. California*, 413 U. S. 115, 119–120, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); see also *Shurtleff* v. *Boston*, 596 U. S. ——, ——–——, 142 S.Ct. 1583, 1590–91 (2022) (flags); *Brown v. Entertainment Merchants Assn.*, 564 U. S.

786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (video games); *Hurley*, 515 U. S., at 568–570, 115 S.Ct. 2338 (parades); *Ward v. Rock Against Racism*, 491 U. S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (music); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501–502, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) (movies).

*9 [10] [11] We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech. 6 F.4th at 1181, and n. 5. Again, the parties' stipulations lead the way to that conclusion. See App. to Pet. for Cert. 181a, 187a. As the parties have described it, Ms. Smith intends to "ve[t]" each prospective project to determine whether it is one she is willing to endorse. *Id.*, at 185a. She will consult with clients to discuss "their unique stories as source material." *Id.*, at 186a. And she will produce a final story for each couple using her own words and her own "original artwork." *Id.*, at 182a–183a. Of course, Ms. Smith's speech may combine with the couple's in the final product. But for purposes of the First Amendment that changes nothing. An individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication. *Hurley*, 515 U. S., at 569, 115 S.Ct. 2338.

[12] As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide. As the Tenth Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to "forc[e her] to create custom websites" celebrating other marriages she does not. 6 F.4th at 1178. Colorado seeks to compel this speech in order to "excis[e] certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Indeed, the Tenth Circuit recognized that the coercive "[e]liminati[on]" of dissenting "ideas" about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith. 6 F.4th at 1178.

[13] We part ways with the Tenth Circuit only when it comes to the legal conclusions that follow. While that court thought Colorado could compel speech from Ms. Smith consistent with the Constitution, our First Amendment precedents laid out above teach otherwise. In *Hurley*, the Court found that Massachusetts impermissibly compelled speech in violation of the First Amendment when it sought to force parade organizers to accept participants who would "affec[t] the[ir] message." 515 U.S. at 572, 115 S.Ct. 2338. In *Dale*, the Court held that New Jersey intruded on the Boy Scouts' First Amendment rights when it tried to require the group to "propound a point of view contrary to its beliefs" by directing its membership choices. 530 U.S. at 654, 120 S.Ct. 2446. And in *Barnette*, this Court found impermissible coercion when West Virginia required schoolchildren to recite a pledge that contravened their convictions on threat of punishment or expulsion. 319 U.S. at 626–629, 63 S.Ct. 1178. Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in "remedial ... training," filing periodic compliance reports as officials deem necessary, and paying monetary fines. App. 120; *supra*, at ——. Under our precedents, that "is enough," more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely. *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338.

[14] [15] Consider what a contrary approach would mean. Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait. 6 F.4th at 1198 (Tymkovich, C. J., dissenting). Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require "an unwilling Muslim movie director to make a film with a Zionist message," or "an atheist muralist to accept a commission celebrating Evangelical zeal," so long as they would make films or murals for other

members of the public with different messages. *Id.*, at 1199. Equally, the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. See Brief for Petitioners 26–27. Countless other **creative** professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. See, *e.g.*, Brief for **Creative** Professionals et al. as *Amici Curiae* 5–10; Brief for First Amendment Scholars as *Amici Curiae* 19–22. As our precedents recognize, the First Amendment tolerates none of that.

*10 [16] [17] In saying this much, we do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts v. United States Jaycees*, 468 U. S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); see also *Hurley*, 515 U. S., at 571–572, 115 S.Ct. 2338. This Court has recognized, too, that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (internal quotation marks omitted); see also, *e.g.*, *Katzenbach v. McClung*, 379 U. S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*).

Over time, governments in this country have expanded public accommodations laws in notable ways too. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. *Dale*, 530 U. S., at 656–657, 120 S.Ct. 2446. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees. See, *e.g.*, *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 S.Ct. 469, 32 L.Ed. 788 (1889); *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14, 14 S.Ct. 1098, 38 L.Ed. 883 (1894). Over time, some States, Colorado included, have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public. Compare 1885 Colo. Sess. Laws pp. 132–133 (a short list of entities originally bound by the State's public accommodations law) with Colo. Rev. Stat. § 24–34–601(1) (currently defining a public accommodation to include "any place of business engaged in any sales to the public").

[18] Importantly, States have also expanded their laws to prohibit more forms of discrimination. Today, for example, approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation.[2] And, as we have recognized, this is entirely "unexceptional." *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1728. States may "protect gay persons, just as [they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment." *Ibid.*; see also *Hurley*, 515 U. S., at 571–572, 115 S.Ct. 2338; 6 F.4th at 1203 (Tymkovich, C. J., dissenting). Consistent with all of this, Ms. Smith herself recognizes that Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses. Reply Brief 15; see Tr. of Oral Arg. 45–46.

*11 [19] [20] [21] At the same time, this Court has also recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech. In *Hurley*, the Court commented favorably on Massachusetts' public accommodations law, but made plain it could not be "applied to expressive activity" to compel speech. 515 U. S. at

571, 578, 115 S.Ct. 2338. In *Dale*, the Court observed that New Jersey's public accommodations law had many lawful applications but held that it could "not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." 530 U.S. at 659, 120 S.Ct. 2446. And, once more, what was true in those **cases** must hold true here. When a state public accommodations law and the Constitution collide, there can be no question which must prevail. U. S. Const., Art. VI, cl. 2.

Nor is it any answer, as the Tenth Circuit seemed to suppose, that Ms. Smith's services are "unique." 6 F.4th at 1180. In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes. In *Hurley*, the veterans had an "enviable" outlet for speech; after all, their parade was a notable and singular event. 515 U. S. at 560, 577–578, 115 S.Ct. 2338. In *Dale*, the Boy Scouts offered what some might consider a unique experience. 530 U.S. at 649–650, 120 S.Ct. 2446. But in both **cases** this Court held that the State could not use its public accommodations statute to deny speakers the right "to choose the content of [their] own message[s]." *Hurley*, 515 U. S., at 573, 115 S.Ct. 2338; see *Dale*, 530 U. S., at 650–656, 120 S.Ct. 2446. Were the rule otherwise, the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government's preferred messages. That would not respect the First Amendment; more nearly, it would spell its demise.

IV

Before us, Colorado appears to distance itself from the Tenth Circuit's reasoning. Now, the State seems to acknowledge that the First Amendment *does* forbid it from coercing Ms. Smith to create websites endorsing same-sex marriage or expressing any other message with which she disagrees. See Brief for Respondents 12 (disclaiming any interest in "interfer[ing] with [Ms. Smith's] choice to offer only websites of [her] own design"); see also Brief for United States as *Amicus Curiae* 19 (conceding that "constitutional concerns" would arise if Colorado "require[d] petitione[r] to design a website" that she "would not create or convey for any client"). Instead, Colorado devotes most of its efforts to advancing an alternative theory for affirmance.

The State's alternative theory runs this way. To comply with Colorado law, the State says, all Ms. Smith must do is repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*. She sells a product to some, the State reasons, so she must sell the same product to all. Brief for Respondents 15, 20. At bottom, Colorado's theory rests on a belief that the Tenth Circuit erred at the outset when it said this **case** implicates pure speech. *Id.*, at 19. Instead, Colorado says, this **case** involves only the sale of an ordinary commercial product and any burden on Ms. Smith's speech is purely "incidental." *Id.*, at 18, 25–28; see Tr. of Oral Arg. 65, 97–98. On the State's telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny. In places, the dissent seems to advance the same line of argument. *Post*, at —— (opinion of SOTOMAYOR, J.).

This alternative theory, however, is difficult to square with the parties' stipulations. As we have seen, the State has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create "customized and tailored" speech for each couple. App. to Pet. for Cert. 181a, 187a. The State has stipulated that "[e]ach website **303 Creative** designs and creates is an original, customized creation for each client." *Id.*, at 181a. The State has stipulated, too, that Ms. Smith's wedding websites "will be expressive in nature, using text, graphics, and in some **cases** videos to celebrate and promote the couple's wedding and unique love story." *Id.*, at 187a. As the **case** comes to us, then, Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond the reach of its powers.

***12** [22] Of course, as the State emphasizes, Ms. Smith offers her speech for pay and does so through **303 Creative** LLC, a company in which she is "the sole member-owner." *Id.*, at 181a; see also *post*, at ——

(opinion of SOTOMAYOR, J.) (emphasizing Ms. Smith's "commercial" activity). But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our **cases** involving everything from movie producers to book publishers to newspapers. See, *e.g.*, *Joseph Burstyn, Inc.*, 343 U. S., at 497–503, 72 S.Ct. 777; *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 114–116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Grosjean v. American Press Co.*, 297 U. S. 233, 240–241, 249, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

[23] [24] Colorado next urges us to focus on the *reason* Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the "protected characteristics" of certain customers. Brief for Respondents 16; see also *post*, at ——— – ———, ——— – ——— (opinion of SOTOMAYOR, J.) (reciting the same argument). But once more, the parties' stipulations speak differently. The parties agree that Ms. Smith "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites" do not violate her beliefs. App. to Pet. for Cert. 184a. That is a condition, the parties acknowledge, Ms. Smith applies to "all customers." *Ibid.* Ms. Smith stresses, too, that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments. See Tr. of Oral Arg. 18–20. Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive. See *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U. S. 449, 468–469, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C. J.) (observing that "a speaker's motivation is entirely irrelevant" (internal quotation marks omitted)); *National Socialist Party of America v. Skokie*, 432 U. S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (*per curiam*) (upholding free-speech rights of participants in a Nazi parade); *Snyder*, 562 U. S., at 456–457, 131 S.Ct. 1207 (same for protestors of a soldier's funeral).[3]

***13** Failing all else, Colorado suggests that this Court's decision in *FAIR* supports affirmance. See also *post*, at ——— – ——— (opinion of SOTOMAYOR, J.) (making the same argument). In *FAIR*, a group of schools challenged a law requiring them, as a condition of accepting federal funds, to permit military recruiters space on campus on equal terms with other potential employers. 547 U. S. at 51–52, 58, 126 S.Ct. 1297. The only expressive activity required of the law schools, the Court found, involved the posting of logistical notices along these lines: " 'The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m.' " *Id.*, at 61–62, 126 S.Ct. 1297. And, the Court reasoned, compelled speech of this sort was "incidental" and a "far cry" from the speech at issue in our "leading First Amendment precedents [that] have established the principle that freedom of speech prohibits the government from telling people what they must say." *Ibid.*; see also *NIFLA*, 585 U. S., at ——, 138 S.Ct. at 2371.

[25] [26] It is a far cry from this **case** too. To be sure, our **cases** have held that the government may sometimes "requir[e] the dissemination of purely factual and uncontroversial information," particularly in the context of "commercial advertising." *Hurley*, 515 U. S., at 573, 115 S.Ct. 2338 (internal quotation marks omitted); see also *NIFLA*, 585 U. S., at ——, 138 S.Ct. at 2373; *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795–796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). But this **case** involves nothing like that. Here, Colorado does not seek to impose an incidental burden on speech. It seeks to force an individual to "utter what is not in [her] mind" about a question of political and religious significance.

Barnette, 319 U. S., at 634, 63 S.Ct. 1178. And that, *FAIR* reaffirmed, is something the First Amendment does not tolerate. No government, *FAIR* recognized, may affect a "speaker's message" by "forc[ing]" her to "accommodate" other views, 547 U.S. at 63, 126 S.Ct. 1297; no government may " 'alter' " the " 'expressive content' " of her message, *id.*, at 63–64, 126 S.Ct. 1297 (alteration omitted); and no government may "interfer[e] with" her "desired message," *id.*, at 64, 126 S.Ct. 1297.

V

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

When the dissent finally gets around to that question—more than halfway into its opinion—it reimagines the facts of this **case** from top to bottom. The dissent claims that Colorado wishes to regulate Ms. Smith's "conduct," not her speech. *Post*, at ——— – ———. Forget Colorado's stipulation that Ms. Smith's activities are "expressive," App. to Pet. for Cert. 181a, and the Tenth Circuit's conclusion that the State seeks to compel "pure speech," 6 F.4th at 1176. The dissent chides us for deciding a pre-enforcement challenge. *Post*, at ——. But it ignores the Tenth Circuit's finding that Ms. Smith faces a credible threat of sanctions unless she conforms her views to the State's. 6 F.4th at 1172–1175. The dissent suggests (over and over again) that any burden on speech here is "incidental." *Post*, at ———, ——— – ———, ——— – ———. All despite the Tenth Circuit's finding that Colorado intends to force Ms. Smith to convey a message she does not believe with the "very purpose" of "[e]liminating ... ideas" that differ from its own. 6 F.4th at 1178.[4]

Nor does the dissent's reimagination end there. It claims that, "for the first time in its history," the Court "grants a business open to the public" a "right to refuse to serve members of a protected class." *Post*, at ———; see also *id.*, at 26, n. 10, 35, 14 S.Ct. 1098. Never mind that we do no such thing and Colorado *itself* has stipulated Ms. Smith will (as CADA requires) "work with all people regardless of ... sexual orientation." App. to Pet. for Cert. 184a. Never mind, too, that it is the dissent that would have this Court do something truly novel by allowing a government to coerce an individual to speak contrary to her beliefs on a significant issue of personal conviction, all in order to eliminate ideas that differ from its own.

***14** There is still more. The dissent asserts that we "sweep under the rug petitioners' challenge to CADA's Communication Clause." *Post*, at 26. This despite the fact the parties and the Tenth Circuit recognized that Ms. Smith's Communication Clause challenge hinges on her Accommodation Clause challenge. (So much so that Colorado devoted less than two pages at the tail end of its brief to the Communication Clause and the Tenth Circuit afforded it just three paragraphs in its free-speech analysis. See Brief for Respondents 44–45; 6 F.4th at 1182–1183.)[5] The dissent even suggests that our decision today is akin to endorsing a "separate but equal" regime that would allow law firms to refuse women admission into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a "White Applicants Only" sign. *Post*, at ———, ——— – ———, —, ——— – ———, ———, and n. 13, ———. Pure fiction all.

In some places, the dissent gets so turned around about the facts that it opens fire on its own position. For instance: While stressing that a Colorado company cannot refuse "the full and equal enjoyment of [its] services" based on a customer's protected status, *post*, at ———, the dissent assures us that a company selling **creative** services "to the public" *does* have a right "to decide what messages to include or not to include," *post*, at ———. But if that is true, what are we even debating?

Instead of addressing the parties' stipulations about the **case** actually before us, the dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment. *Post*, at ——— – ———, ——— – ———, ———. But those **cases** are not *this* **case**. Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this **case** presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve "pure speech." See *supra*, at ———, ———. Nothing the dissent says can alter this—nor can it displace the First Amendment protections that follow.

[27] The dissent's treatment of precedent parallels its handling of the facts. Take its remarkable suggestion that a government forcing an individual to create speech on weighty issues with which she disagrees—all, as the Tenth Circuit found, with the goal of "[e]liminating" views it does not share, 6 F.4th at 1178—only "incidental[ly]" burdens First Amendment liberties. *Post*, at ——— – ———. Far from embracing a notion like that, our **cases** have rejected it time after time—including in the context of public accommodations laws. See Parts II–IV, *supra*; *FAIR*, 547 U. S., at 61–64, 126 S.Ct. 1297 (no government may affect a "speaker's own message" by "forc[ing]" her to "accommodate" views she does not hold); *Hurley*, 515 U. S., at 563, 566, 115 S.Ct. 2338 (using a public accommodations law to compel parade organizers to include speech they did not believe was no mere " 'incidental' " infringement on First Amendment rights); *Dale*, 530 U. S., at 659, 120 S.Ct. 2446 (employing a public accommodations law to require the Boy Scouts to alter their admissions policies had more than "an incidental effect on protected speech").[6]

*15 [28] When it finally gets around to discussing these controlling precedents, the dissent offers a wholly unpersuasive attempt to distinguish them. The First Amendment protections furnished in *Barnette*, *Hurley*, and *Dale*, the dissent declares, were limited to schoolchildren and "nonprofit[s]," and it is "dispiriting" to think they might also apply to Ms. Smith's "commercial" activity. *Post*, at ——— – ———. But our precedents endorse nothing like the limits the dissent would project on them. Instead, as we have seen, the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists, and website designers). See *supra*, at ——— – ———. If anything is truly dispiriting here, it is the dissent's failure to take seriously this Court's enduring commitment to protecting the speech rights of all comers, no matter how controversial—or even repugnant—many may find the message at hand.

Finally, the dissent comes out and says what it really means: Once Ms. Smith offers some speech, Colorado "would require [her] to create and sell speech, notwithstanding [her] sincere objection to doing so"—and the dissent would force her to comply with that demand. *Post*, at ——— – ———. Even as it does so, however, the dissent refuses to acknowledge where its reasoning leads. In a world like that, as Chief Judge Tymkovich highlighted, governments could force "an unwilling Muslim movie director to make a film with a Zionist message," they could compel "an atheist muralist to accept a commission celebrating Evangelical zeal," and they could require a gay website designer to create websites for a group advocating against same-sex marriage, so long as these speakers would accept commissions from the public with different messages. 6 F.4th at 1199 (dissenting opinion). Perhaps the dissent finds these possibilities untroubling because it trusts state governments to coerce only "enlightened" speech. But if that is the calculation, it is a dangerous one indeed.[7]

The dissent is right about one thing—"[w]hat a difference" time can make. See *post*, at ——— (internal quotation marks omitted). Eighty years ago in *Barnette*, this Court affirmed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." 319 U.S. at 642, 63 S.Ct. 1178. The Court did so despite the fact that the speech rights it defended were deeply unpopular; at the time, the world was at war and many

thought respect for the flag and the pledge "essential for the welfare of the state." *Id.*, at 662–663, 63 S.Ct. 1178 (Frankfurter, J., dissenting); see also *id.*, at 636, 640, 63 S.Ct. 1178 (majority opinion). Fifty years ago, this Court protected the right of Nazis to march through a town home to many Holocaust survivors and along the way espouse ideas antithetical to those for which this Nation stands. See *Skokie*, 432 U. S., at 43–44, 97 S.Ct. 2205; *supra*, at ———— . Five years ago, in a **case** the dissenters highlight at the outset of their opinion, the Court stressed that "it is not ... the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1746. And just days ago, Members of today's dissent joined in holding that the First Amendment restricts how States may prosecute stalkers despite the "harm[ful]," "low-value," and "upsetting" nature of their speech. *Counterman* v. *Colorado*, 600 U. S. ——, ——, —— S.Ct. ——, ——. —— L.E.2d —— (2023) (slip op., at 6); *id.*, at ——, —— S.Ct. at —— (SOTOMAYOR, J., concurring in part and concurring in judgment) (slip op., at 5).

*16 [29] Today, however, the dissent abandons what this Court's **cases** have recognized time and time again: A commitment to speech for only *some* messages and *some* persons is no commitment at all. By approving a government's effort to "[e]liminat[e]" disfavored "ideas," 6 F.4th at 1178, today's dissent is emblematic of an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic. But "[i]f liberty means anything at all, it means the right to tell people what they do not want to hear." 6 F.4th at 1190 (Tymkovich, C. J., dissenting) (quoting G. Orwell).

*

[30] [31] In this **case**, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. In the past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment's boundaries by seeking to compel speech they thought vital at the time. But, as this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider "unattractive," *post*, at —— (opinion of SOTOMAYOR, J.), "misguided, or even hurtful," *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338. But tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is

Reversed.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

Five years ago, this Court recognized the "general rule" that religious and philosophical objections to gay marriage "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ——, —— –, 138 S.Ct. 1719, 1727, 201 L.Ed.2d 35 (2018). The Court also recognized the "serious stigma" that would result if "purveyors of goods and services who object to gay marriages for moral and religious reasons" were "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " *Id.*, at ——, 138 S.Ct. at 1728–29.

Commented [ER7]: Dissent

Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. Specifically, the Court holds that the First Amendment exempts a website-design company from a state law that prohibits the company from denying wedding websites to same-sex couples if the company chooses to sell those websites to the public. The Court also holds that the company has a right to post a notice that

says, " 'no [wedding websites] will be sold if they will be used for gay marriages.' " *Ibid.*

"What a difference five years makes." *Carson* v. *Makin*, 596 U. S. ——, ——, 142 S.Ct. 1987, 2014, 213 L.Ed.2d 286 (2022) (SOTOMAYOR, J., dissenting). And not just at the Court. Around the country, there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.

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

I

A

A "public accommodations law" is a law that guarantees to every person the full and equal enjoyment of places of public accommodation without unjust discrimination. The American people, through their elected representatives, have enacted such laws at all levels of government: The federal Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 prohibit discrimination by places of public accommodation on the basis of race, color, religion, national origin, or disability.[1] All but five States have analogous laws that prohibit discrimination on the basis of these and other traits, such as age, sex, sexual orientation, and gender identity.[2] And numerous local laws offer similar protections.

The people of Colorado have adopted the Colorado Anti-Discrimination Act (CADA), which provides:

> "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. § 24–34–601(2)(a).

***18** This provision, known as the Act's "Accommodation Clause," applies to any business engaged in sales "to the public." § 24–34–601(1). The Accommodation Clause does not apply to any "church, synagogue, mosque, or other place that is principally used for religious purposes." *Ibid.*

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

A public accommodations law has two core purposes. First, the law ensures "*equal access* to publicly available goods and services." *Roberts v. United States Jaycees, 468 U.* 468 U.S. 609, 624, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (emphasis added). For social groups that face discrimination, such access is vital. All the more so if the group is small in number or if discrimination against the group is widespread. Equal access is mutually beneficial: Protected persons receive "equally effective and meaningful opportunity to benefit from all aspects of life in America," 135 Cong. Rec. 8506 (1989) (remarks of Sen. Harkin) (Americans with Disabilities Act), and "society," in return, receives "the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U. S., at 625, 104 S.Ct. 3244.

Second, a public accommodations law ensures *equal dignity* in the common market. Indeed, that is the law's "fundamental object": "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' " *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964)). This purpose does not depend on whether goods or services are otherwise available. " 'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.' " 379 U.S. at 292, 85 S.Ct. 348 (Goldberg, J., concurring). When a young Jewish girl and her parents come across a business with a sign out front that says, " 'No dogs or Jews allowed,' "[3] the fact that another business might serve her family does not redress that "stigmatizing injury," *Roberts*, 468 U. S., at 625, 104 S.Ct. 3244. Or, put another way, "the hardship Jackie Robinson suffered when on the road" with his baseball team "was not an inability to find *some hotel* that would have him; it was the indignity of not being allowed to stay in the *same hotel* as his white teammates." J. Oleske, The Evolution of Accommodation, 50 Harv. Civ. Rights-Civ. Lib. L. Rev. 99, 138 (2015).

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

Preventing the "unique evils" caused by "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" is a compelling state interest "of the highest order." *Roberts*, 468 U. S., at 624, 628, 104 S.Ct. 3244; see *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U. S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). Moreover, a law that prohibits only such acts by businesses open to the public is narrowly tailored to achieve that compelling interest. The law "responds precisely to the substantive problem which legitimately concerns the State": the harm from status-based discrimination in the public marketplace. *Roberts*, 468 U. S., at 629, 104 S.Ct. 3244 (internal quotation marks omitted).

This last aspect of a public accommodations law deserves special emphasis: The law regulates only businesses that choose to sell goods or services "to the general public," *e.g.*, Va. Code Ann. § 2.2–3904, or "to the public," *e.g.*, Mich. Comp. Laws § 37.2301. Some public accommodations laws, such as the federal Civil Rights Act, list establishments that qualify, but these establishments are ones open to the public generally. See, *e.g.*, 42 U.S.C. § 2000a(b) (hotels, restaurants, gas stations, movie theaters, concert halls,

sports arenas, stadiums). A public accommodations law does not force anyone to start a business, or to hold out the business's goods or services to the public at large. The law also does not compel any business to sell any particular good or service. But if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination. In particular, the state may ensure that groups historically marked for second-class status are not denied goods or services on equal terms.

The concept of a public accommodation thus embodies a simple, but powerful, social contract: A business that chooses to sell to the public assumes a duty to serve the public without unjust discrimination. J. Singer, No Right To Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283, 1298 (1996) (Singer).

B

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

1

*20 "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U. S. 557, 571, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (quoting *Lane* v. *Cotton*, 12 Mod. 472, 485, 88 Eng. Rep. 1458, 1465 (K. B. 1701) (Holt, C. J.)). "Public employment" meant a business "in which the owner has held himself out as ready to serve the public by exercising his trade." Singer 1307; see, *e.g.*, *Gisbourn* v. *Hurst*, 1 Salk. 249, 91 Eng. Rep. 220 (K. B. 1710). Take, for example, *Lane* v. *Cotton*, "[t]he leading English **case**" on the subject "cited over and over again in the nineteenth century in the United States." Singer 1304. There, Lord Chief Justice Holt explained:

> "[W]here-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him.... If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade." *Lane* v. *Cotton*, 12 Mod., at 484, 88 Eng. Rep., at 1464.

That is to say, a business's duty to serve all comers derived from its choice to hold itself out as ready to serve the public. This holding-out rationale became firmly established in early American law. See 2 J. Kent, Commentaries on American Law 464–465 (1827); J. Story, Commentaries on the Law of Bailments §§ 495, 591 (1832); see also, *e.g.*, *Markham v. Brown*, 8 N.H. 523, 528 (1837); *Jencks v. Coleman*, 13 F.Cas. 442, 443 (No. 7,258) (CC RI 1835) (Story, J.); *Dwight v. Brewster*, 18 Mass. 50, 53 (1822).

The majority is therefore mistaken to suggest that public accommodations or common carriers historically assumed duties to serve all comers because they enjoyed monopolies or otherwise had market power. *Ante*, at ——. Tellingly, the majority cites no common-law **case** espousing the monopoly rationale.[5] That is because nowhere in the relevant **case** law "is monopoly suggested as the distinguishing characteristic." E. Adler, Business Jurisprudence, 28 Harv. L. Rev. 135, 156 (1914) ("A distinction based on monopoly would require proof that the common carrier had some kind of a monopoly which the private carrier did not have, or that 'common' was synonymous with

'monopoly.' The plain meaning of the **cases** is [instead that] the common was the public, the professional, the business carrier or other trader").[6]

2

***21** After the Civil War, some States codified the common-law duty of public accommodations to serve all comers. See M. Konvitz & T. Leskes, A Century of Civil Rights 155–157 (1961). Early state public accommodations statutes prohibited discrimination based on race or color. Yet the principle was at times stated more broadly: to provide "a remedy against any unjust discrimination to the citizen in all public places." *Ferguson v. Gies*, 82 Mich. 358, 365, 46 N.W. 718, 720 (1890). In 1885, Colorado adopted " 'An Act to Protect All Citizens in Their Civil Rights,' which guaranteed 'full and equal enjoyment' of certain public facilities to 'all citizens,' 'regardless of race, color or previous condition of servitude.' " *Masterpiece Cakeshop*, 584 U. S., at ——— – ———, 138 S.Ct. at 1725 (quoting 1885 Colo. Sess. Laws p. 132). "A decade later, the [State] expanded the requirement to apply to 'all other places of public accommodation.' " 584 U. S., at ———, 138 S.Ct. at 1725 (quoting 1895 Colo. Sess. Laws ch. 61, p. 139). Congress, too, passed the Civil Rights Act of 1875, which established "[t]hat all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement ... applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Act of Mar. 1, 1875, § 1, 18 Stat. 336.

This Court, however, struck down the federal Civil Rights Act of 1875 as unconstitutional. *Civil Rights Cases*, 109 U. S. 3, 25, 3 S.Ct. 18, 27 L.Ed. 835 (1883). Southern States repealed public accommodations statutes and replaced them with Jim Crow laws. And state courts construed any remaining right of access in ways that furthered *de jure* and *de facto* racial segregation.[7] Full and equal enjoyment came to mean "separate but equal" enjoyment. The result of this backsliding was "the replacement of a general right of access with a general right to exclude ... in order to promote a racial caste system." Singer 1295.

In time, the civil rights movement of the mid-20th century again demanded racial equality in public places. In 1963, two decades after then–Howard University law student Pauli Murray organized sit-ins at cafeterias in Washington, D. C., a diverse group of students and faculty from Tougaloo College sat at Woolworth's lunch counter in Jackson, Mississippi. For doing so, they were violently attacked by a white mob. See A. Moody, Coming of Age in Mississippi 235–240 (1992). Around the country, similar acts of protest against racial injustice, some big and some small, sought "to create such a crisis and foster such a tension" that the country would be "forced to confront the issue." M. King, Letter from a Birmingham Jail, Apr. 16, 1963. That year, Congress once more set out to eradicate "discrimination ... in places of accommodation and public facilities," *Heart of Atlanta Motel*, 379 U. S., at 246, 85 S.Ct. 348, notwithstanding this Court's previous declaration of a federal public accommodations law to be unconstitutional.

Congress believed, rightly, that discrimination in places of public accommodation—"the injustice of being arbitrarily denied equal access to those facilities and accommodations which are otherwise open to the general public"—had "no place" in this country, the country "of the melting pot, of equal rights, of one nation and one people." S. Rep. No. 872, at 8–9 (quoting President Kennedy, June 19, 1963). It therefore passed Title II of the Civil Rights Act of 1964, which declares: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation ... without discrimination ... on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a. In enacting this landmark civil rights statute, Congress invoked the holding-out rationale from antebellum common law: "one who employed his private property for purposes

of commercial gain by offering goods or services to the public must stick to his bargain." S. Rep. No. 872, at 22; see also *id.*, at 9–10 (endorsing Lord Holt's view in *Lane* v. *Cotton*).

*22 This bargain, America would soon realize, had long excluded half of society. Women, though having won the right to vote half a century earlier, were not equal in public. Instead, a "separate-spheres ideology" had "assigned women to the home and men to the market." E. Sepper & D. Dinner, Sex in Public, 129 Yale L. J. 78, 83, 88–90 (2019) (Sepper & Dinner). Women were excluded from restaurants, bars, civic and professional organizations, financial institutions, and sports. "Just as it did for the civil rights struggle, public accommodations served as kindling for feminist mobilization." *Id.*, at 83, 97–104; cf. S. Mayeri, Reasoning From Race: Feminism, Law, and the Civil Rights Revolution 9–40 (2011). In response to a movement for women's liberation, numerous States banned discrimination in public accommodations on the basis of "sex." See Sepper & Dinner 104, nn. 145–147 (collecting statutes). Colorado was the first State to do so. See 1969 Colo. Sess. Laws ch. 74, p. 200.

In the decades that followed, the Nation opened its eyes to another injustice. People with disabilities, though inherently full and equal members of the public, had been excluded from many areas of public life. This exclusion worked harms not only to disabled people's standards of living, but to their dignity too. So Congress, responding once again to a social movement, this time against the subordination of people with disabilities, banned discrimination on that basis and secured by law disabled people's equal access to public spaces. See S. Bagenstos, Law and the Contradictions of the Disability Rights Movement 13–20 (2009); R. Colker, The Disability Pendulum 22–68 (2005). The centerpiece of this political and social action was the Americans with Disabilities Act of 1990 (ADA). Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a).

Not only have public accommodations laws expanded to recognize more forms of unjust discrimination, such as discrimination based on race, sex, and disability, such laws have also expanded to include more goods and services as "public accommodations." What began with common inns, carriers, and smiths has grown to include restaurants, bars, movie theaters, sports arenas, retail stores, salons, gyms, hospitals, funeral homes, and transportation networks. See nn. 1–2, *supra*; L. Lerman & A. Sanderson, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N. Y. U. Rev. L. & Soc. Change 215, 217 (1978) (" 'Public accommodations' is a term of art which was developed by the drafters of discrimination laws to refer to [public] places other than schools, work places, and homes"). Today, laws like Colorado's cover "any place of business engaged in any sales to the public and any place offering services ... to the public." Colo. Rev. Stat. § 24–34–601(1); see also, *e.g.*, Ohio Rev. Code Ann. § 4112.01(9). Numerous other States extend such protections to businesses offering goods or services to "the general public." Ariz. Rev. Stat. Ann. § 41–1441(2); see also, *e.g.*, Mass. Gen. Laws, ch. 272, § 92A.

This broader scope, though more inclusive than earlier state public accommodations laws, is in keeping with the fundamental principle—rooted in the common law, but alive and blossoming in statutory law—that the duty to serve without unjust discrimination is owed to everyone, and it extends to any business that holds itself out as ready to serve the public. If you have ever taken advantage of a public business without being denied service because of who you are, then you have come to enjoy the dignity and freedom that this principle protects.

3

Lesbian, gay, bisexual, and transgender (LGBT) people, no less than anyone else, deserve that dignity

and freedom. The movement for LGBT rights, and the resulting expansion of state and local laws to secure gender and sexual minorities' full and equal enjoyment of publicly available goods and services, is the latest chapter of this great American story.

*23 LGBT people have existed for all of human history. And as sure as they have existed, others have sought to deny their existence, and to exclude them from public life. Those who would subordinate LGBT people have often done so with the backing of law. For most of American history, there were laws criminalizing same-sex intimacy. *Obergefell v. Hodges*, 576 U. S. 644, 660–661, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). "Gays and lesbians were [also] prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Id.*, at 661, 135 S.Ct. 2584. "These policies worked to create and reinforce the belief that gay men and lesbians" constituted "an inferior class." Brief for Organization of American Historians as *Amicus Curiae* in *Obergefell v. Hodges*, O. T. 2014, No. 14556, p. 3.

State-sponsored discrimination was compounded by discrimination in public accommodations, though the two often went hand in hand. The police raided bars looking for gays and lesbians so often that some bars put up signs saying, " 'We Do Not Serve Homosexuals.' " *Id.*, at 13 (quoting G. Chauncey, Why Marriage 8 (2004)). LGBT discrimination in public accommodations has continued well into the 21st century. See UCLA School of Law Williams Institute, C. Mallory & B. Sears, Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity (2016).

A social system of discrimination created an environment in which LGBT people were unsafe. Who could forget the brutal murder of Matthew Shepard? Matthew was targeted by two men, tortured, tied to a buck fence, and left to die for who he was. See K. Drake, Gay Man Beaten, Burned and Left Tied to Fence, Casper Star-Tribune, Oct. 10, 1998, p. A1. Or the Pulse nightclub massacre, the second-deadliest mass shooting in U. S. history? See S. Stolberg, For Gays Across America, a Massacre Punctuates Fitful Gains, N. Y. Times, June 13, 2016, p. A1. Rates of violent victimization are still significantly higher for LGBT people, with transgender persons particularly vulnerable to attack. See Dept. of Justice, J. Truman & R. Morgan, Violent Victimization by Sexual Orientation and Gender Identity, 2017–2020 (2022).

Determined not to live as "social outcasts," *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1727, LGBT people have risen up. The social movement for LGBT rights has been long and complex. See L. Faderman, The Gay Revolution (2015) (Faderman). But if there ever was an "earthquake," it occurred in the final days of June in 1969 at the Stonewall Inn in Greenwich Village. *Id.*, at 169. The Stonewall Inn was a gay bar with a "varied and lively clientele." *Id.*, at 171. Its " 'unruly' element" made it "an especially inviting target" for police raids. J. D'Emilio, Sexual Politics, Sexual Communities 231 (1983) (D'Emilio). "Patrons of the Stonewall tended to be young and nonwhite. Many were drag queens...." *Ibid.* Just before midnight on June 27, the New York police's Public Morals Squad showed up to the bar and started making arrests. Drag queens, for example, were arrested for offenses like being "disguised" in "unnatural attire." N. Y. Penal Law Ann. § 240.35(4) (West 1967).

What started out as a fairly routine police raid, however, became anything but. Outside the Stonewall Inn, patrons who had been thrown out started to form a crowd. "Jeers and catcalls arose from the onlookers when a paddy wagon departed with the bartender, the Stonewall's bouncer, and three drag queens." D'Emilio 231. "A few minutes later, an officer attempted to steer the last of the patrons, a lesbian, through the bystanders to a nearby patrol car." *Id.*, at 231–232. When she started to struggle, protests erupted. They lasted into the night and continued into the next. News of the Stonewall protests "spread rapidly," and "within a year gay liberation groups had sprung into existence on college campuses and in cities around the nation." *Id.*, at 233. From there, the path to LGBT rights has not been quick or easy. Nor is it over. Still, change has

come: change in social attitudes, in representation, and in legal institutions. Faderman 535–629.

*24 One significant change has been the addition of sexual orientation and gender identity to public accommodations laws. State and local legislatures took note of the failure of such laws to protect LGBT people and, in response, acted to guarantee them "all the privileges ... of any other member of society." Hearings on S. B. 200 before the House Judiciary Committee, 66th Gen. Assem., 2d Reg. Sess., 4, 11–12 (Colo. 2008) (remarks of Sen. Judd). Colorado thus amended its antidiscrimination law in 2008 to prohibit the denial of publicly available goods or services on the basis of "sexual orientation." 2008 Colo. Sess. Laws. ch. 341, pp. 1596–1597. About half of the States now provide such protections.[8] It is " 'unexceptional' " that they may do so. *Ante*, at —— (quoting *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1728). "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U. S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). LGBT people do not seek any special treatment. All they seek is to exist in public. To inhabit public spaces on the same terms and conditions as everyone else.

C

Yet for as long as public accommodations laws have been around, businesses have sought exemptions from them. The civil rights and women's liberation eras are prominent examples of this. Backlashes to race and sex equality gave rise to legal claims of rights to discriminate, including claims based on First Amendment freedoms of expression and association. This Court was unwavering in its rejection of those claims, as invidious discrimination "has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U. S. 455, 470, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). In particular, the refusal to deal with or to serve a class of people is not an expressive interest protected by the First Amendment.

1

Opponents of the Civil Rights Act of 1964 objected that the law would force business owners to defy their beliefs. Cf. *ante*, at ——. They argued that the Act would deny them "any freedom to speak or to act on the basis of their religious convictions or their deep-rooted preferences for associating or not associating with certain classifications of people." 110 Cong. Rec. 7778 (1964) (remarks of Sen. Tower). Congress rejected those arguments. Title II of the Act, in particular, did not invade "rights of privacy [or] of free association," Congress concluded, because the establishments covered by the law were "those regularly held open to the public in general." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 9 (1963); see also S. Rep. No. 872, at 92.

Having failed to persuade Congress, opponents of Title II turned to the federal courts. In *Heart of Atlanta Motel*, one of several arguments made by the plaintiff motel owner was that Title II violated his Fifth Amendment due process rights by "tak[ing] away the personal liberty of an individual to run his business as he sees fit with respect to the selection and service of his customers." Brief for Appellant, O. T. 1964, No. 515, p. 32. This Court disagreed, based on "a long line of **cases**" holding that "prohibition of racial discrimination in public accommodations" did not "interfer[e] with personal liberty." 379 U.S. at 260, 85 S.Ct. 348.

In *Katzenbach v. McClung*, 379 U. S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964), the owner of Ollie's Barbecue (Ollie McClung) likewise argued that Title II's application to his business violated the "personal rights of persons in their personal convictions" to deny services to Black people. Brief for Appellees, O. T. 1964, No. 543, p. 33 (citing, *inter alia*, *West*

Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)). Note that McClung did not refuse to *transact* with Black people. Oh, no. He was willing to offer them take-out service at a separate counter. See Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* in *Katzenbach* v. *McClung*, p. 4, n. 5. Only integrated table service, you see, violated McClung's core beliefs. So he claimed a constitutional right to offer Black people a limited menu of his services. This Court rejected that claim, citing its decision in *Heart of Atlanta Motel*. See 379 U. S. at 298, n. 1, 85 S.Ct. 377.

***25** Next is *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*), in which the owner of a chain of drive-in establishments asserted that requiring him to "contribut[e]" to racial integration in any way violated the First Amendment by interfering with his religious liberty. App. to Pet. for Cert., O. T. 1967, No. 339, p. 21a. Title II could not be applied to his business, he argued, because that would " 'controven[e] the will of God.' " 390 U. S. at 402–403, n. 5, 88 S.Ct. 964. The Court found this argument "patently frivolous." *Ibid.*

Last but not least is *Runyon v. McCrary*, 427 U. S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), a **case** the majority studiously avoids. In *Runyon*, the Court confronted the question whether "commercially operated" schools had a First Amendment right to exclude Black children, notwithstanding a federal law against racial discrimination in contracting. *Id.*, at 168, 96 S.Ct. 2586; see 42 U.S.C. § 1981. The schools in question offered "educational services" for sale to "the general public." 427 U.S. at 172, 96 S.Ct. 2586. They argued that the law, as applied to them, violated their First Amendment rights of "freedom of speech, and association." Pet. for Cert., O. T. 1976, No. 7562, p. 6; see also Brief for Petitioners, O. T. 1976, No. 7562, p. 12 ("Freedom to teach, to express ideas"). The Court, however, reasoned that the schools' "*practice*" of denying educational services to racial minorities was not shielded by the First Amendment, for two reasons: First, "the Constitution places no value on discrimination." 427 U.S. at 176, 96 S.Ct. 2586 (alterations and internal quotations marks omitted). Second, the government's regulation of conduct did not "inhibit" the schools' ability to teach its preferred "ideas or dogma." *Ibid.* (internal quotation marks omitted). Requiring the schools to abide by an antidiscrimination law was not the same thing as compelling the schools to express teachings contrary to their sincerely held "belief that racial segregation is desirable." *Ibid.*

2

First Amendment rights of expression and association were also raised to challenge laws against sex discrimination. In *Roberts* v. *United States Jaycees*, the United States Jaycees sought an exemption from a Minnesota law that forbids discrimination on the basis of sex in public accommodations. The U. S. Jaycees was a civic organization, which until then had denied admission to women. The organization alleged that applying the law to require it to include women would violate its "members' constitutional rights of free speech and association." 468 U.S. at 615, 104 S.Ct. 3244. "The power of the state to change the membership of an organization is inevitably the power to *change the way in which it speaks*," the Jaycees argued. Brief for Appellee, O. T. 1983, No. 83–724, p. 19 (emphasis added). Thus, "the right of the Jaycees to decide its own membership" was "inseparable," in its view, "from its ability to freely express itself." *Ibid.*

This Court took a different view. The Court held that the "application of the Minnesota statute to compel the Jaycees to accept women" did not infringe the organization's First Amendment "freedom of expressive association." *Roberts*, 468 U. S., at 622, 104 S.Ct. 3244. That was so because the State's public accommodations law did "not aim at the suppression of speech" and did "not distinguish between prohibited and permitted activity on the basis of viewpoint." *Id.*, at 623–624, 104 S.Ct. 3244. If the State had applied

the law "for the *purpose* of hampering the organization's ability to express its views," that would be a different matter. *Id.*, at 624, 104 S.Ct. 3244 (emphasis added). "Instead," the law's purpose was "eliminating discrimination and assuring [the State's] citizens equal access to publicly available goods and services." *Ibid.* "That goal," the Court reasoned, "was unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Ibid.*

***26** Justice O'Connor concurred in part and concurred in the judgment. See *id.*, at 631, 104 S.Ct. 3244. She stressed that the U. S. Jaycees was a predominantly commercial entity open to the public. And she took the view that there was a First Amendment "dichotomy" between rights of commercial and expressive association. *Id.*, at 634, 104 S.Ct. 3244. The State, for example, was "free to impose any rational regulation" on commercial transactions themselves. "A shopkeeper," Justice O'Connor explained, "has no constitutional right to deal only with persons of one sex." *Ibid.*

To wit, the Court had just decided in *Hishon v. King & Spalding*, 467 U. S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), that a law partnership had no constitutional right to discriminate on the basis of sex in violation of Title VII. The law partnership was an act of association. Its services (legal advocacy) were expressive; indeed, they consisted of speech. So the law firm argued that requiring it to consider a woman for the partnership violated its First Amendment rights "of free expression" and "of commercial association." Brief for Respondent, O. T. 1983, No. 82–940, pp. 14–18. This Court rejected that argument. The application of Title VII did not "infringe constitutional rights of expression or association," the Court held, because compliance with Title VII did not "inhibi[t]" the partnership's ability to advocate for certain "ideas and beliefs." 467 U.S. at 78, 104 S.Ct. 2229 (internal quotation marks omitted); see also *supra*, at —— (discussing *Runyon*, 427 U. S., at 176, 96 S.Ct. 2586). The Court reiterated: " '[I]nvidious private discrimination ... has never been accorded affirmative constitutional protections.' " 467 U.S. at 78, 104 S.Ct. 2229 (quoting *Norwood*, 413 U. S., at 470, 93 S.Ct. 2804).

II

Battling discrimination is like "battling the Hydra." *Shelby County v. Holder*, 570 U. S. 529, 560, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting). Whenever you defeat "one form of ... discrimination," another "spr[ings] up in its place." *Ibid.* Time and again, businesses and other commercial entities have claimed constitutional rights to discriminate. And time and again, this Court has courageously stood up to those claims—until today. Today, the Court shrinks. A business claims that it would like to sell wedding websites to the general public, yet deny those same websites to gay and lesbian couples. Under state law, the business is free to include, or not to include, any lawful message it wants in its wedding websites. The only thing the business may not do is deny whatever websites it offers on the basis of sexual orientation. This Court, however, grants the business a broad exemption from state law and allows the business to post a notice that says: Wedding websites will be refused to gays and lesbians. The Court's decision, which conflates denial of service and protected expression, is a grave error.

A

303 Creative LLC is a limited liability company that sells graphic and website designs for profit. Lorie Smith is the company's founder and sole member-owner. Smith believes same-sex marriages are "false," because " 'God's true story of marriage' " is a story of a " 'union between one man and one woman.' " Brief for Petitioners 4, 6–7 (quoting App. to Pet. for Cert. 188a, 189a); Tr. of Oral Arg. 36, 40–41. Same-sex marriage, according to her, "violates God's will" and "harms society and children." App. to Pet. for Cert. 186a.

303 Creative has never sold wedding websites. Smith now believes, however, that "God is calling her 'to explain His true story about marriage.' " Brief for Petitioners 7 (quoting App. to Pet. for Cert. 188a). For that reason, she says, she wants her for-profit company to enter the wedding website business. There is only one thing: Smith would like her company to sell wedding websites "to the public," App. to Pet. for Cert. 189a; Colo. Rev. Stat. § 24–34–601(1), but not to same-sex couples. She also wants to post a notice on the company's website announcing this intent to discriminate. App. to Pet. for Cert. 188a–189a. In Smith's view, "it would violate [her] sincerely held religious beliefs to create a wedding website for a same-sex wedding because, by doing so, [she] would be expressing a message celebrating and promoting a conception of marriage that [she] believe[s] is contrary to God's design." *Id.*, at 189a.

*27 Again, Smith's company has never sold a wedding website to any customer. Colorado, therefore, has never had to enforce its antidiscrimination laws against the company. As the majority puts it, however, Smith "worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman." *Ante*, at ——. So Smith and her company, the petitioners here, sued the State in federal court. They sought a court decree giving them a special exemption from CADA's Accommodation Clause (which, remember, makes it unlawful for a business to hold itself out to the public yet deny to any individual, because of sexual orientation, the full and equal enjoyment of the business's goods or services, see *supra*, at —— – ——) and CADA's Communication Clause (which makes it unlawful to advertise that goods or services will be denied because of sexual orientation, see *supra*, at ——). App. **303**–304.

The breadth of petitioners' pre-enforcement challenge is astounding. According to Smith, the Free Speech Clause of the First Amendment entitles her company to refuse to sell *any* "websites for same-sex weddings," even though the company plans to offer wedding websites to the general public. *Ibid.*; see also Brief for Petitioners 22–23, and n. 2; Tr. of Oral Arg. 37–38. In other words, the company claims a categorical exemption from a public accommodations law simply because the company sells expressive services. The sweeping nature of this claim should have led this Court to reject it.

B

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

I

This Court has long held that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (*FAIR*). This principle explains "why an ordinance against outdoor fires might forbid burning a flag and why antitrust laws can prohibit agreements in restraint of trade." *Sorrell*, 564 U. S., at 567, 131 S.Ct. 2653 (citation and internal quotation marks omitted).

Consider *United States v. O'Brien*, 391 U. S., 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In that **case**, the Court upheld the application of a law against the destruction of draft cards to a defendant who had burned his draft card to protest the Vietnam War. The protester's conduct was indisputably expressive. Indeed, it was political expression, which lies at the heart of the First Amendment. *Whitney v. California*, 274 U. S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Yet the *O'Brien* Court focused on whether the Government's interest in regulating the conduct was to burden expression. Because it was not, the regulation was subject to lesser constitutional scrutiny. 391 U. S., at 376–377, 381–382, 88 S.Ct. 1673; *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 294, 299, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). The *O'Brien* standard is satisfied if a regulation is unrelated to the suppression of expression and " 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *FAIR*, 547 U. S., at 67, 126 S.Ct. 1297 (quoting *United States v. Albertini*, 472 U. S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)).[9]

***28** *FAIR* confronted the interaction between this principle and an equal-access law. The law at issue was the Solomon Amendment, which prohibits an institution of higher education in receipt of federal funding from denying a military recruiter "the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access." 547 U.S. at 55, 126 S.Ct. 1297; see 10 U.S.C. § 983(b). A group of law schools challenged the Solomon Amendment based on their sincere objection to the military's "Don't Ask, Don't Tell" policy. For those who are too young to know, "Don't Ask, Don't Tell" was a homophobic policy that barred openly LGBT people from serving in the military. LGBT people could serve only if they kept their identities secret. The idea was that their open existence was a threat to the military.

The law schools in *FAIR* claimed that the Solomon Amendment infringed the schools' First Amendment freedom of speech. The schools provided recruiting assistance in the form of emails, notices on bulletin boards, and flyers. 547 U. S., at 60–61, 126 S.Ct. 1297. As the Court acknowledged, those services "clearly involve speech." *Id.*, at 60, 126 S.Ct. 1297. And the Solomon Amendment required "schools offering such services to other recruiters" to provide them equally "on behalf of the military," even if the school deeply objected to creating such speech. *Id.*, at 61, 126 S.Ct. 1297. But that did not transform the equal provision of services into "compelled speech" of the kind barred by the First Amendment, because the school's speech was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.*, at 62, 126 S.Ct. 1297. Thus, any speech compulsion was "plainly incidental to the Solomon Amendment's regulation of conduct." *Ibid.*

2

The same principle resolves this **case**. The majority tries to sweep under the rug petitioners' challenge to CADA's Communication Clause, so I will start with it. Recall that Smith wants to post a notice on her company's homepage that the company will refuse to sell any website for a same-sex couple's wedding. This Court, however, has already said that "a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." *Sorrell*, 564 U. S., at 567, 131 S.Ct. 2653 (quoting *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297; some internal quotation marks omitted); see *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 389, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). So petitioners concede that they are not entitled to an exemption from the Communication Clause unless they are also entitled to an exemption from the Accommodation Clause. Brief for Petitioners 34–35. That concession is all but fatal to their argument, because it shows that even "pure speech" may be burdened incident to a valid regulation of conduct.[10]

CADA's Accommodation Clause and its application here are valid regulations of conduct. It is well settled that a public accommodations law like the Accommodation Clause does not "target speech or discriminate on the basis of its content." *Hurley*, 515 U. S., at 572, 115 S.Ct. 2338. Rather, "the focal point of its prohibition" is "on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Ibid.* (emphasis added). The State confirms this reading of CADA. The law applies only to status-based refusals to provide the full and equal enjoyment of whatever services petitioners choose to sell to the public. See Brief for Respondents 15–18.

***29** Crucially, the law "does not dictate the content of speech at all, which is only 'compelled' if, and to the extent," the company offers "such speech" to other customers. *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297. Colorado does not require the company to "speak [the State's] preferred message." *Ante*, at ——. Nor does it prohibit the company from speaking the company's preferred message. The company could, for example, offer only wedding websites with biblical quotations describing marriage as between one man and one woman. Brief for Respondents 15. (Just as it could offer only t-shirts with such quotations.) The company could also refuse to include the words "Love is Love" if it would not provide those words to any customer. All the company has to do is offer its services without regard to customers' protected characteristics. *Id.*, at 15–16. Any effect on the company's speech is therefore "incidental" to the State's content-neutral regulation of conduct. *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297; see *Hurley*, 515 U. S., at 572–573, 115 S.Ct. 2338.

Once these features of the law are understood, it becomes clear that petitioners' freedom of speech is not abridged in any meaningful sense, factual or legal. Petitioners remain free to advocate the idea that same-sex marriage betrays God's laws. *FAIR*, 547 U. S., at 60, 126 S.Ct. 1297; *Hishon*, 467 U. S., at 78, 104 S.Ct. 2229; *Runyon*, 427 U. S., at 176, 96 S.Ct. 2586. Even if Smith believes God is calling her to do so through her for-profit company, the company need not hold out its goods or services to the public at large. Many filmmakers, visual artists, and writers never do. (That is why the law does not require Steven Spielberg or Banksy to make films or art for anyone who asks. But cf. *ante*, at ——, —— – ——.) Finally, and most importantly, even if the company offers its goods or services to the public, it remains free under state law to decide what messages to include or not to include. To repeat (because it escapes the majority): The company can put whatever "harmful" or "low-value" speech it wants on its websites. It can "tell people what they do not want to hear." *Ante*, at —— (internal quotation marks and brackets omitted). All the company may not do is offer wedding websites to the public yet refuse those same websites to gay and lesbian couples. See *Runyon*, 427 U. S., at 176, 96 S.Ct. 2586 (distinguishing between schools' ability to express their bigoted view "that racial segregation is desirable" and the schools' proscribable "*practice* of excluding racial minorities").

Another example might help to illustrate the point. A professional photographer is generally free to choose her subjects. She can make a living taking photos of flowers or celebrities. The State does not regulate that choice. If the photographer opens a portrait photography business to the public, however, the business may not deny to any person, because of race, sex, national origin, or other protected characteristic, the full and equal enjoyment of whatever services the business chooses to offer. That is so even though portrait photography services are customized and expressive. If the business offers school photos, it may not deny those services to multiracial children because the owner does not want to create any speech indicating that interracial couples are acceptable. If the business offers corporate headshots, it may not deny those services to women because the owner believes a woman's place is in the home. And if the business offers passport photos, it may not deny those services to Mexican Americans because the owner opposes immigration from Mexico.

The same is true for sexual-orientation discrimination. If a photographer opens a photo booth outside of city hall and offers to sell newlywed photos captioned with the words "Just Married," she may not refuse to sell that

service to a newlywed gay or lesbian couple, even if she believes the couple is not, in fact, just married because in her view their marriage is "false." Tr. of Oral Arg. 36, 40–41.

3

***30** Because any burden on petitioners' speech is incidental to CADA's neutral regulation of commercial conduct, the regulation is subject to the standard set forth in *O'Brien*. That standard is easily satisfied here because the law's application "promotes a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*, 547 U. S., at 67, 126 S.Ct. 1297 (internal quotation marks omitted). Indeed, this Court has already held that the State's goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is "unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Roberts*, 468 U. S., at 624, 104 S.Ct. 3244. The Court has also held that by prohibiting only "*acts* of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages," the law "responds precisely to the substantive problem which legitimately concerns the State and abridges no more speech ... than is necessary to accomplish that purpose." *Id.*, at 628–629, 104 S.Ct. 3244 (emphasis added; internal quotation marks omitted); see *supra*, at ——— – ———.

C

The Court reaches the wrong answer in this case because it asks the wrong questions. The question is not whether the company's products include "elements of speech." *FAIR*, 547 U. S., at 61, 126 S.Ct. 1297. (They do.) The question is not even whether CADA would require the company to create and sell speech, notwithstanding the owner's sincere objection to doing so, if the company chooses to offer "such speech" to the public. *Id.*, at 62, 126 S.Ct. 1297 . (It would.) These questions do not resolve the First Amendment inquiry any more than they did in *FAIR*. Instead, the proper focus is on the character of state action and its relationship to expression. Because Colorado seeks to apply CADA only to the refusal to provide same-sex couples the full and equal enjoyment of the company's publicly available services, so that the company's speech "is only 'compelled' if, and to the extent," the company chooses to offer "such speech" to the public, any burden on speech is "plainly incidental" to a content-neutral regulation of conduct. *Ibid.*

The majority attempts to distinguish this clear holding of *FAIR* by suggesting that the compelled speech in *FAIR* was "incidental" because it was "logistical" (*e.g.*, "The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."). *Ante*, at —— (internal quotation marks omitted). This attempt fails twice over. First, the law schools in *FAIR* alleged that the Solomon Amendment required them to create and disseminate speech propagating the military's message, which they deeply objected to, and to include military speakers in on- and off-campus forums (if the schools provided equally favorable services to other recruiters). 547 U.S. at 60–61, 126 S.Ct. 1297; App. 27 and Brief for Respondents 5–8 in *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, O. T. 2005, No. 04–1152. The majority simply skips over the Court's key reasoning for why any speech compulsion was nevertheless "incidental" to the Amendment's regulation of conduct: It would occur only "if, and to the extent," the regulated entity provided "such speech" to others. *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297. Likewise in *O'Brien*, the reason the burden on O'Brien's expression was incidental was not because his message was factual or uncontroversial. But cf. *ante*, at ——. O'Brien burned his draft card to send a political message, and the burden on his expression was substantial. Still, the burden was "incidental" because it was ancillary to a regulation that did not aim at expression. 391 U.S. at 377, 88 S.Ct. 1673.

Second, the majority completely ignores the categorical nature of the exemption claimed by

petitioners. Petitioners maintain, as they have throughout this litigation, that they will refuse to create *any* wedding website for a same-sex couple. Even an announcement of the time and place of a wedding (similar to the majority's example from *FAIR*) abridges petitioners' freedom of speech, they claim, because "the announcement of the wedding itself is a concept that [Smith] believes to be false." Tr. of Oral Arg. 41. Indeed, petitioners here concede that if a same-sex couple came across an opposite-sex wedding website created by the company and requested an identical website, with only the names and date of the wedding changed, petitioners would refuse. *Id.*, at 37–38.[11] That is status-based discrimination, plain and simple.

***31** Oblivious to this fact, the majority insists that petitioners discriminate based on message, not status. The company, says the majority, will not sell same-sex wedding websites to anyone. *Ante*, at ——. It will sell only opposite-sex wedding websites; that is its service. Petitioners, however, "cannot define their service as 'opposite-sex wedding [websites]' any more than a hotel can recast its services as 'whites-only lodgings.' " *Telescope Media Group v. Lucero*, 936 F.3d 740, 769 (CA8 2019) (Kelly, J., concurring in part and dissenting in part). To allow a business open to the public to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws. It would mean that a large retail store could sell "passport photos for white people."

The majority protests that Smith will gladly sell her goods and services to anyone, including same-sex *couples*. *Ante*, at ——, ——. She just will not sell websites for same-sex *weddings*. Apparently, a gay or lesbian couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing.[12] I suppose the Heart of Atlanta Motel could have argued that Black people may still rent rooms for their white friends. Smith answers that she will sell other websites for gay or lesbian clients. But then she, like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu.[13] This is plain to see, for all who do not look the other way.

The majority, however, analogizes this **case** to *Hurley* and *Boy Scouts of America v. Dale*, 530 U. S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). The law schools in *FAIR* likewise relied on *Hurley* and *Dale* to argue that the Solomon Amendment violated their free-speech rights. *FAIR* confirmed, however, that a neutral regulation of conduct imposes an incidental burden on speech when the regulation grants a right of equal access that requires the regulated party to provide speech only if, and to the extent, it provides such speech for others. *Supra*, at ——–——, ——–——.

Hurley and *Dale*, by contrast, involved "peculiar" applications of public accommodations laws, not to "the act of discriminating ... in the provision of publicly available goods" by "clearly commercial entities," but rather to private, nonprofit expressive associations in ways that directly burdened speech. *Hurley*, 515 U. S., at 572, 115 S.Ct. 2338 (private parade); *Dale*, 530 U. S., at 657, 120 S.Ct. 2446 (Boy Scouts). The Court in *Hurley* and *Dale* stressed that the speech burdens in those **cases** were not incidental to prohibitions on status-based discrimination because the associations did not assert that "mere acceptance of a member from a particular group would impair [the association's] message." *Dale*, 530 U. S., at 653, 120 S.Ct. 2446; see also *ibid.* (reasoning that Dale was excluded for being a gay rights activist, not for being gay); *ibid.* (explaining that in *Hurley*, "the parade organizers did not wish to exclude the GLIB [Irish-American gay, lesbian, and bisexual group] members because of their sexual orientations, but because they wanted to march behind a GLIB banner"); *Hurley*, 515 U. S., at 572–573, 115 S.Ct. 2338.

***32** Here, the opposite is true. **303 Creative** LLC is a "clearly commercial entit[y]." *Dale*, 530 U. S., at 657, 120 S.Ct. 2446. The company comes under the regulation of CADA only if it sells services to the public, and only if it denies the equal enjoyment of such

services because of sexual orientation. The State confirms that the company is free to include or not to include any message in whatever services it chooses to offer. *Supra*, at ——— – ———. And the company confirms that it plans to engage in status-based discrimination. *Supra*, at ——— – ———, ——— – ———. Therefore, any burden on the company's expression is incidental to the State's content-neutral regulation of commercial conduct.

Frustrated by this inescapable logic, the majority dials up the rhetoric, asserting that "Colorado seeks to compel [the company's] speech in order to excise certain ideas or viewpoints from the public dialogue." The State's "very purpose in seeking to apply its law," in the majority's view, is "the coercive elimination of dissenting ideas about marriage." *Ante*, at ——— – ——— (internal quotation marks and brackets omitted).[14] That is an astonishing view of the law. It is contrary to the fact that a law requiring public-facing businesses to accept all comers "is textbook viewpoint neutral," *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 561 U. S. 661, 695, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010); contrary to the fact that the Accommodation Clause and the State's application of it here allows Smith to include in her company's goods and services whatever "dissenting views about marriage" she wants; and contrary to this Court's clear holdings that the purpose of a public accommodations law, as applied to the commercial act of discrimination in the sale of publicly available goods and services, is to ensure equal access to and equal dignity in the public marketplace, *supra*, at ——— – ——— –.

So it is dispiriting to read the majority suggest that this **case** resembles *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). A content-neutral equal-access policy is "a far cry" from a mandate to "endorse" a pledge chosen by the Government. *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297. This Court has said "it trivializes the freedom protected in *Barnette*" to equate the two. *Ibid.* Requiring Smith's company to abide by a law against invidious discrimination in commercial sales to the public does not conscript her into espousing the government's message. It does not "invad[e]" her "sphere of intellect" or violate her constitutional "right to differ." *Ante*, at ———, ——— (internal quotation marks omitted). All it does is require her to stick to her bargain: "The owner who hangs a shingle and offers her services to the public cannot retreat from the promise of open service; to do so is to offer the public marked money. It is to convey the promise of a free and open society and then take the prize away from the despised few." J. Singer, We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom, 95 B. U. L. Rev. 929, 949 (2015).

III

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

***33** "The truth is," these "affronts and denials" "are intensely human and personal." S. Rep. No. 872, at 15 (internal quotation marks omitted). Sometimes they may "harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity." *Ibid.* To see how, imagine a same-sex couple browses the public market with their child. The market could be online or in a shopping mall. Some stores sell products that are customized and expressive. The family sees a notice announcing that services will be refused for same-sex weddings. What message does that send? It sends the message that we live in a society

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

This **case** cannot be understood outside of the context in which it arises. In that context, the outcome is even more distressing. The LGBT rights movement has made historic strides, and I am proud of the role this Court recently played in that history. Today, however, we are taking steps backward. A slew of anti-LGBT laws have been passed in some parts of the country,[15] raising the specter of a "bare ... desire to harm a politically unpopular group." *Romer*, 517 U. S., at 634, 116 S.Ct. 1620 (internal quotation marks omitted). This is especially unnerving when "for centuries there have been powerful voices to condemn" this small minority. *Lawrence v. Texas*, 539 U. S. 558, 571, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). In this pivotal moment, the Court had an opportunity to reaffirm its commitment to equality on behalf of all members of society, including LGBT people. It does not do so.

Although the consequences of today's decision might be most pressing for the LGBT community, the decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services. A website designer could equally refuse to create a wedding website for an interracial couple, for example. How quickly we forget that opposition to interracial marriage was often because " 'Almighty God ... did not intend for the races to mix.' " *Loving v. Virginia*, 388 U. S. 1, 3, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Yet the reason for discrimination need not even be religious, as this **case** arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for "traditional" families. And so on.[16]

Wedding websites, birth announcements, family portraits, epitaphs. These are not just words and images. They are the most profound moments in a human's life. They are the moments that give that life personal and cultural meaning. You already heard the story of Bob and Jack, the elderly gay couple forced to find a funeral home more than an hour away. *Supra*, at ——— – ———, and n. 4. Now hear the story of Cynthia and Sherry, a lesbian couple of 13 years until Cynthia died from cancer at age 35. When Cynthia was diagnosed, she drew up a will, which authorized Sherry to make burial arrangements. Cynthia had asked Sherry to include an inscription on her headstone, listing the relationships that were important to her, for example, "daughter, granddaughter, sister, and aunt." After Cynthia died, the cemetery was willing to include those words, but not the words that described Cynthia's relationship to Sherry: " 'beloved life partner.' " N. Knauer, Gay and Lesbian Elders 102 (2011). There are many such stories, too many to tell here. And after today, too many to come.

***34** I fear that the symbolic damage of the Court's opinion is done. But that does not mean that we are powerless in the face of the decision. The meaning of our Constitution is found not in any law volume, but in the spirit of the people who live under it. Every business owner in America has a choice whether to live out the values in the Constitution. Make no mistake: Invidious discrimination is not one of them. "[D]iscrimination in any form and in any degree has no justifiable part whatever in our democratic way of life." *Korematsu v. United States*, 323 U. S. 214, 242, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (Murphy, J., dissenting). "It is unattractive in any setting but it is utterly revolting among a free people who have

embraced the principles set forth in the Constitution of the United States." *Ibid.*

The unattractive lesson of the majority opinion is this: What's mine is mine, and what's yours is yours. The lesson of the history of public accommodations laws is altogether different. It is that in a free and democratic society, there can be no social castes. And for that to be true, it must be true in the public market. For the "promise of freedom" is an empty one if the Government is "powerless to assure that a dollar in the hands of [one person] will purchase the same thing as a dollar in the hands of a[nother]." *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 443, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). Because the Court today retreats from that promise, I dissent.

All Citations

--- S.Ct. ----, 2023 WL 4277208

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499 (1906).

1 In addition to the Accommodation Clause, CADA contains a "Communication Clause" that prohibits a public accommodation from "publish[ing] ... any written ... communication" indicating that a person will be denied "the full and equal enjoyment" of services or that he will be "unwelcome, objectionable, unacceptable, or undesirable" based on a protected classification. Colo. Rev. Stat. § 24–34–601(2)(a) (2022). The Communication Clause, Ms. Smith notes, prohibits any speech inconsistent with the Accommodation Clause. Because Colorado concedes that its authority to apply the Communication Clause to Ms. Smith stands or falls with its authority to apply the Accommodation Clause, see Brief for Respondents 44–45, we focus our attention on the Accommodation Clause.

2 Besides Colorado, this includes Cal. Civ. Code Ann. § 51 (West 2020); Conn. Gen. Stat. § 46a–81d (2021); Del. Code Ann., Tit. 6, § 4504 (2019); Haw. Rev. Stat. § 489–3 (Cum. Supp. 2021); Ill. Comp. Stat., ch. 775, § 5/1–102 (West 2021); Iowa Code § 216.7 (2022); Me. Rev. Stat. Ann., Tit. 5, § 4591 (2013); Md. State Govt. Code Ann. § 20–304 (2021); Mass. Gen. Laws, ch. 272, § 98 (2021); Mich. Comp. Laws Ann. § 37.2302 (West 2013); Minn. Stat. § 363A.11 (2022); Nev. Rev. Stat. § 651.070 (2017); N. H. Rev. Stat. Ann. § 354–A:17 (2022); N. J. Stat. Ann. § 10:5–12 (West 2013); N. M. Stat. Ann. § 28–1–7 (2022); N. Y. Exec. Law Ann. § 291(2) (West 2019); Ore. Rev. Stat. § 659A.403 (2021); R. I. Gen. Laws § 11–24–2 (2002); Vt. Stat. Ann., Tit. 9, § 4502(a) (2020); Va. Code Ann. § 2.2–3904 (2022); Wash. Rev. Code § 49.60.215 (2022); Wis. Stat. § 106.52 (2019–2020). See also Brief for Local Governments et al. as *Amici Curiae* 5 (noting that many local governments have enacted similar rules).

3 The dissent labels the distinction between status and message "amusing" and "embarrassing." *Post*, at ——. But in doing so, the dissent ignores a fundamental feature of the Free Speech Clause. While it does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message—even when we may disapprove of the speaker's motive or the message itself. The dissent's derision is no answer to any of this. It ignores, too, the fact that Colorado *itself* has, in other contexts, distinguished status-based discrimination (forbidden) from the right of a speaker to control his own message (protected). See App. 131, 137, 140, 143–144, 149, 152, 154. (Truth be told, even the dissent acknowledges "th[is] distinction" elsewhere in its opinion. *Post*, at ——, n. 11.) Nor is the distinction unusual in societies committed both to nondiscrimination rules and free expression. See, *e.g.*, *Lee* v. *Ashers Baking Co. Ltd.*, [2018] UKSC 49, p. 14 ("The less favourable treatment was afforded to the message not to the man."). Does the dissent really find all that amusing and embarrassing?

4 Perplexingly, too, the dissent suggests that, by recounting the Tenth Circuit's conclusion on this score, we "misunderstan[d] this **case**" and "invo[ke] ... Orwellian thought policing." *Post*, at ——, n. 14.

5 Why does the dissent try to refocus this **case** around the Communication Clause? Perhaps because the moment one acknowledges the parties' stipulations—and the fact Colorado seeks to use its Accommodation Clause to compel speech in order to ensure conformity to its own views on a topic of

major significance—the First Amendment implications become obvious. As does the fact that our **case** is nothing like a typical application of a public accommodations law requiring an ordinary, non-expressive business to serve all customers or consider all applicants. Our decision today does not concern—much less endorse—anything like the " 'straight couples only' " notices the dissent conjures out of thin air. *Post*, at ——, n. 10. Nor do the parties discuss anything of the sort in their stipulations.

6 The dissent observes that public accommodations laws may sometimes touch on speech incidentally as they work to ensure ordinary, non-expressive goods and services are sold on equal terms. Cf. *post*, at —— —— —— (citing *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011); *Rumsfeld* v. *FAIR*, 547 U. S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *United States v. O'Brien*, 391 U. S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). But as *Hurley* observed, there is nothing "incidental" about an infringement on speech when a public accommodations law is applied "peculiar[ly]" to compel expressive activity. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). The dissent notes that our **case** law has not sustained every First Amendment objection to an antidiscrimination rule, as with a law firm that sought to exclude women from partnership. *Post*, at —— —— —— (citing *Hishon v. King & Spalding*, 467 U. S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Roberts v. United States Jaycees*, 468 U. S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)). But the dissent disregards *Dale*'s holding that context matters and that very different considerations come into play when a law is used to force individuals to toe the government's preferred line when speaking (or associating to express themselves) on matters of significance. *Boy Scouts of America v. Dale*, 530 U. S. 640, 648–653, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

7 Perhaps the dissent finds these possibilities untroubling for another reason. It asserts that CADA does not apply to "[m]any filmmakers, visual artists, and writers" because they do not "hold out" their services to the public. *Post*, at ——. But the dissent cites nothing to support its claim and instead, once more, fights the facts. As we have seen, Colorado's law today applies to "*any* place of business engaged in *any* sales to the public." Colo. Rev. Stat. § 24–34–601(1) (emphasis added); see also Part III, *supra*. And the dissent can hardly dispute that many artists and writers accept commissions from the public. Brief for **Creative** Professionals et al. as *Amici Curiae* 5–21. Certainly, Colorado does not advance anything like the dissent's argument; it calls any exemption to its law for "artists" and others who provide "custom" services "unworkable." Brief for Respondents 28–31 (internal quotation marks omitted).

1 See 42 U.S.C. § 2000a *et seq.* (Title II of Civil Rights Act of 1964); 42 U.S.C. § 12181 *et seq.* (Title III of Americans with Disabilities Act of 1990).

2 See Alaska Stat. § 18.80.230 (2023); Ariz. Rev. Stat. Ann. § 41–1442 (2017); Ark. Code Ann. § 16–123–107 (Supp. 2021); Cal. Civ. Code Ann. § 51 (West 2020); Colo. Rev. Stat. § 24–34–601 (2022); Conn. Gen. Stat. §§ 46a–64, 46a–81d (Cum. Supp. 2023); Del. Code Ann., Tit. 6, § 4504 (Cum. Supp. 2022); Fla. Stat. §§ 413.08, 760.08 (2022); Haw. Rev. Stat. § 489–3 (Cum. Supp. 2021); Idaho Code Ann. § 67–5909 (2020); Ill. Comp. Stat., ch. 775, § 5/1–102 (West Supp. 2021); Ind. Code § 22–9–1–2 (2022); Iowa Code § 216.7 (2023); Kan. Stat. Ann. § 44–1001 (2021); Ky. Rev. Stat. Ann. §§ 344.120, 344.145 (West 2018); La. Rev. Stat. Ann. § 51:2247 (West Cum. Supp. 2023); Me. Rev. Stat. Ann., Tit. 5, § 4591 (Cum. Supp. 2023); Md. State Govt. Code Ann. § 20–304 (2021); Mass. Gen. Laws, ch. 272, § 98 (2020); Mich. Comp. Laws §§ 37.1102, 37.2302 (1981), as amended, 2023 Mich. Pub. Acts no. 6 (*sine die*); Minn. Stat. § 363A.11 (2022); Mo. Rev. Stat. § 213.065 (Cum. Supp. 2021); Mont. Code Ann. § 49–2–304 (2021); Neb. Rev. Stat. § 20–134 (2022); Nev.

Rev. Stat. § 651.070 (2017); N. H. Rev. Stat. Ann. § 354–A:17 (2022); N. J. Stat. Ann. § 10:5–12 (West Cum. Supp. 2023); N. M. Stat. Ann. § 28–1–7 (2022); N. Y. Civ. Rights Law Ann. § 40 (West 2019); N. D. Cent. Code Ann. § 14–02.4–14 (2017); Ohio Rev. Code Ann. § 4112.02 (Lexis Supp. 2023); Okla. Stat., Tit. 25, § 1402 (2011); Ore. Rev. Stat. § 659A.403 (2021); Pa. Stat. Ann., Tit. 43, § 953 (Purdon 2020); R. I. Gen. Laws § 11–24–2 (2002); S. C. Code Ann. § 45–9–10 (2016); S. D. Codified Laws § 20–13–23 (2016); Tenn. Code Ann. § 4–21–501 (2021); Utah Code § 13–7–3 (2022); Vt. Stat. Ann., Tit. 9, § 4502 (2020); Va. Code Ann. § 2.2–3904 (2022); Wash. Rev. Code § 49.60.215 (2022); W. Va. Code Ann. § 5–11–2 (Lexis 2022); Wis. Stat. § 106.52 (2019–2020); Wyo. Stat. Ann. § 6–9–101 (2021).

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

4 The men in this story are Robert "Bob" Huskey and John "Jack" Zawadski. Bob and Jack were a loving couple of 52 years. They moved from California to Colorado to care for Bob's mother, then to Wisconsin to farm apples and teach special education, and then to Mississippi to retire. Within weeks of this Court's decision in *Obergefell v. Hodges*, 576 U. S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), Bob and Jack got married. They were 85 and 81 years old on their wedding day. A few months later, Bob's health took a turn. He died the following spring. When Bob's family was forced to find an alternative funeral home more than an hour from where Bob and Jack lived, the lunch in Bob's memory had to be canceled. Jack died the next year.

5 For example, a case on which the majority relies found that it could "shortly dispos[e]" of the question whether a steamship company was a common carrier because the company was "the owner of a general ship, carrying goods for hire ... and perform[ing]" that service "regular[ly]." *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 S.Ct. 469, 32 L.Ed. 788 (1889). No showing of market power was required. *Ibid.*

6 Nor does "host[ing] or transport[ing] others and their belongings," *ante*, at ——, explain the right of access. Smiths, for instance, did not always practice their trade by holding property for others. And even when they did, any duty of care resulting from such bailment cannot explain the duty to serve all comers, which logically must be assumed beforehand. See *Lane* v. *Cotton*, 12 Mod. 472, 484, 88 Eng. Rep. 1458, 1464 (K. B. 1701) (Holt, C. J.). That duty instead came from somewhere else, and the weight of authority indicates that it came from a business's act of holding itself out to the public as ready to serve anyone who would hire it. Singer 1304–1330; 3 W. Blackstone, Commentaries on the Laws of England 164 (1768); J. Story, Commentaries on the Law of Bailments §§ 495, 591 (1837); 1 T. Parsons, Law of Contracts 639, 643, 649 (1853).

7 Compare, *e.g.*, *Chesapeake, O. & S. R. Co. v. Wells*, 85 Tenn. 613, 615, 4 S.W. 5 (1887) (rejecting Ida B. Wells's claim that she was denied " 'accommodations equal in all respects,' " when she tried to enter a train car "set apart for white ladies and their gentlemen" on account of tobacco smoke in her car, and was forcibly removed), with *Memphis & C. R. Co. v. Benson*, 85 Tenn. 627, 632, 4 S.W. 5, 7 (1887) (accepting that a white man would be permitted to ride standing in the ladies' car on account of tobacco smoke in his car).

8 See Cal. Civ. Code Ann. § 51; Colo. Rev. Stat. § 24–34–601; Conn. Gen. Stat. § 46a–81d; Del. Code Ann., Tit. 6, § 4504; Haw. Rev. Stat. § 489–3; Ill. Comp. Stat., ch. 775, § 5/1–102; Iowa Code § 216.7; Me. Rev. Stat. Ann., Tit. 5, § 4591; Md. State Govt. Code Ann. § 20–304; Mass.

Gen. Laws, ch. 272, § 98; Mich. Comp. Laws § 37.2302, as amended; Minn. Stat. § 363A.11; Nev. Rev. Stat. § 651.070; N. H. Rev. Stat. Ann. § 354–A:17; N. J. Stat. Ann. § 10:5–12; N. M. Stat. Ann. § 28–1–7; N. Y. Civ. Rights Law Ann. § 40; Ore. Rev. Stat. § 659A.403; R. I. Gen. Laws § 11–24–2; Vt. Stat. Ann., Tit. 9, § 4502; Va. Code Ann. § 2.2–3904; Wash. Rev. Code § 49.60.215; Wis. Stat. § 106.52.

9 The majority commits a fundamental error in suggesting that a law does not regulate conduct if it ever applies to expressive activities. See *ante*, at ——, ——. This would come as a great surprise to the *O'Brien* Court.

10 The majority appears to find this discussion of the Communication Clause upsetting. See *ante*, at ——– ——, and n. 5. It is easy to understand why: The Court's prior First Amendment **cases** clearly explain that a ban on discrimination may require a business to take down a sign that expresses the business owner's intent to discriminate. See, *e.g.*, *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297. This principle is deeply inconsistent with the majority's position. Thus, a "straight couples only" notice, like the one the Court today allows, see App. to Pet. for Cert. 188a–189a, is itself a devastating indictment of the majority's logic.

11 Because petitioners have never sold a wedding website to anyone, the record contains only a mockup website. The mockup confirms what you would expect: The website provides details of the event, a form to RSVP, a gift registry, etc. See App. 51–72. The customization of these elements pursuant to a content-neutral regulation of conduct does not unconstitutionally intrude upon any protected expression of the website designer. Yet Smith claims a First Amendment right to refuse to provide *any* wedding website for a same-sex couple. Her claim therefore rests on the idea that her act of service is itself a form of protected expression. In granting Smith's claim, the majority collapses the distinction between status-based and message-based refusals of service. The history shows just how profoundly wrong that is. See *Runyon v. McCrary*, 427 U. S. 160, 176, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976); *Hishon v. King & Spalding*, 467 U. S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Roberts v. United States Jaycees*, 468 U. S. 609, 622–629, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

12 The majority tacitly acknowledges the absurdity. At the start of its opinion, it explains that Smith "decided to expand her offerings to include services for couples seeking websites for *their* weddings." *Ante*, at —— – (emphasis added).

13 What is " 'embarrassing' " about this reasoning is not, as the Court claims, the "distinction between status and message." *Ante*, at ——, n. 3. It is petitioners' contrivance, embraced by the Court, that a prohibition on status-based discrimination can be avoided by asserting that a group can always buy services on behalf of others, or else that the group can access a "separate but equal" subset of the services made available to everyone else.

14 The majority's repeated invocation of this Orwellian thought policing is revealing of just how much it misunderstands this **case**. See *ante*, at —— – ——, ——– – ——, —— – —— (claiming that the State seeks to "eliminate ideas" and that it will punish Smith unless she "conforms her views to the State's").

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

16 The potential implications of the Court's logic are deeply troubling. Would *Runyon* v. *McCrary* have come out differently if the schools had argued that accepting Black children would have required them to create original speech, like lessons, report cards, or diplomas, that they deeply objected to? What if the law firm in *Hishon* v. *King & Spalding* had argued that promoting a woman to the partnership would have required it to alter its speech, like letterhead or court filings, in ways that it would rather not? Once you look closely, "compelled speech" (in the majority's facile understanding of that concept) is everywhere.

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Redlich v. City of St. Louis

United States Court of Appeals, Eighth Circuit. | October 12, 2022 | 51 F.4th 283 | 2022 WL 6880810

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Outline

Feeding the homeless

Free speech and religious duty

Strict Scrutiny met ordinance upheld

51 F.4th 283
United States Court of Appeals, Eighth Circuit.

Raymond REDLICH; Christopher Ohnimus, Plaintiffs - Appellants

v.

CITY OF ST. LOUIS, a municipality and political subdivision of the State of Missouri, Defendant - Appellee

No. 21-2894

Submitted: June 16, 2022

Filed: October 12, 2022

Synopsis

Background: Pastor and his assistant brought action alleging that city's enforcement of ordinance requiring permit for distribution of "potentially dangerous food" violated Free Exercise and Free Speech Clauses and state law. The United States District Court for the Eastern District of Missouri, Nannette A. Baker, Chief United States Magistrate Judge, 550 F.Supp.3d 734, entered summary judgment in city's favor, and plaintiffs appealed.

[**Holding:**] The Court of Appeals, Menendez, District Judge, sitting by designation, held that city's enforcement of ordinance against pastor and his assistant did not violate Free Speech Clause.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (9)

[1] **Federal Courts**⚖Summary judgment

Court of Appeals reviews district court's grant of summary judgment de novo, drawing all reasonable inferences, without resort to speculation, in non-moving party's favor.

[2] **Constitutional Law**⚖Fourteenth Amendment in general
Constitutional Law⚖Conduct, protection of

In addition to protecting spoken or written word, conduct may be sufficiently imbued with elements of communication to fall within scope of First and Fourteenth Amendments. U.S. Const. Amends. 1, 14.

1 Case that cites this headnote

[3] **Constitutional Law**⚖Conduct, protection of

To decide whether conduct is sufficiently imbued with communicative elements to be protected under First Amendment, courts ask whether intent to convey particularized message was present and whether likelihood was great that message would be understood by those who viewed it. U.S. Const. Amend. 1.

1 Case that cites this headnote

[4] **Constitutional Law**⚖Conduct, protection of

Person's intent to express idea through conduct cannot alone bring that conduct within First Amendment's protection of speech; rather, First Amendment protection extends only to conduct that is inherently expressive. U.S. Const. Amend. 1.

1 Case that cites this headnote

[5] **Constitutional Law**⚖Conduct, protection of

Even where person's conduct is inherently expressive, and may, therefore, be

considered speech, governmental regulation that restricts ability to engage in expressive behavior does not necessarily violate First Amendment. U.S. Const. Amend. 1.

[6] **Constitutional Law**⇨Exercise of police power; relationship to governmental interest or public welfare

When speech and nonspeech elements are combined in same course of conduct, sufficiently important governmental interest in regulating nonspeech element can justify incidental limitations on First Amendment freedoms. U.S. Const. Amend. 1.

[7] **Constitutional Law**⇨Exercise of police power; relationship to governmental interest or public welfare

Constitutional Law⇨Narrow tailoring

Regulation does not violate person's freedom of expression if it is within government's constitutional power, if it furthers important or substantial governmental interest, if governmental interest is unrelated to suppression of free expression, and if incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest. U.S. Const. Amend. 1.

[8] **Constitutional Law**⇨Licenses and Permits in General

Food⇨Municipal power in general

City's enforcement of ordinance requiring permit for distribution of "potentially dangerous food" against pastor and his assistant while they were distributing bologna sandwiches to homeless people did not violate Free Speech Clause; city had substantial interest in preventing spread of illness or disease among its citizens, including its homeless population, regulation was based on scientific research intended to provide municipalities with guidelines and rules to limit risk factors known to cause foodborne illness, and nothing about city's enforcement of ordinance against pastor and his assistant prevented them from conveying their religious message in other ways. U.S. Const. Amend. 1.

1 Case that cites this headnote

[9] **Constitutional Law**⇨Narrow tailoring

To establish that governmental regulation of nonspeech element of conduct that also contains speech elements does not violate First Amendment, regulation need not be least speech-restrictive means of advancing government's interests; rather, requirement of narrow tailoring is satisfied, so long as regulation promotes substantial government interest that would be achieved less effectively absent regulation. U.S. Const. Amend. 1.

***284** Appeal from United States District Court for the Eastern District of Missouri - St. Louis

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellants and appeared on the appellants' brief was David Edward Roland, of Mexico, MO.

Counsel who presented argument on behalf of the appellee and appeared on the appellee's brief was Abby Joe Duncan, of Saint Louis, MO.

Before LOKEN and KELLY, Circuit Judges, and MENENDEZ,[1] District Judge.

Opinion

MENENDEZ, District Judge.

Appellants, Pastor Raymond Redlich and Christopher Ohnimus, commendably distribute food to homeless people in the City of St. Louis and wish to continue doing so as part of their charitable and religious

practice. In October 2018, a St. Louis police officer observed Appellants distributing bologna sandwiches and issued each a citation for violating a city ordinance requiring a permit for the distribution of "potentially dangerous food." Although the City declined to prosecute the ***285** citations, Pastor Redlich and Mr. Ohnimus filed this suit, claiming that the City's enforcement of the ordinance violated their federal and state constitutional rights and Missouri statutes. The district court[2] granted the City's motion for summary judgment and declined to exercise supplemental jurisdiction over the state claims. We affirm.

I.

Pastor Redlich and Mr. Ohnimus are Christians who both live and work in the City of St. Louis. Pastor Redlich is the Vice President of the New Life Christian Evangelical Center, and Mr. Ohnimus is his assistant. Both Pastor Redlich and Mr. Ohnimus believe it is their religious duty to provide food, drink, and spiritual support for those in need, and particularly for the City's homeless population.

On October 31, 2018, Appellants distributed bologna sandwiches and bottled water to hungry people that they encountered in St. Louis. Though they sometimes also shared religious literature with the recipients of the food, they did not do so that day. St. Louis Police Officer Stephen Ogunjobi saw Appellants passing out the sandwiches and approached them. Officer Ogunjobi cited Appellants for distributing food without a permit in violation of the St. Louis Food Code. In his incident report, Officer Ogunjobi noted that Appellants passed out sandwiches stored in a cooler with no ice.

At the time Appellants received these citations, St. Louis Ordinance No. 68597 ("the Ordinance") contained the provisions relevant to this appeal.[3] The Ordinance places restrictions on the distribution of "potentially hazardous food."[4] For example, "[t]he preparation or service of ... sandwiches containing MEAT, POULTRY, EGGS, or FISH is prohibited" by temporary food establishments. For those seeking to distribute other potentially hazardous foods on a temporary basis, a temporary food permit is required, which costs $50 for each day of operation, and must be applied for more than 48 hours before the event. In addition, the operation must have a hand-washing station for employees; several food-grade washtubs; and enough potable water available for food preparation, cleaning of utensils and other equipment, and for hand washing.

Consistent with the instructions on their citations, Appellants appeared at the City's ***286** municipal courthouse on December 4, 2018. They met with attorneys in the City Counselor's Office, who informed them the City would not pursue the citations. Later that day, the City's Public Safety Director publicly stated that issuing citations to those feeding the homeless was not a priority.

Just over one month after the City elected not to pursue the citations, Appellants filed this action. They alleged that, as applied to them, the St. Louis Food Code violates their First Amendment rights under the Free Exercise and Free Speech Clauses and sought both declaratory and prospective injunctive relief. While the litigation was pending in the district court, the City amended the St. Louis Food Code on two occasions. First, on April 18, 2020, the City enacted Ordinance No. 71106 ("the 2020 Ordinance"). The 2020 Ordinance introduced a Charitable Feeding Temporary Food Permit, at a reduced cost, and a Temporary Food Safety Training Program designed for those who wished to help feed the public free of charge. Just after the briefing was complete on the parties' summary judgment motions, the City amended the St. Louis Food Code again, enacting Ordinance No. 71324 ("the 2021 Ordinance") on February 23, 2021. The 2021 Ordinance, which remains in effect today, adopted several chapters of the 2017 Edition of the National Food Code, and retained the Charitable Feeding Temporary Food Permit and Temporary Food Safety Training Program.

The district court granted the City's motion for summary judgment and denied the Appellants' cross-motion for partial summary judgment. *Redlich v. City of St. Louis*, 550 F. Supp. 3d 734 (E.D. Mo. 2021). The

court found that although the 2020 and 2021 amendments to the St. Louis Food Code post-dated Appellants' conduct, their claims were not moot because there remained "a credible threat of present or future enforcement against [Appellants]." *Id.* at 749. However, the court concluded that Appellants could not prevail on their First Amendment free-exercise claim, *id.* at 750–54, speech claim, *id.* at 754–59, or hybrid-rights claim, *id.* at 761–62. This appeal followed.[5]

II.

[1] "We review the district court's grant of summary judgment de novo, drawing all reasonable inferences, without resort to speculation, in favor of the non-moving party." *Wilson v. Miller*, 821 F.3d 963, 967 (8th Cir. 2016) (quoting *Carrington v. City of Des Moines*, 481 F.3d 1046, 1049 (8th Cir. 2007)). "Summary judgment is appropriate only if the moving party satisfies its burden of demonstrating that no genuine issues of material fact remain for trial." *Murchison v. Rogers*, 779 F.3d 882, 887 (8th Cir. 2015).

A.

Pastor Redlich and Mr. Ohnimus appeal the summary judgment decision in favor of the City on their claim that the Ordinance violates their rights under the Free Speech Clause of the First Amendment. They assert that the City's enforcement of the Ordinance against them interferes with their ability to communicate their message ***287** about God's love and concern for those in need. We affirm the district court's disposition of this claim.

[2] The First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. In addition to protecting "the spoken or written word, ... conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.' " *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)).

[3] [4] To decide whether conduct is sufficiently imbued with communicative elements to be protected, courts ask "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Id.* (alterations in original) (quoting *Spence*, 418 U.S. at 410–11, 94 S.Ct. 2727). A person's intent to express an idea through conduct cannot alone bring that conduct within the First Amendment's protection of speech. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65–66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (citing *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)); *Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 957 (8th Cir. 2019) (citing *Masterpiece Cakeshop, Ltd. v. Col. Civ. Rights Comm'n*, — U.S. —, —, 138 S. Ct. 1719, 1742, 201 L.Ed.2d 35 (2018) (Thomas J., concurring in part and concurring in the judgment)). "Instead, [the Supreme Court] ha[s] extended First Amendment protection only to conduct that is inherently expressive." *Rumsfeld*, 547 U.S. at 66, 126 S.Ct. 1297.

[5] [6] [7] Even where a person's conduct is inherently expressive, and may, therefore, be considered speech, a governmental regulation that restricts the ability to engage in the expressive behavior does not necessarily violate the First Amendment. *O'Brien*, 391 U.S. at 376, 88 S.Ct. 1673. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* A regulation does not violate a person's freedom of expression under the following circumstances:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the

> incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377, 88 S.Ct. 1673; *see* *Telescope Media Gr. v. Lucero*, 936 F.3d 740, 756 (8th Cir. 2019) (stating that if "the government seeks to neutrally regulate the non-speech element [of a person's conduct], intermediate scrutiny applies under the incidental-burden doctrine").

[8] Appellants do not suggest that the City lacks the constitutional power to enact the Ordinance, nor do they contend that the City's interest in preventing the spread of foodborne illness is related to suppression of free expression. Instead, Appellants argue that the Ordinance does not further an important or substantial government interest and that the Ordinance is not sufficiently tailored to the asserted interest. We disagree. Appellants' expressive-conduct claim fails because, even assuming that the conduct at issue is sufficiently communicative to fall within ***288** the First Amendment's purview, the Ordinance satisfies the test set forth in *O'Brien*.[6]

First, we reject Appellants' suggestion that the City failed to show that its asserted interest is a substantial one. Both common sense and the record say otherwise. It is an imminently reasonable proposition that a municipality has a substantial interest in preventing the spread of illness or disease among its citizens, including its homeless population. And the evidence before the district court belies Appellants' claim that the City failed to make an adequate showing with respect to the interest served by the Ordinance. The City introduced evidence that it has traced incidents of illness among its homeless population to illegally distributed food dating back to 2012. The City also pointed to CDC data indicating that nationally, in 2018 alone, nearly 6,000 people were hospitalized and 120 people died due to foodborne illness.

Appellants argue that several "data points" undercut the importance of the City's interest in preventing foodborne illness. For example, Appellants point to the decision not to pursue the citations and the Director of Public Safety's December 4, 2018, statement that issuing such citations was not a priority for the City. These details do not undermine our conclusion. The Director's press release downplayed the importance of criminal enforcement of the Ordinance, but it reinforced the regulation's goal "to prevent people from contracting a dangerous foodborne illness." That same municipal goal is reflected in Officer Ogunjobi's incident report, which stated that health department officials asked "officers ... to identify individuals who are breaking the rules, so they can follow-up and bring them to compliance." And on this record, the City Counselor's Office's decision to forego prosecution of the citations similarly appears to have been based on a choice to prioritize obtaining compliance over criminal enforcement, not a tacit admission that prevention of foodborne illness is an insubstantial concern.[7]

[9] In addition to finding that the City's interest is substantial, we conclude that the Ordinance furthers that interest and is narrowly tailored to it. To satisfy the *O'Brien* standard "a regulation need not be the least speech-restrictive means of advancing the Government's interests. Rather, the requirement of narrow tailoring is satisfied, so long as the regulation promotes a substantial government interest that would be achieved less effectively ***289** absent the regulation." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (cleaned up).

As noted above, the Ordinance adopted the 2009 Edition of the National Food Code, which is based on scientific research and was intended to provide municipalities with guidelines and rules to limit risk factors known to cause foodborne illness. The City offered evidence that food contaminated by pathogenic microorganism growth and toxin formation causes foodborne illness. The same criteria determine how the National Food Code defines "potentially hazardous food." And, in turn, the Ordinance identifies sandwiches containing meat, poultry, eggs, or fish as among those foods considered to be potentially hazardous. As applied to Appellants, the Ordinance furthers the City's important interest in preventing the spread of foodborne illness by regulating the

Commented [ER2]: Narrow tailored regualtion

Commented [ER1]: The Substantial governmental interest

distribution of potentially hazardous food—namely, sandwiches containing bologna.

The Ordinance requires Appellants to obtain a permit and meet other requirements only if they distribute potentially hazardous food,[8] and imposes such conditions because they are effective at preventing the spread of foodborne illness. To distribute potentially hazardous food on a temporary basis, Appellants would be required to pay a $50 fee for the permit at least two days in advance of their food-sharing activities and notify the City of both the time and place where the food would be distributed. These provisions ensure that health inspectors have an opportunity to determine whether the temporary food establishment is complying with the Ordinance. When operating a temporary food establishment, Appellants would also have to ensure: that they take steps to prevent contamination of any ice served to consumers; that tableware provided to consumers is only in single-service and single-use articles; that any equipment is located and installed in a way that avoids food contamination and to facilitate cleaning; that food-contact surfaces are protected from consumer contamination; and that they have water available for cleaning utensils and equipment and to make convenient handwashing facilities available for any employees. Without these provisions regarding the distribution of potentially ***290** hazardous food to the public, the City's goal of preventing foodborne illness would be achieved less effectively.

Moreover, we note that nothing about the City's enforcement of the Ordinance against Appellants prevents them from conveying their religious message in other ways. *Cf.* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (explaining that time, place, and manner restrictions on expression are valid where, among other things, they "leave open ample alternative channels for communication of the information" and noting that the *O'Brien* test is "little, if any, different from the standard applied to time, place, and manner restrictions"). For example, Appellants may continue engaging in the allegedly expressive act of sharing non-hazardous food with those in need while simultaneously discussing the substance of their message with them or with passersby, sharing literature, or engaging in other protected speech. Enforcement of the Ordinance against Appellants for the distribution of potentially hazardous food limits none of those alternative avenues of expression.

We affirm the district court's entry of summary judgment in favor of the City on Appellants' freedom-of-expression claim.

B.

Appellants also argue that the City was not entitled to summary judgment on their hybrid-rights claim under *Department of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Appellants claim that because they asserted both a Free Exercise claim and a freedom-of-expression claim, the district court erred by refusing to apply strict scrutiny to their hybrid-rights claim. We disagree. Appellants concede that they do not have a viable claim under the Free Exercise Clause, and their expressive-conduct claim lacks merit. Because each of the claims making up their hybrid-rights claim "fails on its own, ... this case is not in the class of hybrid situations in which the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech, can bar application of a neutral, generally applicable law." *B.W.C. v. Williams*, 990 F.3d 614, 622 (8th Cir. 2021) (quotation omitted).

The judgment of the district court is, therefore, affirmed.

All Citations

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Footnotes

1 The Honorable Katherine M. Menendez, United States District Judge for the District of Minnesota, sitting by designation.

2 Nannette A. Baker, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

3 The Ordinance was adopted March 16, 2010, and remained in effect until April of 2020, when it was repealed and superseded by a new ordinance.

4 The term "potentially hazardous food" in the Ordinance is drawn from the 2009 Edition of the National Food Code published by the U.S. Department of Health and Human Services, Public Health Service, and Food and Drug Administration. " 'Potentially hazardous food' means a food that requires time/temperature control for safety (TCS) to limit pathogenic microorganism growth or toxin formation," and specifically includes raw or heat-treated animal foods. FDA Food Code 2009, Ch. 1, § 1-201.10(B) (Potentially Hazardous Food definition, subparagraphs (1)–(2)(a)). It excludes, for example, hard-boiled eggs in the shell, foods packaged in hermetically sealed containers and prepared under sterile conditions, and foods that have been handled to prevent the growth of toxins and microorganisms. *Id.* (Potentially Hazardous Food definition, subparagraph (3)). More recently, in the 2017 Edition of the National Food Code, the term "potentially hazardous foods" was replaced with the term "time/temperature control for safety food," but its meaning remains the same. FDA Food Code 2017, Ch. 1, § 1-201.10(B) (Time/Temperature Control for Safety Food definition).

5 The district court also granted summary judgment to the City on Appellants' claim that the regulation violated their freedom to associate under the First Amendment and their right to equal protection under the Fourteenth Amendment, *id.* at 759–61, but Appellants have expressly waived those issues on appeal. Appellants' Br. 24. The district court's determination that it should not exercise supplemental jurisdiction over the Appellants claims under the Missouri Constitution and the Missouri Religious Freedom Restoration Act is also not before us. *Id.* at 763.

6 The district court similarly found it unnecessary to decide whether Appellants' conduct was inherently expressive because the Ordinance does not violate their right to free expression under *O'Brien*. *Redlich*, 550 F. Supp. 3d at 757–59.

7 Appellants also suggest that the City's interest is not substantial because the regulation does not require a permit if a person shares potentially hazardous foods at a potluck or dinner party, but this argument is far afield from their as-applied challenge. Moreover, it rests upon a flawed reading of the Ordinance. If the potluck or dinner party were in a private space, the person would not be subject to the permitting and other requirements of the Ordinance even if potentially hazardous food were shared with family members and friends. But if such an event involves distribution of potentially hazardous food to the public, the Ordinance's requirement for a permit and its other provisions would be applicable. The Ordinance applies to "Temporary Food Establishments," which are a form of "Food Establishment" under the 2009 Edition of the National Food Code. FDA Food Code 2009, Ch. 1, § 1-201.10(B) (Temporary Food Establishment definition). A "Food Establishment" is, in turn, an operation that "stores, prepares, packages, serves, [or]

vends food directly to the consumer." *Id.* (Food Establishment definition subparagraph (1)(a)). And a "consumer" is "a person who is a member of the public." *Id.* (Consumer definition).

8 In their briefing and at oral argument, Appellants asserted that the City would place onerous restrictions on their food-sharing activities even if they were to distribute only pre-packaged, ready-to-eat food that was not potentially hazardous. Appellants' Br. 13; Appellants' Reply 10–11. Appellants point to the Ordinance's definition of a "Mobile Food Establishment," which includes packaged-food distributors using vehicles that serve only pre-packaged, "ready-to-eat FOOD or drink and/or whole, uncut fruit and/or vegetables from an APPROVED source." Ordinance No. 68597, Ch. 1 (Mobile Food Establishment definition subparagraph (3)). This does not change the outcome here. Under the Ordinance, a Mobile Food Establishment is itself a "Food Establishment," which, in turn, is defined as an operation that serves "potentially hazardous foods." *Id.*, Ch. 1 (Food Establishment definition subparagraph (1)(c)). But more importantly, nothing in the record suggests that Appellants were cited for violating the Mobile Food Establishment rules, nor that they received a citation for distributing food items that do not meet the definition of "potentially hazardous food." And Appellants provide no reason to conclude that under the version of the St. Louis Food Code currently in effect, they are likely to be prosecuted if they pass out food that is not potentially hazardous. This is, after all, an as-applied challenge to the Ordinance, and Appellants have not alleged that the regulation is (or would likely be) applied to them in this manner. *See* *McCullen v. Coakley*, 573 U.S. 464, 485 n.4, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) ("[A] plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him.").

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Students for Fair Admissions, Inc. v. President and Fellows of Harvard College

Supreme Court of the United States. | June 29, 2023 | --- S.Ct. ---- | 2023 WL 4239254

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Outline

Equal Protection, 14th Amendment

Consideration of race as a factor

College admissions

2023 WL 4239254
Supreme Court of the United States.

STUDENTS FOR **FAIR ADMISSIONS**, INC., Petitioner
v.
PRESIDENT AND **FELLOWS** OF **HARVARD COLLEGE**
Students for **Fair Admissions**, Inc., Petitioner
v.
University of North Carolina, et al.

No. 20-1199, No. 21-707
|
Argued October 31, 2022
|
Decided June 29, 2023

Synopsis

Background: In first case, nonprofit organization brought action for declaratory and injunctive relief against private **college**, alleging that its race-based **admissions** program violated Equal Protection Clause, Title VI of Civil Rights Act, and federal statute prohibiting racial discrimination in contracting. The United States District Court for the District of Massachusetts, Allison D. Burroughs, J., 261 F.Supp.3d 99, denied motion to dismiss for lack of Article III standing, and following bench trial entered judgment for **college**, 397 F.Supp.3d 126. Organization appealed. The United States Court of Appeals for the First Circuit, Lynch, Circuit Judge, 980 F.3d 157, affirmed. Certiorari was granted. In second case, same nonprofit organization brought action for declaratory and injunctive relief against public university, asserting same constitutional and statutory claims as in first case. Following a bench trial, the United States District Court for the Middle District of North Carolina, Loretta C. Biggs, J., 567 F.Supp.3d 580, entered judgment for university. Organization appealed to the United States Court of Appeals for the Fourth Circuit, and the Supreme Court granted certiorari before judgment.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] nonprofit organization established its representational or organizational standing under Article III;

[2] **college's** asserted compelling interests for race-based **admissions** program did not satisfy requirement of being sufficiently measurable to permit strict scrutiny for equal protection violation, which would also be a Title VI violation;

[3] university's asserted compelling interests were not sufficiently measurable;

[4] **college** and university failed to articulate a meaningful connection between the means they employed and their diversity goals;

[5] **admissions** programs failed strict scrutiny by using race as a stereotype or negative; and

[6] **admissions** programs failed strict scrutiny by lacking a logical end point.

Court of Appeals reversed in first case; District Court reversed in second case.

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined.

Justice Thomas filed a concurring opinion.

Justice Gorsuch filed a concurring opinion, in which Justice Thomas joined.

Justice Kavanaugh filed a concurring opinion.

Justice Sotomayor filed a dissenting opinion, in which Justice Kagan joined, and in which Justice Jackson joined as it applied to second case.

Justice Jackson filed a dissenting opinion in second case, in which Justices Sotomayor and Kagan joined.

Justice Jackson took no part in consideration or decision of first case.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Judgment; Motion to Dismiss for Lack of Standing; Request for Declaratory Judgment; Motion for Permanent Injunction.

West Headnotes (38)

[1] **Civil Rights**⚖Publicly assisted programs

Discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI, which provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601, 42 U.S.C.A. § 2000d.

[2] **Federal Courts**⚖Jurisdiction, powers, and authority in general

Before turning to the merits in a case in which the Supreme Court has granted certiorari review, it must assure itself of its jurisdiction.

[3] **Federal Courts**⚖Case or Controversy Requirement
Federal Courts⚖Nature of dispute; concreteness

Article III limits the judicial power of the United States to "cases" or "controversies," ensuring that federal courts act only as a necessity in the determination of real, earnest, and vital disputes. U.S. Const. art. 3, § 2, cl. 1.

[4] **Federal Civil Procedure**⚖In general; injury or interest
Federal Civil Procedure⚖Causation; redressability
Federal Courts⚖Case or Controversy Requirement

To state a case or controversy under Article III, as required for federal jurisdiction, a plaintiff must establish standing, and that, in turn, requires a plaintiff to demonstrate that it has: (1) suffered an injury in fact, (2) that is **fairly** traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

[5] **Associations**⚖Injury or interest in general
Associations⚖Suits on Behalf of Members; Associational or Representational Standing

Where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways: either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert standing solely as the representative of its members. U.S. Const. art. 3, § 2, cl. 1.

[6] **Associations**⚖Suits on Behalf of Members; Associational or Representational Standing

For an organization, as a plaintiff, to invoke representational or organizational standing under Article III, it must demonstrate that (a) its members would otherwise have standing to sue in their own right; (b) the

interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. U.S. Const. art. 3, § 2, cl. 1.

[7] **Associations**⇨Education
Civil Rights⇨Education
Declaratory Judgment⇨Subjects of relief in general

Nonprofit organization established its representational or organizational standing under Article III to bring actions for declaratory and injunctive relief against private **college** and public university, alleging that their race-based **admissions** programs violated Equal Protection Clause and Title VI, by identifying its members and offering declarations that members were being represented in good faith, and thus, further scrutiny into how the organization operated was not required; organization offered evidence in action against **college** that it was validly incorporated 501(c)(3) nonprofit with 47 members who joined voluntarily to support its mission, and in action against university, four high school graduates who had been denied **admission** filed declarations stating they voluntarily joined organization, supported its mission, received updates about status of case from organization's **president**, and had opportunity for input and direction on organization's case. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 14; 26 U.S.C.A. § 501(c)(3); Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[8] **Constitutional Law**⇨Persons or Entities Protected
Constitutional Law⇨Race, National Origin, or Ethnicity

The Equal Protection Clause is a broad and benign provision that applies to all persons, and in the eye of the law, hostility to race and nationality is not justified. U.S. Const. Amend. 14.

[9] **Constitutional Law**⇨Discrimination and Classification

Under the Equal Protection Clause, separate cannot be equal. U.S. Const. Amend. 14.

[10] **Constitutional Law**⇨Public Elementary and Secondary Education

Racial segregation in public schools violates the Equal Protection Clause, even if the physical facilities and other tangible factors provided to Black **students** and white **students** are of roughly the same quality; the mere act of separating children because of their race generates a feeling of inferiority. U.S. Const. Amend. 14.

[11] **Constitutional Law**⇨Public Elementary and Secondary Education
Constitutional Law⇨Elementary and Secondary Education

Under the Equal Protection Clause, the right to a public education must be made available to all on equal terms, and no State has any authority to use race as a factor in affording educational opportunities among its citizens. U.S. Const. Amend. 14.

[12] **Constitutional Law**⇨Race, National Origin, or Ethnicity

The Equal Protection Clause requires equality of treatment before the law for all persons without regard to race or color. U.S. Const. Amend. 14.

[13] **Constitutional Law**⇨Intentional or purposeful action

The Equal Protection Clause proscribes all invidious racial discriminations. U.S. Const. Amend. 14.

[14] **Constitutional Law**⇨Race, National Origin, or Ethnicity

The core purpose of the Equal Protection Clause is to do away with all governmentally imposed discrimination based on race. U.S. Const. Amend. 14.

1 Case that cites this headnote

[15] **Constitutional Law**⇨Race, National Origin, or Ethnicity

The Equal Protection Clause applies without regard to any differences of race, of color, or of nationality—it is universal in its application. U.S. Const. Amend. 14.

[16] **Constitutional Law**⇨Race, National Origin, or Ethnicity

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination under strict scrutiny, with a court asking, first, whether the racial classification is used to further compelling governmental interests, and second, if so, whether the government's use of race is narrowly tailored—meaning necessary—to achieve that interest. U.S. Const. Amend. 14.

[17] **Constitutional Law**⇨Affirmative action in general

Under strict scrutiny for an equal protection violation, compelling interests that permit resort to race-based government action are remediating specific, identified instances of past discrimination that violated the Constitution or a statute, and avoiding imminent and serious risks to human safety in prisons, such as a race riot. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[18] **Constitutional Law**⇨Race, national origin, or ethnicity

Even the most rigid scrutiny for an equal protection violation can sometimes fail to detect an illegitimate racial classification, and any retreat from the most searching judicial inquiry can only increase the risk of such error occurring in the future. U.S. Const. Amend. 14.

[19] **Constitutional Law**⇨Race, National Origin, or Ethnicity

Under the Equal Protection Clause, distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality, and that principle cannot be overridden except in the most extraordinary case. U.S. Const. Amend. 14.

[20] **Constitutional Law**⇨Race, National Origin, or Ethnicity

Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake, which the Equal Protection Clause forbids. U.S. Const. Amend. 14.

[21] **Constitutional Law**⇨**Admissions**

Because racial discrimination is invidious in all contexts, universities must operate their race-based **admissions** programs in a manner that is sufficiently measurable to permit judicial review under the rubric of strict scrutiny for an equal protection violation. U.S. Const. Amend. 14.

[22] **Constitutional Law**⇨Public Elementary and Secondary Education

To satisfy strict scrutiny for an equal protection violation, classifying and assigning **students** based on their race requires more than an amorphous end. U.S. Const. Amend. 14.

[23] **Civil Rights**⇨**Admission**
Constitutional Law⇨**Admissions**

Interests that private **college** asserted as compelling interests for its race-based **admissions** program did not satisfy requirement of being sufficiently measurable to permit judicial review under rubric of strict scrutiny for equal protection violation, which would also be a Title VI violation; **college** identified, as educational benefits it was pursuing, training future leaders in public and private sectors, preparing graduates to adapt to increasingly pluralistic society, better educating its **students** through diversity, and producing new knowledge stemming from diverse outlooks. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[24] **Civil Rights**⇨**Admission**
Constitutional Law⇨**Admissions**

Interests that public university asserted as compelling interests for its race-based **admissions** program did not satisfy requirement of being sufficiently measurable to permit judicial review under rubric of strict scrutiny for equal protection violation, which would also be a Title VI violation; university identified, as educational benefits it was pursuing, promoting the robust exchange of ideas, broadening and refining understanding, fostering innovation and problem-solving, preparing engaged and productive citizens and leaders, enhancing appreciation, respect, empathy, and cross-racial understanding, and breaking down stereotypes. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[25] **Civil Rights**⇨**Admission**
Constitutional Law⇨**Admissions**
Education⇨**Admission** or Matriculation

Private **college** and public university failed to articulate a meaningful connection between the means they employed, i.e., assigning applicants to racial categories, and diversity goals they pursued, as would be required for their race-based **admissions** programs to survive strict scrutiny for an equal protection violation, which would also be a Title VI violation; categories were arbitrary or undefined, e.g., "Hispanic," or plainly overbroad, e.g., grouping together all Asian **students**, or underinclusive, e.g., it was unclear how applicants from Middle Eastern countries were classified, and using opaque racial categories undermined the goals. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[26] **Constitutional Law**⇨Post-Secondary Institutions

While courts give a degree of deference to a university's academic decisions, any deference must exist within constitutionally prescribed limits, and deference does not imply abandonment or abdication of judicial review for equal protection violations, and thus, courts may not license separating **students** on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. U.S. Const. Amend. 14.

[27] **Constitutional Law**⇨Race, national origin, or ethnicity

Under the Equal Protection Clause, racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. U.S. Const. Amend. 14.

[28] **Civil Rights**⇨**Admission**
Constitutional Law⇨**Admissions**
Education⇨**Admission** or Matriculation

Under strict scrutiny, race-based **admissions** programs of private **college** and public university violated Equal Protection Clause, which violation was

also a Title VI violation, by using race as a stereotype or negative; **college's** consideration of race led to 11.1% decrease in number of Asian-Americans admitted, **college** and university acknowledged that race was determinative for at least some—if not many—of the **students** they admitted, and the point of their **admissions** programs was that there was an inherent benefit in race for race's sake, e.g., **college's** program rested on pernicious stereotype that a Black **student** could usually bring something that a white person could not offer. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[29] **Constitutional Law**⇨Discrimination and Classification

Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. U.S. Const. Amend. 14.

[30] **Constitutional Law**⇨**Students**

Under the Equal Protection Clause, universities may not operate their **admissions** programs on the belief that minority **students** always (or even consistently) express some characteristic minority viewpoint on any issue. U.S. Const. Amend. 14.

[31] **Constitutional Law**⇨Intentional or purposeful action

Equal protection does not allow government actors to intentionally allocate preference to those who may have little in common with one another but the color of their skin. U.S. Const. Amend. 14.

[32] **Constitutional Law**⇨Race, National Origin, or Ethnicity

One of the principal reasons race is treated as a forbidden classification under the Equal Protection Clause is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. U.S. Const. Amend. 14.

[33] **Civil Rights**⇨**Admission**
Constitutional Law⇨**Admissions**
Education⇨**Admission** or Matriculation

Under strict scrutiny, race-based **admissions** programs of private **college** and public university violated Equal Protection Clause, which violation was also a Title VI violation, by lacking a logical end point; by promising to terminate their use of race when some rough percentage of various racial groups was admitted, **college** and university effectively assured that race would always be relevant and that ultimate goal of eliminating race as a criterion would never be achieved, and while **college** and university asserted that they would no longer need to engage in race-based **admissions** when, in their absence, **students** nevertheless received educational benefits of diversity, it was not clear how a court was supposed to determine when stereotypes had broken down or productive citizens and leaders had been created. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[34] **Constitutional Law**⇨Affirmative action in general

Outright racial balancing is patently unconstitutional, because at the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class. U.S. Const. Amend. 14.

[35] **Constitutional Law**⇨Affirmative action in general

Under strict scrutiny for an equal protection violation, remedying the effects of societal discrimination is not a compelling interest for racial classification; such an interest presents an amorphous concept of injury that may be ageless in its reach into the past, and it cannot justify a racial classification that imposes disadvantages upon persons who bear no responsibility for whatever harms the beneficiaries of the race-based classification are thought to have suffered. U.S. Const. Amend. 14.

[36] **Constitutional Law**⚖**Admissions**

Under the Equal Protection Clause, race-based university **admissions** programs must have reasonable durational limits, and their deviation from the norm of equal treatment must be a temporary matter. U.S. Const. Amend. 14.

[37] **Constitutional Law**⚖Constitutional Rights in General
Constitutional Law⚖Race, National Origin, or Ethnicity

The Constitution deals with substance, not shadows, and the Equal Protection Clause's prohibition against racial discrimination is leveled at the thing, not the name. U.S. Const. Amend. 14.

1 Case that cites this headnote

[38] **Constitutional Law**⚖**Admissions**

Under the Equal Protection Clause, for university **admissions**, an applicant must be treated based on his or her experiences as an individual, not on the basis of race, and thus, a benefit to an applicant who overcame racial discrimination must be tied to that applicant's courage and determination, or a benefit to an applicant whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that **student's** unique ability to contribute to the university. U.S. Const. Amend. 14.

*Syllabus**

***1 Harvard College** and the University of North Carolina (UNC) are two of the oldest institutions of higher learning in the United States. Every year, tens of thousands of **students** apply to each school; many fewer are admitted. Both **Harvard** and UNC employ a highly selective **admissions** process to make their decisions. **Admission** to each school can depend on a **student's** grades, recommendation letters, or extracurricular involvement. It can also depend on their race. The question presented is whether the **admissions** systems used by **Harvard College** and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

At **Harvard**, each application for **admission** is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race. **Harvard's admissions** subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full **admissions** committee, and they take an applicant's race into account. When the 40-member full **admissions** committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to **Harvard's** director of **admissions**, is ensuring there is no "dramatic drop-off" in minority **admissions** from the prior class. An applicant receiving a majority of the full committee's votes is tentatively accepted for **admission**. At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee. The last stage of **Harvard's admissions** process, called the "lop," winnows the list of tentatively admitted **students** to arrive at the final class. Applicants that **Harvard** considers cutting at this

stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the **Harvard admissions** process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

UNC has a similar **admissions** process. Every application is reviewed first by an **admissions** office reader, who assigns a numerical rating to each of several categories. Readers are required to consider the applicant's race as a factor in their review. Readers then make a written recommendation on each assigned application, and they may provide an applicant a substantial "plus" depending on the applicant's race. At this stage, most recommendations are provisionally final. A committee of experienced staff members then conducts a "school group review" of every initial decision made by a reader and either approves or rejects the recommendation. In making those decisions, the committee may consider the applicant's race.

Petitioner, **Students** for **Fair Admissions** (SFFA), is a nonprofit organization whose stated purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." SFFA filed separate lawsuits against **Harvard** and UNC, arguing that their race-based **admissions** programs violate, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. After separate bench trials, both **admissions** programs were found permissible under the Equal Protection Clause and this Court's precedents. In the **Harvard** case, the First Circuit affirmed, and this Court granted certiorari. In the UNC case, this Court granted certiorari before judgment.

*2 *Held*: **Harvard's** and UNC's **admissions** programs violate the Equal Protection Clause of the Fourteenth Amendment. Pp. ———.

(a) Because SFFA complies with the standing requirements for organizational plaintiffs articulated by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383, SFFA's obligations under Article III are satisfied, and this Court has jurisdiction to consider the merits of SFFA's claims.

The Court rejects UNC's argument that SFFA lacks standing because it is not a "genuine" membership organization. An organizational plaintiff can satisfy Article III jurisdiction in two ways, one of which is to assert "standing solely as the representative of its members," *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343, an approach known as representational or organizational standing. To invoke it, an organization must satisfy the three-part test in *Hunt*. Respondents do not suggest that SFFA fails *Hunt*'s test for organizational standing. They argue instead that SFFA cannot invoke organizational standing at all because SFFA was not a genuine membership organization at the time it filed suit. Respondents maintain that, under *Hunt*, a group qualifies as a genuine membership organization only if it is controlled and funded by its members. In *Hunt*, this Court determined that a state agency with no traditional members could still qualify as a genuine membership organization in substance because the agency represented the interests of individuals and otherwise satisfied *Hunt*'s three-part test for organizational standing. See 432 U.S. at 342, 97 S.Ct. 2434. *Hunt*'s "indicia of membership" analysis, however, has no applicability here. As the courts below found, SFFA is indisputably a voluntary membership organization with identifiable members who support its mission and whom SFFA represents in good faith. SFFA is thus entitled to rely on the organizational standing doctrine as articulated in *Hunt*. Pp. ———.

(b) Proposed by Congress and ratified by the States in the wake of the Civil War, the Fourteenth Amendment provides that no State shall "deny to any person ... the equal protection of the laws." Proponents of the Equal Protection Clause described its "foundation[al] principle" as "not permit[ing] any distinctions of law based on race or color." Any "law which operates upon one man," they maintained, should "operate equally upon all." Accordingly, as this Court's early decisions interpreting the Equal Protection Clause explained, the

Fourteenth Amendment guaranteed "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States."

Despite the early recognition of the broad sweep of the Equal Protection Clause, the Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

*3 After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education*, 347 U.S. 483, 491, 74 S.Ct. 686, 98 L.Ed. 873. Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black **students** educational opportunities equal to—even if formally separate from—those enjoyed by white **students**. See, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–350, 59 S.Ct. 232, 83 L.Ed. 208. But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted **students**. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–642, 70 S.Ct. 851, 94 L.Ed. 1149. By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. There, the Court overturned the separate but equal regime established in *Plessy* and began on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. The conclusion reached by the *Brown* Court was unmistakably clear: the right to a public education "must be made available to all on equal terms." 347 U.S. at 493, 74 S.Ct. 686. The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit **students** "on a racially nondiscriminatory basis." *Brown v. Board of Education*, 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083.

In the years that followed, *Brown*'s "fundamental principle that racial discrimination in public education is unconstitutional," *id.*, at 298, 75 S.Ct. 753, reached other areas of life—for example, state and local laws requiring segregation in busing, *Gayle v. Browder*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (*per curiam*); racial segregation in the enjoyment of public beaches and bathhouses *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (*per curiam*); and antimiscegenation laws, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010. These decisions, and others like them, reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421.

Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750.

Any exceptions to the Equal Protection Clause's guarantee must survive a daunting two-step examination known as "strict scrutiny," *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158, which asks first whether the racial classification is used to "further compelling governmental interests," *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304, and second whether the government's use of race is

"narrowly tailored," *i.e.*, "necessary," to achieve that interest, *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312, 133 S.Ct. 2411, 186 L.Ed.2d 474. Acceptance of race-based state action is rare for a reason: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007. Pp. ——.

(c) This Court first considered whether a university may make race-based **admissions** decisions in *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750. In a deeply splintered decision that produced six different opinions, Justice Powell's opinion for himself alone would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious **admissions** policies." *Grutter*, 539 U.S. at 323, 123 S.Ct. 2325. After rejecting three of the University's four justifications as not sufficiently compelling, Justice Powell turned to its last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse **student** body. Justice Powell found that interest to be "a constitutionally permissible goal for an institution of higher education," which was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its **student** body." 438 U.S. at 311–312, 98 S.Ct. 2733. But a university's freedom was not unlimited—"[r]acial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291, 98 S.Ct. 2733. Accordingly, a university could not employ a two-track quota system with a specific number of seats reserved for individuals from a preferred ethnic group. *Id.*, at 315, 98 S.Ct. 2733. Neither still could a university use race to foreclose an individual from all consideration. *Id.*, at 318, 98 S.Ct. 2733. Race could only operate as "a 'plus' in a particular applicant's file," and even then it had to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.*, at 317, 98 S.Ct. 2733. Pp. ——.

*4 (d) For years following *Bakke*, lower courts struggled to determine whether Justice Powell's decision was "binding precedent." *Grutter*, 539 U.S. at 325, 123 S.Ct. 2325. Then, in *Grutter* v. *Bollinger*, the Court for the first time "endorse[d] Justice Powell's view that **student** body diversity is a compelling state interest that can justify the use of race in university **admissions**." *Ibid.* The *Grutter* majority's analysis tracked Justice Powell's in many respects, including its insistence on limits on how universities may consider race in their **admissions** programs. Those limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate ... stereotyp[ing]." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (plurality opinion). **Admissions** programs could thus not operate on the "belief that minority **students** always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341, 123 S.Ct. 2325.

To manage these concerns, *Grutter* imposed one final limit on race-based **admissions** programs: At some point, the Court held, they must end. *Id.*, at 342, 123 S.Ct. 2325. Recognizing that "[e]nshrining a permanent justification for racial preferences would offend" the Constitution's unambiguous guarantee of equal protection, the Court expressed its expectation that, in 25 years, "the use of racial preferences will no longer be necessary to further the interest approved today." *Id.*, at 343, 123 S.Ct. 2325. Pp. ——.

(e) Twenty years have passed since *Grutter*, with no end to race-based **college admissions** in sight. But the

Court has permitted race-based **college admissions** only within the confines of narrow restrictions: such **admissions** programs must comply with strict scrutiny, may never use race as a stereotype or negative, and must—at some point—end. Respondents' **admissions** systems fail each of these criteria and must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment. Pp. ——— – ———.

(1) Respondents fail to operate their race-based **admissions** programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny. *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 381, 136 S.Ct. 2198, 195 L.Ed.2d 511. First, the interests that respondents view as compelling cannot be subjected to meaningful judicial review. Those interests include training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens. While these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. It is unclear how courts are supposed to measure any of these goals, or if they could, to know when they have been reached so that racial preferences can end. The elusiveness of respondents' asserted goals is further illustrated by comparing them to recognized compelling interests. For example, courts can discern whether the temporary racial segregation of inmates will prevent harm to those in the prison, see *Johnson v. California*, 543 U.S. 499, 512–513, 125 S.Ct. 1141, 160 L.Ed.2d 949, but the question whether a particular mix of minority **students** produces "engaged and productive citizens" or effectively "train[s] future leaders" is standardless.

Second, respondents' **admissions** programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, respondents measure the racial composition of their classes using racial categories that are plainly overbroad (expressing, for example, no concern whether *South* Asian or *East* Asian **students** are adequately represented as "Asian"); arbitrary or undefined (the use of the category "Hispanic"); or underinclusive (no category at all for Middle Eastern **students**). The unclear connection between the goals that respondents seek and the means they employ preclude courts from meaningfully scrutinizing respondents' **admissions** programs.

***5** The universities' main response to these criticisms is "trust us." They assert that universities are owed deference when using race to benefit some applicants but not others. While this Court has recognized a "tradition of giving a degree of deference to a university's academic decisions," it has made clear that deference must exist "within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. Respondents have failed to present an exceedingly persuasive justification for separating **students** on the basis of race that is measurable and concrete enough to permit judicial review, as the Equal Protection Clause requires. Pp. ——— – ———.

(2) Respondents' race-based **admissions** systems also fail to comply with the Equal Protection Clause's twin commands that race may never be used as a "negative" and that it may not operate as a stereotype. The First Circuit found that **Harvard's** consideration of race has resulted in fewer **admissions** of Asian-American **students**. Respondents' assertion that race is never a negative factor in their **admissions** programs cannot withstand scrutiny. **College admissions** are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.

Respondents **admissions** programs are infirm for a second reason as well: They require stereotyping—the very thing *Grutter* foreswore. When a university admits **students** "on the basis of race, it engages in the offensive and demeaning assumption that [**students**] of a particular race, because of their race, think alike." *Miller v. Johnson*, 515 U.S. 900, 911–912, 115 S.Ct. 2475, 132 L.Ed.2d 762. Such stereotyping is contrary to the "core purpose" of the Equal Protection Clause. *Palmore*, 466 U.S. at 432, 104 S.Ct. 1879. Pp. ——— – ———.

(3) Respondents' **admissions** programs also lack a "logical end point" as *Grutter* required. 539 U.S. at 342, 123 S.Ct. 2325. Respondents suggest that the

end of race-based **admissions** programs will occur once meaningful representation and diversity are achieved on **college** campuses. Such measures of success amount to little more than comparing the racial breakdown of the incoming class and comparing it to some other metric, such as the racial makeup of the previous incoming class or the population in general, to see whether some proportional goal has been reached. The problem with this approach is well established: "[O]utright racial balancing" is "patently unconstitutional." *Fisher,* 570 U.S. at 311, 133 S.Ct. 2411. Respondents' second proffered end point—when **students** receive the educational benefits of diversity—fares no better. As explained, it is unclear how a court is supposed to determine if or when such goals would be adequately met. Third, respondents suggest the 25-year expectation in *Grutter* means that race-based preferences must be allowed to continue until at least 2028. The Court's statement in *Grutter*, however, reflected only that Court's expectation that race-based preferences would, by 2028, be unnecessary in the context of racial diversity on **college** campuses. Finally, respondents argue that the frequent reviews they conduct to determine whether racial preferences are still necessary obviates the need for an end point. But *Grutter* never suggested that periodic review can make unconstitutional conduct constitutional. Pp. – ——.

(f) Because **Harvard's** and UNC's **admissions** programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those **admissions** programs cannot be reconciled with the guarantees of the Equal Protection Clause. At the same time, nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university. Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice. Pp. 39–40.

*6 980 F.3d 157; 567 F.Supp.3d 580, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion. GORSUCH, J., filed a concurring opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined, and in which JACKSON, J., joined as it applies to No. 21–707. JACKSON, J., filed a dissenting opinion in No. 21–707, in which SOTOMAYOR and KAGAN, JJ., joined. JACKSON, J., took no part in the consideration or decision of the case in No. 20–1199.

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