First Amendment Law Review

Volume 24 2025-2026

THE UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW

Administration

PETER HANS, B.A., M.A., *UNC System President*
ANDREW HESSICK, B.A., J.D., *Judge John J. Parker Distinguished Professor of Law and Interim Dean*
NICK P. GOETTSCH, B.A., B.A., M.P.A, *Associate Dean for Administration*
KELLY PODGER SMITH, B.A., J.D., *Senior Associate Dean*
BIANCA MACK, B.A., M.B.A., J.D., *Associate Dean for Student Affairs*
CAROLINE L. OSBORNE, B.A., J.D., LL.M., M.S.L.S., *Director of the Law Library and Associate Professor of Law*
KIMBERLY C. BISHOP, B.A., J.D., *Associate Dean for Experiential Learning and Martha Brandis Term Professor of Law*
W. MARK C. WEIDEMAIER, B.A., J.D., *Associate Dean for Faculty Research and Ralph M. Stockton, Jr. Distinguished Professor of Law*
CRAIG T. SMITH, B.A., J.D., LL.M., *Associate Dean for Academic Affairs, Assistant Dean for the Writing and Learning Resources Center, and Martha Brandis Term Professor of Law*
ROBERT MICHAEL BIRRENKOTT, B.A., M.A., J.D., *Assistant Dean for Career Development and Adjunct Associate Professor of Law*
IAN MCINNIS, B.B.A., J.D., *Assistant Dean for Career Development and Adjunct Associate Professor of Law*
AMY BAREFOOT GRAEDON, B.A., *Assistant Dean for Communications*
CYNTHIA ANN LOWERY, B.S., *Assistant Dean for Finance*
DAVID WRIGHT, B.A., J.D., *Assistant Dean for Student Development*

Faculty

DAVID S. ARDIA, B.S., M.S., J.D., LL.M., *Associate Professor Law, Reef C. Ivey II Excellence Fund Term Professor of Law, and Co-Director of the Center for Media Law and Policy*
TRACEY BANKS, B.A., J.D., *Clinical Professor of Law*
KEVIN BENNARDO, B.A., J.D., *Clinical Professor of Law*
KIMBERLY C. BISHOP, B.A., J.D., *Associate Dean for Experiential Learning and Clinical Professor of Law*
LAUREN BRASIL, B.A., J.D., *Staff Attorney*
MARTIN H. BRINKLEY, A.B., J.D., *William Rand Kenan, Jr. Distinguished Professor of Law and Dean Emeritus*
JOHN WESLEY BROOKER, B.A., J.D., LL.M., M.M.A.S., *Clinical Associate Professor of Law*
LISSA LAMKIN BROOME, B.S., J.D., *Burton Craige Distinguished Professor of Law and Director of the Center for Banking and Finance*
KARA J. BRUCE, B.A., J.D., *Professor of Law*
ELLIE CAMPBELL, B.A., M.A., M.A., J.D., M.L.I.S, *Reference Librarian and Clinical Associate Professor of Law*
ALEXA Z. CHEW, A.B., J.D., *Clinical Professor of Law*
ANDREW CHIN, B.S., PH.D., J.D., *Paul B. Eaton Distinguished Professor of Law*
JOHN MARTIN CONLEY, B.A., J.D., PH.D., *William Rand Kenan Jr. Professor of Law*
JOHN F. COYLE, B.A., M.PHIL., J.D., *Reef C. Ivey II Distinguished Professor of Law*
HARMONY DECOSIMO, B.A., J.D., *Visiting Clinical Professor of Law*
NICOLE M. DOWNING, B.S., J.D., M.S.L.S., *Assistant Director for Public Services and Clinical Associate Professor of Law*
MAXINE N. EICHNER, B.A., J.D., M.A., PH.D., *Graham Kenan Distinguished Professor of Law*
KATE SABLOSKY ELENGOLD, B.A., J.D., *Assistant Professor of Law*
LEWIS MOORE EVERETT, B.A., M.A., J.D., *Clinical Professor of Law*
BARBARA A. FEDDERS, B.A., J.D., *Director of Clinical Programs and Associate Professor of Law*
ERIC FISHER, B.A., M.ED., J.D., *Clinical Assistant Professor of Law*
CARRIE LYNN FLOYD, B.A., M.S.W., J.D., *Assistant Professor of Law*
MARCUS GADSON, B.A., J.D., *Associate Professor of Law*
DEBORAH R. GERHARDT, B.A., J.D., *Paul B. Eaton Distinguished Professor of Law*
MICHAEL J. GERHARDT, B.A., M.S., J.D., *Burton Craige Distinguished Professor of Jurisprudence*
CALEB NATHANAEL GRIFFIN, B.B.A., J.D., *Associate Professor of Law*
RACHEL I. GURVICH, B.A., J.D., *Clinical Associate Professor of Law*
THOMAS LEE HAZEN, B.A., J.D., *Cary C. Boshamer Distinguished Professor of Law*
ANDREW HESSICK, B.A., J.D., *Judge John J. Parker Distinguished Professor of Law and Interim Dean*
CARISSA BYRNE HESSICK, B.A., J.D., *Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law*
JEFFREY MICHAEL HIRSCH, B.A., M.P.P., J.D., *Geneva Yeargan Rand Distinguished Professor of Law*
DONALD THOMAS HORNSTEIN, B.A., J.D., *Aubrey L. Brooks Professor of Law*
EISHA JAIN, B.A., J.D., *Henry P. Brandis Distinguished Professor of Law*
OSAMUDIA JAMES, B.A., J.D., LL.M., *Professor of Law*
THOMAS A. KELLEY, A.B., J.D., *James Dickson Phillips, Jr. Distinguished Professor of Law*
JOSEPH E. KENNEDY, B.A., J.D., *Martha Brandis Term Professor of Law*
JULIE L. KIMBROUGH, B.A., J.D., M.S.L.S., *Clinical Professor of Law*
AARON S. KIRSCHENFELD, A.B., M.S.I.S., J.D., *Digital Initiatives Law Librarian and Clinical Associate Professor of Law*
JOAN H. KRAUSE, B.A., J.D., *Dan K. Moore Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
HOLNING S. LAU, B.A., J.D., *Willie Person Mangum Distinguished Professor of Law*
NOAH HERTZ MARKS, B.A., B.S., J.D., LL.M., *Assistant Professor of Law*
DUSTIN MARLAN, B.A., J.D., *Assistant Professor of Law*
WILLIAM P. MARSHALL, B.A., J.D., *William Rand Kenan Jr Distinguished Professor of Law*
ERIC L. MULLER, A.B., J.D., *Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics*
GENE R. NICHOL, B.A., J.D., *Boyd Tinsley Distinguished Professor of Law*
DONNA L. NIXON, B.A., M.S.L.S., *Clinical Professor of Law & Electronic Resources Librarian*
CAROLINE L. OSBORNE, B.A., J.D., LL.M., M.S.L.S., *Director of the Law Library and Clinical Professor of Law*
LEIGH Z. OSOFSKY, A.B., J.D., *William D. Spry III Distinguished Professor of Law*
BETH S. POSNER, A.B., M.A., J.D., *Clinical Professor of Law*
DANIEL RICE, B.A., J.D., *Assistant Professor of Law*
MICHELLE E. RODENBURG, B.A., M.S.I., J.D., *Law and Technology Librarian, Clinical Assistant Professor of Law*
KERRI-ANN ROWE, B.A., J.D., M.S., *Reference Librarian and Clinical Assistant Professor of Law*
STACEY L. ROWLAND, B.A., M.I.S., M.S., J.D., *Assistant Director for Collection & Technology Services and Clinical Associate Professor of Law*
OSCAR J. SALINAS, B.A., J.D., M.A., *Director of Academic Excellence Program and Clinical Professor of Law*
MARIA SAVASTA-KENNEDY, B.A., J.D., *Director of the Externship Program and Clinical Professor of Law*
RICHARD S. SAVER, B.A., J.D., *Arch T. Allen Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
ANNIE SCARDULLA, B.A., J.D., *Clinical Assistant Professor of Law*

Theodore M. Shaw, B.A., J.D., *Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights*
Craig T. Smith, B.A., J.D., LL.M., *Associate Dean for Academic Affairs, Assistant Dean for the Writing and Learning Resources Center, and Martha Brandis Term Professor of Law*
Mark Storslee, B.A., M.A., M.A., J.D., Ph.D., *Associate Professor and C. Boyden Gray Distinguished Scholar*
Rick Su, B.A., J.D., *Professor of Law*
Kathleen DeLaney Thomas, B.S., J.D., LL.M., *George R. Ward Term Professor of Law and Director of UNC School of Law Tax Institute*
Sara B. Warf, B.A., J.D., *Clinical Associate Professor of Law*
W. Mark C. Weidemaier, B.A., J.D., *Ralph M. Stockton, Jr. Distinguished Professor of Law*
Arthur Mark Weisburd, A.B., J.D., *Reef C. Ivey II Distinguished Professor of Law Emeritus*
Deborah M. Weissman, B.A., J.D., *Reef C. Ivey II Distinguished Professor of Law*
Marjorie S. White, A.B., J.D., *Clinical Professor of Law*
Erika K. Wilson, B.S., J.D., *Professor of Law, Wade Edwards Distinguished Scholar, and Thomas Willis Lambeth Distinguished Chair in Public Policy*
Andrew Wisniewsky, B.A., J.D., *Reference Librarian and Clinical Assistant Professor of Law*
Janine M. Zanin, B.A., J.D., *Assistant Director of Externship Programs and Clinical Professor of Law*

Adjunct Faculty

Teresa Artis, B.A., J.D., M.B.A., *Adjunct Professor of Law*
E. Kent Auberry, A.B., J.D., *Adjunct Professor of Law*
Carmen Bannon, B.S., J.D., *Adjunct Professor of Law*
E. William Bates II, B.A., J.D., *Adjunct Professor of Law*
Jennifer Bills, B.A., J.D., *Adjunct Professor of Law*
Seth A. Blum, B.A., M.A., J.D., *Adjunct Professor of Law*
M. Christopher Bolen, B.S., M.B.A., J.D., *Adjunct Professor of Law*
Eric J. Brignac, B.A., J.D., *Adjunct Professor of Law*
Jonathan E. Broun, B.Ph., J.D., *Adjunct Professor of Law*
LeAnn Nease Brown, B.A., M.S., J.D., *Adjunct Professor of Law*
Tracy Calder, B.A., J.D., *Adjunct Professor of Law*
Benjamin A. Davidson, B.S., J.D., *Adjunct Associate Professor of Law*
Karen Davidson, B.A., M.A., J.D., *Adjunct Associate Professor of Law*
Allison De Marco, B.A., M.S.W., Ph.D., *Adjunct Associate Professor of Law*
Patricia DeVine, B.A., J.D., *Adjunct Associate Professor of Law*
Dennis Duffy, B.A., J.D., *Adjunct Associate Professor of Law*
Robert E. Duggins, B.S., J.D., *Adjunct Professor of Law*
Catherine Ross Dunham, B.A., M.A., J.D., LL.M., *Adjunct Associate Professor of Law*
The Honorable Anita S. Earls, B.A., J.D., *Adjunct Professor of Law*
J. Ford Eubanks, B.A., M.A., J.D., *Adjunct Assistant Professor of Law*
Elizabeth Fisher, B.S., J.D., *Adjunct Associate Professor of Law*
Jillian Franke, B.A., J.D., *Adjunct Associate Professor of Law*
Beth Grimes, B.A., J.D., *Adjunct Associate Professor of Law*
Ken Hammer, B.S., J.D., *Adjunct Professor of Law*
R. Harper Heckman, B.A., J.D., *Adjunct Professor of Law*
Ashley Lee Hogewood III, A.B., J.D., *Adjunct Associate Professor of Law*
Samuel S. Jackson, A.B., J.D., *Adjunct Professor of Law*
Robert O. Jenkins, B.A., M.P.A., J.D., *Adjunct Professor of Law*
Sally C. Johnson, B.S., M.D., *Adjunct Professor of Law*
Valerie A. Johnson, B.A., J.D., *Adjunct Professor of Law*
William D. Johnson, B.A., J.D., *Adjunct Professor of Law*
Tod M. Leaven, B.S., J.D., *Adjunct Clinical Associate Professor of Law*
Chris Lynch, B.A., J.D., *Adjunct Associate Professor of Law*
Richard L. Magee, B.A., J.D., *Adjunct Professor of Law*
C. Steven Mason, B.A., J.D., *Adjunct Professor of Law*
John McArthur, B.A., J.D., *Adjunct Associate Professor of Law*
William S. Mills, A.B., J.D., *Adjunct Professor of Law*
Marcia Morey, B.A., J.D., *Adjunct Associate Professor of Law*
Orla Marie O'Hannaidh, B.A., M.A., J.D., *Adjunct Associate Professor of law*
Barbara Osborne, B.A., M.A., M.Ed., J.D., *Adjunct Professor of Law*
M. Scott Peeler, B.A., J.D., *Adjunct Professor of Law*
Alexis Pendergraft, B.S., J.D., *Adjunct Associate Professor of Law*
Charles Plambeck, B.A., J.D., *Adjunct Associate Professor of Law*
Carolyn Pratt, B.A., J.D., *Adjunct Associate Professor of Law*
Katie Rose Guest Pryal, A.B., M.A., J.D., Ph.D., *Adjunct Associate Professor of Law*
Amanda Reid, B.A., M.A., Ph.D., J.D., *Adjunct Associate Professor of Law*
Todd S. Roessler, B.S., M.S., J.D., *Adjunct Associate Professor of Law*
Thomas C. Shanahan, B.S., J.D., *Adjunct Associate Professor of Law*
Elliot Silverstein, B.S., J.D., Ph.D., *Adjunct Associate Professor of Law*
Elizabeth Simpson, B.A., J.D., *Adjunct Associate Professor of Law*
Richard A. Simpson, B.A., J.D., *Adjunct Professor of Law*
Eric J. Spitler, B.A., J.D., *Adjunct Professor of Law*
Josh Starin, B.A., J.D., LL.M., *Adjunct Professor of Law*
Kimberly Tran, B.S., M.A., Ph.D., *Adjunct Associate Professor of Mental Health and the Law*
Joni L. Walser, B.A., J.D., *Adjunct Professor of Law*
Frank Whitney, B.A., J.D., M.B.A., *Adjunct Associate Professor of Law*

Faculty Emeriti

John Charles Boger, A.B., M.Div., J.D., *Wade Edwards Distinguished Professor of Law Emeritus*
Kenneth S. Broun, B.S., J.D., *Henry Brandis Professor of Law Emeritus*
Caroline Nicholson Brown, B.A., M.A., J.D., *Professor of Law Emerita*
Patricia L. Bryan, B.A., J.D., LL.M., *Professor of Law Emerita and Adjunct Professor of Law*
Michael L. Corrado, B.A., B.S., A.M., Ph.D., J.D., *Arch T. Allen Distinguished Professor of Law Emeritus*
Laura N. Gasaway, B.A., M.S., J.D., *Paul B. Eaton Distinguished Professor of Law Emerita*
S. Elizabeth Gibson, B.A., J.D., *Burton Craige Professor of Law Emerita*
Melissa B. Jacoby, B.A., J.D., *Graham Kenan Professor of Law Emerita*

FIRST AMENDMENT LAW REVIEW

VOLUME 24 **ISSUE 3**

ARTICLES

NOTES

PROTECTING PROMISES: SHIELDING JOURNALISTS AGAINST COMPELLED DISCLOSURE

Olivia S. Hiltbrand*

ABSTRACT

In recent high-profile cases, prosecutors have sought confidential or off-the-record reporting materials from journalists, and judges have granted that access. This alarming trend raises grave concerns for journalists, who must be able to make and keep promises to their sources, whether that involves off-the-record information or keeping a source's identity confidential. Many states offer journalists some protection via shield laws or judicial decisions, although this protection is often qualified. On the federal level, the U.S. Supreme Court has not recognized a First Amendment reporter's privilege within the First Amendment, federal circuit courts take varied approaches to resolving these cases, the U.S. Congress has failed to enact a federal shield law, and the Federal Rules of Evidence do not address testimonial privileges for journalists. These gaps put journalists and their confidential sources at risk at a time when their work is critically important.

I. INTRODUCTION

In September 2023, investigative journalist Gretchen Voss published a longform report about a controversial murder case in Norfolk County, Massachusetts.[1] Voss's report explored whether "a successful South Shore woman really kill[ed] her police officer boyfriend" or whether, as the woman claimed, "a slew of dirty cops frame[d] her."[2] A few months later, the county's district attorney asked a judge to order Voss "to turn over notes and recordings from three interviews she conducted with Karen Read, the Mansfield defendant accused of murdering her boyfriend, Boston Police officer John O'Keefe."[3] The judge later approved a special prosecutor's request for access to Voss's

*Litigation associate at Squire Patton Boggs in Columbus, Ohio, and recent J.D. graduate from The Ohio State University Moritz College of Law. Thank you to my husband and family for their support and encouragement. Special thanks to The Honorable Edmund A. Sargus of the Southern District of Ohio for his insight and feedback on this piece, which was written as part of his spring 2025 seminar on Evidence and Trial Practice.

[1] Gretchen Voss, *The Karen Read Case in Canton: The Killing That Tore a Town Apart*, Bos. Mag. (Sept. 27, 2023, 8:30 AM), https://www.bostonmagazine.com/news/2023/09/27/canton-karen-read.

[2] *Id.*

[3] *The Karen Read Story Continues: Judge Keeps 'Off the Record' Interview Confidential*, Bos. Mag. (Jan. 25, 2024, 7:18 PM), https://www.bostonmagazine.com/news/2024/01/25/karen-read-case-update.

reporting materials—interview notes, emails, voicemails, texts, and audio recordings—including off-the-record notes.[4]

After Voss asked the judge to reconsider the order to produce off-the-record notes, the judge "backtracked," reasoning that Voss compellingly argued "that requiring disclosure of the notes pose[d] a greater risk to the free flow of information than the other materials."[5] The judge added that Massachusetts had not shown that its need for the off-the-record notes "outweigh[ed]" that risk.[6]

This is not the only recent case in which prosecutors have requested confidential or off-the-record materials from journalists.[7] In another high-profile case, prosecutors sought confidential material from a *New Yorker* magazine journalist's interview with the husband of Lindsay Clancy, a Massachusetts woman charged with murdering her children.[8] The *New Yorker*

---

[4] *See* Lance Reynolds, *Karen Read Judge Rules in Favor of Boston Magazine, the 'Free Flow of Information,'* Bos. Herald (Feb. 1, 2025, 7:57 AM), https://www.bostonherald.com/2025/02/01/karen-read-judge-rules-in-favor-of-boston-magazine-the-free-flow-of-information. Notably, state court judges in Massachusetts are appointed for life, albeit with mandatory retirement at age 70. *How A Judge Is Selected in Massachusetts*, Mass.gov (Aug. 21, 2018), https://www.mass.gov/news/how-a-judge-is-selected-in-massachusetts. For an explanation of journalism terms, such as "off the record," *see Here Are All the Journalism Terms You Need to Know, Defined*, Poynter (Jan. 7, 2025), https://www.poynter.org/reporting-editing/2025/journalism-words-reporting-terms-off-the-record (defining "[o]ff the [r]ecord" as "[w]hen a person provides information, but the source and reporter agree the information won't be used in a published story in a way attributable to them").

[5] Reynolds, *supra* note 4.

[6] *Id.* A jury ultimately found Read not guilty of second-degree murder but convicted her on a drunken driving charge. *See* Bridget Brown et al., *Jury Finds Karen Read Not Guilty of Second-Degree Murder in Death of Police Boyfriend*, AP NEWS (June 18, 2025, 4:48 PM), https://apnews.com/live/karen-read-trial-verdict.

[7] *See, e.g.*, *First Amendment Clinic Wins Appeal to Protect Journalist's Unnamed Sources*, CORNELL L. SCH. (Dec. 3, 2025), https://www.lawschool.cornell.edu/news/first-amendment-clinic-wins-appeal-to-protect-journalists-unnamed-sources (noting that a subpoena of a newspaper's former managing editor "had to be quashed because the party that issued the subpoena failed to meet the strict test imposed by the New York Shield Law").

[8] *See* Brittany Johnson & Kevin Rothstein, *Prosecutors Seeking Journalists' Information Raising Press Freedom Concerns*, WCVB CHANNEL 5 (Feb. 22, 2025, 4:35 PM), https://www.wcvb.com/article/prosecutors-seeking-journalists-information-raising-press-freedom-concerns/63870281. Clancy's trial is scheduled for July 2026. *See* Marc Fortier & Asher Klein, *Trial of Lindsay Clancy, Mom Accused of Killing Her Kids, Delayed Until Next Summer*, NBC10 BOS. (Nov. 18, 2025, 1:15 PM), https://www.nbcboston.com/news/local/trial-of-lindsay-clancy-duxbury-mom-accused-of-killing-her-kids-delayed-until-july-2026/3847163.

said in a statement that it planned to push back on a judge's order to produce that information.[9]

These cases raise grave concerns for journalists, who must be able to make and keep "promises of confidentiality" to their sources, whether that involves off-the-record information or keeping a source's identity confidential.[10] Justin Silverman, executive director of the New England First Amendment Coalition, called these cases "troubling":

> Sometimes you have sources that want to provide information, want to share a story, but in doing so, might open themselves up to legal risk. Their personal safety might be at risk. We're talking about very sensitive information that's only going to be shared if reporters can make certain assurances to them that they'll be protected.[11]

Protection for confidential sources and materials is critical to ensuring journalists can continue to report important news without risking compelled disclosure.[12] These situations may arise when journalists are reporting on national security matters or are called to testify before grand juries

Although nearly all states offer some protection for journalists via shield laws or judicial decisions, some offer only qualified protection.[13] On the federal level, the situation is even bleaker: the U.S. Supreme Court has not recognized a reporter's privilege within the First Amendment,[14] federal circuit courts

---

[9] *See* Johnson & Rothstein, *supra* note 8 ("These sorts of subpoenas that seek to turn independent journalists into tools of law enforcement violate basic First Amendment values.").

[10] *Id.*

[11] *Id.*; *see also NEFAC, Press Groups Argue Against Forced Disclosure of Reporter's Notes in Karen Read Case*, NEW ENGLAND FIRST AMEND. COAL. (Jan. 31, 2025), https://www.nefac.org/news/nefac-press-groups-argue-against-forced-disclosure-of-reporters-notes-in-karen-read-case ("[T]he government's intrusion into entirely confidential communications between a reporter and source, including the thought processes and work product of a journalist, unjustifiably intrudes on First Amendment interests and, as precedent, would unnecessarily chill the newsgathering process.").

[12] These are not the only situations in which journalists or their sources might be compromised. In August 2023, for example, police raided the newsroom of a small Kansas newspaper, the *Marion County Record*, though a prosecutor later withdrew the related search warrant. *See* Luke Nozicka et al., *Warrant for Kansas Newspaper Raid Withdrawn by Prosecutor for 'Insufficient Evidence*,*'* KAN. CITY STAR (Oct. 17, 2024, 6:02 AM), https://www.kansascity.com/news/state/kansas/article278300178.html.

[13] *See infra* Part III.B.

[14] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 690 (1972); *infra* Part II.A.

resolve such cases inconsistently,[15] the most recent Congress to consider a federal shield law failed to enact it,[16] and the Federal Rules of Evidence contain just a single privilege rule, which does not directly address journalists in the context of testimonial privileges.[17]

These failures put journalists and confidential sources at risk. With inconsistent state and circuit approaches, federal courts cannot effectively shield journalists or their sources, especially in diversity cases. This Essay explores how to improve the situation. Part I served as a brief introduction. Part II revisits *Branzburg v. Hayes*, the seminal Supreme Court case on reporter's privilege, and delves into the history of the Federal Rules of Evidence, explaining how a dozen privileges were cast aside in favor of a single rule. Part III considers differing approaches to reporter's privilege within the federal circuits and among states. Part IV examines the failed PRESS Act and urges its revival. Part V proposes a new Federal Rule of Evidence to help protect journalists against compelled disclosure and testimony. Part VI concludes.

II. FIFTY YEARS OF UNCERTAINTY: *BRANZBURG V. HAYES* AND THE FEDERAL RULES OF EVIDENCE

The U.S. Supreme Court has taken up the issue of reporter's privilege only once, in *Branzburg v. Hayes*, where it concluded that the First Amendment did not provide journalists a testimonial privilege against revealing sources or information.[18] Shortly after *Branzburg* was decided in the 1970s, the Supreme Court submitted proposed Federal Rules of Evidence to Congress, which Congress later enacted.[19] As this Part explains, neither *Branzburg* nor the Federal Rules protect journalists against compelled disclosure.

A. Branzburg v. Hayes

"The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society."

—Justice Potter Stewart, dissenting in *Branzburg v. Hayes*[20]

---

[15] *See infra* Part III.A.
[16] *See infra* Part IV.
[17] *See* FED. R. EVID. 501; *infra* Part II.B.
[18] *See* 408 U.S. at 690.
[19] *See Federal Rules of Evidence*, U.S. CTS., https://www.uscourts.gov/forms-rules/current-rules-practice-procedure/federal-rules-evidence (last visited Mar. 27, 2026).
[20] Branzburg v. Hayes, 408 U.S. at 725 (Stewart, J., dissenting).

In *Branzburg v. Hayes*, the Supreme Court declined to interpret the First Amendment as providing journalists a constitutional privilege against being forced to reveal confidential sources before a grand jury or in a criminal trial.[21] *Branzburg* consisted of four cases decided together: two involving Paul Branzburg, a Louisville newspaper reporter;[22] one involving Paul Pappas, a New England TV news photographer;[23] and the last involving Earl Caldwell, a *New York Times* reporter.[24]

In the first case, Paul Branzburg published a story about people producing hashish from marijuana in Louisville, in which he noted that he had agreed not to reveal their identities.[25] Subpoenaed by a county grand jury, Branzburg appeared but would not identify the people in his story or others he had seen possessing marijuana.[26] State courts ordered him to answer questions anyway, rejecting his assertions of privilege under the Kentucky reporter's privilege statute, the Kentucky Constitution, and the First Amendment of the U.S. Constitution.[27]

The second case involving Branzburg described drug use in Kentucky's capital city, Frankfort, and recounted interviews with multiple drug users.[28] Once again, Branzburg was subpoenaed—this time before a grand jury in a different county.[29] Despite his attempts to quash the subpoena, arguing that "his effectiveness as a reporter would be greatly damaged" by testifying before the grand jury or disclosing confidential information, state courts again concluded that Branzburg's "tenuous" fears did not "abridge[]" freedom of the press.[30]

The third case concerned Paul Pappas's coverage of civil unrest in New Bedford, Massachusetts.[31] Pappas was invited inside the Black Panther Party's headquarters after agreeing "not

---

[21] *See id.* at 690 ("We are asked to create another [privilege beyond the Fifth Amendment's privilege against self-incrimination] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process.").
[22] *See id.* at 667–71.
[23] *See id.* at 672–75.
[24] *See id.* at 675–79.
[25] *See id.* at 667–68.
[26] *See id.* at 668.
[27] *See id.* at 668.
[28] *See id.* at 669.
[29] *See id.*
[30] *Id.* at 670–71.
[31] *See id.* at 672.

to disclose anything he saw or heard inside" other than "an anticipated police raid," which he "was free to photograph and report as he wished."[32] That raid never took place, and Pappas never wrote a story.[33] Ordered to appear before a grand jury, Pappas answered questions about himself, his employment, and what he had observed outside the location, but he claimed First Amendment privilege in refusing to disclose what had taken place inside.[34] The Massachusetts courts—like the Kentucky courts that considered Branzburg's cases—rejected Pappas's arguments and characterized his concerns about being unable to report in the future as a result of his grand jury testimony as "indirect, theoretical, and uncertain."[35]

The fourth case came to the Supreme Court on a different procedural posture. Earl Caldwell, subpoenaed by a federal grand jury to testify about his reporting on the Black Panther Party, had won his appeal in the Ninth Circuit.[36] The Ninth Circuit held that the First Amendment did provide a qualified privilege to journalists, and that requiring reporters' grand jury testimony would not only dissuade future sources from communicating with journalists but would also cause journalists to censor what they wrote "to avoid being subpoenaed."[37]

The *Branzburg* majority clarified that it did "not question the significance of free speech, press, or assembly to the country's welfare" and that newsgathering was entitled to *some* First Amendment protection.[38] But it reasoned that the only issue before it was "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."[39] Acknowledging that some states provided statutory privileges for journalists, the Court declined to root a testimonial privilege for journalists within the First Amendment, while carefully explaining that news outlets could still publish as they wished and suggesting that this decision would not "threaten the vast bulk of confidential [reporter–source] relationships."[40]

---

[32] *Id.*
[33] *See id.*
[34] *See id.* at 673.
[35] *Id.* at 674–75 (citing *In re* Pappas, 358 Mass. 604, 612 (1971)).
[36] *See id.* at 675–79.
[37] *Id.*
[38] *Id.* at 681.
[39] *Id.* at 682.
[40] *Id.* at 689–91.

Although the Court did not characterize the journalists' arguments as "irrational," it said that it "remain[ed] unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury."[41] Justice Stewart, in his dissent, took issue with the majority's holding:

> The Court . . . invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the administration of justice.
>
> . . .
>
> The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press, because the guarantee is "not for the benefit of the press so much as for the benefit of all of us."
>
> Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society.[42]

Beyond simply elucidating the harmful effects of compelled disclosure on the press and on society, Justice Stewart also offered his own practical test for lower courts:

> [W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific

[41] *Id.* at 693.
[42] *Id.* at 725–26 (Stewart, J., dissenting) (citations omitted).

> probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[43]

Stewart cautioned, however, that grand juries could still issue subpoenas, and journalists could not just ignore them.[44]

It is worth noting that *Branzburg* was narrowly decided. Justice White wrote the Court's opinion, Justice Powell concurred, Justice Douglas dissented, and Justice Stewart separately dissented (joined by Justices Brennan and Marshall).[45] Both Justice Powell's concurring opinion and Justice Stewart's dissenting opinion "recognized a qualified privilege for reporters."[46] That meant five justices—Justices Powell, Stewart, Brennan, Marshall, and Douglas—"gave the qualified privilege issue a majority."[47] Nevertheless, since *Branzburg*, the Court has never again taken up the issue of whether the First Amendment affords journalists a testimonial privilege.

B. History of the Privileges

Months after *Branzburg*, the Supreme Court submitted proposed Federal Rules of Evidence to Congress.[48] Among the proposed rules the Court had approved were thirteen rules of privilege, to be housed in Article V of the Rules.[49] But many of these rules were "vigorously attacked" by critics.[50] Rule 501—as proposed—was criticized as "an affront to the states' sovereignty" because it would have applied federal privilege law to all claims in federal court, even where state law governed.[51] Congress ultimately rejected nearly all of the proposed privileges

---

[43] *Id.* at 743.
[44] *See id.* ("[B]efore the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.").
[45] *See id.* at 667, 709-11, 725.
[46] *Introduction to the Reporter's Privilege Compendium*, REPS. COMM. FOR FREEDOM OF THE PRESS (Nov. 5, 2021), https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium.
[47] *Id.*
[48] *See* FED. R. EVID. 501.
[49] 5 FED. RULES OF EVIDENCE MANUAL 501-11 to -12 (Saltzburg et al. eds., 12th ed. 2022).
[50] *Id.*
[51] *Id.* (also noting that "[n]ews reporters, social workers, and accountants complained of the failure to provide them with privileges").

and enacted just one privilege rule: a federal "common-law approach to privileges" that deferred to state privileges when state law "provide[d] the rule of decision."[52] The Federal Rules of Evidence, with a narrowed Article V, became law in January 1975.[53]

While none of the proposed privileges addressed news reporters, Proposed Rule 510 would have allowed the government to protect the identity of confidential informers in law enforcement investigations.[54] The Advisory Committee highlighted the importance of confidentiality in such investigations, "whether the informer is a citizen who steps forward with information or a paid undercover agent," adding that "the basic importance of anonymity in the effective use of informers is apparent."[55] The same is true for journalists and their sources.

Yet legislative history shows that courts could—and, indeed, may have been expected to—implement reporter's privilege rules. The main drafter of Rule 501 noted that its flexible language permitted courts "to develop a privilege for newspaperpeople on a case-by-case basis."[56]

III. INCONSISTENT APPROACHES TO REPORTER'S PRIVILEGE

Without a federal reporter's shield law or rule of privilege, the scope of reporter's privilege varies widely among states and across federal courts, "mak[ing] it impossible for a journalist to act with any certainty when dealing with potential sources."[57] As media attorney Lynn Oberlander explains:

> [I]f a New York-based reporter receives a subpoena seeking the identity of a confidential source issued out of the New York Supreme Court at 60 Centre Street, the reporter can refuse to comply, relying on New York's absolute privilege

---

[52] *See* FED. R. EVID. 501.

[53] *See Federal Rules of Evidence*, *supra* note 17 (citing Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975)).

[54] Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 255–58 (proposed Nov. 20, 1972).

[55] *Id.* at 256.

[56] *The Federal Common Law of Journalists' Privilege: a Position Paper*, N.Y.C. BAR ASS'N, https://www.nycbar.org/pdf/report/White%20paper%20on%20reporters%20privilege.pdf (last visited Mar. 29, 2026).

[57] Lynn Oberlander, *Protecting the Press from Prosecutorial Overreach*, N.Y. STATE BAR ASS'N (Aug. 4, 2021), https://nysba.org/protecting-the-press-from-prosecutorial-overreach/.

> for confidential sources (found in New York Civil Rights Law § 79-h). If, on the other hand, the subpoena comes from 40 Centre Street, the federal courthouse next door, the journalist will face a "qualified" privilege based on common law, meaning that it could be overcome by a compelling government interest.[58]

This also creates discrepancies in how federal courts treat reporter's privilege. Courts hearing diversity cases may reach wildly divergent outcomes because of differing state approaches. And those hearing federal-question cases must search for common law principles, which may also be inconsistent across courts. Despite arguments for "recognition of a federal common law journalists' privilege" in light of threats to the press,[59] federal courts have been reluctant to recognize either a First Amendment or federal common law privilege.[60]

A 2005 federal grand jury investigation demonstrates the potential consequences. Judith Miller, a *New York Times* reporter, spent eighty-five days in jail for refusing to testify before a federal grand jury and reveal a confidential source.[61] She and another journalist had been subpoenaed in an investigation into "the public exposure of a covert CIA agent's identity," and both were held in civil contempt of court when they would not testify.[62] The D.C. Circuit affirmed a lower court's conclusion that "there is

---

[58] *Id.*

[59] *See supra* note 56 (collecting examples of subpoenas issued to journalists).

[60] *See infra* Part III.A.

[61] Don van Natta Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES (Oct. 16, 2005), https://www.nytimes.com/2005/10/16/us/the-miller-case-a-notebook-a-cause-a-jail-cell-and-a-deal.html (reporting that the investigation concerned "whether Bush administration officials leaked the identity of Ms. [Valerie] Plame, an undercover C.I.A. operative, to reporters as part of an effort to blunt criticism of the president's justification for the war in Iraq"). The investigation was spurred not by Miller's own reporting, but by an op-ed written by a former diplomat—Plame's husband—who criticized the administration for "twisting intelligence to exaggerate the Iraqi threat." *Id.*; *see* Joseph C. Wilson 4th, *What I Didn't Find in Africa*, N.Y. TIMES (July 6, 2003), https://www.nytimes.com/2003/07/06/opinion/what-i-didn-t-find-in-africa.html ("I have little choice but to conclude that some of the intelligence related to Iraq's nuclear weapons program was twisted to exaggerate the Iraqi threat.").

[62] *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1138, 1138–39 (D.C. Cir. 2006); *see also Contempt of Court, Civil*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/contempt_of_court_civil (last visited Mar. 29, 2026) ("Civil contempt of court refers to disobedience of an order of the court which carries quasi-criminal penalties rather than direct criminal penalties. The goal of civil contempt of court charges is to persuade the party subject to the charges to comply with the court order(s). Unlike other civil penalties, however, civil contempt of court can result in jail time.").

no First Amendment privilege protecting the evidence sought" and that "if any common law privilege exists, it is not absolute" and is "overcome" by the special counsel's filings.[63] After Miller's source "released" her from their confidentiality agreement, Miller ultimately testified before the grand jury.[64] She later explained that without the source's permission, and without the prosecutor agreeing to limit questioning to only information about that particular source, she "would not have testified and would still be in jail."[65] But the D.C. Circuit's conclusion that any common law privilege would not be absolute, with at least one judge asserting that no common law privilege existed whatsoever,[66] illustrates why it is problematic not to have a uniform federal statute or rule of evidence shielding journalists.

A. Circuit Split

Most circuit courts recognize—in at least some circumstances—a qualified reporter's privilege, rooted within the First Amendment or federal common law.[67] The Reporters Committee for Freedom of the Press maintains a "Reporter's Privilege Compendium," which examines how various states and federal circuits approach "the right not to be compelled to testify or disclose sources and information in court."[68] The circuit courts' approaches can be grouped into three broad categories based on the existence or strength of the privilege and applicable tests to overcome it.

Beginning with the circuits with the least protection for journalists, the Eighth Circuit has not "definitively established" a reporter's privilege, with some district courts finding a qualified privilege in civil cases and others finding no privilege in criminal

---

[63] *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 965 (D.C. Cir. 2005), *rev'd,* 438 F.3d 1141 (D.C. Cir. 2006).

[64] *See* van Natta et al., *supra* note 61. Miller's source turned out to be I. Lewis "Scooter" Libby, chief of staff to then-Vice President Dick Cheney. *See id.*

[65] Judith Miller, *My Four Hours Testifying in the Federal Grand Jury Room*, N.Y. TIMES (Oct. 16, 2005), https://www.nytimes.com/2005/10/16/us/my-four-hours-testifying-in-the-federal-grand-jury-room.html.

[66] *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d at 1139.

[67] *See Introduction to the Reporter's Privilege Compendium*, *supra* note 46 (noting that, as of November 2021, only the Seventh and Eighth Circuits did not definitively recognize at least a qualified privilege, and that the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits "recognized a privilege in at least some cases" based on the First Amendment, with the Third Circuit also "describ[ing] the privilege as arising from federal common law").

[68] *Reporter's Privilege Compendium*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/reporters-privilege (last visited Mar. 30, 2026).

cases or grand jury investigations.[69] The Seventh Circuit generally limits the privilege to confidential sources in federal-question cases, with some courts protecting nonconfidential material under a generally applicable "reasonableness" test.[70] The Sixth Circuit affords reporters "some sort of privilege," but its "scope and contours" are unclear, particularly in criminal cases or for nonconfidential information.[71]

Five circuits—the First, Fifth, Tenth, Eleventh, and D.C. Circuits—recognize a qualified reporter's privilege, typically with balancing tests (like the one proposed by Justice Stewart in the *Branzburg* dissent) that allow a party seeking material to overcome the privilege with certain showings. For instance, the Eleventh Circuit—which generally follows Fifth Circuit precedent, after the courts split in the 1980s—has held that a qualified reporter's privilege in criminal cases can be overcome by the other party's clear and convincing evidence that the information is "highly relevant, necessary to the proper presentation of the case, and unavailable from other sources."[72] It also recognizes a qualified privilege in civil cases where "the party seeking the information must demonstrate with substantial evidence that the information is relevant, not available

---

[69] *Introduction: History & Background*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/privilege-sections/i-introduction-history-background (last visited Mar. 30, 2026) (noting that *Cervantes v. Time, Inc.*, 464 F.2d 986, 992–93 (8th Cir. 1972), has been treated as establishing a qualified privilege but that a later case, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997), indicated that reporter's privilege was still an "open" question in the Eighth Circuit).

[70] *Id.*; *see* McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003) ("It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas.").

[71] David Marburger, *6th Circuit, Reporter's Privilege Compendium*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/privilege-compendium/6th-circuit (last visited Mar. 30, 2026). In the civil context, the Sixth Circuit has recognized journalists' right "to avoid compelled disclosure of commercial information received from a source to whom the newspaper promised anonymity." *See id.* (discussing *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998)). The privilege is less clear in criminal or grand jury contexts. *See id.* (noting that "there is doubt" as to "any special prerogative of the press to resist the subpoena" and noting that in one case, *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987), the court "opined that the First Amendment provides the press with protection only from grand jury subpoenas issued in bad faith to harass the press or to disrupt its relationship with its sources," ultimately upholding "a grand jury subpoena to obtain video outtakes . . . in a context in which the taped subjects expected anonymity" and refusing to overturn a contempt conviction).

[72] United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); *See Introduction: History & Background*, *supra* note 69.

elsewhere, and the need for information is compelling."[73] The Fifth Circuit itself, however, only recognizes a qualified privilege for the identity of sources in civil cases and does not recognize a privilege for nonconfidential sources or materials in a criminal or grand jury context, absent intentional harassment of the journalist by the government.[74] The First Circuit determines privilege by "balancing the potential harm to the free flow of information and First Amendment interests" in each case "against the . . . asserted need for the requested information."[75] The Tenth Circuit, which extends the privilege "even to published information," based on the First Amendment, has formulated a four-part test but has not applied it in any case.[76] And, as noted above, the D.C. Circuit has been reluctant to expand reporter's privilege beyond qualified protection.[77]

Four circuits—the Second, Third, Fourth, and Ninth Circuits—employ a more expansive approach. The Second Circuit recognizes a privilege that spans both civil and criminal cases, as well as nonconfidential and confidential sources, with tests that the Reporters Committee has deemed "somewhat more press-protective" than those in other circuits.[78] The Third Circuit generally upholds a qualified privilege in civil cases but is "more likely to find that other constitutional interests outweigh" the privilege in criminal or grand jury contexts.[79] Like the Second Circuit, the Third Circuit employs a balancing test that rests on "specific showings that the information sought is material, relevant and necessary to the party's claims or defenses."[80] The Ninth Circuit resembles the Third Circuit, particularly in civil cases, but with "mixed results" in different factual scenarios.[81] For example, courts in the Ninth Circuit have protected a

---

[73] *Introduction: History & Background*, *supra* note 69 (discussing Miller v. Transamerican Press, Inc., 621 F.2d 721, 726, *as modified*, 628 F.2d 932 (5th Cir. 1980)).
[74] *See id.* (discussing United States v. Smith, 135 F.3d 963, 968–72 (5th Cir. 1998)).
[75] *Id.*
[76] *Id.* This test addresses (1) "[w]hether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful," (2) "[w]hether the information goes to the heart of the matter," (3) "[w]hether the information is of certain relevance," and (4) "[t]he type of controversy." Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977).
[77] *See supra* text accompanying notes 61–66.
[78] *Introduction: History & Background*, *supra* note 69 (collecting cases that use factors such as the relevance and materiality of the information, how necessary or critical the information is to the claim, and whether it can be obtained from other sources).
[79] *Id.*
[80] *Id.* (discussing Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979)).
[81] *Id.* (discussing the application of journalist's privilege in Ninth Circuit cases).

magazine publisher from revealing unpublished information[82] but have also compelled reporters to appear before grand juries and provide confidential information about their sources.[83] And the Fourth Circuit, though "less aggressive" than other circuits in exploring the boundaries of the privilege, has established a balancing test for a qualified First Amendment privilege for confidential and nonconfidential information and sources in civil cases.[84]

These inconsistencies across—and even within—circuits have led to uneven and unsettled results, particularly given the varied state approaches discussed below.

B. State Shield Laws

No federal reporter's shield law currently exists, but nearly all states have either passed statutes or otherwise recognize a reporter's privilege against compelled testimony or disclosure.[85] The Reporter's Privilege Compendium identifies four main approaches among these state laws, which I briefly summarize below.

1. Approach 1: No Shield Law

Only two states—Hawai'i and Wyoming—have no shield law, with no other privilege recognized by courts.[86] Hawai'i previously had a shield statute from 2008 to 2013, which lapsed and was automatically repealed; efforts to reenact a similar law were unsuccessful.[87] While Hawai'i's constitution contains no express shield for journalists (nor have state courts construed it that way), it does contain language that mirrors the First Amendment.[88] Wyoming similarly has no shield law, with no shield bill ever filed at the state level, although the state's press association has contemplated advocating for one.[89] Although Wyoming's constitution has a provision that a federal district

[82] *See id.* (discussing Carushka, Inc. v. Premiere Prods., Inc., No. CV 87 02356, 1989 WL 253565 (C.D. Cal. Sep. 1, 1989)).
[83] *See id.* (discussing *In re* Grand Jury Subpoenas to Fainaru-Wade & Williams, 438 F. Supp. 2d 1111, 1121 (N.D. Cal. 2006)).
[84] *Id.* (discussing LaRouche v. Nat'l Broad. Co., 780 F.2d 1134 (4th Cir. 1986)).
[85] *See id.*
[86] *See id.*
[87] *See* John P. Duchemin, *Reporter's Privilege Compendium: Hawaii*, REPS. COMM. FOR FREEDOM OF THE PRESS (Apr. 2025), https://www.rcfp.org/privilege-compendium/hawaii.
[88] *See id.* (citing HAW. CONST. art. I, § 4).
[89] Bruce T. Moats, *Reporter's Privilege Compendium: Wyoming*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/privilege-compendium/wyoming (last visited Jan. 26, 2026).

court once deemed "broader" than the First Amendment, no state courts have interpreted it this way or considered how it might affect reporter's privilege.[90]

2. Approach 2: No Shield Law, but Courts Recognize a Qualified Privilege for Sources

Seven additional states lack shield laws but recognize a reporter's privilege via common law or court rules.[91] This Subpart briefly highlights the disparate approaches—from common law balancing tests to evidentiary rules to the First Amendment—in three states: Massachusetts, Utah, and Virginia.

Massachusetts has no statutory shield law, and the state's highest court has not recognized a privilege under either the U.S. Constitution or the state's constitution.[92] But state courts have sometimes used "a common law balancing test based on general First Amendment principles to protect reporters' confidential sources."[93] In the 1980s, the Governor's Press Shield Law Task Force petitioned the Massachusetts Supreme Judicial Court to adopt rules that would have created a qualified privilege against "compelled disclosure [of] the identity of confidential sources and all unpublished information,"[94] but the court rejected it in

---

[90] *Id.* (citing Tate v. Akers, 409 F. Supp. 978, 981 (D. Wyo. 1976), *aff'd* 565 F.2d 1166 (10th Cir. 1977)); *see* WYO. CONST. art. I, § 20.

[91] *See Reporter's Privilege Compendium*: *A. Shield Law Statute*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/privilege-sections/a-shield-law-statute/ (last visited Jan. 26, 2026) (Iowa, Massachusetts, Mississippi, Missouri, New Hampshire, Utah, and Virginia). Idaho recently passed a shield law, which was set to take effect on July 1, 2025. *See* Kyle Pfannenstiel, *Idaho Will Have Journalism Shield Law, After Gov. Little Signs Bill*, IDAHO CAP. SUN (Mar. 27, 2025, at 16:20 ET), https://idahocapitalsun.com/briefs/idaho-will-have-journalism-shield-law-after-gov-little-signs-bill.

[92] *See Reporter's Privilege Compendium: Massachusetts*, REPS. COMM. FOR FREEDOM OF THE PRESS (May 2018), https://www.rcfp.org/privilege-compendium/massachusetts.

[93] *Id.* (citing *In re* John Doe Grand Jury Investigation, 574 N.E.2d 373, 375 (Mass. 1991); *In re* Roche, 411 N.E.2d 466, 473 (Mass. 1980); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 695 (Mass. 2005)). In *Ayash*, the court concluded that a lower court had properly found that "the plaintiff's need for the requested information outweighed the public interest in the protection of the free flow of information to the press." *Ayash*, 822 N.E.2d at 696 n.33. And in *Roche*, the court reasoned that the journalist "himself ha[d] already provided enough information" for the judge to identify the journalist's sources and therefore "the danger of such harm resulting from . . . further testimony [was] negligible." *Roche*, 411 N.E.2d at 474.

[94] *In re* Promulgation of Rules Regarding Prot. of Confidential News Sources, 479 N.E.2d 154, 165 (Mass. 1985).

favor of a common law approach, in part because advocates "could not agree on the exact contours" of the privilege.[95] In 2025, state lawmakers introduced bills to create a reporter's shield law.[96] A joint committee recommended passage of the bills in December 2025.[97]

Although Utah does not have a statutory shield law, the Utah Supreme Court adopted Utah Rule of Evidence 509 in 2008.[98] Advocates anticipated that this rule would make courts "much more willing, indeed obligated," to protect journalists against subpoenas.[99] Rule 509's protection for confidential sources is "nearly absolute," and it provides qualified protection for nonconfidential "newsgathering information."[100]

Virginia, which also lacks a shield law, does recognize a qualified reporter's privilege under the First Amendment.[101] Courts must undertake a balancing test that considers (1) whether the subpoena seeks relevant information, (2) whether there are alternative ways to obtain that information, and (3) "whether there is a compelling interest in the information."[102]

Without probing further into every state in this category, it is evident that each takes a distinctive approach to recognizing reporter's privilege in the absence of legislatively enacted shield laws.

---

[95] *Reporter's Privilege Compendium: Massachusetts*, *supra* note 92.

[96] *See NEFAC Testifies in Support of Mass. Shield Law, Protection for Reporter Sources and Materials*, NEW ENG. FIRST AMEND. COAL. (July 17, 2025), https://nefac.org/news/nefac-testifies-in-support-of-mass-shield-law-protection-for-reporter-sources-and-materials.

[97] *See* Karen Anderson, *Mass. Lawmakers Advance Long-Stalled Shield Law to Protect Journalists*, WCVB BOS. (Dec. 9, 2025, at 18:12 ET), https://www.wcvb.com/article/mass-lawmakers-advance-long-stalled-shield-law-to-protect-journalists/69678243.

[98] *See* Jeffrey J. Hunt, David C. Reymann & Michael S. Anderson, *Reporter's Privilege Compendium: Utah*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 2023), https://www.rcfp.org/privilege-compendium/utah (noting that "[u]nder the Utah Constitution, the Utah Supreme Court—not the Legislature—is given primary authority for enacting rules of evidence, including evidentiary privileges" (citing UTAH CONST. art. VIII, § 4)).

[99] *Id.*

[100] *Id.*; *see* UTAH R. EVID. 509.

[101] *See* Brett Spain & Bethany Fogerty, *Reporter's Privilege Compendium: Virginia*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 10, 2024), https://www.rcfp.org/privilege-compendium/virginia.

[102] *Id.*; *see, e.g.*, Horne v. WTVR, LLC, 893 F.3d 201, 212–13 (4th Cir. 2018); Ashcraft v. Conoco, Inc., 218 F.3d 282, 287 (4th Cir. 2000); Brown v. Commonwealth, 204 S.E.2d 429, 431 (Va. 1974) (describing the privilege as "related to the First Amendment and not a First Amendment Right, absolute, universal, and paramount to all other rights").

3. Approach 3: Shield Law with Qualified Privilege or Exceptions

More than twenty states have shield laws that provide a qualified reporter's privilege, some of which predate *Branzburg*.[103] Arkansas, for instance, has had a broad shield law since the 1930s, which has been amended over the years to protect broadcasters and "internet news sources."[104]

The basis for the privilege (either generally or within the shield statute itself) varies widely from state to state. Some states root it in the First Amendment[105] or their state constitutions,[106] others in *Branzburg*,[107] and still others in the common law—and some, like Florida, rely on a combination of these sources.[108] States also vary as to whether the privilege applies to nonconfidential as well as confidential information, and whether state courts have their own rules of evidence.[109] The Reporters Committee highlights North Carolina's shield law in this category as "among the two strongest" in the U.S., applying to a variety of proceedings and to "virtually everyone connected with the publication or distribution of information via any news medium."[110]

---

[103] *See Reporter's Privilege Compendium*, *supra* note 68 (Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maine, Michigan, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and parts of Alaska).

[104] Philip S. Anderson & Alec Gaines, *Reporter's Privilege Compendium: Arkansas*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 18, 2019), https://www.rcfp.org/privilege-compendium/arkansas.

[105] *See Reporter's Privilege Compendium*, *supra* note 68 (e.g., Florida, Indiana, Kansas, and Maine).

[106] *See id.* (e.g., Florida, Illinois, Louisiana, and North Carolina).

[107] *See id.* (e.g., Florida, Michigan, Oklahoma, and Tennessee).

[108] *See* James B. Lake et al., *Reporter's Privilege Compendium: Florida*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 15, 2023), https://www.rcfp.org/privilege-compendium/florida.

[109] *See Reporter's Privilege Compendium*, *supra* note 68 (noting that, for instance, New Mexico's supreme court has created a rule of evidence that supplies a reporter's privilege).

[110] Marcus W. Trathen & Amanda M. Whorton, *Reporter's Privilege Compendium: North Carolina*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/privilege-compendium/north-carolina (last visited Jan. 26, 2026) (noting that, among state shield laws, only Nevada's is stronger).

4. Approach 4: Shield Law with Strong Protection for Sources

The remaining jurisdictions provide near-absolute protection for sources via shield laws.[111] These vary in scope and date of enactment.[112] The strongest shield law appears to be Nevada's, which offers reporters absolute privilege, protecting confidential sources—as well as published and unpublished information from those sources—"from disclosure in any proceeding."[113]

Some states, despite providing absolute protection, cabin the privilege narrowly. For instance, Kentucky's shield law prohibits compelled disclosure—in seemingly every conceivable proceeding or circumstance—about "the source of any information procured or obtained . . . and published," with no balancing test to overcome the privilege.[114] But the statute, which has not changed since *Branzburg*, shields journalists only from compelled disclosure of "the identities of their confidential sources," though it "has never faced constitutional challenge."[115]

Other jurisdictions protect more broadly against compelled disclosure. Washington, D.C.'s shield law, for example, is absolute with regard to sources—confidential or not—and also contains a qualified privilege for unpublished information.[116] D.C. courts have applied the privilege expansively, encompassing "information gathered outside of the

---

[111] *See Reporter's Privilege Compendium*, *supra* note 68 (Alabama, Arizona, California, District of Columbia, Kentucky, Maryland, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Vermont, Washington, Wisconsin, and parts of Alaska).

[112] New Jersey's shield law, for example, was originally enacted in 1933, but it was repealed and replaced with a more expansive statute in 1960 and has since been amended multiple times. *See* Thomas J. Cafferty et al., *Reporter's Privilege Compendium: New Jersey*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 2021), https://www.rcfp.org/privilege-compendium/new-jersey (discussing New Jersey Shield Law, N.J. REV. STAT. § 2A:84A-21 and N.J. R. EVID. 508).

[113] Kristen Gallagher & Adam Hosmer-Henner, *Reporter's Privilege Compendium: Nevada*, REPS. COMM. FOR FREEDOM OF THE PRESS (June 2020), https://www.rcfp.org/privilege-compendium/nevada; *see* NEV. REV. STAT. § 49.275.

[114] *See* KY. REV. STAT. § 421.100.

[115] Jeremy S. Rogers, *Reporter's Privilege Compendium: Kentucky*, REPS. COMM. FOR FREEDOM OF THE PRESS (July 30, 2021), https://www.rcfp.org/privilege-compendium/kentucky.

[116] *See* Charles D. Tobin et al., *Reporter's Privilege Compendium: District of Columbia*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/privilege-compendium/district-of-columbia (citing Free Flow of Information Act, D.C. CODE §§ 16-4701 to -4704 (2026)).

District, by non-resident journalists, or about events that occurred elsewhere," and have even applied it retroactively to documents or sources predating the shield law's enactment.[117]

IV. THE PRESS ACT

"Journalists shouldn't be forced to choose between burning their sources or going to jail."

—Seth Stern, Director of Advocacy, Freedom of the Press Foundation[118]

In January 2024, the U.S. House of Representatives unanimously passed a bill that would have created a federal shield law.[119] The Protect Reporters from Exploitative State Spying (PRESS) Act aimed to prevent the federal government from compelling journalists to disclose information.[120] As the bill headed to the Senate, the Freedom of the Press Foundation called it "the strongest shield bill we've ever seen" and added that it did not "see enough room for improvement to hold out for a hypothetical better one."[121] The foundation's deputy director of advocacy urged the Senate to "act to ensure that whistleblowers and other sources feel free to share newsworthy information that journalists use to inform the public."[122] The Society of Professional Journalists also supported the bill,[123] which would have prohibited the federal government "from using subpoenas, search warrants, or other compulsory actions to force journalists to reveal sources," barring "rare and narrow circumstances."[124]

---

[117] *Id.* (citation omitted).

[118] Press Release, PRESS Act Unanimously Passes the House. Now on to the Senate!, FREEDOM OF THE PRESS FOUND. (Jan. 18, 2024) [hereinafter FPF Press Release], https://freedom.press/issues/press-act-unanimously-passes-the-house-now-on-to-the-senate.

[119] *See id.*

[120] *See id.*; Protect Reporters from Exploitative State Spying Act, H.R. 4250, 118th Cong. (2023); S. 2074, 118th Cong. (2023).

[121] Seth Stern, *Frequently Asked Questions About the PRESS Act*, FREEDOM OF THE PRESS FOUND. (Jan. 25, 2024), https://freedom.press/issues/frequently-asked-questions-about-the-press-act.

[122] FPF Press Release, *supra* note 118.

[123] *See The PRESS Act: What It Is, and Why It's Important to Get It Passed*, SOC'Y OF PRO. JOURNALISTS, https://www.spj.org/the-press-act-what-it-is-and-why-its-important-to-get-it-passed (last visited Jan. 26, 2026).

[124] Anthony Adragna, *Cotton Blocks Federal Journalist Shield Legislation in Senate*, POLITICO (Dec. 10, 2024, at 17:25 ET), https://www.politico.com/live-updates/2024/12/10/congress/press-act-blocked-in-senate-00193602 (noting the bill's "protections would also apply to third parties like email providers and phone companies, shielding them from being forced to release potentially identifying information").

Despite bipartisan support, the PRESS Act faced obstacles. In November 2024, President-elect Donald Trump urged Republicans to "KILL THIS BILL" on his Truth Social account.[125] On the Senate floor two weeks later, Senator Tom Cotton (R-Ark.) derided the "liberal media" and argued that "[t]he press badge doesn't make you better than the rest of America or put you above the law."[126] To the dismay of organizations and individuals that value press freedom, the bill never made it out of the Senate.[127]

In light of ongoing threats to the press, this outcome is alarming.[128] Journalists from *Rolling Stone*, recalling investigators' attempts during President Trump's first term to subpoena a news outlet to identify its sources, reported at length in late 2024 about such threats in Trump's second term.[129] One threat included plans to discard a Biden Department of Justice policy that largely prohibited federal prosecutors "from seizing journalists' phone records and other private communications during the course of leak investigations."[130] *Rolling Stone* acknowledged that the Obama administration, like the first

---

[125] Charlie Savage, *Trump Tells Republicans to 'Kill' Reporter Shield Bill Passed Unanimously by House*, N.Y. TIMES (Nov. 20, 2024), https://www.nytimes.com/2024/11/20/us/politics/trump-press-act-freedom-reporters.html; Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Nov. 20, 2024, at 14:37 ET), https://truthsocial.com/@realDonaldTrump/posts/113516968142292237.

[126] Adragna, *supra* note 124.

[127] *See, e.g.*, *Dems Fail on PRESS Act*, FREEDOM OF THE PRESS FOUND. (Jan. 3, 2025), https://freedom.press/issues/dems-fail-on-press-act ("Senate Democrats waited 11 months to act, after the House passed the bill . . . . Bottom line, if leadership saw the bill as a higher priority, it would be the law of the land today."); *cf.* Shawn Musgrave, *Democrats Had a Shot at Protecting Journalists from Trump. They Blew It.*, INTERCEPT (Apr. 29, 2025, at 11:50 ET), https://theintercept.com/2025/04/29/press-act-trump-doj-journalists-leaks-subpoenas (reporting that the DOJ had "already launched multiple investigations into reporters' sources for embarrassing stories").

[128] *See, e.g.*, Savage, *supra* note 125 (noting that Trump "has exhibited extreme hostility to mainstream news reporters, whom he has often referred to as 'enemies of the people'"); Dominick Mastrangelo, *Trump Sparks Fears over Retribution Against Media with Patel FBI Pick*, THE HILL (Dec. 11, 2024, at 6:00 ET), https://thehill.com/media/5030896-threats-kash-patel-fbi-media; Asawin Suebsaeng & Andrew Perez, *'It'll Be Brutal': Inside Trump's Planned War on Leakers and the Press*, ROLLING STONE (Dec. 12, 2024), https://www.rollingstone.com/politics/politics-features/trump-war-press-media-leaks-1235202909; Nozicka et al., *supra* note 12.

[129] Suebsaeng & Perez, *supra* note 128.

[130] *Id.*; Press Release, U.S. Dep't of Just., Attorney General Garland Announces Revised Justice Department News Media Policy (Oct. 26, 2022), https://www.justice.gov/archives/opa/pr/attorney-general-garland-announces-revised-justice-department-news-media-policy; *see also* Gabe Rottman, *DOJ Inspector General Releases Report on 2020–21 Journalist Records Seizures*, REPS. COMM. FOR FREEDOM OF THE PRESS (Jan. 21, 2025), https://www.rcfp.org/doj-ig-report-journalist-records-seizures (explaining that DOJ's internal "news media guidelines" were first implemented during the Nixon administration).

Trump administration, also "attracted significant uproar from press-freedom groups for . . . secret DOJ seizures of records from reporters and others" but added that "[w]hatever record Obama and his Justice Department set, Trump and his senior officials were determined to shatter it" in Trump's first term.[131] Following the Senate's failure to pass the PRESS Act during the 118th Congress, despite strong bipartisan support, Congress should revive the PRESS Act and pass it as soon as possible to protect journalists. But ample room exists for additional efforts.

V. PROPOSED RULE 503

"Without an effective privilege, whistle-blowers would stop relying on reporters, and the public would be denied the benefit of investigative reporting uncovering wrongdoing."

—Kurt Wimmer & Stephen Kiehl[132]

This Part suggests amending the Federal Rules of Evidence to include a new privilege rule. Proposed Rule 503 would create an absolute privilege for journalists' confidential sources and materials and a qualified privilege for nonconfidential material, prohibiting compelled disclosure in all but the narrowest of circumstances.

I suggest modeling this rule after Utah's Rule 509, with elements drawn from New York and Washington, D.C.'s shield laws, all of which are straightforward and easy to understand.[133] Proposed Rule 503 provides for narrow circumstances in which disclosure *may* be compelled for certain information and essentially codifies variations on the balancing tests (based on Justice Stewart's *Branzburg* dissent) that lower courts often use. It also adds procedural requirements that must be followed before a court can lawfully compel disclosure of journalists' sources or materials.

---

[131] Suebsaeng & Perez, *supra* note 128 (noting that "the first Trump administration referred a record number of leaks to the feds for criminal investigations"); *see* Press Release, U.S. Dep't of Just., DOJ OIG Releases Report on DOJ Obtaining Records of Members of Congress, Congressional Staffers, and Members of the News Media Using Compulsory Process (Dec. 10, 2024), https://oig.justice.gov/sites/default/files/2024-12/12-10-2024.pdf.

[132] Kurt Wimmer & Stephen Kiehl, *Who Owns the Journalist's Privilege—the Journalist or the Source?*, COMMC'NS LAW., Aug. 2011, at 9, 9 (noting that "most courts addressing this issue have found [that] this societal value can only be honored by a determination that the journalist 'owns' the privilege").

[133] UTAH R. EVID. 509; N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2025); D.C. CODE §§ 16-4701 to -4704 (2026). Proposed Rule 503 incorporates elements of all three of these laws, in addition to my own language. Although these laws contain definitions of terms such as "confidential source information" or "news reporter," I do not include definitions here for the sake of simplicity.

A. Proposed Rule 503: Reporter-Source Privilege and Compelled Disclosure

(a) A news reporter or other person who is or has been employed by the news media in a newsgathering or news-disseminating capacity has a privilege to refuse to disclose—and to prevent any other person from disclosing—confidential source information, unless the person seeking the information demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.

(b) A news reporter or other person who is or has been employed by the news media in a newsgathering or news-disseminating capacity has a privilege to refuse to disclose confidential unpublished news information, unless the person seeking the information demonstrates a need for that information that substantially outweighs the interest of a continued free flow of information to news reporters.

(c) A news reporter or other person who is or has been employed by the news media in a newsgathering or news-disseminating capacity has a privilege to refuse to disclose other unpublished news information if the person claiming the privilege demonstrates that the interest of a continued free flow of information to news reporters outweighs the need for disclosure.

(d) To compel disclosure of information under this rule, a court must hold a hearing to determine the scope of the privilege, where the person or organization claiming the privilege must provide enough information for a judge to determine whether the privilege applies. If there is doubt about whether the privilege applies, the court must conduct an in camera review of the material that is presumed to be privileged to ensure its disclosure is not compelled outside of these circumstances. The court must determine, based on the appropriate balancing tests in sections (a), (b), and (c) of this rule, when disclosure can be compelled.

B. Addressing Potential Criticisms

One critique often leveled at measures to bolster press freedom is that it is difficult to discern who counts as a reporter. After all, unlike members of many other professions (accountants,[134] attorneys,[135] cosmetologists,[136] and physicians,[137] to name a few), journalists need not pass a licensing exam to work as a journalist. A requirement to do so could infringe on their First Amendment rights.[138] That does not mean, however, that journalists lack professional standards or ethical obligations.[139] Still, in the age of content creators and social media influencers, there must be some way to distinguish

---

[134] *Becoming a CPA*, NAT'L ASS'N OF STATE BDS. OF ACCT., https://nasba.org/exams/becomingacpa (last visited Jan. 26, 2026) ("A CPA license is the accounting profession's highest standard of competence, a symbol of achievement and assurance of quality.").

[135] *Bar Exams*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/bar-admissions/bar-exams (last visited Jan. 26, 2026) ("For initial licensure, competence is ordinarily established by a showing that the applicant holds an acceptable educational credential (with some exceptions, a JD degree) from a law school that meets educational standards, and by achieving a passing score on the bar examination.").

[136] *See, e.g.*, *Become a Cosmetologist: Requirements*, N.Y. DEP'T OF STATE, https://dos.ny.gov/become-cosmetologist (last visited Jan. 26, 2026) (noting that, among other requirements, New York State applicants must "[c]omplete a 1,000 hour approved course of study and pass both the New York State written and practical examinations").

[137] *About Physician Licensure*, FED'N OF STATE MED. BDS., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/about-physician-licensure (last visited Jan. 26, 2026) ("Through licensing, state medical boards ensure that all practicing physicians have appropriate education and training, and that they abide by recognized standards of professional conduct while serving their patients.").

[138] *See* Dave Bostwick, *Ethics in Journalism & Strategic Media: 4. Code of Ethics*, UNIV. OF ARK., https://uark.pressbooks.pub/journalismethics/chapter/chapter-4 (last visited Jan. 26, 2026) ("If state governments required journalists to pass an exam for a reporting license, it could lead to public officials revoking licenses of journalists who provide unfavorable but accurate coverage of governmental affairs."). For a recent example of this, albeit in the context of White House press credentials, see David Bauder, *AP and Trump Administration Argue Access Case Before Federal Appeals Court; No Ruling Yet*, AP NEWS (Nov. 24, 2025), https://www.ap.org/media-center/ap-in-the-news/2025/ap-and-trump-administration-argue-access-case-before-federal-appeals-court-no-ruling-yet.

[139] *See* Olivia S. Hiltbrand, *Guarding the News Media's Intellectual Property in the Age of Generative AI*, 28 STAN. TECH. L. REV. 35, 63–64 (2024) ("Society would lose a free press that calls out abuses of power, follows established journalistic ethics to report vital information, and advances freedom of expression to support other democratic ideals." (footnotes omitted)); *see Code of Ethics*, SOC'Y OF PRO. JOURNALISTS, https://www.spj.org/pdf/spj-code-of-ethics.pdf (last visited Mar. 28, 2026); *Our Values*, COMM. TO PROTECT JOURNALISTS, https://cpj.org/about/video/#values (last visited Jan. 26, 2026) ("Access to independent information enables all people to make decisions and hold the powerful to account.").

journalists and their newsgathering efforts for the purposes of this important privilege. This does not require journalists to be affiliated with large, traditional outlets. Independent journalists and community news outlets[140] have always done[141]—and continue to do—vital and excellent reporting.[142]

First Amendment and media law scholar Sonja West has urged a distinction between professional journalists and what she calls "occasional public commentators"—not only for practical reasons but for constitutional purposes, because "[d]efining the press too broadly makes the Press Clause's protections redundant with the Speech Clause."[143] This is because journalists carry out "unique constitutional functions," such as "gathering newsworthy information, disseminating it to the public, and serving as a check on the government and powerful people."[144] And although "[o]ccasional public commentators might at times serve these functions," West argues that "the press has a commitment to these roles that reaches far beyond sporadic or ineffective efforts."[145] From applying specialized knowledge and making editorial decisions, to contextualizing the news and timely conveying it to readers or viewers, West highlights journalists' distinct functions and the resources that outlets

---

[140] *See, e.g.*, *Black Owned Media Outlets: How to Find and Support Them,* THE DEMOCRACY LABS, https://thedemlabs.org/2021/03/12/black-owned-media-matters/ (last visited Jan. 26, 2026) ("Communities of color and immigrants often rely on their own news outlets as the only trusted sources of information. Yet these news outlets remain largely invisible to mainstream media, public officials, the nonprofit sector, advertisers, and philanthropic organizations.").

[141] *See About Community Newspapers*, NAT'L NEWSPAPER ASS'N FOUND., https://www.nna.org/about-community-newspapers (last visited Jan. 26, 2026) ("America's community newspapers began in Boston on Sept. 25, 1690, with the publication of Publick Occurrences: Both Foreign and Domestic by Benjamin Harris. . . . Despite the emergence of new information technologies such as the Internet, community newspapers continue to play an important role in the Information Age. Over 150 million people are informed, educated and entertained by a community newspaper every week.").

[142] *See, e.g.*, *$2 Million Gift to Documented to Train US Newsrooms in Community Journalism*, DOCUMENTED (Dec. 17, 2024), https://documentedny.com/2024/12/17/documented-national-training-journalism-knight (announcing a grant for twenty local newsrooms across the country to address "overlapping crises," including "lack of support for newsrooms to have the time and resources to invest in new editorial approaches and product innovation for multilingual audiences" and "[a]n increasingly unreliable information ecosystem facing immigrants and non-English speakers at a time when the need for reliable, trusted and timely news is quite literally life altering for them").

[143] Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2437–38, 2438 n.23 (2014) (citing Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1030–31, 1056, 1057 (2011)).

[144] *Id.* at 2443–44.

[145] *Id.* at 2444.

deploy to reach audiences and advocate for societally beneficial changes.[146] This thoughtful reasoning can inform what definitions of the press should be included in any journalist–source privilege rules.

Another criticism—that specific federal privilege rules would be "an affront to the states' sovereignty"[147]—should not stand in the way of creating a federal journalist–source privilege. As in other matters involving preemption, the Federal Rules of Evidence could create a floor, not a ceiling.[148] Federal courts could defer to state privilege laws that provide more comprehensive protection when state law governs the case, while using Proposed Rule 503 as a backstop to protect journalists and their confidential sources.

VI. CONCLUSION

Journalists' ability to report important news—both now and in the future—hinges on protecting their confidential sources and materials.[149] As this Essay has observed, states' and federal circuit courts' disparate approaches to shield laws or other protections for journalists leave much to be desired. While a federal shield law, like the PRESS Act, can and should fill in many of the gaps, a journalist–source privilege rule should be added to the Federal Rules of Evidence to standardize protections and outcomes across federal courts.[150] With growing

---

[146] *See id.* at 2444–45.

[147] *See supra* text accompanying note 51.

[148] *See, e.g.*, William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1551 (2007) (discussing how, in "floor" preemption, states can "increase the stringency of regulation," but "more lenient state regulation" is preempted by federal law).

[149] *See* Joshua Benton, *Here Are 12 Principles Journalists Should Follow to Make Sure They're Protecting Their Sources*, NIEMAN LAB (Jan. 16, 2019, at 11:00 ET), https://www.niemanlab.org/2019/01/here-are-12-principles-journalists-should-follow-to-make-sure-theyre-protecting-their-sources (noting that "a journalist's commitment to protect the anonymity of confidential sources and whistleblowers should only be breached in the most exceptional circumstances," such as when "determin[ing] identity . . . is critical to avert imminent loss of human life").

[150] For discussion of the concerns journalists face in granting confidentiality to sources, see, for example, *Confidential Sources*, ONLINE NEWS ASS'N: ETHICS, https://ethics.journalists.org/topics/confidential-sources (last visited Jan. 26, 2025) ("If good laws to protect confidential sources do not exist in your region, you need to consider whether law enforcement or someone in a civil court case will try to force you to reveal your source. Then you need to decide whether this story, the information the source is providing and the source himself is worth going to jail for.").

threats against the press, this may be critical to protecting our democracy.[151]

[151] *See, e.g.*, The Learning Network, *How Important Is a Free Press to Our Democracy? Is It Under Threat?*, N.Y. TIMES (Mar. 27, 2025), https://www.nytimes.com/2025/03/27/learning/how-important-is-a-free-press-to-our-democracy-is-it-under-threat.html.

SACRED OR SHAM? STRENGTHENING JUDICIAL REVIEW OF RELIGIOUS SINCERITY UNDER THE FREE EXERCISE CLAUSE

Montana Martinez*

INTRODUCTION

In recent years, Free Exercise Clause litigation has increasingly focused on claims for religious exemptions from otherwise neutral and generally applicable laws. These claims place courts in the difficult position of determining when religious belief warrants legal accommodation while avoiding impermissible inquiries into religious truth. COVID-19 restrictions,[1] foster-care policies,[2] and vaccination mandates[3] have all been reshaped by claimants asserting religious liberty. Yet while the Court has expanded the scope of Free Exercise protections, it has conspicuously failed to articulate how courts should separate sincere religious claims from fraudulent ones. The result is a doctrinal void: any claimant can recast political or philosophical objections as "religious" and demand constitutional protection. This danger is not hypothetical. Empirical studies of vaccine exemptions show that when secular opt-outs are removed, religious exemptions spike dramatically, even in states with low religiosity, suggesting that many claimants rebrand nonreligious objections to fit within constitutional or statutory safe harbors.[4]

This gap in the Court's jurisprudence undermines the very purpose of the Religion Clauses. The Framers did not intend religious liberty to serve as a tactical loophole for those seeking to avoid civic obligations. They understood religion as an inalienable duty of conscience, central, identity-defining, and

---

* Assistant Professor of Law, Western New England University School of Law. LL.M., Columbia Law School 2022. J.D., George Washington University Law School 2019.

[1] *See generally* Tandon v. Newsom, 593 U.S. 61 (2021) (requiring an exemption for at-home Bible study groups).

[2] *See generally* Fulton v. City of Phila., 593 U.S. 522 (2021) (finding that an anti-discrimination provision did not survive strict scrutiny and was therefore unconstitutional as applied to the religious group).

[3] *See generally* Dahl v. Bd. of Trs. of W. Mich. Univ., 15 F.4th 728, 730 (6th Cir. 2021) (finding that the vaccine requirement was not neutral and generally applicable so it would have to survive strict scrutiny to be constitutional).

[4] *See generally* Tyler P. Moore, et al., *State Policy Removing the Personal Belief Exemption for Measles, Mumps, and Rubella (MMR) School Immunization Requirement, Washington State, 2014-2022*, 113(7) AM. J. PUB. HEALTH 795 (2023) (noting that religious exemptions increased by 367 percent after Washington eliminated the personal/philosophical exemption).

binding even under threat of punishment.[5] James Madison argued that an individual's duty to the Creator was "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[6] William Penn willingly endured imprisonment rather than betray the commands of his faith.[7] For the Founders, free exercise was designed to protect these profound obligations, not casual appeals to belief or thinly veiled political dissent.

The Court's current reluctance to engage with sincerity directly erodes both judicial credibility and public trust in the judicial system. When religious exemptions are perceived as vehicles for insincere claims, backlash follows, not against opportunists, but against religious liberty itself.[8] The risk is that the Free Exercise Clause, if stripped of any sincerity filter, will collapse into a generalized right to exemption from law.[9] To prevent this, courts must reinvigorate sincerity review. Far from intruding on liberty, sincere inquiries safeguard it, ensuring that protection extends only to genuine conscience claims while respecting institutional autonomy and constitutional limits.

This Article argues that courts can assess religious sincerity without evaluating the truth or validity of the religious belief, and it proposes a framework grounded in the constitutional text, historical practice, and modern precedent. Part I surveys the founding-era conception of liberty of conscience and the ways early state legislatures required

---

[5] *See* Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 1, 21 (2003).

[6] James Madison, *Memorial and Remonstrance Against Religious Assessments, [CA. 20 June] 1785*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163.

[7] *See* Arlin M. Adams & Charles J. Emmerich, *William Penn and the American Heritage of Religious Liberty*, 8 J. L. & RELIGION 57, 63 (1990) [hereinafter *William Penn and the American Heritage of Religious Liberty*]. Penn argued that "imposition, restraint, and persecution for matters relating to conscience directly invade the divine prerogative, and divest the Almighty of a due, proper to none besides himself." When government coerces conscience they invade "a realm belonging to God alone[.]" What follows is that "Caesar (however he got it) has all, God's share, and his own too; and being Lord of both, both are Caesar's and not God's." (quoting William Penn, *The Great Case of Liberty of Conscience* (1670)).

[8] *See generally* PRRI & IFYC, RELIGIOUS IDENTITIES AND THE RACE AGAINST THE VIRUS: AMERICAN ATTITUDES ON VACCINATION MANDATES AND RELIGIOUS EXEMPTIONS (WAVE 3) 14 (2021).

[9] *See* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 726 (1981) (Rehnquist, J., dissenting) (noting that without testing for religious sincerity any person can claim a religious exemption by just asserting their "own particular beliefs required it"); Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981) ("Without some sort of required showing of sincerity on the part of the individual or organization seeking judicial protection of its beliefs, the first amendment would become 'a limitless excuse for avoiding all unwanted legal obligations.'").

evidence of sincerity before granting accommodations. Part II traces the Supreme Court's treatment of religious sincerity, from its early articulation to its later refinement, emphasizing the Court's consistent distinction between evaluating the sincerity of the claimant's belief and judging the truth or validity of the belief itself. Part III situates sincerity review in light of the Court's recent Religion Clause decisions, explaining why the expansion of Free Exercise protections and the abandonment of the *Lemon* test demand renewed engagement. Part IV details the harms of fraudulent claims, both doctrinal and practical. Finally, Part V advances a two-step framework: first, requiring institutional validation or an affirmative "Religious Island" pleading; and second, evaluating sincerity through evidence of lived practice, incentives, and contextual consistency.

The stakes could not be higher. The Religion Clauses stand as dual guardians of religious liberty, shielding authentic faith from government compulsion while preventing opportunistic misuse. Robust sincerity review is the mechanism by which those dual purposes can be preserved. Without it, the First Amendment risks becoming less of a shield for conscience than a sword for opportunism.

I. HISTORY, TRADITION, AND RELIGION

To understand the role that religious sincerity should play under the First Amendment, it is essential to begin with the principles that animated the Founders' and Framers' drive to protect religious liberty. What is the core value that the Religion Clauses seek to secure? As some legal scholars observe, the "single end" of the Religion Clauses was "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions in which secure the best hope of attainment of that end."[10] This section examines that founding-era vision, exploring the movement for religious liberty, the debates that produced the Religion Clauses, the understandings of James Madison, Thomas Jefferson, and their contemporaries, and the historical traditions that shaped the conviction that the duty of religion "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society[.]"[11] This section is

[10] Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1598 n.172 (collecting scholarly sources) [hereinafter *A Heritage of Religious Liberty*]. *But see* Leo Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 564 (1980) (asserting that "separation guarantees freedom and freedom requires separation").

[11] Madison, *supra* note 6.

not intended to provide an exhaustive recounting of history but rather to show overarching themes and ideas that demonstrate the role sincerity plays in securing religious liberty.[12]

A. The Colonial Struggle for Religious Liberty

The early settlers in North America were often religious dissenters fleeing the established religions of their home countries.[13] The Quaker William Penn, for example, was jailed in England several times for solely practicing his religion.[14] From his Newgate prison cell, he completed *The Great Case of Liberty of Conscience*, which explains what religious liberty is and why it is so important to people of faith. Penn argues,

> by liberty of conscience, we understand not only a mere liberty of the mind, in believing or disbelieving… but ***the exercise of ourselves in a visible way of worship***, upon our believing it to be ***indispensably required at our hands***, that if we neglect it for fear or favor of any mortal man, ***we sin and incur Divine wrath***…[15]

---

[12] For more complete recounting of the historical lead up to the Free Exercise Clause *see* Michael W. McConnel, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1989); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); *see also* AKHILL REED AMAR, THE BILL OF RIGHTS (1998); AKHILL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2006).

[13] In England, the Church of England had been the established church since the sixteenth century. The Toleration Act of 1689 allowed most Protestant dissenters to worship but excluded Catholics and non-Trinitarians, who remained barred from public office, higher education, and open religious practice. *See* Richard H. Dees, *Establishing Toleration*, 27 POL. THEORY 667, 676 (1999) ("[I]t granted freedom of worship only to Trinitarian Protestants, and only members of the official Anglican Church could hold office. So Catholics, Unitarians, and non-Christians still lay outside the official toleration."). Though the Catholic Relief Acts of 1778 and 1791 eased some restriction, full emancipation would not come until 1829. Meanwhile, in France, Catholicism was entrenched as the state religion following the Edict of Fontainebleau in 1685. *See* Laura Zwicker, *The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined*, 66 IND. L.J. 773, 778 n.32 (1991) (the Edict of Fontainebleau revoked the Edict of Nants which granted toleration to French Protestants and required all children to be baptized in the Catholic church).

[14] *See William Penn and the American Heritage of Religious Liberty*, *supra* note 7, at 61 (Penn was briefly incarcerated in 1667. But in the following year he wrote a piece that "criticized traditional interpretations of the Trinity, the doctrine of justification, and Christ's atonement. He was charged with blasphemy and confined to the Tower of London").

[15] *Id.* at 63 (emphasis added) (quoting William Penn, *The Great Case of Liberty of Conscience* (1670)).

This passage underscores the profound stakes for people of faith. Liberty of conscience protects not only internal belief but also the outward performance of religious obligations that adherents understand to be divinely required.[16] William Penn's life illustrates this dilemma with clarity. He repeatedly accepted earthly punishment rather than compromise his conscience, reasoning that temporal penalties were preferable to eternal consequences.[17] For Penn, the protection of religious liberty was essential precisely because no individual should be forced to choose between fidelity to divine obligation and obedience to civil authority.

Penn's personal willingness to endure imprisonment rather than violate conscience foreshadowed the political vision he would implement in America.[18] In 1681, the English Crown granted him proprietorship over "Pennsilvania [*sic*]," and Penn sought to embody in law the religious liberty he was denied in England.[19] Indeed, he barred the colony from compelling adherence to any particular faith.[20] And the first Pennsylvania Constitution guaranteed that all who "followed God" would,

> in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship, nor shall they be compelled, at any time, to frequent or maintain any religious worship, place or ministry whatever.[21]

---

[16] *See id.*

[17] *See id.*

[18] *See A Heritage of Religious Liberty*, *supra* note 10, at 1566. Before coming to the United States, William Penn also contributed to the founding documents of New Jersey which declared that "because no man 'hath power or authority to rule over men's consciences in religious matters,' no settler shall be 'in the least punished or hurt, either in person, estate, or privilege, for the sake of his opinion, judgment, faith, or worship towards God in matters of religion.'"

[19] *See William Penn and the American Heritage of Religious Liberty*, *supra* note 7, at 65 (Penn noted that "the government at home was glad to be rid of us, at so cheap a rate as a little parchment, to be practiced in a desert 3,000 miles off") (quoting a *Letter from William Penn to the Earl of Romney* (Sept. 1701), in THE PAPERS OF WILLIAM PENN, (Richard Dunn & Mary Dunn, eds., 1981) (changed to conform to modern usage)).

[20] *See id.* at 65–66.

[21] *See generally A Heritage of Religious Liberty*, *supra* note 10, at 1567. However, that protection was not exhaustive. Pennsylvania still imposed restrictions and prohibitions on Christians and the Sabbath, and outlawed certain conduct in attempt to foster public morality.

Pennsylvania thus became a "holy experiment dedicated to the ideal of religious freedom."[22]

Many of the other colonies,[23] however, did not adopt William Penn's vision. The Puritan colonies of New England[24] established civil governments that actively suppressed dissent.[25] Massachusetts, the least tolerant, went so far as to banish Baptists in 1644 and executed four Quakers who returned after their expulsion from the state.[26] Other dissenters were "horsewhipped or jailed."[27] Although such barbaric punishments waned by 1680, hostility towards religious minorities persisted well into the nineteenth century.[28]

Indeed, it took until 1816 for Connecticut to repeal penalties for nonattendance at church, and until 1818 for the state to formally disestablish its churches through constitutional revision.[29] Even then, the state constitutional text prohibited preference only "to any Christian sect or mode of worship," suggesting that the newly articulated religious freedom extended only to Christian denominations.[30] Massachusetts eliminated religious tests for office in 1820 and formally disestablished its church in 1833.[31] The New Hampshire Constitution likewise reflected Protestant preference, providing that only Protestant Christians would "be equally under the protection of the law."[32]

---

[22] *See William Penn and the American Heritage of Religious Liberty*, *supra* note 7, at 58 ("This ideal was his 'most important and fixed political principle, and the basis of a political philosophy of natural law and fundamental right.'").

[23] For a comprehensive review of the colonies' approaches to toleration or in-toleration *see* McConnell, *supra* note 12, at 1421–30.

[24] *See* McConnell, *supra* note 12, at 1424–25. Rhode Island, founded by Roger Williams, was an outlier in the New England Colonies. In fact, it was founded in response to Massachusetts' extreme persecution of other religions. *See also* Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS UNIV. L. REV. 289, 290 n.3 (2005) ("Williams landed by boat in what is now the Providence area in June 1636. In 1638, Williams drew up a charter for government, based on democratic principles."). The Rhode Island Charter of 1663 "was the first to use the formulation 'liberty of conscience.'" McConnell, *supra* note 12, at 1425. "Persecution of conscience was what Williams called 'the bloody tenent;' each person was to be free from the 'bloody tenent' so that each person could follow his or her sense of the divine." Eberle, *supra* note 24, at 290.

[25] *See* McConnell, *supra* note 12, at 1422.

[26] *See id.* at 1423.

[27] *Id.*

[28] *See id.*

[29] *See* SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 512–13 (1902), https://dn790009.ca.archive.org/0/items/riseofreligiou00cobb/riseofreligiou00cobb.pdf.

[30] *Id.*

[31] *See id.* at 515.

[32] *Id.* at 516.

Nevertheless, the state gradually recognized the rights of dissenting denominations through "[s]eparate acts of legislation in 1792, 1804, 1805, and 1817," which granted "exemptions to Episcopalians, Baptists, Universalists, and Methodists, providing that each should be considered as a distinct denomination, with privileges as such."[33] Delaware did not abolish religious tests for public office until 1831.[34]

Pennsylvania's model of institutionalized religious liberty not only diverged from its New England neighbors but also laid the groundwork for evolving approaches to conscientious accommodation. After the Founding, as colonies transitioned into states, the governments began grappling with the practical implications of free exercise and fashioned laws that allowed sincere religious dissenters to opt out of legal obligations.

B. Religious Accommodations[35] and State Free Exercise Clauses

During the eighteenth and early nineteenth centuries, colonial and state legislatures grappled with balancing liberty of conscience and legal obligations. Even Massachusetts, long notorious for suppressing dissent, began enacting limited religious accommodations. In 1728, a Massachusetts law exempted Baptists[36] and Quakers from paying poll taxes supporting ministers of the colony, provided that they were "enrolled or entered in their respective societies as members thereof" and regularly attended "meetings of their respective

[33] *Id.* at 516–17.
[34] *See id.* at 517.
[35] This Article uses the words "accommodation" and "exemption" interchangeably. However, there may be subtle differences between the two terms. An accommodation may result in an adjustment of a person's legal obligation (e.g., instead of being drafted the religious objector must pay a certain sum of money or find a replacement to satisfy their legal obligation). An exemption, on the other hand, entirely excuses the person of their legal obligation (e.g., a religious objector is exempt from military service even if drafted, no other efforts are required of them). The difference between the two does not affect any arguments here because both resolve the conflict between the religious belief and the law.
[36] The Baptists in Massachusetts did have some objections to these accommodations, arguing that they were being administered in a discriminatory fashion. *See* McConnell, *supra* note 12, at 1470, 1469 n.300 (noting that some certificates were ignored and rejected on technicalities reflecting the "general hostility against the Baptists"). This illustrated how even when laws sought to protect religious liberty and dissent, the prejudices at the time hindered true religious progress. The Baptists also had a theological objection that only God could determine which members "were 'conscientiously' of the Baptist persuasion[.]" *Id.* Thus, requiring the Baptist church to make such an assertion was a violation of their religious liberty (i.e., if the faith's religious doctrines bars them from making determinations of who is a Baptist, then the requirement in law that they make such a determination violates their liberty of conscience).

societies."[37] New Hampshire also exempted persons from religious assessments who could prove that they were "conscientiously of a different persuasion[,]" that they "attended services of [their] own faith" "constantly[,]" and "made financial contributions toward its support."[38]

These types of religious accommodations continued even after twelve of the thirteen states had protected free exercise rights in their state constitutions.[39] This is significant because "state constitutions provide the most direct evidence of the original understanding" of what "free exercise of religion" meant.[40] Laws that were compatible with the states' free exercise rights would likely be compatible with the federal Free Exercise Clause.[41] In 1807, Maryland's militia exemption required conscientious objectors to submit a "certificate from a licensed preacher of the Gospel," confirming both their doctrinal opposition to bearing arms and their personal conviction.[42] Massachusetts employed a similar system. The person seeking the accommodation had to file a certificate "signed by two elders and the clerk" of their church stating they were members, "frequently" attended worship, and they were conscientiously opposed to bearing arms.[43] The courts enforced this strictly and rejected certificates that were vague about compliance with any of the statutory requirements.[44] They reasoned that anyone can "occasionally attend meetings" but that does not mean they are members of the faith.[45]

Justice George Thacher of the Massachusetts Supreme Judicial Court defended the requirement of denominational

---

[37] The Act of June 20, 1728, ch. 4, §1–2, 1728 Mass. Acts 494–95 (exempting persons commonly called anabaptists and those called quakers within this province from being taxed for and towards the support of ministers).

[38] McConnell, *supra* note 12, at 1469 (citing S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 298–99 (1902)).

[39] *See id.* at 1455. McConnell also notes that Maryland and Delaware only protected the free exercise rights of Christians. New Hampshire, Massachusetts, New Jersey, North Carolina, and Pennsylvania limited protections to "theists." New York, Georgia, Rhode Island, and South Carolina did not have any limitations on the type of religion protected.

[40] *Id.* at 1456.

[41] *See id.* at 1456 (arguing that the states understood the Free Exercise Clause of the Constitution to mean "what it had meant in their states").

[42] Wesley J. Campbell, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 984 n.55 (2011).

[43] *Id.* at 985.

[44] *See id.* at 985–86. Maine was less rigid with their certificates if they conformed to the law substantially, but this deference was because of the trust they had in the religious leaders to be honest. *See id.* at 986.

[45] *Id.* at 986.

certification for religious exemptions on pragmatic as well as doctrinal grounds. In his view, it was neither "safe nor proper" to allow individuals to exempt themselves from generally applicable laws based solely on their own assertions of conscience.[46] Self-interested declarations were too susceptible to abuse, and requiring a certificate from clergy or elders provided a safeguard against fraud.[47] At the same time, denominational verification lessened the need for civil authorities to engage in intrusive inquiries into an individual's "personal conscience," thereby respecting both the integrity of religious communities and the proper limits of judicial competence. [48]

The historical record shows that colonial and early state governments routinely demanded outward evidence of sincerity before granting religious accommodations. Legislatures did not accept bare assertions of conscience; rather, they required claimants to demonstrate consistent affiliation with a recognized faith community. Proof often took the form of regular church attendance, financial contributions to the support of the congregation, and formal certification by clergy attesting to membership and conscientious scruple. When such indicators were present, lawmakers considered them reliable proxies for sincerity and sufficient to guard against fraud, concluding that the claimant was a genuine religious objector rather than an opportunist seeking exemption from civic duty.

C. The Text of the First Amendment

The debates over religious liberty came to a head at the time of the ratification of the First Amendment, but the constitutional text that emerged left much ambiguity about the scope and enforcement of religious freedom. The Framers generally understood religious liberty to be a natural right, one that existed independently of government action.[49] For them, "liberty of conscience" meant that civil authorities could not compel belief or force conformity in matters of faith.[50] Thomas Jefferson vigorously advanced this view. In his Virginia Bill for Establishing Religious Freedom, Jefferson declared that "God hath created the mind free" and warned that any governmental

---

[46] *Id.* at 985 (citing JEREMIAH PERLEY, THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, OF THE COVNENTION OF DELEGATES 189–90 (Portland, A. Shirley 1820).
[47] *See id.*
[48] *Id.*
[49] *See A Heritage of Religious Liberty*, *supra* note 10, at 1599.
[50] *Id.*

compulsion in matters of conscience was "a dangerous fallacy, which at once destroys all religious liberty[.]"[51]

James Madison, the principal drafter of the First Amendment, likewise conceived of religious liberty as an inalienable natural right.[52] His *Memorial and Remonstrance Against Religious Assessments* framed freedom of conscience as preceding civil society itself: a person's duty to God is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[53] In other words, loyalty to the divine outweighs loyalty to the state. For Madison, liberty of conscience was not just a political preference, but a higher-order obligation embedded in natural rights theory.

Still, the constitutional text itself is strikingly sparse.[54] Madison's initial draft of what would become the First

---

[51] Thomas Jefferson, *A Bill for Establishing Religious Freedom, 18 June 1779*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082. Jefferson further explained that belief cannot be coerced because the mind "involuntarily adheres to the evidence it finds persuasive, and that it cannot be restrained." VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 70 (2022). His views drew heavily on John Locke, who taught that only "Light and Evidence" can change opinions, and that outward penalties or corporal punishments could never produce genuine belief. *Id.* at 70–72 (quoting John Locke, *A Letter Concerning Toleration* 27 (ed. James H. Tully) (1983)). Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947). Jefferson is also remembered for his metaphor of a "wall of separation between church and State."

[52] *See* Muñoz, *supra* note 5, at 21.

[53] Madison, *supra* note 6. The text also quotes the Virginia Declaration of Rights of 1776. *Id.* ("[T]hat Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only be reason and conviction, not by force or violence.").

[54] The original Constitution (1788) did not protect "free exercise" or broad religious freedom. However, some provisions reflect protection towards religious beliefs. Article VI prohibits religious test to serve in office. Articles I, II, and VI all allow persons to take "affirmations" instead of "oaths." These provisions show the Constitution was trying to be religiously inclusive. But one did not need to be religious to take advantage of these provisions (e.g., a person who did not want to make an oath for political or philosophical reasons could take advantage of the provision). *See* McConnell, *supra* note 12, at 1474. The lack of direct free exercise protections likely can be attributed to the federalist position at the time that the federal government's powers were enumerated and thus did not reach matters of religion. *See* THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce."). But in an act of good will towards the anti-federalists, the First Congress started work on a Bill of Rights. AMAR, AMERICA'S CONSTITUTION, *supra* note 12, at 315–320. Madison noted the frustrations of the anti-federalists saying, "We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution…." *Id.* at 318. Professor Amar also notes

Amendment provided that "the civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed."[55] That formulation was far more expansive than what was ultimately settled on, it seemed to forbid any law that touched the rights of conscience "in any manner, nor on any pretext."[56] By the time of ratification, however, the text had narrowed considerably.[57] The First Amendment, as adopted, prohibits only laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[58] Unlike Madison's broader draft, the final text appears to target only laws that directly prohibit religious exercise as such.[59] The language does not speak to incidental burdens, indirect effects, or the mechanics of sincerity. Nor was there any clear debate in the First Congress about whether the Clause required exemptions for religious objectors.

The contemporaneous debates over what would become the Second Amendment, however, shed light on the Framers' views of religious accommodations generally.[60] Legislators considered whether religious pacifists should be exempt from

---

that the Bill of Rights was used to induce the two holdouts (Rhode Island and North Carolina) to join the Union. *Id.* at 319 (Representative Eldbridge Gerry argued, "[t]here are two States not in the Union; it would be a very desirable circumstance to gain them. I should therefore be in favor of such amendments as might tend to invite them and gain their confidence; good policy will dictate to use to expedite that event").

[55] I ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (proposal of James Madison, June 8, 1789).

[56] *Id.*

[57] For a comprehensive review of drafting process and changes *see* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1100–1109 (2008).

[58] U.S. CONST. amend. I.

[59] AMAR, THE BILL OF RIGHTS, *supra* note 12, at 42; *but see* McConnell, *supra* note 12, at 1481–84 (arguing that changes from the first proposal were primarily stylistic rather than substantive).

[60] These debates were going on at the same time that they were drafting and debating the Free Exercise Clause so their views on religious accommodations in the Second Amendment context illustrates their views about religious accommodations generally. *See* Muñoz, *supra* note 57 at 1112, 1109–10 (arguing that this evidence suggests that the "First Congress did not understand the Free Exercise Clause to include a right to religious exemptions from generally applicable laws").

militia service,[61] permitted to hire substitutes, or pay a fine.[62] Representative John Vining of Delaware, argued that requiring objectors to find replacements was equivalent, from the state's perspective, to requiring them to serve.[63] But Representative Thomas Scott of Pennsylvania voiced concern about "draft-time conversions," warning that nonbelievers might feign religious objections to evade service.[64] These exchanges show that while the Framers took religious scruples seriously and often considered accommodation, they were also aware of the dangers of insincere claims.[65] The final text of the Second Amendment did not mandate exemptions, leaving accommodations to legislative grace.[66]

This history illustrates several important points. First, the Framers conceived religious liberty as an inalienable right of conscience, immune from governmental compulsion. Second, religious liberty was material enough that believers would rather endure civil punishment than betray the commands of their faith. Third, legislatures did sometimes provide accommodations but often required outward evidence of sincerity, such as membership in a recognized faith or certification by religious authorities, reflecting their concern with fraud. Fourth, and most crucial for present purposes, the text of the Free Exercise Clause does not itself specify how courts should distinguish sincere from insincere claims. The role of sincerity is thus largely a matter of judicial construction and historical practice rather than constitutional text.

---

[61] *See id.* at 1112 ("A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.").

[62] *See id.* ("James Jackson, a Revolutionary War hero, objected to the provision as 'unjust,' because it did not specify that conscientious objectors were obligated to pay an equivalent in lieu of military service.").

[63] *See id.* at 1113 ("[H]e saw no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight.").

[64] *Id.* at 1114–15 (He wasn't opposed to the government legislating a religious accommodation per say but wanted to "guard against those who are of no religion" from taking advantage).

[65] *See id.* at 1116–1117.

[66] *See id.* The Senate removed the provision on September 9, 1789, but there was no recorded debate that explains why. Professor Muñoz argues that this means that the "First Congress *did not* consider exemption from a generally applicable legal duty to be necessary to protect religious freedom." *Id.*

II. THE COURT'S APPROACH TO RELIGIOUS SINCERITY

Before courts grant a religious exemption under the Free Exercise Clause,[67] they must determine that the belief at issue is both religious[68] and sincere.[69] Sincerity is checking whether the claimant *genuinely holds* the religious conviction they seek to protect. However, the Court has never articulated a clear rule or standard for determining sincerity. In fact, the Court often presumes that these elements are met without applying any test or scrutiny.[70] Some members of the Court have even suggested

---

[67] It is worth noting that religious exemptions may also be granted under statutory regimes like the Religious Freedom Restoration Act (RFRA).

[68] This Article does not attempt to define what is "religion" or "religious" under the Free Exercise Clause. The Supreme Court has endorsed both expansive and narrow interpretations of what is "religious" and is therefore protected. *C.f.* United States v. Seeger, 380 U.S. 163, 166 (1965) (arguing that beliefs that occupy "a place in the life of its possessor parallel to that filled by the orthodox belief in God of [religious believers]" were religious.); *and* Welsh v. United States, 398 U.S. 333, 342–44 (1970) (broadening the Court's *Seeger* approach); *with* Wisconsin v. Yoder, 406 U.S. 205, 216 (1971) (holding that religion does not include "philosophical and personal" choices). In *Yoder* the Court stated:

> In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

[69] *See Yoder*, 406 U.S. at 215–16; Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 833 (1989); *Seeger*, 380 U.S. at 185; United States v. Ballard, 322 U.S. 78, 87 (1944).

[70] *See* Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963) ("No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible."); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons."); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014) (accepting it as a "sincere religious belief" and moving on to assessing substantial burden); *id.* at 758-

that any consideration of religious sincerity would violate the First Amendment.[71] Neglecting direct examination of religious sincerity risks undermining the axiomatic principle that the Free Exercise Clause only protects sincere "beliefs rooted in religion[.]"[72] Indeed, without a filter, any person can mask a political or philosophical objection as a sincere religious one and ask for a religious accommodation.[73] By not having a framework to test religious sincerity, the Court does violence against the very Religion Clauses it seeks to protect. This Part examines the Court's historical treatment of religious sincerity, tracing its inconsistent and often reluctant engagement with the problem.

A. United States v. Ballard: *The Seminal Case on Religious Sincerity*

The Supreme Court's first chance to define the role that religious sincerity plays in First Amendment analysis came in *United States v. Ballard*.[74] Edna and Donald Ballard, two of the leaders[75] of the "I AM" religious group, were indicted on twelve counts of fraud.[76] At issue was the Ballard's representations that they "had the ability and power to cure persons… of diseases which are ordinarily classified by the medical profession as being

---

59 (Ginsburg, J., dissenting) (agreeing with the majority that the religious beliefs were "sincerely held" and further arguing that "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature" must be "accept[ed] as true[.]"). The presumption of religious sincerity may in part reflect the way cases are litigated. If the opposing party does not raise sincerity as an issue, courts have little reason to probe it further. But the deeper dynamic is that courts themselves have often signaled, both through doctrine and dicta, that inquiries into sincerity are disfavored or even off limits. When courts take that position, litigants have no incentive to expend resources challenging sincerity because they know it is not a winning argument. The result is that courts rarely confront sincerity because parties rarely press it, and parties rarely press it because courts have suggested that such challenges are inappropriate.

[71] Transcript of Oral Argument at 16, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (No. 13-354) (comments of Justice Kagan) ("I think this is absolutely right… that you… cannot test the sincerity of religion.").

[72] *Frazee*, 489 U.S. at 833 (citing *Seeger*, 380 U.S. at 163) (finding that "[p]urely secular views do not suffice").

[73] *See* United States v. Meyers, 906 F. Supp. 1494, 1508 (D. Wyo. 1995) (holding that the "Church of Marijuana" was not a religion and therefore did not get protection under RFRA, but noting that if the Plaintiff had said that the Church of Marijuana was a sect of Christianity, that it would be religious). *Id.* ("Had Meyers asserted that the Church of Marijuana was a Christian sect, and that his beliefs were related to Christianity, this Court probably would have been compelled to conclude that his beliefs were religious."). This conclusion shows that claimants can satisfy the religion requirement by just tying the belief to an established faith.

[74] 322 U.S. 78 (1944).

[75] *Id.* at 79. Guy Ballard, "alias Saint Germain, Jesus, George Washington, and Godfre Ray King," was the head of the church but was deceased by the time of the lawsuit. *Id.*

[76] *See id.*

incurable diseases" and that they had in fact cured some people of those diseases.[77] The indictment further alleges that the Ballards knew that those representations were false and made them with the intent to defraud persons of their money.[78] So, at issue was whether the "I AM" faith was fraudulent in some respects. The district court instructed the jury to consider only whether the Ballards "honestly and in good faith believe[d] those things," not whether they actually possessed the power to heal others.[79] This "good faith" standard represents an early articulation of what would later be described as a sincerity inquiry. The district court thus asked the jury to determine whether the Ballards genuinely held their professed religious beliefs, regardless of whether those beliefs were objectively true. The Court of Appeals rejected this approach, concluding that the jury should have been permitted to determine whether some of the Ballards' representations were in fact false.[80] In other words, the appellate court disagreed with the district court's limitation of the inquiry to sincerity and instead required consideration of the truth or falsity of the claimed religious powers.

The Supreme Court disagreed with the Court of Appeals stating that "the First Amendment precludes" a jury from determining "the truth or verity of [the Ballards'] religious doctrines or beliefs."[81] The Court emphasized that "the law knows no heresy," and that it would be unconstitutional for courts to determine whether a religious belief is true or false.[82] Indeed, the Religion Clauses have a "dual aspect" that prevents "compulsion by law of the acceptance of any creed or the practice of any form of warship"—to *establish* a religion—and it "safeguards the *free exercise* of the chosen form of religion."[83] Allowing courts or juries to determine whether a religious belief is true amounts to a violation of both Religion Clauses. A court

---

[77] *Id.* at 80.
[78] *See id.*
[79] *Id.* at 81 ("Whether [the alleged acts of healing are] true or not is not the concern of this Court and is not the concern of the jury . . . . They are not going to be permitted to speculate on the actuality of the happening of those incidents… [T]he religious beliefs of these defendants cannot be an issue in this court."). This "good faith" question seems to be the early sincerity test. It is asking whether the persons genuinely hold that professed religious belief.
[80] *See id.* at 83 (1944). It is not entirely clear if the Circuit Court's opinion was out of religious animosity or on the legal reality that proving fraud requires a false statement.
[81] *Id.* at 86 (1944).
[82] *Id.* at 86 (1944) (citing Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872)).
[83] *Id.* at 86 (1944) (citing Cantwell v. State of Connecticut, 310 U.S. 296, 303 (1940)) (emphasis added).

determining the orthodoxy of a church based on what it views as correct dogma establishes some form of state sponsored faith.[84] And requiring that claimants follow that interpretation to get First Amendment protection violates their free exercise rights to practice the religion of their choice according to their own conscience.[85]

The Supreme Court ultimately endorsed the district court's "good faith" approach. Under this framework, courts may not determine whether religious doctrines are true or theologically valid, but they may inquire whether a claimant sincerely holds the asserted religious belief.[86] The relevant question, therefore, is not whether the religious proposition itself is correct, but whether the individual invoking the Free Exercise Clause genuinely believes it.[87] Courts can evaluate whether a claimant's professed belief is held in "good faith" while refraining from adjudicating the truth, plausibility, or theological soundness of the belief itself. The prohibition on judicial evaluation of religious truth is now widely regarded as a foundational principle of Religion Clause doctrine.

1. Courts Have Tested Sincerity Before

One setting in which courts have directly evaluated religious sincerity is the statutory conscientious objector context.[88] *Witmer v. United States* illustrates how courts conduct that inquiry. The Petitioner in this case, a member of the Jehovah's Witnesses, was denied a conscientious objector exemption to fighting in the war.[89] To prove his conscientious

---

[84] *See id.*

[85] *See id.*

[86] *See id.* at 88 (finding that the District Court's good faith approach was proper). Again, the accuracy of their beliefs was not at issue here because they are the founding leaders and have the power to determine orthodoxy.

[87] *See id.* at 92–95 (Jackson, J., dissenting). Justice Jackson writes a well-respected dissent in the case about why even adjudicating religious sincerity should be considered off limits under the Religion Clauses. United States v. Ballard, 322 U.S. 78, 92–95 (1944) (Jackson, J., dissenting). For an excellent analysis of Justice Jackson's dissenting opinion and explanation about why his concerns are misplaced, see Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1205 (2017).

[88] Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), and specifically in the prison context, inquiry into religious sincerity is the main "gatekeeping inquiry" as well. Adeel Mohammadi, Note, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836, 1854 (2020).

[89] *See* Witmer v. U.S., 348 U.S. 375, 376 (1955). That Act says that "no person who, 'by reason of religious training and belief, is conscientiously opposed to participation

objector claim, the Petitioner filled out a questionnaire that shows his religious belief and "cites evidence, such as prior public expression of his views," to show his sincerity.[90] He also specifically disclaimed the ministerial exemption.[91] The board denied conscientious objector status, and the Petitioner appealed.[92] On appeal, when asked whether he could serve in a noncombatant role, he said, "the boy who makes the snowballs is just as responsible as the boy who throws them."[93]

The Supreme Court affirmed the board's denial of contentious objector status, holding that the "ultimate question in conscientious objector cases is the *sincerity* of the registrant in objecting, on religious grounds, to participation in war in any form."[94] For that reason, "any fact which casts doubt on the veracity of the registrant is relevant."[95] When evidence demonstrates that the petitioner has not "painted a complete or *accurate* picture[,]" courts may conclude that the claimed religious objection is not sincerely held.[96]

The Court then examined the evidence suggesting that the petitioner lacked a sincere religious belief. The Petitioner's response indicated he was cultivating a farm that would "contribute" to "the war effort . . . ."[97] The farm, he claimed that would contribute to the war effort, had not been cultivated for twenty-three years,[98] and the few available acres were used solely for family purposes.[99] He also asserted that he could not serve in a noncombatant role because doing so would make him morally culpable for the war effort, yet this position conflicted with his earlier willingness to provide food that would support the war

---

in war in any form,' shall be required to undergo combatant training or service in the armed forces." *Witmer*, 348 U.S. at 376 (citing 50 U.S.C. § 3806(j)).

[90] *Id.*

[91] *See id.* (stating that the petitioner wrote "does not apply"). The Universal Military Training and Service Act provided an exemption for religious ministers in addition to conscientious objectors. Under the statute, "[r]egular or duly ordained ministers of religion" were "exempt from training and service." 50 U.S.C.A. § 3806(g)(1) (West 2015).

[92] *See Witmer*, 348 U.S. at 378–79.

[93] *Id.* at 380.

[94] *Id.* at 381 (emphasis added).

[95] *Id.* at 381–82.

[96] *Id.* at 382 (emphasis added) (citing Dickinson v. United States, 346 U.S. 389, 396 (1953)).

[97] *Id.* at 378.

[98] *See id.*

[99] *See id.*

effort.[100] These inconsistencies and misrepresentations, the Court concluded, "support the finding of insincerity."[101]

The decision illustrates the broader framework courts employ when evaluating religious sincerity. Rather than assessing the truth or plausibility of the religious belief itself, courts examine objective evidence bearing on the claimant's credibility—such as inconsistent statements, conduct that contradicts professed beliefs, or omissions that undermine the claimant's narrative. In this way, sincerity determinations focus on whether the individual genuinely holds the asserted belief, not whether the belief is theologically correct. Although the Court has applied this type of inquiry in statutory contexts like conscientious objector claims, it has been more reluctant to engage directly in sincerity analysis in other areas of law, including Free Exercise doctrine.

doctrine.

2. Judicial Deference to Religious Decisions on Doctrine

Legal disputes sometimes turn on questions entangled with religious doctrine. A familiar example arises in church property disputes, where one faction contends that the other has departed from the faith's teachings and thereby forfeited its claim to the congregation's assets. Civil courts plainly have a legitimate interest in resolving property claims within their jurisdiction. Yet some property disputes cannot be resolved without determining which faction's beliefs or practices better reflect the church's doctrine. At that point, courts confront the constitutional boundary articulated in *United States v. Ballard*: civil courts may not adjudicate questions of religious truth or orthodoxy.[102] The central question, then, is how a civil tribunal can resolve legal issues, such as title, possession, or use, without impermissibly deciding matters of doctrine.

In the property law context, the Supreme Court has consistently deferred to churches' own determinations of doctrine as controlling and final.[103] The principle was first articulated in *Watson v. Jones*, decided during the Civil War era.[104]

---

[100] *See id.* at 382.
[101] *Id.* at 383.
[102] *See* United States v. Ballard, 322 U.S. 78, 86 (1944).
[103] *See, e.g.*, Watson v. Jones, 80 U.S. 679, 730 (1871).
[104] *See id.* This is not a "First Amendment" case as it has not been incorporated against the states yet. This case is at the Court in equity. *Id.* at 688 (noting that the petitioner filed a suit "in equity against the defendants").

There, a dispute within the Presbyterian Church turned on the denomination's condemnation of slavery and its requirement that members remain loyal to the Union.[105] A faction resisted this command, arguing that the church should remain neutral on political issues.[106] The dispute ultimately centered on control of church property; both sides claimed to be the rightful body entitled to use the church's buildings and funds.[107] The Court held that,

> whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.[108]

The Court emphasized that it lacked "ecclesiastical jurisdiction" and "cannot revise or question ordinary acts of church discipline."[109] In other words, when disputes hinge on doctrine, civil courts must defer to the church's own authorities.

This principle was constitutionalized in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[110] There, the Illinois Supreme Court had reinstated a bishop whom the church had defrocked, effectively overturning its ecclesiastical ruling.[111] The U.S. Supreme Court reversed, holding that the First Amendment prohibits civil courts from reviewing decisions of religious tribunals on "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[112] The ruling clarified that under the incorporated Religion Clauses, the judiciary must accept the church's own determinations as conclusive, without inquiry into their correctness.[113]

---

[105] *See id.* at 690–91.
[106] *See id.* at 691–92.
[107] *See id.* at 692.
[108] *Id.* at 727. The following paragraph talks about English courts and how they can determine orthodoxy, and then the next paragraph talks about how that is not our way.
[109] *Id.* at 730.
[110] 426 U.S. 696 (1976).
[111] *See id.* at 717–25.
[112] *Id.* at 713.
[113] Jones v. Wolf does not change this fact. 443 U.S. 595, 602–03 (1979). In fact, it reaffirms that the First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Id.* at 602. But, in the context of property disputes, if a State can apply

This doctrine has been repeatedly reaffirmed in recent cases. As the Court has explained, "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[114] The Religion Clauses thus protect churches and other religious bodies from governmental intrusion into questions of faith and internal governance, leaving courts to adjudicate only those civil disputes that can be resolved on neutral principles of law without trespassing into theology.[115]

B. Subsequent Cases About Sincerity

The U.S. Supreme Court's later religious liberty jurisprudence builds upon the foundation established in *United States v. Ballard*, which drew a critical distinction between evaluating the sincerity of a religious belief—permissible—and adjudicating the truth or theological correctness of that belief—constitutionally forbidden.[116] In subsequent cases, the Court refined this framework by clarifying both what counts as a religious belief for purposes of constitutional protection and how courts may assess whether such beliefs are sincerely held. Decisions such as *Frazee v. Illinois Department of Employment Security*[117] and *Thomas v. Review Board of the Indiana Employment Security Division*[118] illustrate the Court's effort to navigate these questions.[119] Together, they reaffirm that the Free Exercise Clause protects individualized religious convictions even when they are not tied to a formal denomination and that courts may

---

a "neutral principles of law approach" to resolve the dispute instead of deferring to the church's determination, that is also acceptable. *Id.* This approach is entirely secular and "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 603. This prevents "*entanglement* in questions of *religious doctrine*, polity, and practice." *Id.* (emphasis added). But, where the issue itself is about doctrine, the Court remains required by the First Amendment to defer to the church's determinations.

[114] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 737 (2020) (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952)).

[115] *See Jones*, 443 U.S. at 602.

[116] 322 U.S. 78, 88 (1944).

[117] 489 U.S. 829 (1989).

[118] 450 U.S. 707 (1981).

[119] Importantly, these cases do not clearly delineate the lines between the arguments advanced by the parties and the courts' analysis. At times, the tribunals appear to question whether the asserted belief is religious at all; at other moments, they seem to suggest that the claimant is merely feigning belief. Much of this confusion ultimately reflects underlying concerns about sincerity, even when the Court does not explicitly frame the issue in those terms.

evaluate sincerity while remaining strictly prohibited from resolving questions of religious doctrine.

In *Frazee*, the Court further clarified the doctrinal landscape by holding that a sincere religious belief need not be tied to the tenets of a particular sect to receive First Amendment protection.[120] Frazee, a Christian unaffiliated with an organized denomination, refused a temporary retail job that required Sunday work, citing his belief that "the Lord's day" must be observed.[121] State officials denied him unemployment benefits because he denied work and his justification, they argue, was not "based upon the tenets or dogma… of some church, sect, or denomination . . . ."[122] Said another way, because this alleged belief was not tied to a specific sect, it created doubt about his sincerity and did not qualify for First Amendment protection. The Court unanimously reversed, reaffirming that "[o]nly beliefs rooted in religion are protected"[123] and that "[p]urely secular views do not suffice[,]"[124] while making clear that the absence of a specific church to tie your belief to does not preclude constitutional protection. Significantly, the Court acknowledged the inherent difficulty in distinguishing "between religious and secular convictions and in determining whether a professed belief is sincerely held[,]" but affirmed that courts possess the competence, and indeed the responsibility, to make such determinations.[125]

In *Thomas*, the Court considered the claim of a Jehovah's Witness who resigned from his factory job after being transferred to a division producing armaments.[126] Thomas sought unemployment benefits but was denied on the grounds that his refusal to work was a "personal philosophical choice" rather than a genuine religious obligation.[127] Early tribunals agreed that he acted from "religious convictions,"[128] but the Indiana

---

[120] *See* 489 U.S. 829, 833 (1989).
[121] *Id.* at 830.
[122] *Id.*
[123] *Id.* at 833 (citing Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 713 (1981)).
[124] *Id.* (citing United States v. Seeger, 380 U.S. 163 (1965)).
[125] *Id.* at 833; *see also Thomas*, 450 U.S. at 714 (stating that determining "what is a 'religious' belief or practice is more often than not a difficult and delicate task").
[126] *Thomas*, 450 U.S. at 709 (specifically, he was moved "from the roll foundry to a department that produced turrets for military tanks.").
[127] *Id.* at 713.
[128] *Id.* at 711–12 (The referee at the administrative hearing reported "claimant did quit due to his religious convictions. . . . [T]he Indiana Court of Appeals, accept[ed] the finding that Thomas terminated his employment 'due to his religious convictions'" and reversed the Review Board).

Supreme Court characterized his decision as personal preference rather than protected religious exercise (i.e., his religious beliefs were not sincere).[129]

The record underscored the difficulty of distinguishing "religious" from "sincere." Indeed, Thomas admitted he was "struggling" with his convictions and could not fully articulate them.[130] He maintained that he could produce raw metal destined for tanks but could not directly assemble weapons.[131] These statements, however, went not to whether his objection was "religious" but to whether it was sincerely held. The inconsistencies noted by the Indiana tribunals thus reflected an assessment of sincerity, not a threshold determination of religiosity. Further complicating matters, Thomas had discussed his concerns with a fellow Jehovah's Witness, who expressed a different understanding of the sect's teachings and did not believe that participation in war production was religiously prohibited.[132] Though Jehovah's Witnesses are a recognized religious community entitled to First Amendment protection,[133] this exchange highlighted an intrafaith disagreement about the scope of the Witnesses' doctrine.

The U.S. Supreme Court reversed, emphasizing that Free Exercise protects individualized religious convictions even when they are not universally shared within a tradition.[134] As the Court

---

[129] *Id.* at 713. When the Indiana Court says his beliefs were "personal philosophical choice[s]" they are not challenging the Jehovah's Witnesses doctrines as not being religious but rather asserting that Thomas does not genuinely hold those religious beliefs (i.e., his motivations are likely philosophical or moral). In that way, determining whether a belief is religious and whether a claimant is sincere result in the same conclusion: religion is not what is making the claimant engage in the alleged behavior. But because the substantive question is different it is important that courts are clear about which question they are considering. The court also notes that even if the beliefs were religious, quitting on that basis would not be considered "good cause" under the unemployment statute and thus he would not be entitled to benefits anyway.

[130] *Id.* at 715.

[131] *See id.*

[132] *See Thomas*, 450 U.S. at 711 (Thomas "consulted another Blaw-Knox employee—a friend and fellow Jehovah's Witness. The friend advised him that working on weapons parts at Blaw-Knox was not 'unscriptural.'"). But Thomas struggled to accept that interpretation. He ultimately "concluded that his friend's view was based upon a less strict reading of Witnesses' principles than his own." *Id.*

[133] *See* Cantwell v. Connecticut, 310 U.S. 296 (1940). In fact, the case that incorporated the Free Exercise Clause to apply against the states through the Fourteenth Amendment was about the religious actions of Jehovah's Witnesses. *Id.*

[134] *See id.* at 715–16 ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

explained, "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[135] Indeed, "[c]ourts are not arbiters of scriptural interpretation."[136] *Thomas* thus reaffirmed that courts may probe sincerity, but they cannot adjudicate theological correctness.[137]

1. Truth vs. Accuracy

At this point, it is helpful to distinguish between truth and accuracy. Truth is a notoriously complex concept in philosophy, subject to competing theories. For the purpose of this Article, however, "truth" is understood in its classical sense: something that reflects or corresponds to reality. As Aristotle put it, "to say of what is that it is, or of what is not that it is not, is true . . . ."[138] Accuracy, by contrast, is a matter of degree. A statement may be more or less accurate depending on how closely it approximates the truth, but accuracy requires a baseline against which the claim can be measured. In the religious context, this baseline would be what might be called true religious orthodoxy.

A simple example illustrates the difference: if a wall is painted white, the truth is that the wall is white. If one observer says the wall is "off-white" and another says it is "brown," both are mistaken, but the "off-white" description is closer to the truth and thus more accurate. Accuracy, therefore, does not collapse into truth but instead describes proximity to it.

Now imagine that all of the judges in a courtroom are blind and cannot directly perceive the wall's color. If a litigant insists the wall is brown, the court lacks the ability to test that claim directly.[139] But if the person who painted the wall submits a sworn declaration stating that the wall was painted white, the court may reasonably conclude that the litigant's claim is inaccurate and, more importantly, insincere (i.e., the litigant does not actually believe the wall is brown but is trying to trick the court). The painter, not the court, established the truth; the

---

[135] *Id.* at 716.
[136] *Id.*
[137] *See id.* (finding the role of the reviewing court to be limited to determining "whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion").
[138] ARISTOTLE, METAPHYSICS bk. IV, ch. 7, at 1011b27 (W. D. Ross trans., Clarendon Press 1928), https://classics.mit.edu/Aristotle/metaphysics.4.iv.html (defining "what the true and the false are").
[139] Much like how the courts are prohibited from determining religious orthodoxy. *See* United States v. Ballard, 322 U.S. 78 (1944).

court's role is merely to compare the litigant's assertion against that authoritative baseline to assess credibility.

At first glance, *Thomas* might appear to prohibit any inquiry into the *accuracy* of a professed religious belief, that is, whether Thomas or his coworker more faithfully described Jehovah's Witness doctrine.[140] A closer reading, however, situates *Thomas* squarely within the reasoning of *Ballard*. The case does not foreclose courts from considering the coherence or plausibility of a claimant's account as evidence of sincerity; rather, it underscores that courts themselves may not determine the content of a faith's doctrine and then measure a claimant's belief against that baseline.[141]

The dispute in *Thomas* concerned the meaning of Jehovah's Witness teaching regarding participation in war production.[142] To evaluate whether Thomas's belief was "accurate," the Court would have had to establish what the denomination's doctrine in fact required, and then decide whether Thomas's position conformed to that orthodoxy.[143] That exercise, judicially pronouncing on the substance of religious doctrine, falls squarely within the prohibition announced in *Ballard*.[144] The constitutional bar is not against recognizing that a belief may or may not reflect doctrinal accuracy, but against the judiciary serving as the arbiter of what a religion *really* teaches. *Ballard* makes clear that the First Amendment forbids courts from deciding matters of theological truth or orthodoxy, even while allowing them to examine sincerity through secular indicia such as consistency, demeanor, or corroborating evidence.[145]

Read together, *Ballard*, *Thomas*, and *Frazee* articulate a coherent principle of Free Exercise jurisprudence. Courts may not adjudicate the truth of religious doctrine, but they may evaluate whether a claimant's asserted belief is sincerely held.[146]

---

[140] *See Thomas*, 450 U.S. at 715–16 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.").
[141] *See id.* at 715 (noting that "the judicial process is singularly ill equipped to resolve such [intrafaith] differences").
[142] *See id.*
[143] *See id.*
[144] *See Ballard*, 322 U.S. 86 ("The First Amendment has a dual aspect. It not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion.'") (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).
[145] *See id.*
[146] *See id.* at 80.

In *Ballard*, the truth claim concerned whether leaders of the "I AM" sect could perform miraculous healings.[147] In *Thomas*, the question turned on whether Jehovah's Witness doctrine permitted participation in war production.[148] In both cases, the Court emphasized that judges are not competent to determine the truth of theological claims; their task is limited to assessing whether the individual claimant sincerely holds the asserted belief.[149] *Frazee* further establishes that the Free Exercise Clause protects sincerely held religious beliefs even when they are not derived from the formal teachings of an organized denomination, and that the lack of such institutional grounding does not itself suggest insincerity.[150] Together, these cases confirm that sincerity, not orthodoxy, marks the boundary of judicial competence in matters of religion.

Despite this precedent, the Court has in recent years shown increasing reluctance to confront sincerity directly. In *Burwell v. Hobby Lobby Stores, Inc.*, both the majority and dissent appeared to treat sincerity review as constitutionally suspect.[151] Justice Ginsburg's dissent went so far as to assert that under the Religious Freedom Restoration Act, courts "must accept as true" that a claimant's "beliefs are sincere and of a religious nature."[152] This drift toward categorical deference, however, is in tension with the Court's historical approach and is increasingly untenable in light of significant doctrinal changes to both Religion Clauses. As the Court's post-*Smith* jurisprudence has expanded the scope of religious accommodation, the threshold inquiry into sincerity has only grown in importance.

III. CHANGES TO THE RELIGION CLAUSES

The Supreme Court's Religion Clause jurisprudence has shifted dramatically in the past five years. With respect to the Free Exercise Clause, the Court has reinterpreted its analysis in

---

[147] *See id.* at 88; *Thomas*, 450 U.S. at 716 (can determine whether Thomas had an "honest conviction"); Frazee v. Illinois Dep't of Emp. Sec., 489 U.S. 829, 833 (1989) (noting that their free exercise cases turned on whether "the claimants had a sincere belief that religion required him or her to refrain from the work in question.").

[148] *See Thomas*, 450 U.S. at 715 (noting the Indiana Supreme Court's reliance on the fact that "another Jehovah's Witness had no scruples about working on tank turrets").

[149] *See id.* at 716; *Ballard*, 322 U.S. at 86–87.

[150] *Frazee*, 489 U.S. at 833 (The Court found that "Thomas unquestionably had a sincere belief that his religion prevented him from doing such work."); *see also Ballard*, 322 U.S. at 88 (supporting the "good faith" approach).

[151] 573 U.S. 682 (2014).

[152] *Id.* at 759 (Ginsburg, J. dissenting) (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)).

a manner that renders most laws vulnerable to challenge.[153] This doctrinal development makes it increasingly important that courts verify the sincerity of a claimant's asserted religious beliefs in order to preserve the integrity of the Clause. At the same time, the Court's abandonment of the *Lemon* test has reshaped Establishment Clause doctrine, eliminating the "excessive government entanglement" factor that once constrained judicial involvement in religious disputes. Together, these changes clear the way for greater judicial engagement with questions of religious sincerity, underscoring the need for a coherent and principled approach to sincerity review.

A. The Supreme Free Exercise Clause

The so-called *Smith* test, at least what remains of it, governs the Court's analysis when determining whether a government action violates the Free Exercise Clause. In *Employment Division v. Smith*, Justice Scalia, writing for the Court, held that laws that are both "neutral" and "generally applicable" do not implicate the Free Exercise Clause, even if they incidentally burden religious practice.[154] If a law is either not neutral or not generally applicable, however, it must survive strict scrutiny to be constitutional.[155]

After *Smith* was decided in 1990, for roughly two decades, *Smith* curtailed broad constitutional claims for religious exemptions, effectively steering protections for religious exercise

---

[153] *See* ELIZABETH REINER PLATT ET AL., WE THE PEOPLE (OF FAITH): THE SUPREMACY OF RELIGIOUS RIGHTS IN THE SHADOW OF A PANDEMIC (2021), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4947&context=faculty_scholarship (School vaccination mandates, employment and housing antidiscrimination laws, minimum wage laws, gun laws, and traffic laws, all have exemptions and therefore would have to survive strict scrutiny to be constitutional.).

[154] *See* 494 U.S. 872, 879 (1990). The application of this test is simple: a law fails to be "neutral" when those laws "*by their terms* impose disabilities on the basis of religion." Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557 (1993) (Scalia, J., concurring). For example, a law that specifically excludes persons of certain faiths from public benefits would not be considered neutral because it directly targets religion. If a law is neutral but through its design or "enforcement target[s] the practices of a particular religion for discriminatory treatment" then it fails to be generally applicable. *Id.* This is because the law acts like a religious gerrymander meaning discriminatory purpose can be inferred.

[155] *Lukumi*, 508 U.S. at 540. This test seems to parallel the Equal Protection Clause with the opinion of the Court directly finding "guidance in our equal protection cases" to determine whether a law is "neutral." Justice Harlan recognized under the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis" (quoting Walz v. Tax Comm'n of N.Y.C, 397 U.S. 664, 696 (1970)).

into the legislative realm.[156] Without proof of religious targeting (lack of neutrality) or religious gerrymandering (lack of general applicability), a free exercise claim would fail. Recently, however, the Court has interpreted the *Smith* test in ways that expand opportunities for exemptions from otherwise valid laws.

In *Tandon v. Newsom*, the Court clarified that laws "are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[157] Comparability, the Court explained, must be judged against the government interest asserted to justify the regulation.[158] At issue in *Tandon* was a California law limiting at-home gatherings to three households to mitigate the spread of COVID-19.[159] Individuals seeking to host at-home Bible study groups with more than three households challenged the restriction as violating the Free Exercise Clause, and the Court agreed.[160] Because California permitted more than three households to gather in grocery stores, restaurants, and personal care facilities (settings that also risked viral spread of COVID-19), the regulation was not neutral and generally applicable because it treated secular activities better than religious exercise and thus was subject to strict scrutiny.[161]

Similarly, in *Fulton v. City of Philadelphia*, the Court held that whenever a law has an individualized mechanism for granting exceptions, and declines to extend them to religious objectors, then it is not neutral and generally applicable and must

---

[156] Congress disagreed with the Court's decision in *Smith* and sought to make corrections. Three years after *Smith*, the Court passed the Religious Freedom Restoration Act of 1993 ("RFRA") "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)." 42 U.S.C. § 2000bb(b). RFRA therefore requires the government to demonstrate that any substantial burden on religious exercise is the least restrictive means of furthering a compelling governmental interest. The Supreme Court later held that RFRA exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment when applied to the states. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). As a result, RFRA remains applicable to federal law but does not bind the states. *Id.* Even under RFRA's heightened scrutiny framework, however, courts continue to examine whether the claimant's asserted religious belief is sincerely held.

[157] Tandon v. Newsom, 593 U.S. 61, 62 (2021).

[158] *Id.*

[159] *Id.* at 62–63.

[160] *Id.*

[161] *See generally id.* (noting that the Court did not explain which principle was violated or whether both were.); *but see id.* at 66 ("As the *per curiam*'s reliance on separate opinions and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons.") (Kagan, J., dissenting).

survive strict scrutiny to be constitutional.[162] Taken together, these decisions have produced a hyper-protective Free Exercise Clause, one that subjects a wide range of laws to searching judicial review whenever they treat religious exercise less favorably than even a single secular comparator.

B. The Fall of Lemon

The Establishment Clause, no less than the Free Exercise Clause, has undergone significant transformation in recent years. In *Kennedy v. Bremerton School District*, the Court finally abandoned the *Lemon v. Kurtzman* framework, long the controlling test for Establishment Clause disputes.[163] For decades, judicial reluctance to scrutinize either the sincerity or the doctrinal accuracy of religious claims can be traced to *Lemon*'s third prong, which prohibited "excessive government entanglement with religion."[164] That entanglement concern

---

[162] Fulton v. City of Philadelphia, 593 U.S. 522, 540 (2021) ("The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable.").

[163] Kennedy v. Bremerton School District, 597 U.S. 507, 534 (2022). Government action would violate the *Lemon* test and thus the Establishment Clause if the action (1) lacked a secular legislative purpose, (2) had the primary effect of advancing or inhibiting religion, or (3) resulted in "excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[164] Justice Rehnquist, writing in dissent, notes that state inquiry into whether the claimant's belief is "'religious' and whether it is sincerely held . . . would surely 'entangle' the State in religion" in violation of the third factor of the *Lemon* Test. He also notes that this examination, while violating *Lemon*, is required "[o]therwise any dissatisfied employee may leave his job without cause and claim that he did so because his own particular beliefs required it." *Thomas*, 450 U.S. at 726 (Rehnquist, J., dissenting); *see also* Crowder v. S. Baptist Convention, 828 F.2d 718, 723 (11th Cir. 1987) (citing to Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969)); *see id.* at 722 n.11 (the Supreme Court has suggested "that the establishment clause based prohibition against *excessive government entanglement* with religion is implicated where the method of dispute resolution involves *an inquiry into religious beliefs or doctrines*.") (emphasis added); Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla., 824 F. App'x. 680, 683 (11th Cir. 2020) ("by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks 'establishing' a religion."); *id.* (the adjudication of ecclesiastical concerns would "excessively entangle us in questions of ecclesiastical doctrine or belief[.]"); Askew v. Trustees of Gen. Assemb. of Church of the Lord Jesus Christ of the Apostolic Faith, Inc., 684 F.3d 413, 418 (3d Cir. 2012) (recognizing inquiry "into ecclesiastical law and governance" implicates the "entanglement principle."); Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991) (considering the reasonable "beliefs and practices" of a faith "fosters excessive entanglement with religion."). L.L.N. v. Clauder, 563 N.W.2d 434, 440 (Wis. 1997); Isely v. Capuchin Province, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) ("It is well-settled that when a court is required to interpret Canon Law or internal church policies and practices, the First Amendment is violated because such judicial inquiry would constitute excessive government entanglement with religion.") (collecting cases).

created anxiety for courts and fostered a posture of deference. Sincerity was often treated as a presumption rather than an evidentiary question, with litigants permitted to assert a religious belief without meaningful verification. This produced a paradox. On the one hand, the Free Exercise Clause required courts to distinguish sincere claims from opportunistic ones, because only sincere religious exercise warrants protection.[165] On the other hand, the Establishment Clause discouraged close scrutiny for fear that such inquiry would entangle the state in theology.[166]

Kennedy fundamentally altered this dynamic. By replacing *Lemon* with a test grounded in "historical practices and understandings," the Court removed a key doctrinal barrier that had dissuaded courts from even minimal sincerity verification.[167] Under *Kennedy*, courts remain barred from adjudicating religious truth or orthodoxy, but they are no longer constrained by an entanglement rule so rigid that it foreclosed reliance on institutional evidence or community practice. Instead, courts may now consider indicia of sincerity in ways consistent with historical traditions of adjudicating conscience-based claims.[168]

The convergence of these doctrinal shifts, the expansion of Free Exercise Clause protections through cases like *Fulton* and *Tandon*, and the dismantling of *Lemon* in *Kennedy*, creates an inflection point. With more Free Exercise challenges reaching the courts, and with a greater likelihood of success, sincerity verification becomes not only unavoidable but essential. The constitutional prohibition on adjudicating theological truth remains intact, yet the historical-practice framework frees courts to examine sincerity in a manner consistent with the Religion Clauses' shared purpose—to safeguard genuine faith while guarding against opportunistic misuse.

IV. THE STAKES OF SINCERITY REVIEW (WHY IT MATTERS)

The rigorous examination of religious sincerity is not a peripheral concern under the First Amendment; it is central to maintaining the integrity of the Religion Clauses. While some

---

[165] *Yoder*, 406 U.S. at 216 (holding that sincere religious beliefs do not include "philosophical and personal" choices).
[166] *Crowder,* 828 F.2d at 722 n.11.
[167] *Kennedy,* 597 U.S. at 535–36 ("[i]n 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.'").
[168] *Id.* at 536 ("[t]he line that courts and governments 'must draw between the permissible and the impermissible' has to 'accord with history and faithfully reflect the understanding of the Founding Fathers.'").

have argued that it is better to allow occasional insincere claims to proceed than to risk denying a genuine one,[169] such an approach misapprehends both the nature of sincerity review and the right the Founders sought to secure. Judicial engagement with sincerity is not an intrusion into religious liberty—it is a safeguard for it. This Part examines the harms of extending First Amendment protection to insincere claims, including backlash against religion, erosion of judicial credibility, and the dilution of constitutional protections for those whose faith is sincere.

A. Fraudulent Religious Claims

The concern that people might strategically reframe political or philosophical objections as religious beliefs to get an accommodation is not a new fear. When the First Congress debated whether to include a religious accommodation for pacifist religions in what would become the Second Amendment, Thomas Scott of Pennsylvania objected.[170] He did not disagree with the idea that religion should be accommodated when possible but that the exception would be used as "pretext[] to get excused from bearing arms[]" by "those who are of no religion."[171] Recent empirical studies show that Scott's fears were not unfounded. When secular exemptions are unavailable, some individuals convert their moral, political, or philosophical objections into religious ones.[172]

---

[169] *See* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 780 n.108 (1984) (arguing that courts should only find beliefs insincere if they are "patently insincere" which would give "a heavy presumption in favor of sincerity.").

[170] Muñoz, *supra* note 57, at 1115.

[171] *Id.*

[172] Moore, *supra* note 4, at 802; *see also* Carolyn M. Batie et al., *COVID-19 Vaccination in a Military Population: Evaluation of a Quality Improvement Initiative to Increase Vaccine Confidence and Reduce Hesitancy*, 188 Military Medicine e2885, e2888 (2023) (noting that all "459 Special Warfare Trainees located at Lackland Air Force Base… had previously received required vaccinations for entrance into the U.S. Military. None of the 459 trainees had previously requested a religious exemption from receiving vaccinations; however, in September 30, 2021, [all] 459 trainees [] were requesting religious exemptions" to the COVID-19 vaccine requirement.). The article suggests that the religious exemption requests were "due to distrust and overall hesitancy to receive the COVID-19 vaccine" rather than true religious sincerity. *Id.*

Studies of mandatory vaccination requirements provide striking illustrations.[173] Washington State, like all states,[174] mandates certain vaccines for school attendance but historically permitted both religious and personal/philosophical exemptions.[175] By 2018-2019, the state's nonmedical exemption rate rose to 4.5 percent, more than double the national median of 2.0 percent, and coincided with two measles outbreaks that produced the highest number of cases in the state since 1990.[176] In response, the legislature enacted Engrossed House Bill 1638, eliminating the personal/philosophical exemption for the MMR vaccine while leaving the religious exemption intact.[177] The policy was effective; kindergarten MMR compliance increased by more than 5 percentage points to over 94 percent in the following two school years.[178] Yet researchers noted an unintended consequence. Religious exemption rates rose by 367 percent, from 0.3 percent to 1.4 percent, and religious membership exemptions doubled from 0.1 percent to 0.2 percent.[179] The data suggests that many parents sought religious exemptions as substitutes for the eliminated philosophical option, a notable phenomenon in a state ranked forty-fourth nationally in religiosity, lending credence to the conclusion that "religious exemptions may be held by an increasing number of individuals without such religious beliefs."[180]

Vermont's experience points the same way. After the state eliminated its personal/philosophical exemption, the average percentage of kindergartners claiming a religious exemption increased sevenfold, from 0.5 percent to 3.7 percent.[181] The study further confirmed the substitution effect; and states that allowed both religious and personal/philosophical exemptions were one-quarter as likely to

---

[173] *See id.* at 795. These studies were done in the medical field context attempting to understand how policy makers could increase the overall vaccination rate in the state.

[174] As this article is being written states like Florida and Idaho are considering legislation that would end vaccine requirements at public schools. *See State Vaccine Requirements for Children*, KFF, https://www.kff.org/state-health-policy-data/state-indicator/state-vaccine-requirements-for-children/ (last visited Mar. 25, 2026).

[175] *Id.*

[176] Moore, *supra* note 4, at 796 (noting that the increase was due to the increase in nonmedical exemptions).

[177] *Id.*

[178] *Id.* at 797.

[179] *Id.* at 799.

[180] *Id.* at 802.

[181] Joshua T.B. Williams, et al., *Religious Vaccine Exemptions in Kindergartners: 2011-2018*, 144 PEDIATRICS 1, 1 (Dec. 2019).

report kindergartners with religious exemptions as states offering only religious exemptions.[182] These studies demonstrate empirically what Scott feared normatively—that personal objections will be rebranded as religious when religious accommodations are the only option available.

The harms associated with such strategic or fraudulent accommodations are significant. The Religion Clauses and statutory religious exemption regimes were designed to protect sincere religious beliefs, not personal, philosophical, or moral convictions, however deeply held.[183] This distinction is not semantic; it is foundational. Allowing demonstrably nonreligious claims to be recast as religious ones not only distorts that constitutional line, but it also trivializes the very protections the Framers intended. In this sense, the mere extension of constitutional shelter to inauthentic claims constitutes an independent harm, mocking the constitutional design and reducing religious liberty to a tactical loophole for noncompliance.[184]

The risk is not merely doctrinal but also political. Public support for religious exemptions, whether grounded in the Free Exercise Clause or enacted through statute, depends on the perception that they protect authentic matters of conscience rather than opportunistic refusals to comply with generally applicable laws. The moral force of religious liberty derives from the idea that it shields those who would otherwise suffer profound spiritual injury, not those seeking to evade civic obligations for ideological reasons.[185] When religious exemptions are perceived as back doors for secular objection, that moral force erodes. Such perceptions can provoke legislative

---

[182] *Id.*

[183] William Penn described free exercise as actions compelled by God under penalty of "Divine wrath." Adams & Emmerich, *supra* note 7, at 63 (quoting William Penn, *The Great Case of Liberty of Conscience* (1670)). The Supreme Court has agreed that only religious beliefs are protected, and philosophical objections, even deeply held like Thoreau's choice to "isolate[] himself at Walden Pond" are not protected. *Yoder*, 406 U.S. at 216.

[184] *See* Muñoz, *supra* note 57, at 1114–15 (noting Congress's concerns that a religious accommodation provision in the Second Amendment would not "guard against those who are of no religion" from taking advantage); *Thomas*, 450 U.S. at 726 (Rehnquist, J., dissenting) (arguing that without testing sincerity anyone could claim an exemption under law because could just say, even if it was not true, that their actions were required by their religion).

[185] *See* Muñoz, *supra* note 57, at 1114–15 (Congress understood that making people violate their religion was not good but concerns of using an exemption by nonreligious persons was also reason for concern).

retrenchment, judicial skepticism, and cultural hostility toward religious accommodation itself.[186]

A study showed that 51 percent of Americans "favor allowing individuals who would otherwise be required to receive a COVID-19 vaccine to refuse if doing so violates their religious beliefs."[187] 59 percent of Americans agree that "[t]oo many people are using religion as an excuse to avoid COVID-19 vaccination requirements[.]"[188] Interestingly, only 39 percent of Americans agree "that anyone who says that the vaccines go against their religious beliefs should qualify for an exemption."[189] And the more a person makes outward manifestations of religious sincerity, the more people are likely to support the exemption.[190] For example, 51 percent support an exemption if the individual has a signed document from a religious leader attesting to their beliefs, 55 percent if the individual shows they refused vaccinations in other contexts, and 57 percent if they are a member of a faith that has a record of refusing other vaccinations.[191] These polls show that while the public narrowly favors religious exemptions there is a growing majority that is concerned about fraudulent use, and support for exemptions increases when evidence of sincerity is reported.

Moreover, the misuse of religious exemptions undermines the capacity of the sovereign to address pressing public welfare concerns. The COVID-19 pandemic and recent measles outbreaks illustrate the point starkly. If every individual previously holding a personal/philosophical objection simply recharacterizes it as a religious one, the state remains in precisely the same public health predicament that justified removing the exemption in the first place.[192] This renders legislative efforts to solve urgent problems, whether in health, education, or safety, functionally ineffective.

Finally, insincere claims shift the burden of public backlash onto religious institutions themselves. When opportunistic exemptions lead to visible harms, such as preventable disease outbreaks, religious communities become targets of public frustration, even if those communities neither endorsed nor shared the alleged belief. The faith's public witness

---

[186] *See* RELIGIOUS IDENTITIES AND THE RACE AGAINST THE VIRUS, *supra* note 8, at 14.
[187] *Id.* at 7.
[188] *Id.* at 19.
[189] *Id.* at 21.
[190] *See id.*
[191] *Id.*
[192] *See* Moore, *supra* note 4.

is weakened, and legitimate claims for accommodation are met with suspicion. For all these reasons, courts have an interest in rigorously examining religious sincerity. Doing so is not a rejection of religious liberty, but rather a defense of it—ensuring that constitutional protections are reserved for the authentic exercise of faith, preserving the moral authority of religious accommodation, and safeguarding the sovereign's ability to serve the common good.

V. A FRAMEWORK TO DETERMINE RELIGIOUS SINCERITY

Courts must confront the question of religious sincerity directly in order to prevent the Free Exercise Clause from being exploited as a loophole rather than serving its intended purpose of safeguarding sincere religious belief. This Part proposes a two-part framework that courts and legislatures can employ to ensure that individuals seeking religious exemptions, whether under statutory schemes or the Free Exercise Clause, assert sincerely held religious beliefs. It also explains how the framework is consistent with history, tradition, and precedent.

A. Step One: Validate the Religious Claim

Any claimant who is seeking an exemption to a law under the Free Exercise Clause must demonstrate that the law, in fact, burdens a sincerely held religious belief.[193] This threshold requirement performs a gatekeeping function, ensuring that constitutional protections extend only to religious convictions, rather than philosophical, political, or purely personal objections, consistent with the Clause's text and purpose.[194]

For accommodation claims grounded in the teachings of an organized religious body, this framework would require the claimant to submit a sworn declaration from an authorized representative of the relevant institution (e.g., clergy member, denominational official, or governing body) attesting that the asserted belief is recognized or supported within that tradition. Additionally, the declaration would substantiate the claimant's assertion that if the claimant complied with the challenged law, they would be acting in conflict with the church's teachings. This step is important because it presents to the court the religious doctrine at issue, the conduct it demands of its followers, and that the law at issue requires the claimant to act contrary to their

---

[193] *Ballard*, 322 U.S. at 88.

[194] *Yoder*, 406 U.S. at 216 (holding that sincere religious beliefs do not include "philosophical and personal" choices).

faith. This information being certified by the church is not subject to deeper inquiry.[195]

The determination of who is "authorized" to issue such a declaration would rest entirely with the internal governance of the religious institution.[196] For some churches, this may be a formal denominational body, such as a diocesan office within Catholicism[197] or a synod within certain Protestant churches.[198] In others, particularly congregational or non-hierarchical faiths (e.g., independent Baptist and evangelical churches), authority may rest with the local pastor or elders.[199] Some faiths with even looser organizational structures may identify leaders informally recognized within their communities. Courts must not second-guess these internal determinations because that would violate the *Ballard* rule against adjudicating church doctrine.[200] Instead, they should defer to each religious body's own designation of who is empowered to speak on its behalf, recognizing the wide diversity of organizational structures across religious traditions.[201]

The information provided by the church in the declaration will aid the court in determining the *sincerity* of the

---

[195] *Watson*, 80 U.S. at 727 (When questions of faith have been decided by the church the "legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.").

[196] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (the courts are prohibited from reviewing a church's decisions about "internal organization.").

[197] The Catholic Church also has an International Theological Commission that examines "doctrinal questions of major importance." (translated) *Acta Apostolicae Sedis* 61, at 540–41 (1969).

[198] A synod is "a local or provincial assembly of bishops and other church officials meeting to resolve questions of discipline or administration." *Synod*, ENCYC. BRITANNICA (Mar. 6, 2025), https://www.britannica.com/topic/synod (last visited Aug. 6, 2025). For Example, the Lutheran Church Missouri Synod has a Commission on Theology and Church Relations and are charged with "maintaining doctrinal unity within the Synod" and "provide guidance to the Synod in matters of theology and church relations." Rev. Dr. Joel D. Lehenbauer, *Commission on Theology and Church Relations,* 2 (2023), https://files.lcms.org/file/preview/7D9FB1E6-87ED-4C91-B798-21F802332D05?_gl=1*113ztcu*_ga*MTc3MTMzODUyNy4xNzU1MDA5ODM5*_ga_Z0184DBP2L*czE3NzMwMDc3NzkkbzIkZzEkdDE3NzMwMDc3OTEkajQ4JGwwJGgw. "Because the church's life is so intimately involved with these means of grace, it must take special care that they are not falsified or distorted in any way as the church reaches out to people living in a particular time or place." *Id.* at 1.

[199] *Theological Positions,* THE EVANGELICAL FREE CHURCH OF AMERICA, https://www.efca.org/theological-positions (last visited Aug. 19, 2025). In the Evangelical Free Church, each local church is autonomous and free from ecclesiastical and hierarchical control.

[200] *Our Lady of Guadalupe*, 591 U.S. at 737.

[201] *Id.*

claimant. If the religious institution expressly *disclaims* the asserted belief in the declaration or disputes whether the law at issue compels conduct prohibited by the faith, this fact may serve as probative evidence of insincerity. If a claimant seeks an exemption from a law on the grounds that their religion prohibits certain conduct but then offers an inaccurate or fabricated representation of that religion's teachings, this inconsistency may legitimately cast doubt on their sincerity.[202] If the religious institution affirms the asserted belief, it is factual evidence that the claimant is sincere. To be clear, this step is not about courts evaluating whether a belief is religious[203] or whether a religious doctrine is true.[204] Instead, it is a fact-based inquiry into *whether the claimant actually believes what they say they believe*. Misstatements about religious doctrine and what it requires undermine that claim.[205]

Not all sincere religious beliefs are derived from a single religious institution or doctrinal pool, and those beliefs are still entitled to First Amendment protection.[206] Individuals sometimes assert religious obligations grounded in their own *personal understanding* of faith rather than in the doctrine of a recognized church or denomination. This Article refers to such claims as "Religious Islands"—religious beliefs that arise from

---

[202] *See Witmer*, 348 U.S. at 381–82 (during a sincerity analysis "any fact which casts doubt on the veracity of the registrant is relevant."); *id.* at 382–83 (finding that inconsistent statements about his religious obligations cased doubt on whether it was sincere).

[203] If a claimant seeking a religious exemption submits a declaration from their church that disagrees with the claimant's position, one could argue that the belief then isn't religious (i.e., your church says it isn't part of the faith so it is not a religious claim but something else). But if the claimant is using religious language to define the belief, it likely may still be considered religious. *Meyers*, 906 F. Supp. at 1494 (if the Plaintiff had said that the Church of Marijuana was a sect of Christianity, that it would be considered religious). Indeed, it may just be that it is their own interpretation of religious doctrine and still merit protection under the Free Exercise Clause. *Thomas*, 450 U.S. at 715–16 (The "guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."). Instead, the issue that this is addressing is whether they are sincere about the belief (i.e., testing whether they actually hold that religious belief). Even if they mischaracterize the church's doctrine, they are still asserting a religious basis for the claim. But the inaccuracy may demonstrate insincerity.

[204] *Ballard*, 322 U.S. at 78 (prohibiting courts from determining whether a doctrine is true).

[205] *See Witmer*, 348 U.S. at 381 (finding inconsistent statements about what conduct is permissible under their faith was evidence of insincerity (e.g., could provide food for the war effort but later said he could not help in a noncombatant role because he who makes the snowballs is equally culpable as the one that throws them)).

[206] *Frazee*, 489 U.S. at 833 (the Court found that "Thomas unquestionably had a sincere belief that his religion prevented him from doing such work" even though it was not tied to a specific church).

an individual claimant's personal interpretation of faith and are not anchored in an identifiable institutional doctrine. Because no church authority or doctrinal source can corroborate such beliefs, claimants asserting a Religious Island must affirmatively plead the individualized nature of their belief. The pleading should expressly state that the belief is personal and derived from the claimant's own understanding of faith.[207] This requirement helps distinguish individualized religious claims from institutional ones and provides courts with a clearer factual basis for evaluating the sincerity of the asserted belief.

Step One by itself is not determinative about a claimant's religious sincerity. It just provides evidence for a finding of sincerity or insincerity. Courts should then move on to Step Two before making a final determination about sincerity.

1. Benefits and Purpose of Step One

Requiring institutional verification or an affirmative pleading of a Religious Island at the outset offers several critical benefits. Far from burdening sincere religious exercise, this preliminary filter safeguards both the integrity of the religious doctrine at issue and the judicial process while deterring fraudulent or opportunistic claims for religious exemptions.

Step One is designed to enhance religious liberty by protecting the doctrinal integrity of organized religion by preventing claimants from misappropriating or "hijacking" religious teaching to get an exemption. Without Step One, claimants can invoke an affiliation with a particular church while advancing a belief that the institution itself repudiates, thereby forcing courts to implicitly credit the individual's characterization of doctrine over the institution's own authoritative interpretation. This is because, under the *Ballard* rule, courts are not allowed to examine theology or determine the correct view of a church.[208] Step One seeks to solve this

[207] This does not prevent them from claiming some base religion (e.g., Catholicism, Islam, etc.) but is designed to center the fact that they have departed in some respects from those institutions' doctrines.

[208] *Ballard*, 322 U.S. at 81 ("Whether [the alleged acts of healing] is true or not is not the concern of this Court and is not the concern of the jury… They are not going to be permitted to speculate on the actuality of the happening of those incidents… the religious beliefs of these defendants cannot be an issue in this court."); *Thomas,* 450 U.S. at 715–16 (The "guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

problem without having courts determine truth, but rather defers to a church's authoritative determination of doctrine.[209]

Consider the case of a parent opposed to vaccinations. Their state requires immunization as a condition of public school attendance. The parent, motivated by political and moral opposition to vaccines, files a Free Exercise Clause challenge. To support the claim, the parent alleges that their church prohibits vaccination and that the state requirement compels them to act against conscience. The difficulty is that the church itself has submitted a declaration stating precisely the opposite: not only does it allow vaccination, but it also affirmatively encourages members to be vaccinated.[210]

In this example, the claimant misrepresented the doctrine of their own church in an attempt to obtain an exemption. Crucially, it was not the court that declared the claimant's belief inaccurate, it was the church itself. In its declaration, the church clarified its actual teaching and explained that the claimant's contrary assertion was mistaken. The court's role was limited to acknowledging this misrepresentation as evidence relevant to sincerity. In doing so, the process respected the church's authority over its doctrine, shielded its teachings from distortion, and prevented the Free Exercise Clause from being manipulated for opportunistic purposes. Without this institutional step, courts would have been unable to challenge the claimant's interpretation of doctrine without impermissibly adjudicating religious truth.[211] And while in theory a "smoking gun" admission, such as an explicit statement that the claimant sought to exploit the Free Exercise Clause, could independently demonstrate insincerity, such direct evidence will rarely be available. More often, sincerity is assessed through circumstantial evidence, like whether a claimant has always publicly said that their faith bars vaccinations.

---

[209] *Watson*, 80 U.S. at 727.

[210] For example, the Church of Jesus Christ of Latter-day Saints released a statement supporting vaccinations. "In word and deed, The Church of Jesus Christ of Latter-day Saints has supported vaccinations for generations." While the Church ultimately left the decision whether to receive the COVID-19 vaccine to individual members, it made clear that its doctrine does not prohibit vaccination but rather encourages it. *The First Presidency and Apostles Over Age 70 Receive the COVID-19 Vaccine,* THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Jan. 19, 2021) https://news-my.churchofjesuschrist.org/article/the-first-presidency-and-apostles-over-age-70-receive-the-covid-19-vaccine.

[211] *Thomas,* 450 U.S. at 715–16 (1981) (arguing that courts cannot make determinations about church orthodoxy).

The Supreme Court has already recognized the constitutional weight of institutional self-definition in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[212] There, the Court emphasized that ministers "personify" the faith and teachings of the church, and requiring a church to accept an "unwanted minister" would impermissibly violate its right "to shape its own faith and mission through its appointments."[213] The underlying principle is that religious communities must retain control over the definition and transmission of their own doctrine. Allowing claimants to distort or misstate church doctrine in pursuit of exemptions would risk replicating the very evil *Hosanna-Tabor* rejected: state displacement of a religious community's authority to define, preserve, and transmit its own faith.[214]

While the contexts are not identical, the analogy is illuminating. Just as *Hosanna-Tabor* protects a church's right to define its mission through ministerial selection, a sincerity framework that incorporates institutional declarations protects a church's right to define its doctrine and defend against misrepresentation. Step One of the proposed framework thus enables the church to "shape its own faith and mission" by authoritatively controlling the interpretation of its teachings.[215] This approach simultaneously respects institutional autonomy, protects doctrinal integrity, and prevents "doctrinal hijacking"

---

[212] 565 U.S. 171, 188–89 (2012).

[213] *Id.*

[214] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89, 196 (2012) (recognizing "special solicitude to the rights of religious organizations" and holding that the Religion Clauses protect a religious group's authority to select those who "personify its beliefs" and "shape its own faith and mission"); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (recognizing religious organizations' "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Watson v. Jones*, 80 U.S. 679, 727, 729 (1872) (holding that civil courts must accept as binding the decisions of the highest church authorities on questions of "discipline," "faith," "ecclesiastical rule, custom, or law," and emphasizing religious bodies' authority to resolve "controverted questions of faith"); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449–52 (1969) (rejecting a "departure-from-doctrine" inquiry of the church because it would require civil courts to interpret church doctrine and assess the importance of particular doctrines to the religion); *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 708–09, 713-14, 721–25 (1976) (holding that civil courts may not substitute their interpretation of church law and polity for that of the church's highest ecclesiastical authorities).

[215] *Hosanna-Tabor*, 565 U.S. at 188–89.

by litigants who would opportunistically invoke religion divorced from its actual content.[216]

The requirement to secure institutional confirmation, or, for non-institutional claimants, to plead a Religious Island, imposes a minimal burden on genuine believers but creates a natural barrier for those seeking to exploit the system. Institutional verification operates as an effective screen for insincere claims because it requires the claimant to compare their alleged belief with the authoritative teachings of the church. A claimant who belongs to an organized faith is far less likely to take a position flatly contrary to that church's teaching, both because of the risk of reputational or disciplinary consequences within the community and because religious identity itself usually presupposes some deference to institutional authority.[217] Unlike political or philosophical beliefs, which individuals can tailor and modify at will, membership in a religious community entails ongoing participation, recognition, and accountability. This built-in accountability discourages opportunism.[218]

Those who merely seek to exploit the Free Exercise Clause for strategic reasons are unlikely to approach their religious institutions for confirmation precisely because doing so risks disclosing that they are trying to use their faith for political gain. When a claimant cannot or will not obtain institutional support, it raises legitimate questions about whether the belief is sincerely held. This is not to say that a member must always conform perfectly to institutional doctrine. *Frazee* makes clear that individualized religious convictions can merit protection even outside denominational teachings, but it is to say that the institutional step filters out those who would blatantly misrepresent their tradition.

In this way, institutional verification imposes little to no burden on *sincere* claimants. For non-institutional believers,

---

[216] Chagai Schlesinger, *Two Concepts of Judicial Deference to Religious Claims*, 50 BYU L. REV. 1355 (2025). This benefit is, in part, recognizing some form of institutional or group protection under the First Amendment. While it is undoubtably true that the Free Exercise Clause protects individual rights of conscious, it is disputed whether that extends to group rights. However, there is a growing body of scholarship that recognizes how courts, even if grounding their decisions in individual rights, have been recognizing some form of group protection.

[217] Laurie Goodstein, *Mormons Expel Founder of Group Seeking Priesthood for Women*, N.Y. TIMES (June 23, 2014), https://www.nytimes.com/2014/06/24/us/Kate-Kelly-Mormon-Church-Excommunicates-Ordain-Women-Founder.html (Ms. Kelly was excommunicated "for conduct contrary to the laws and order of the church").

[218] *See* Nathan Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1211 n.136 (2017).

pleading a Religious Island simply formalizes what is already the reality of their personal religious conviction. This is why Step One works as a fraud screen: it ties the claimant's assertion not just to their own word, but to the broader context of their religious life, where inconsistency between personal claims and institutional doctrine evidences insincerity.

This process respects both individual liberty and institutional autonomy. Take a congregant who initially believes her faith prohibits vaccination. When she consults her leaders in seeking a declaration, she learns that the faith permits vaccination and decides not to pursue an accommodation. Her religious liberty remains intact, even enhanced, by the opportunity for reflection and dialogue. Conversely, another congregant may remain convinced that vaccination violates her conscience. She can then file a Religious Island claim, staking her exemption on her personal conviction rather than institutional doctrine. In both scenarios, conscience is preserved while institutional doctrine is protected from distortion.

Finally, Step One improves judicial efficiency and strengthens public trust in Free Exercise adjudication. Institutional verification reduces the pool of insincere claims, while the requirement of formal declarations signals to the public that courts are not rubber-stamping exemptions but are applying a principled framework that balances religious liberty with fidelity to law. This transparency minimizes backlash against religious accommodations by demonstrating that exemptions are grounded in evidence of genuine belief rather than opportunism.[219]

Taken together, these benefits show that Step One advances the core purposes of the Religion Clauses. It respects the autonomy of religious institutions, protects the liberty of individual conscience, deters abuse, and promotes public confidence in the constitutional regime. In short, it introduces an evidentiary filter that safeguards both religion and the judiciary, ensuring that the Free Exercise Clause protects authentic faith rather than opportunistic misuse.

---

[219] *See* RELIGIOUS IDENTITIES AND THE RACE AGAINST THE VIRUS, *supra* note 8, at 21 (recognizing the more a person makes outward manifestations of religious sincerity, the more people are likely to support the exemption (e.g., 51 percent support an exemption if they have a signed document from a religious leader, 55 percent if the person shows they refused vaccinations in other contexts, and 57 percent if they are members of faiths that has a record of refusing other vaccinations)).

2. Step One is Consistent with History and Precedent

Courts can implement Step One without running afoul of either history or judicial precedent. Institutional verification allows the church, not the court, to define its own doctrine and determine whether a claimant has accurately represented that doctrine. What the court takes notice of is not the truth of a religious belief in the metaphysical or theological sense, but the accuracy of the claimant's factual representation of their own tradition. This distinction is critical. For decades, the Supreme Court has prohibited judicial inquiry into the ultimate validity of religious teachings, recognizing that both the Establishment Clause and the Free Exercise Clause bar civil authorities from adjudicating orthodoxy.[220] The Establishment Clause denies government authority to determine theological correctness, while the Free Exercise Clause protects heterodox or minority beliefs.[221] But when a church itself declares that a litigant has misrepresented its teachings, courts can rely on that determination as part of a sincerity inquiry without crossing into theological judgment.

Consider again the vaccine objector. The claimant asserts that her church forbids vaccination, yet the church submits a declaration affirming that vaccination is both permitted and encouraged. In this scenario, the claimant has not accurately described her own tradition. The court is not deciding what the "true" doctrine is; the *church* has already spoken to that question. Nor is the court measuring theological accuracy by reference to scripture or doctrine. Instead, it is recognizing a factual misrepresentation, comparing the claimant's assertion to the church's authoritative statement, and using that discrepancy as evidence bearing on sincerity. This is no different from any ordinary credibility assessment; since courts regularly evaluate whether a party has misstated a fact central to their claim.[222]

In this way, an accuracy review does not risk improper adjudication of religious truth. Rather, it reduces that risk by deferring to the church's own authoritative voice. The Supreme Court has long affirmed this principle of institutional autonomy. In *Watson v. Jones*, the Court held that "whenever the questions

---

[220] *Ballard*, 322 U.S. at 86 (citing Cantwell v. State of Conn., 310 U.S. 296, 303 (1940)).
[221] *Id.*
[222] *See, e.g.,* United States v. Ruzicka, 333 F. Supp. 3d 853, 872 (D. Minn. 2018) (finding testimony not credible when testimony was inconsistent and contradictory).

of discipline, or of faith, or ecclesiastical rule… have been decided by the highest of these church judicatories… the legal tribunals must accept such decisions as final."[223] Step One simply leverages that deference. Requiring sworn declarations from appropriate religious authorities ensures that claimants cannot misappropriate or distort doctrine while preserving the church's autonomy to define its own teachings.

Nor does this approach disadvantage individuals whose conscience diverges from their church's doctrine.[224] Step One expressly allows claimants to plead a Religious Island, a personal religious conviction not shared by their faith community. This ensures that heterodox beliefs remain protected while also safeguarding institutional integrity. A congregant who departs from her church's teaching may still seek an exemption, but she must do so transparently, acknowledging the divergence rather than misrepresenting institutional doctrine. In this way, Step One preserves liberty of conscience while preventing doctrinal hijacking.

Prior to the Court's decision in *Kennedy v. Bremerton School District*, one might reasonably have argued that Step One would have run afoul of the *Lemon* test, and specifically its prohibition on "excessive government entanglement" with religion.[225] The framework contemplates *voluntary* participation by churches in legal proceedings, such as providing declarations about doctrine and accuracy, and this cooperation could have been characterized as the kind of ongoing, intrusive church-state interaction that *Lemon* sought to avoid.

But, in *Kennedy*, the Court explicitly rejected *Lemon* and its entanglement framework, holding that Establishment Clause disputes must now be decided by reference to "historical practices and understandings."[226] Step One fits comfortably within this historical frame. Indeed, many religious accommodations at and around the founding required

---

[223] *Watson*, 80 U.S. at 727.

[224] *Thomas*, 450 U.S. at 715–16 (The "guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect."); *Frazee*, 489 U.S. at 833 (citing United States v. Seeger, 380 U.S. 163 (1965)) (the First Amendment does not require that a person follow one specific church)).

[225] *See supra* note 164.

[226] *Kennedy*, 597 U.S. at 535–36 ("[i]n 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.'"). This pivot fundamentally alters the constitutional analysis. Instead of a free-floating concern about any cooperation between church and state, the question is whether the interaction mirrors longstanding traditions of church-state relations in American history. *Id.*

institutional verification that the claimant was a member of the faith and held the beliefs asserted. The Baptists in Massachusetts were required to get a certificate from the church confirming that the person was "conscientiously of the Baptist persuasion[.]"[227] In Maryland, a "licensed preacher of the Gospel" had to certify the claimant was of the faith.[228] Importantly, these requirements existed after the states enshrined free exercise protections in their state constitutions.[229] They even continued after the ratification of the federal Free Exercise Clause.[230] These practices were not seen as impermissible entanglement but as appropriate mechanisms for distinguishing genuine conscience claims from opportunistic ones.[231]

By grounding the analysis in history rather than the indeterminate "entanglement" standard, *Kennedy* clears constitutional space for Step One. The framework does not force religious institutions to participate in litigation; it simply permits them to do so voluntarily, and then defers to their own statements when they choose to speak. This is deference to religious autonomy, akin to the Court's approach in *Watson v. Jones* and *Hosanna-Tabor*. Indeed, requiring courts to turn to churches for authoritative statements of doctrine enhances institutional independence by ensuring that secular judges are not the ones defining religious truth. Seen through the lens of history and tradition, Step One is not a constitutional violation but a restoration of the Founders' vision.

---

[227] McConnell, *supra* note 23, at 1470.

[228] Campbell, *supra* note 35, at 984 n.55 (quoting An Act to Regulate and Discipline the Militia of This State, 1807 Md. Laws 339); *id.* at 985 (Massachusetts required the certificate to be "signed by two elders and the clerk" verifying their membership and belief).

[229] McConnell, *supra* note 23, at 1455. McConnell also notes that Maryland and Delaware only protected the free exercise rights of Christians. New Hampshire, Massachusetts, New Jersey, North Carolina, and Pennsylvania limited protections to "theists." New York, Georgia, Rhode Island, and South Carolina did not have any limitations on the type of religion protected. *Id.*

[230] *Compare* Wesley J. Campbell, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 984 n.55 (2011) (quoting An Act to Regulate and Discipline the Militia of This State, 1807 Md. Laws 339) *with* U.S. CONST. amend. I (ratified December 15, 1791).

[231] McConnell, *supra* note 23, at 1507 (citing *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 50 (PA. 1817)). The Supreme Court of Pennsylvania, in an 1817 case, looked to the "Jewish Talmud, containing the traditions of that people, and the Rabbinical constitutions and explications of their law" and found that the asserted belief was not part of their doctrine. *Id.*

B. Step Two: Practice Based Sincerity

"Ye shall know them by their fruits."[232]

Once a claimant has either provided institutional validation of their religious claim or affirmatively pled a non-institutional Religious Island, the court proceeds to the second step of the framework: a full evaluation of sincerity based on evidence. This inquiry does not test the truth, validity, or doctrinal correctness of the belief. Rather, it asks the narrower and constitutionally permissible question of whether the claimant genuinely holds the belief (i.e., are they sincere). Courts are well equipped to handle this task. Having long assessed mental states in criminal and civil contexts, they can draw on familiar evidentiary tools to evaluate credibility and intent.[233]

Under established precedent, sincerity is treated as a factual question,[234] informed by the surrounding context, the incentives the claimant faces,[235] their past conduct,[236] their own statements,[237] and the overall consistency of their professed

---

[232] *Matthew* 7:16 (King James); *James* 2:14, 20 (King James) ("What doth it profit, my brethren, though a man say he hath faith, and hath not works? Can faith save him?... But wilt thou know, O vain man, that faith without works is dead?"); *see also* Qur'an 35:10 ("To Him (God) good word ascends, and righteous deeds are raised up by him."); *Proverbs* 20:11 (Hebrew Bible) ("Even a child can disguise himself with his deeds, if his deed is pure and upright."); Dhammapada v. 20 (Though little he recites the Sacred texts, but acts according to the teaching, forsaking lust, hatred and ignorance, truly knowing, with mind well-liberated, clinging to naught here and hereafter, he shares the fruits of the Holy Life.) (Buddhism); Tattvartha Sutra 1.1 (Right faith, right knowledge, and right conduct, together, constitute the path to liberation – *mokṣamārga) (Jainism).* The Lakota, Dakota, and Nakota languages do not have a word for "religion," instead, they use "spirituality" but view it as distinct from structured religion (i.e., religion is not a separate institution in society for them, it is unified with their daily lives and culture). "Spirituality is an experience that is lived on a daily basis… it is 'doing it in a good way, with dignity, integrity and honor, and with honesty." OCETI SAKOWIN, ESSENTIAL UNDERSTANDINGS & STANDARDS 9 (2018) (describing Oceti Sakowin ideals). The Navajo (Diné) have the principle of *Hózhǫ́ which exact meaning cannot be captured by the English language; however, it reflects roughly "beauty," "harmony," or "balance." This principle guides every aspect of Navajo life including their outward actions. See Janet K. Brewer, Indigenous Origins of Inalienable Rights: Natural Law Theory in Navajo Culture, 8 LOY. J. PUB. INT. L. 37, 42–43 (2006).*

[233] Farmer v. Brennan, 511 U.S. 825, 842 (1994) (inferring subjective mental state from circumstantial evidence); Elonis v. United States, 575 U.S. 723, 743–35 (2015) (proving mental state through circumstantial evidence and inferences).

[234] *Africa*, 662 F.2d at 1025.

[235] *See* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (noting that there were allegations that the prison gangs were using religious activities "to cloak their illicit and often violent conduct." But those assertions were not properly before the Court to consider at this point of the litigation).

[236] *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144–45 (1987).

[237] *Thomas*, 450 U.S. at 716 (1981).

beliefs.[238] The burden properly rests on the claimant, who must demonstrate sincerity by a preponderance of the evidence. This section highlights three factors that should receive particular attention in judicial analysis: (1) the claimant's past practices and conduct, (2) the incentives for honesty or opportunism in the case at hand, and (3) the broader factual context in which the claim arises.

1. Past Practices and Conduct

A claimant's lived practice becomes the evidentiary focus of this second step. Evidence of prior religious practice, such as abstention from prohibited conduct, regular participation in religious observance, or self-imposed burdens consistent with the asserted belief, can support a finding of sincerity. Conversely, a demonstrable pattern of religious convenience undermines such a finding.

For example, suppose a litigant claims a religious objection to vaccination. If the record shows that the individual has previously received vaccines, vaccinated their children, or otherwise exhibited indifference to the tenets of their professed religion, a court may reasonably infer that the present claim lacks sincerity. The inference is not that the religion itself is inconsistent, but rather that the claimant does not actually hold the belief they now assert. Past conduct is one of the most probative indicators of sincerity because it reveals whether the asserted belief is part of a consistent pattern of religious practice or merely a recent, opportunistic position advanced for litigation.

This kind of inquiry is well within the judicial role. As the Supreme Court explained in *United States v. Seeger*, sincerity is a factual question and not about the objective validity of the belief.[239] Indeed, the Court emphasized that while the content of religious or moral belief cannot be second-guessed by civil authorities, courts are nonetheless entitled to probe whether the claimant genuinely holds the belief asserted.[240] In other words, the question is not "is this doctrine correct?" but "is this claimant credible?"

Evaluating sincerity through past conduct avoids unconstitutional entanglement in theology by focusing on the

---

[238] *Seeger*, 380 U.S. at 185 (1965).

[239] *Id.* (explaining that sincerity is, "of course, a question of fact[]").

[240] *Id.* at 184–85 ("The validity of what he believes cannot be questioned[,]" instead, the "task is to decide whether the beliefs professed by a registrant are sincerely held[.]").

same kind of evidence courts regularly consider in other credibility assessments. Just as inconsistencies in testimony may undermine a witness's reliability, inconsistencies between asserted religious belief and demonstrated practice may undercut the credibility of a Free Exercise Clause claim. For example, a claimant who insists their faith forbids vaccination, but who has voluntarily sought out medical immunizations in the past, presents a factual discrepancy that the court may reasonably interpret as evidence of insincerity.

Courts are not thereby declaring that the religion itself is incoherent; many faith traditions allow individual growth, doubt, or even divergence in practice. Rather, the inquiry is contextual: is this litigant's present assertion consistent with how they have lived their faith? By grounding the analysis in observable patterns of conduct rather than theological interpretation, courts respect the constitutional boundary between sincerity and truth while ensuring that exemptions are reserved for those whose claims of conscience are genuine.

2. Incentives to be Sincere

An important factor in assessing religious sincerity is the role of incentives. When a requested accommodation coincides with a desirable personal benefit, especially one unrelated to the asserted faith commitment, courts should approach the claim with skepticism. Accommodations that require adherents to incur costs or forego conveniences in order to remain faithful to their convictions, on the other hand, evidence sincerity. This reality is critical; the Religion Clauses, as understood by the Framers, were not designed to operate as a vehicle for personal advantage, but as a shield against state coercion that forces believers to choose between conscience and compliance with law.[241]

The Supreme Court's decision in *Yoder* illustrates the traditional posture of religious accommodations.[242] The Amish parents who sought an exemption from compulsory high school attendance did not gain a tangible worldly benefit from the accommodation; rather, they undertook greater responsibility, as their children remained at home and required additional instruction and supervision consistent with Amish vocational

[241] *See* Muñoz, *supra* note 57, at 1112–15 (showing the Representatives discussing the importance of accommodating pacifist religious beliefs but having a concern about fraudulent invocation of religion).
[242] *See generally* 406 U.S. 205.

and religious values.[243] Far from easing their lives, the accommodation placed a heavier burden upon them, yet they willingly bore it because their religious convictions demanded it.[244] This alignment of sacrifice and faith is a hallmark of sincerity.

By contrast, where an accommodation request results in a net personal benefit for the claimant, the courts should review religious sincerity carefully. Where a religious accommodation grants personal benefits, it creates an incentive for individuals to reframe political or philosophical objections as religious in nature, particularly when no secular exemptions are available. When exemptions confer personal advantages rather than impose burdens, the temptation to manufacture a religious justification increases markedly.

This is not to say that a beneficial accommodation is inherently insincere. There are faith traditions whose tenets genuinely align with outcomes that may be personally advantageous. However, when a claimed belief emerges only after a new political movement or when the claimant's past conduct reveals no adherence to the asserted restriction, the alignment of the exemption with personal benefit becomes relevant circumstantial evidence of insincerity.

A sincerity inquiry sensitive to incentives thus serves two functions. First, it helps courts distinguish between religious conscience and opportunism by placing the claimant's request within the broader context of their past conduct and the practical effects of the accommodation. Second, it reinforces the purpose of the Free Exercise Clause, safeguarding the faithful from coercive laws that force them to violate deeply held beliefs, not to serve as a general license for the avoidance of civic obligations.

3. The Overall Context

Sincerity determinations cannot be made in a vacuum. Evaluating a claimant's religious sincerity requires situating their asserted belief within the broader context of their personal history, the trajectory of their faith community, and the surrounding sociopolitical climate. The point is not to demand doctrinal perfection; few adherents live in flawless conformity with every tenet of their religion. Instead, courts are tasked to discern whether the belief functions as a genuine matter of conscience.

---

[243] *See id.* at 211.
[244] *See id.* at 216.

The broader political and cultural environment matters. Sudden surges in claims for a particular religious exemption, especially in close temporal proximity to contentious legislative or public health measures, raise the possibility that the asserted belief reflects ideological resistance rather than sincere faith. This is particularly relevant when the faith tradition has not historically opposed the relevant activity, but opposition emerges concurrently with external political mobilization. But again, there must be caution. A new law could be the first of its kind and thus genuinely causes a surge for exemptions, and this should not weigh against sincerity.

At the same time, context requires courts to account for the dynamism of religious belief. Churches can and do change doctrine, new denominations and splinter groups form, and individuals do convert to different faiths all throughout life. The fact that someone has recently converted to a church does not, by itself, indicate insincerity, but it does justify closer examination of the circumstances and timing.[245] Courts should also recognize that sincere believers may occasionally deviate from their professed norms for reasons of human frailty or practical necessity. These inconsistencies do not automatically negate sincerity, but should be considered.

a. Minority Faiths

Importantly, courts must be cautious when dealing with unfamiliar and minority faiths. The danger is not hypothetical; American history is replete with examples of religious outsiders facing suspicion and persecution, from Quakers killed in colonial New England[246] to Jehovah's Witnesses denied benefits[247] or punished for refusing compulsory flag salutes[248] in the twentieth century. Courts must therefore ensure that sincerity review does not become a proxy for privileging majority faiths or for dismissing the lived realities of less familiar traditions. As the Court emphasized in *Thomas*, religious exercise is protected even when it departs from the mainstream understanding of

[245] United States v. Witmer, 115 F. Supp. 19, 23 (M.D. Pa. 1953) ("Defendant was not baptized until his case was on appeal.").
[246] *See* McConnell, *supra* note 23, at 1423.
[247] *See generally* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 391 N.E.2d 1127 (Ind. 1979), *rev'd*, 450 U.S. 707 (1981).
[248] *See generally* W. Va. State Bd. of Edu. v. Barnette, 319 U.S. 624 (1943).

traditions, and even when co-religionists disagree.[249] To guard against implicit bias, judges should remain mindful that minority religions often articulate doctrine in unfamiliar ways or through less hierarchical structures.[250] Unlike established Christian denominations, many minority faiths do not maintain centralized authority capable of issuing definitive statements of belief, meaning that inconsistencies or lack of institutional endorsement cannot be treated as evidence of insincerity. Instead, the inquiry must focus on markers of genuine conviction, such as consistency over time, the individual's willingness to bear costs, or integration of the belief into broader religious practice. In short, while Step Two is essential to deter opportunism and safeguard the integrity of religious exemptions, it must be applied with a heightened awareness of pluralism and difference, ensuring that it does not inadvertently burden precisely those religious minorities whose protection lay at the heart of the Religion Clauses.[251]

Ultimately, the overall context inquiry serves as a balancing mechanism in sincerity analysis. It allows courts to weigh institutional validation, personal history, doctrinal evolution, and political timing without conflating the evaluation of sincerity with adjudication of theological truth. By incorporating this contextual sensitivity, courts can better protect

---

[249] *See Thomas*, 450 U.S. at 715–16 ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

[250] The Lakota, Dakota, and Nakota languages do not have a word for "religion." This is because religion is not separate from their daily lives; indeed, spirituality is lived daily "doing it in a good way, with dignity, integrity and honor, and with honesty." Oceti Sakowin, *Essential Understandings & Standards*, WOLOAKOTA PROJECT, 9 (Mar. 19, 2018), https://www.wolakotaproject.org/wp-content/uploads/2023/12/Oceti-Sakowin-Essential-Understandings-adopted-REVISED-2018.pdf. This fact should not weigh on whether a Dakota spiritual practice is sincere. And the Court has been mindful of this in cases dealing with Amish religious practices. *See generally Yoder*, 406 U.S. at 216 (recognizing that the Amish way of life was inseparable from their religious commands).

[251] *See* James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. L. REV. 65, 69 (1997) (citing David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 255 (1995)) ("Lower federal court and state court exemption cases almost always have involved members of small and nontraditional religions. This pattern strongly suggests that these believers do not enjoy the same access to elected officials as members of mainstream faiths."); *see also* Elizabeth Reiner Platt et al., *Whose Faith Matters? The Right for Religious Liberty Beyond the Christian Right*, COLUM. L., RTS., & RELIGION PROJECT, at 17 (Nov. 2019) (providing that when RFRA was enacted it was understood "to be a civil rights law intended to prevent unintentional discrimination against religious minorities").

genuine religious conscience while filtering out opportunistic claims that dilute the Free Exercise Clause's moral authority.

4. Benefits and Purpose of Step Two

Step Two's benefits overlap with many of those articulated in Step One, but it serves an independent role in the framework. While institutional verification prevents doctrinal hijacking for claimants aligned with established traditions, it cannot operate for claimants who assert individualized beliefs and plead a Religious Island. For these individuals, there is no governing body to verify doctrine or accuracy. Without a practice-based inquiry, courts would have little more than the claimant's self-serving declaration to go on, precisely the scenario that invites fraud and opportunism. A behavioral inquiry supplies the evidentiary check that ensures sincerity is something more than words offered in litigation.

The emphasis on lived practice discourages post hoc rationalizations of belief. Claimants must show that, before the challenged law, they had already abstained from the prohibited conduct in accordance with their claimed faith. For example, a person asserting a religious objection to Sunday work who has historically worked on Sunday cannot persuasively claim sincerity. This is because their actions demonstrate that working on Sunday has not been a religious issue in the past. Similarly, a litigant who suddenly discovers a religious objection to vaccination only after the imposition of a new vaccine mandate raises obvious concerns. Step Two addresses this by looking backward, testing whether the asserted belief guided conduct before the onset of the legal incentive to fabricate it.

By insisting on practice-based evidence, Step Two also vindicates the state's legitimate interest in preserving the integrity of exemptions. Religious liberty protections remain strong and credible when sincerity is tested rather than presumed. At the same time, sincerity inquiries grounded in behavior and context remain faithful to constitutional limits, focusing on credibility rather than truth. The result is a Free Exercise framework that is both robust in its protection of conscience and resistant to abuse.

5. Step Two is Consistent with History and Precedent

Step Two's evaluation of sincerity through behavioral evidence has deep roots in American jurisprudence; however, recent case law shows that courts have shied away from this

inquiry[252] in certain cases and particularly under the Free Exercise Clause. This underscores both the legitimacy of Step Two under precedent and the need to reinvigorate it to preserve the integrity of religious liberty protections. The line of conscientious objector cases demonstrates that courts have and can perform what looks like a version of step two of this framework.[253] It is important for the Court to reestablish this as a norm.

History supports this type of review. In the eighteenth century, the states often required evidence of religious sincerity before granting an accommodation.[254] Claimants were required to attend church meetings "constantly,"[255] pay tithes to their church,[256] and even get endorsements from their church that they were members.[257] Step Two does not require specific actions to establish sincerity, but considers all the claimants' actions or inactions in the context of their asserted belief. It is more flexible than the historical requirements but is seeking the same end: testing religious sincerity. Reviving a behavioral sincerity review is not a departure from precedent but a return to it. The conscientious objector cases recognize that sincerity is provable by conduct and that failing to examine it risks undermining the exemption regime. Step Two requires that courts apply this review to all exemption regimes, ensuring that constitutional protections serve their intended purpose—safeguarding authentic religious conscience and disincentivizing opportunistic claims.

C. Responding to Concerns

It may be argued that this framework is overly restrictive and risks excluding individuals who identify casually with a faith tradition, such as those who attend services or participate socially but do not consistently adhere to its teachings. Critics might say that even these "occasional" believers should fall within the protection of the Free Exercise Clause. But this

---

[252] *See generally Hobby Lobby*, 573 U.S. 682 (accepting it as a "sincere religious belief" and moving on to assessing substantial burden); *see* Transcript of Oral Argument at 16, *Hobby Lobby*, 573 U.S. 682 ("I think this is absolutely right . . . that you . . . cannot test the sincerity of religion.").
[253] *See, e.g., Witmer*, 348 U.S. 375.
[254] *See* McConnell, *supra* note 23, at 1469 (citing SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 298–99 (1902)).
[255] *Id.*
[256] *See id.*
[257] *See* Campbell, *supra* note 35, at 984 n.55 (quoting An Act to Regulate and Discipline the Militia of This State, 1807 Md. Laws 339).

objection misunderstands the original purpose of religious liberty as envisioned by the Founders and Framers.

The protection of free exercise was not intended to safeguard nominal affiliation or casual observance;[258] it was designed to protect the sincere believer whose faith constitutes the core of their existence. As Professor Riga has observed, religion explains the "meaning of [a person's] existence and thus forms the notion of an absolute in his life."[259] Religion was not a peripheral preference but "the core of his conscience [and] of his existence, from which he judges the rest of reality and for which he is ready to sacrifice everything, even his own life, rather than contradict it."[260] This was the conviction James Madison identified when he wrote that an individual's duty to the Creator is "precedent, both in order of time and degree of obligation, to the claims of Civil Society."[261] It was this same sense of obligation that led William Penn to accept repeated imprisonment rather than betray the commands of his faith and risk "Divine wrath."[262]

History is filled with examples of men and women who endured persecution, exile, and even death rather than renounce their religious convictions.[263] The Free Exercise Clause was adopted to prevent such life-or-death coercion by guaranteeing that individuals could believe and, to a large degree, practice

---

[258] This argument is solely about religious accommodations and does not extend to the individual's right to "believe" as they will. The Free Exercise Clause's absolutely protects the individual's right to belief as they will no matter how casual the belief. However, when a person seeks an exemption to law based on that belief the calculations change.

[259] Peter J. Riga, *Religion, Sincerity, and Free Exercise*, 25 CATH. LAW. 246, 252 (1980).

[260] *Id.*

[261] *See supra* note 6, at 883.

[262] WILLIAM PENN, *The Great Case of Liberty of Conscience (1670)*, *in* 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 443, 447 (J. Besse ed. 1726).

[263] Jesus Christ died on the cross due to his beliefs and practices. *See generally Luke* 23:46 (King James) ("Father, into thy hands I commend my spirit."). Sitting Bull, a Hunkpapa Lakota, was shot and killed in part due to his involvement with the religious Ghost Dance that caused fear of an Indian uprising. *See* JAMES P. BOYD, RECENT INDIAN WARS, UNDER THE LEAD OF SITTING BULL, AND OTHER CHIEFS; WITH A FULL ACCOUNT OF THE MESSIAH CRAZE, AND GHOST DANCES 175–90 (1891). Joseph Smith, founder of the Church of Jesus Christ of Latter-day Saints, was shot and killed in Carthage jail for his faith. *See* Doctrine & Covenants 135:1–6 ("I am going like a lamb to the slaughter; but I am calm as a summer's morning; I have a conscience void of offense towards God, and towards all men. I shall die innocent, and it shall yet be said of me – he was murdered in cold blood." Joseph Smith "will be classed among the martyrs of religion."). One of the Founding Fathers, William Penn, was jailed for practicing his religion, and from his cell he wrote "[t]he Great Case of Liberty of Conscience." Adams & Emmerich, *A Heritage of Religious Liberty*, *supra* note 9, at 1602 (noting that Penn was jailed at least four times for practicing his religion).

their faith without fear of bodily harm or civil punishment. But this historical foundation does not diminish the gravity of the kind of beliefs the Framers intended to protect. To the contrary, it reinforces the point that constitutional protection attaches to convictions of conscience that are integral, identity-defining, and deeply binding, not casual or nominal beliefs that play little role in directing one's life.

Thus, the First Amendment's protection was never about shielding occasional or convenient appeals to religion. It was about safeguarding genuine obligations of conscience, beliefs that sit at the center of human identity and that motivate believers to endure suffering rather than betray their faith. Casual religiosity may warrant social respect, but it is deeply rooted convictions that the Framers envisioned when they enshrined the Free Exercise Clause.

This approach, in some ways, mirrors how the Court treats the government under the Free Exercise Clause. In *Fulton*, the Court emphasized that the City's policy was not "generally applicable" because it included a discretionary mechanism for exemptions.[264] The very existence of this mechanism undermined the City's claim that its policy of "equal treatment of prospective foster parents and foster children" could "brook no departures," because in practice it could.[265] The same principle applies to claimants seeking religious exemptions. A person who asks a court to recognize that their faith permits "no departures" must themselves demonstrate that they cannot brook departures. Evidence that a claimant selectively chooses when to follow their professed beliefs, complying in some contexts and disregarding them in others, undercuts the argument that the asserted obligation is binding on them.

In other words, just as the presence of discretionary exceptions revealed that Philadelphia's policy was not generally applicable, evidence of selective or inconsistent adherence to religious beliefs reveals that a claimant's asserted belief is not genuinely absolute. The Free Exercise Clause protects the believer who demonstrates that their faith imposes genuine obligations on their conduct, not the claimant whose religious convictions function only as convenient shields against regulatory burdens. Courts are thus justified in considering whether a claimant's conduct reflects consistency with their asserted belief, for inconsistency is evidence of insincerity.

---

[264] *Fulton*, 593 U.S. at 533.
[265] *Id.* at 542.

CONCLUSION

The Free Exercise Clause was never meant to provide a blank check for those seeking to evade generally applicable laws under the guise of religious liberty. From the earliest state accommodations, which required outward evidence of sincerity, to the Supreme Court's foundational cases distinguishing between truth and sincerity, the constitutional tradition has recognized that safeguarding genuine faith demands filtering out opportunism. Without such a filter, the Clause risks collapse into a general right to exemption from civil obligation, untethered from its historical and textual foundations. The harms are not hypothetical. As empirical studies of vaccine exemptions illustrate, when sincerity is presumed rather than tested, political or philosophical objections are easily repackaged as religious claims, eroding public trust, endangering public welfare, and diluting the very protections the First Amendment was meant to secure.

This Article has argued for a two-part framework to restore coherence to the Court's sincerity jurisprudence. Step One requires either institutional validation or the affirmative pleading of a Religious Island, ensuring that claimants cannot misappropriate doctrine or disguise opportunism as faith. Step Two subjects all claims, both institutional and individualized, to an evidentiary assessment grounded in lived practice, incentives, and contextual consistency. Together, these steps respect the autonomy of religious institutions, preserve individual conscience, and safeguard the legitimacy of judicial review. By embracing this approach, courts can honor the Framers' vision of liberty of conscience: a protection for those whose beliefs are sincere, central, and identity-defining, while preventing the Free Exercise Clause from being distorted into a loophole for insincerity. In short, rigorous sincerity review is not a threat to religious liberty—it is the very means of preserving it.

THE CASE OF THE CURSING CHEERLEADER: AN ORAL HISTORY

Lisa A. Tucker*

ABSTRACT

This article tells the story of Brandi Levy, the cheerleader who sent a Snap to 250 friends and made Supreme Court history as a result. In 2021, in Mahanoy Area School District v. B.L., the Court held for the first time that off-campus speech that did not substantially disrupt school activities and was not harassing or bullying could not be the subject of school suppression or censorship. While numerous scholars have analyzed the case and its contributions to First Amendment jurisprudence, this article breaks new ground in that it is the first scholarly or mainstream piece to rely on interviews with Brandi Levy, her attorneys, and her parents to tell the behind-the-scenes story of the case. Finally, it describes Brandi's emotional and social experiences in bringing her case and explains why prolonged Supreme Court litigation may be difficult for child litigants. In doing so, it points to potential psychological and emotional hurdles for children involved in newsworthy cases and seeks to educate, assist, and support future child litigants, their parents, and their attorneys as they consider litigation efforts.

INTRODUCTION

This Article is the story of Brandi Levy,[1] the respondent in the seminal school speech case, *Mahanoy Area School District v.*

---

* Professor of Law, Drexel University Thomas R. Kline School of Law. The author wishes to thank Jessa Feiler for outstanding research assistance. She also thanks Mary-Rose Papandrea, the Levy family, Molly Tack Hooper, David Cole, Sara Rose, and Anat Lior for their assistance in discussing this case and considering the overall themes and of and experiences with the litigation. As always, the author thanks Adam Bonin, Zoe and Abby McElroy, and Lucy and Phoebe Bonin for being along for the ride. The author was Scholar-in-Residence at Washington and Lee Law School when this project was begun. The author received Institutional Review Board approval from the Washington and Lee University IRB on January 18, 2024 (documentation available upon request).

[1] Brandi Levy was permitted to file her case in the Middle District of Pennsylvania anonymously, and under United States Supreme Court general practice, the case retained the caption style of the courts below, "and the United States Supreme Court opted to maintain Levy's anonymity in the case." *See generally* Sup. Ct. R. 34(c) (stating that all documents should bear "the caption of the case as appropriate in this Court"); *see also* Tom Isler, *White Paper: Anonymous Civil Litigants*, REPS. COMM., https://www.rcfp.org/journals/news-media-and-law-fall-2015/white-paper-anonymous-civil-l (last visited Jan. 19, 2026). However, Brandi has indicated that she has always wanted to stand up for what she believed and that anonymity is not important to her. *See infra* at notes 173-174. Even as her case was ongoing, Brandi was identified by her full name in the media. *See, e.g.,* Jeannie Suk Gersen, *The Complicated Case of the Pennsylvania Cheerleader*, THE NEW YORKER (May 6, 2021), https://www.newyorker.com/news/our-columnists/the-complicated-case-of-the-

B.L.[2] While the opinion in Brandi's case and its impact on American free speech jurisprudence have been analyzed from every possible angle, this Article is the first to tell the story of the case from the point of view of the respondent team, including Brandi's lawyers, Brandi's parents, and Brandi herself.

This story is part of a series of stories currently in progress about children who have brought cases to the United States Supreme Court.[3] Again, while many of the cases are quite famous and have been analyzed in the legal literature, adding to the legal scholarship, few of the actual child parties to the cases have been interviewed and their oral histories recorded. By preserving their accounts of what happened across the many years of their litigation, individual attorneys and impact litigation groups who seek to represent children and vindicate their rights may learn from the experience of others and better support their clients.

If a child initiates a case that ends up at the United States Supreme Court, there's no ignoring the attention that they will receive, both negative and positive. This is true whether or not the child intentionally acts in a way that is designed to raise a legal issue or not.[4] But what many parents and children may not understand is how ongoing the attention will be. A case can take

---

pennsylvania-cheerleader; Adam Liptak, *Supreme Court Rules for Cheerleader Punished for Vulgar Snapchat Message*, N.Y. TIMES (June 23, 2011), https://www.nytimes.com/2021/06/23/us/supreme-court-free-speech-cheerleader.html. Because she was a minor under the age of 15 when her case began, this Article will refer to her by her first name, as is convention. *See* THE ASSOCIATED PRESS STYLEBOOK 156 (57th ed. 2024) ("In general, call children 15 or younger by their first name on second reference. Use the last name, however, if the seriousness of the story calls for it . . . .").

[2] *See generally* 594 U.S. 180 (2021).

[3] This article is part of a book to be published by The New Press.

[4] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (intentional school protest involving schoolchildren wearing black armbands to protest the Vietnam War); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (intentional protest involving a student who read a Koran in school during a state-mandated reading of Bible verses); Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (intentional protest by student against censorship of school library books); Morse v. Frederick, 551 U.S. 393, 401 (2007) (intentional protest by student displaying a banner advocating for drug use); Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (mem.) (denial of certiorari) (case arising organically through trans student's request to use the restroom corresponding to his gender identity); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (case arising organically when a school principal censored student-published newpaper); Graham v. Fla., 560 U.S. 48 (2010) (case arising organically when a minor was convicted of a non-homicide crime and was sentenced to life without parole); Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009) (case arising organically when a five-year old was sexually assaulted by a third grader on the school bus and school refused to intervene).

many years to wind its way through the state or federal courts before arriving at the Supreme Court.[5] During this time, children are changing psychologically and emotionally. What seemed like a good idea at age thirteen may be less appealing or engaging at age nineteen. And yet, to make law, a child must remain in the litigation for the life of the case. It can be Sophie's Choice: Drop out, or decide not to appeal again to protect a child's privacy, or take the case all the way and risk the child's trauma increasing exponentially from the original injury.

It is critical to understand why we need children to stay involved in their own cases. According to the United States Constitution,[6] "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [or] the Laws of the United States . . . ." Colloquially, this clause is often called the "Case or Controversy" requirement."[7] Chief Justice Hughes defined the controversy requirement as:

> [O]ne that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[8]

In other words, a case must involve real parties with real, direct, articulable injuries, not merely a desire to change the law in the abstract.

---

[5] *See* Elizabeth Slattery, *How Does a Case Get to the Supreme Court*, PAC. LEGAL FOUND. (Jan. 19, 2024), https://pacificlegal.org/how-does-a-case-get-to-the-supreme-court ("'I'll take it all the way to the Supreme Court.' It's far easier said than done, and it can take years for a legal battle to wind its way through the courts. . . . [I]t takes a relentless, determined attitude to press on, sometimes for more than a decade.").

[6] U.S. CONST. art. III, § 2, cl. 1.

[7] *ArtIII.S2.C1.2 Historical Background on Cases or Controversies Requirement*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-2/ALDE_00001243/ (last visited Jan. 16, 2026).

[8] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937).

For children, of course, the case or controversy means that they must behave in a way they are often advised against. Parents tend to teach children to get along, to share, to be "nice" to others, to defer to authorities like teachers and principals and police officers and even older children. Even in the course of litigation, children may need to "play nice" to engender the respect and cooperation of adults. As Steven Pico, a former child Supreme Court plaintiff/respondent,[9] put it, when lawyers and parties to his litigation were unpleasant to each other, he often felt like he had to be "the adult in the room."[10]

Understandably, for many children, it may be difficult to reconcile a years-long conflict with an expectation of congeniality. It may also be emotionally taxing, even traumatizing, for children to engage in a public conflict over a long period of time,[11] one in which children are maturing and peer opinions are of paramount importance.[12]

Remarkably, the social science literature is almost completely devoid of research into the psychological effect of civil litigation on child plaintiffs or appellants.[13] Virtually all of the studies that focus on children in civil litigation deal with cases

---

[9] *See generally Pico*, 457 U.S. 853.

[10] Interview with Steven Pico, Plaintiff of Bd. of Educ. V. Pico, in N.Y.C. (Mar. 8, 2024) (recording and transcript on file with author).

[11] *See, e.g.*, Aoife Nolan et al., *Advancing Child Rights-Consistent Strategic Litigation Practice,* ADVANCING CHILD RTS. STRATEGIC LITIG., at 68 (2022), https://static1.squarespace.com/static/601a99dda1a4280a885bc0d6/t/649028aa518f87218df3a6fb/1687169203041/ACRiSL-Report.pdf ("[Child Rights Strategic Litigation] can sometimes pose a risk of harm and trauma to children who take part in the litigation process. . . . The risk of harm can take different forms, including stress or trauma caused by having to think about or to repeat accounts of earlier harm. The risk of harm could also be in the form of impact on the children's time, their home life, their education and their right to rest and leisure.").

[12] *See, e.g.*, Brett Laursen & Rene Veenstra, *Toward Understanding the Functions of Peer Influence: A Summary and Synthesis of Recent Empirical Research,* 24 J. RSCH. ADOLESCENCE 889, 891 (2021) ("Adolescents quickly learn to rely on close peers for companionship, protection, and guidance as they navigate novel contexts where norms are established and enforced by peers. Afraid of the social consequences of nonconformity, most conclude that the best way to get along is to go along.").

[13] *See, e.g.*, Elizabeth Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, 11 TRANSNAT'L ENV'T L. 263, 265, 283 (2022) ("[I]t is ethically problematic that we currently have no empirical understanding of how child claimants are affected by this litigation and advocacy. The involvement of children has potential trade-offs and risks, which remain under-addressed . . . . There is a total lack of empirical research on this subject, research that is necessary for legal practitioners to mitigate harm responsibly."); *see* Comm. on the right of the child to be heard, U.N. HRC, 51st Sess., U.N. Doc. CRC/C/GC/12 (2009) (laying out three "main issues which require that the child be heard," all involving family law). *See generally* Lisa V. Martin, *Litigation as Parenting*, 95 N.Y.U. L. REV. 442 (2020) (arguing that appointing parents as children's representatives in court is in the children's best interests).

in which children are non-parties who have an interest in the outcome of a case, such as child custody and support matters.[14] But the psychological effects of family law litigation on children would presumably be largely inapposite here, because in those cases the children are dealing with parents feuding with each other rather than with an outside party, and without the public attention which these cases can engender from the earliest stages.

I. THE ROAD TO THE SUPREME COURT

Supreme Court advocates will tell you that two critical factors make for a certworthy case: time[15] and vehicle.[16] Impact litigation groups are well aware that, to make law, they need to find attractive plaintiffs with good facts.[17] Of course, the more egregiously a plaintiff has been harmed, the better her facts may seem to lawyers wishing to convince a court to rule in her favor; similarly, a "good kid" who has been wronged may appear to be a more attractive plaintiff than one who has a history of conflict. In other words, the harder the situation for the child, the better the case for the lawyer. This dichotomy may raise serious concerns for child welfare during extended litigation.

While it is hard to imagine that any lawyer or advocacy group would intentionally pressure a child who did not want to continue pursuing a case to do so, sunk costs are a real concern, as are the objectives of many interest groups to make law as a result of these court decisions. Conversely, the Supreme Court of the mid-2020s is a very different animal than the Court of the decade prior. While advocates may wish to forgo future litigation out of fear of making "bad law,"[18] children and families may

---

[14] *See, e.g.*, Rae Kaspiew, *Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation*, 29 SYDNEY L. REV. 131, 141 (2007); Peggy Malpass, *The Intersection of Health and Legal Issues in a Family Break-Up*, 5 PAEDIATRICS & CHILD HEALTH 214, 214 (2000) ("A prolonged and angry legal fight between the parents is one of the major indicators of severe distress for the children involved.").

[15] *See generally* Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611 (1984).

[16] Stephen R. McAllister, *Practice Before the Supreme Court of the United States*, 64 J. KAN. B. ASS'N 25, 42 (1995) ("If an attorney is not careful to make a case an attractive vehicle for deciding a particular issue, the chances of obtaining a grant of cert decrease drastically, even if the case raises a legitimate, certworthy issue. The burden is on the petitioner to demonstrate why the case merits the full Court's full attention. Do not give the Justices an easy excuse to pass over the case.").

[17] *See generally* Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136 (2015).

[18] *See generally* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1962 (2017) ("Specialists from the ACLU, Public Citizen, the NAACP Legal Defense Fund, and the Stanford Supreme Court Clinic all said that they assess the likelihood of success when deciding whether to pursue or resist cert. . . . Civil-

wish to continue their cases because the public attention has been positive, because of pressure from the communities invested in the issue they legally represent, or because they misunderstand the likelihood of vindication. And, of course, "bad law" may take one of two forms: it may be law that is contrary to that which an interest group seeks to establish,[19] or it may be law in which a plaintiff's case is so sympathetic that a court "twist[s]"[20] the law to find in the plaintiff's favor, establishing inconsistent and sometimes arbitrary precedent.[21]

Certainly, there's a key difference between kids who set out to make a statement and those who merely found themselves in the middle of an unanticipated controversy. Child activists are often either recruited for impact litigation purposes or devoted to a cause which they understand may lead to court battles. Therefore, the cases of children like Mary Beth Tinker,[22] Ellery Schemp,[23] and Steven Pico[24] found their way to the Supreme Court in a substantially different way than did those of children like Brandi Levy, Gavin Grimm,[25] Cathy Kuhlmeier,[26] Terrence

---

rights groups have long sought to avoid making 'bad law' by screening out certain cases.").

[19] *See, e.g.*, Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 543 (2003) ("Clinics, and indeed most lawyers, that participate in impact litigation frequently worry about creating 'bad law.'"); *see* Jack Greenberg, *Litigation For Social Change: Methods, Limits and Role in Democracy*, 29 REC. ASS'N BAR CITY N.Y. 320, 326, 349 (1974) ("Lawyers ought to try to avoid creating a new *Plessy v. Ferguson*."); *see* Melissa E. Crow, *Impact Litigation Reconsidered: Navigating the Challenges of Movement Lawyering at the Border and Beyond*, 31 CLINICAL L. REV. 107, 115 (2024) ("Judicial remedies . . . run the risk of entrenching the systems that are being challenged, as well as the assumptions that undergird those systems."); *see also* Susan Wnukowska-Mtonga, *The Real Impact of Impact Litigation*, 31 FLA. J. INT'L L. 121, 121–22 (2019) ("[T]here are certain risks associated with bringing a case forward to be decided on its merits, namely that the outcome might not be decided in favor of the rights holder whose rights have been violated. This not only affects the rights holder, who may be denied a remedy for the harm they have suffered but may also hamper the legal change being sought through the judicial process.").

[20] *See, e.g., Sepehr Shahshahani, When Hard Cases Make Bad Law: A Theory of How Case Facts Affect Judge-Made Law,* 110 CORNELL L. REV. 963, 965 (2025).

[21] *See, e.g.*, Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation,* 51 J. LEGAL STUD. 133, 133 (2022) ("When a case raises concerns that are not reflected in doctrine, the court might distort the law to avoid a hardship. Distortion is more likely when the case is important or the facts are close to the border of legality. Litigators may exploit courts' attention to extradoctrinal concerns by strategically selecting cases for litigation.").

[22] *See generally Tinker*, 393 U.S. 503.

[23] *See generally Schempp*, 374 U.S. 203.

[24] *See generally Pico*, 457 U.S. 853.

[25] *See generally Grimm*, 141 S. Ct. 2878 (mem.) (denial of certiorari).

[26] *See generally Kuhlmeier*, 484 U.S. 260.

Graham,[27] and Jacqueline Fitzgerald,[28] who just happened to be in the right–or perhaps the wrong–place at the right (or wrong) time. It naturally follows that the experiences of children who intentionally bring about a controversy through protest may be quite different from those who find themselves in the spotlight, never having intended to be there.

II. THE CASE OF THE CURSING CHEERLEADER

"There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."[29]

For Brandi Levy, May 28, 2017, was just an ordinary Saturday. The fourteen-year-old high school freshman was hanging with her friends at the Cocoa Hut, a rundown combination gas station and convenience store where they'd headed to buy cans of tea and bags of chips[30] and "hang out."[31]

But hanging out at the Cocoa Hut wasn't as much fun as usual, because Brandi was in a pretty foul mood. The day before, she'd tried out for the varsity cheerleading team at Mahanoy Area High School,[32] and things had not gone as planned.

All of Brandi's friends had been trying out that day, too. And because Brandi had cheered in middle school and honed her cheer skills, she thought it was reasonable to hope that she'd be chosen for the varsity team. It was a stressful process. As Brandi describes it:

> We all tried out, and we had to sit there for four hours and wait for every girl to try out separately. Then we had to wait in the locker room for the judges to tally up the scores. Then they called us all back out and they said in front of everyone who made JV and who made varsity.[33]

---

[27] *See generally Graham*, 560 U.S. 48.
[28] *See generally Fitzgerald*, 555 U.S. 246.
[29] *Morse*, 551 U.S. at 401.
[30] *See* text message from Brandi Levy to Lisa Tucker, Author (June 26, 2024, 10:20 a.m.) (on file with author) ("Just a Guers tea and a bag of chips . . . [Guers is] a brand of tea they only make in [S]chuykill [C]ounty [PA].").
[31] Interview with Brandi Levy, in Frackville, Pennsylvania (Feb. 10, 2024) (on file with author).
[32] *See* text message from Brandi Levy to Lisa Tucker, Author (June 26, 2024, at 10:19 a.m.) (on file with author).
[33] Interview with Brandi Levy, *supra* note 31.

That was when Brandi found out that she had been chosen, not for varsity, but for the junior varsity cheer squad. Brandi had been under the impression that all freshmen had to cheer for a year on the JV team.[34] That would have sounded logical and reasonable but for the fact that another freshman had been placed on varsity. Brandi was skeptical, and, frankly, pissed off at a system that elevated a newbie over an older, more experienced cheerleader.

It seemed inconsistent, not to mention unfair.[35] And Brandi didn't see why she should stay quiet about it.

Like most kids her age,[36] Brandi tended to express herself through social media, communicating with her peers and even her parents[37] through Snapchat and the like. So there at the Cocoa Hut, Brandi pulled out her iPhone.[38] As she often did, she wanted to vent to her friends,[39] because she was, in her own words, "more or less pissed about not making the teams."[40] And she said so, vociferously. Her snap read:

"Fuck school fuck softball[41] fuck cheer fuck everything."

---

[34] The rules for cheer squad selection seemed to be unclear, at least to Brandi, perhaps explaining her surprise. *See* text message from Brandi Levy to Nicole Luchetta-Rump (May 26, 2017, at 2:45 PM) ("Hey, it's Brandi. Just wondering do you have to dk [sic] a year of jv before you could make varsity? My mom was wondering[.] No.") (on file with author); *see also* Deposition Transcript at 70, Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (2021) (No. 40-13) ("[S]he asks if you have to do a year of JV before you could make varsity, and you said say no.").

[35] After the snap that led to her suspension, Brandi Snapped again, saying, "[l]ove how me and [another student] get told we need a year of jv before we make varsity but that's doesn't matter to anyone else?🙃" Jeannie Suk Gersen, *The Complicated Case of the Pennsylvania Cheerleader*, NEW YORKER (May 6, 2021), https://www.newyorker.com/news/our-columnists/the-complicated-case-of-the-pennsylvania-cheerleader.

[36] *See, e.g.*, Brief of Amici Curiae Electronic Frontier Foundation et al. in Support of Respondents at 11, Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (2021) (No. 20-255) ("Social media is a central means for young people to express themselves, connect with others, and engage in advocacy surrounding issues they care about.").

[37] *See* in-person interview with Brandi Levy, *supra* note 31.

[38] *See* text message from Brandi Levy to Lisa Tucker, Author (June 26, 2024, at 11:26 a.m.) (on file with author).

[39] *See* Transcript of Proceeding – Preliminary Injunction Before the Honorable A. Richard Caputo at 5, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-01734).

[40] Interview with Brandi Levy, *supra* note 30.

[41] *See* text message from Brandi Levy to Lisa Tucker, Author, (June 27, 2024, at 10:29 a.m.) (on file with author). Brandi had also tried out for the Mahanoy town softball league but had not been selected.

Brandi added an image of herself and a friend[42] flipping off the camera, middle fingers raised, then posted it. She thought nothing of it – all the kids used profanity, and–at least as far as she knew–no one had ever been punished for it at school.[43]

Brandi's snap did not name the school, the cheerleading coach, the softball coach, or any other school-affiliated person. The snap did not feature any school symbols, nor did it feature the cheerleading uniforms or equipment. Because it was on Snapchat, it self-deleted after twenty-four hours. And only 250 of Brandi's friends and family members even had access to her snaps. All in all, this was a typical social media interaction by a typical fourteen-year-old on a typical weekend in a typical American small town.

But the legal battle that ensued would be anything but typical.

---

[42] D.K., who was a freshman at Mahanoy Area High School with Brandi. D.K. would eventually be on the cheer squad, too. D.K.'s identity has never been revealed to the public, but Brandi refers to her as "my friend Devon" in the preliminary injunction hearing. *See* Transcript of Proceeding, *supra* note 38, at 16–17.

[43] *See* text message from Brandi Levy to Lisa Tucker, Author, (June 26, 2024, at 10:24 a.m.) (on file with author). *But cf.* Statement of Undisputed Facts in Support of Plaintiff B.L.'s Motion for Summary Judgment, Exhibit H, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-01734) [hereinafter Statement of Undisputed Facts in Support of Plaintiff].

What Brandi didn't know was that Sydney Gnall, a fellow student whose mother was one of the cheerleading coaches, had taken a photo of the snap.[44] For some reason Brandi doesn't understand, she didn't get a notification of the screenshot, even though Snapchat is supposed to send one.[45] As far as Brandi knew, the snap was forever gone twenty-four hours later, when the app automatically deleted stories and snaps.[46]

And mostly, it was gone. But kids at school started gossiping about it. Nicole Luchetta-Rump, an algebra teacher at

---

[44] *See* text message from Brandi Levy to Lisa Tucker, Author, (June 26, 2024, at 10:21 a.m.) (on file with author). While Brandi herself called the photos "screenshot[s]," it is not clear that the images in question were screenshots at all. The Supreme Court suggests that the middle fingers image was taken with another phone. That statement seems to align with exhibits in the trial court. *See, e.g.*, Defendant's Statement of Undisputed Facts in Support of their Motion for Summary Judgment Parts 3–4, at 1, 1. B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-01734). It also aligns with Brandi's statement at the preliminary injunction hearing that "[to] take a picture of somebody's Snapchat . . . [y]ou'd have to get another phone to take a picture of it from someone else's phone." Transcript of Proceeding, *supra* note 38, at 18. In the trial court Exhibit D-2, the whole phone is in the shot, suggesting that the Supreme Court was correct in stating that it is a photo by a second phone. *See* Defendant's Statement of Undisputed Facts in Support of their Motion for Summary Judgment Part 4, at 1, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-01734); Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 185 (2021). The subsequent exhibits are less clear due to image cropping, but they could be photographs, too. In the Defendant's Statement of Undisputed Facts in Support of Defendant's Motion for Summary Judgment, Mahanoy claimed that April Gnall's daughter sent screenshots to her, but in the cited deposition, it says "photo[s] or screen shot[s]" and does not say that Gnall-the-daughter took them herself. Defendant's Statement of Undisputed Facts Part 1, at 8; *Id.* Part 15, at 1. Similarly, the appellee brief in the Third Circuit seems to reference a "photo" rather than a screenshot. *See* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 177 (3d Cir. 2020). Brief cite is 3rd Circuit brief of appellee, p. 11, It seems feasible that some media source or the parties loosely used the word "screenshot" and the term started to self-perpetuate across other media outlets.

[45] *See* text message from Brandi Levy to Lisa Tucker, Author, (June 26, 2024, at 10:21 a.m.) (on file with author).

[46] *See What Is Snapchat? What Parents Need to Know*, internetmatters.org, https://www.internetmatters.org/hub/guidance/snapchat-safety-a-how-to-guide-for-parents/, (last visited Jan. 22, 2026, at 17:44 EST) ("Each [s]nap is temporary and only available for 24 hours unless you delete it or set a different limit."); Statement of Undisputed Facts in Support of Plaintiff Part 2, *supra* note 43, at 189 ("Okay. I want to talk a little bit about Snapchat . . . . [M]y understanding is that . . . the essential feature of Snapchat is that the posts are self deleting."); Transcript of Proceeding, *supra* note 39, at 5 ("Snaps are designed to be fleeting and temporary. They're available for anywhere from one second to 24 hours. This particular [s]nap was accessible only by her friends on Snapchat, you couldn't go on-line and see it, the general public couldn't download the Snapchat app and see it. And even her friends could only access it for 24 hours from that Saturday. So by Monday morning the [s]nap had already self-deleted from Snapchat. By the time the school week started it was gone."); Tadani Alyahya & Firdous Kausar, *Snapchat Analysis to Discover Digital Forensic Artifacts on Android Smartphone*, 109C PROCEDIA COMPUT. SCI. 1035, 1035 (2017).

Mahanoy Area High School and one of the cheerleading coaches, testified in a deposition that lots of kids were talking about the snap, asking her if she had seen it. "There were several different students that approached me at different times throughout the day," she said.[47] But when asked if talk of the snap had disrupted class, Mrs. Luchetta-Rump answered, "[o]ther than taking class time away from my students briefly, I cannot think of anything other than that."[48]

In almost any other situation, a teenager's snap would barely cause a ripple in a school's small pond, let alone in a whole town's. But Brandi's would eventually reverberate and make law for the entire country. Why? Because instead of just shaking their heads and commenting on "kids today," the cheer coaches and the principal decided that the snap was grounds to suspend Brandi from the junior varsity cheerleading squad for the following school year.[49]

Brandi initially had no idea that the snap had circulated or that the school was upset about it. For three days after she returned to school, no one mentioned a thing. But the following Thursday, Brandi found out that she was suspended when her cheer coach, Nicole Luchetta-Rump, pulled her out of homeroom and asked her to come to her classroom.[50] Luchetta confronted Brandi with a printed copy of the snap, pointed to the words "fuck cheer,"[51] and told her that the snap was "disrespectful" to the coaches, school and other cheerleaders.[52]

Presumably, Luchetta-Rump was relying on clauses in the Mahanoy Area School District Cheerleading Rules that stated:

> Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember, you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced, [sic] this includes foul language and inappropriate

[47] Defendant's Statement of Undisputed Facts Part 14, *supra* note 44, at 59.
[48] *Id.* at 59–60.
[49] *See* Verified Complaint at 6, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-01734).
[50] The incident occurred on June 1, 2017. *See id*.
[51] Transcript of Proceeding, *supra* note 39, at 19.
[52] *Id*.; *see* Verified Complaint, *supra* note 49, at 6.

> gestures. . . There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.

2017-2018

Mahanoy Area High School Cheerleading Rules

All of the information below is at the coaches' discretions and rules may be subject to change. If there is a situation with extreme circumstances, it will be addressed at that time.

ATTENDANCE

- All cheerleaders must attend every practice and workshop. Vacations and absences from school are the only acceptable excuses. Coaches must be given a written notice at least one week in advance for vacations/trips to be considered excused. Non-school related activities and work are not acceptable excuses. (Internships are not excused). Other sporting activities will be accommodated as much as possible. If you are too sick to attend practice/game and were present in school, a doctor's note is required or you will be benched for the next game.
- All games are mandatory. Only acceptable excuses are as above.
- If unable to attend practice or a game you (yourself) must call or text Miss Luchetta or Mrs. Gnall. If a coach is not contacted prior to the practice/game you will be benched for the next game.
- All cheerleaders will ride to and from the games on the bus. If you would like to leave with a parent or guardian, you must fill out the transportation form and hand it in to the office prior to the game. See coaches for such forms.
- Buses are scheduled to leave at a certain time. The bus will not wait. If you are not on the bus at the scheduled time, the bus will leave without you. This will be considered an unexcused absence.

ACADEMIC POLICY

- All cheerleaders must be academically eligible (you are ineligible if you are failing two or more classes) to participate at games.
- Eligibility reports are usually created every Sunday Evening and will be in effect until the following Sunday when the new report is run.
- If you are academically ineligible for three consecutive weeks, you will be dismissed from the team.

UNIFORMS

- Uniforms are to be worn at cheerleading functions only.
- Uniforms should be machine washed **weekly** and line dried during regular season.
- All uniforms, including sneakers, must be kept clean at all times
- When going to and from games you must wear your uniform and warm-ups.
- Absolutely NO JEWLERY should be worn at practice or games.
- Any tattoos or piercings should not be visible.

MASD000003

2017-2018

- Artificial nails are not allowed at any time, polish must be removed for games (unless using clear polish).
- Chewing gum is not allowed at practice/games
- Hair must be pulled back at all times. A cheerleading bow must be worn at all games. Headbands or other hair accessories are not allowed. If your hair is too short for a pony tail you must have the sides pulled up off your face.
- All hair color must be natural.

SPORTSMANSHIP AND RESPONSIBILITIES/FUNDRAISING

- Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember, you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures.
- All other school rules apply when at sporting events.
- If a cheerleader is benched three times they will be dismissed from the squad.
- Each cheerleader must have a physical completed between June 1st and August 15th in order to be able to participate. If unable to participate this is considered an unexcused absence. Please see the high school nurse for forms and more information.
- Fundraising is mandatory. Each cheerleader must raise at least $60 per year (or pay the boosters this fee) to remain on the squad. If the $60 is not met the cheerleader will not be able to cheer the following year until their debt is paid off. Several fundraiser will take place throughout the year to meet this requirement.

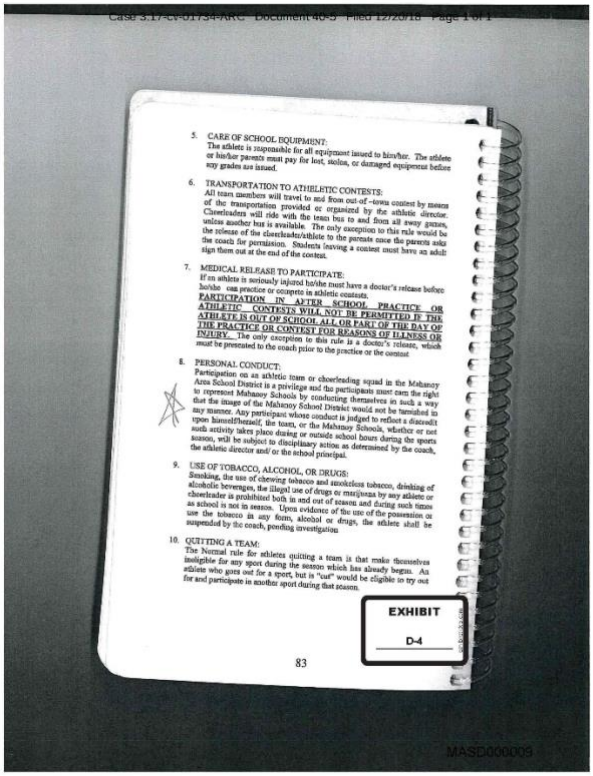
TECHNOLOGY

- The use of cell phones is prohibited during games and other events.
- There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.

Brandi had received a copy of these rules when she accepted her spot on the JV squad, and she and her mother had signed a form acknowledging and promising to abide by them.[53]

What's more, the school handbook referred to "Participation on an athletic team or cheerleading squad in Mahanoy Area School District [as] a privilege" and stated that:

> Participants must earn the right to represent Mahanoy schools by conducting themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner. Any participant whose conduct is judged to reflect a discredit upon himself/herself, the team or the Mahanoy schools, *whether or not such activity takes place during or outside school hours during the school sport season* will be subject to disciplinary action as determined by the coach, the athletic director, and/or the school principal.[54]



[53] Transcript of Proceeding, *supra* note 39, at 22–24.
[54] Defendant's Statement of Undisputed Facts, *supra* note 44, at 5.

Still, Brandi was shocked. How could a snap she posted on the weekend, at a local business, from her own device, be in violation of *school* rules? Upset, she asked to go to the principal's office to call her parents. When Larry Levy got on the phone, Luchetta told him that it was true: Brandi would not be able to participate in cheerleading during her sophomore year and indicated that the final decision was up to the school principal, Thomas Smith. And when Brandi talked to Mr. Smith, crying as she pleaded her case,[55] he told her that he not only agreed that she should be suspended from cheerleading, but that she might face school discipline as well. He would tolerate no disrespect.[56]

Brandi had never been in trouble at school.[57] She was a good kid, involved in extracurricular activities, planning on attending college. A member of the National Honor Society, she had been an honors student since seventh grade. Her friends were not "problem" kids, either. And yet the school seemed to be trying to kill a fly with a sledgehammer, taking away Brandi's favorite extracurricular activity for a seemingly minor incident.

Like the swearing Snap, the punishment–a fifteen-year-old being told that she can't cheer for the JV sports teams–might seem minor. But Sara Rose, one of Brandi's eventual ACLU lawyers, notes that it depends on the context. "If being on the team, if you take something away, that's hugely important to a teenager in response to something they say."[58] Molly Tack-Hooper, another of Brandi's ACLU lawyers, agrees: "Brandi was a kid for whom cheerleading was really important. She wanted to be on the team."[59]

Brandi's parents figured that the situation had just gotten overheated. Surely, it could be resolved. After all, this couldn't be such a huge deal: before this, Brandi's father, Larry Levy "didn't even know Snapchat existed."[60]

And, at first, Larry did not know that the suspension from the team was potentially illegal. He was concerned about the school's actions because, as he puts it:

---

[55] Transcript of Proceeding, *supra* note 39, at 29.
[56] Verified Complaint, *supra* note 49, at 7.
[57] Transcript of Proceeding, *supra* note 39, at 13.
[58] Zoom interview with Sara Rose (May 29, 2024) (recording and transcript on file with author).
[59] Zoom interview with Molly Tack-Hooper (July 3, 2024) (recording and transcript on file with author).
[60] Zoom interview with Larry Levy (August 10, 2025) (recording and transcript on file with author).

> I knew initially that it wasn't their place. This was my job. She acted out of sorts on a weekend, not in a school function, not on school [property]. Nothing even relevant to the school. How can they discipline [her]? And that's kind of what set me off and kind of lit the fuse. Now you're stepping into my parental boundaries. And that's where I started drawing a line. And that's when I did all my research.[61]

Larry Levy made it clear to his daughter that she needed to keep a low profile for a while.

> I pretty much told her, "I will handle it. Don't do anything else stupid. Let me deal with this. No Facebook posts, none of those snaps, nothing. Keep it quiet. Let me work on this because it only complicates things when I'm trying to fix something if something else is being tangled with." At that time I was trying to get her reinstated . . . I said, "Let's take one step at a time. Let's get you back on [on the cheer team], and then we'll fight this battle."[62]

But when Larry Levy asked Smith for a meeting with the administration to discuss the issue, the meeting was rescheduled several times, finally taking place two weeks later. After the first week, Levy wrote to the superintendent, the principal, and the school athletic director, Kieran Cray, making a remarkably cogent legal argument, given that he was not a lawyer. As Molly Tack-Hooper described it with admiration, "It was a pretty great demand letter. He cited to the big school speech cases and big chunks of the ACLU Student Rights Handbook. It was pretty darn good."[63]

When Larry Levy finally met with the administration and the cheer coaches on June 14, they stuck to their guns. Brandi had violated the rules with her "demeaning"[64] Snap, they said, and the suspension would stand. Brandi remembers, "None of

---

[61] *Id.*
[62] *Id.*
[63] Zoom interview with Tack-Hooper, *supra* note 59; *see also* Statement of Undisputed Facts in Support of Plaintiff, *supra* note 43, at 4–7 (comprising the demand letter from Levy to the school administration).
[64] Verified Complaint, *supra* note 49, at 8.

them wanted to hear [our arguments]."[65] As Molly Tack-Hooper relates the story, "They were all unmoved."[66]

At this point, the Levy family was convinced that the issue was not a matter of the coaches' irritation with a difficult teenager or an impulsive reaction to Brandi's Snap. It must be that the school district didn't understand the law. Even though the school handbook said that the school could discipline students for "activit[ies that] take[] place during or outside school hours,"[67] that didn't make the rule legal under the United States Constitution. The Levy family decided that the next step had to be to educate the administrators and school board about the First Amendment, Supreme Court precedent, and a school's limited power to limit or punish the speech of its minor students.

And so, Larry Levy attended the Mahanoy Area School District school board meeting two weeks later,[68] asking for the Board to override Smith's decision and reinstate Brandi to the cheerleading team.

Larry Levy was a long-time assistant foreman for the Borough of Mahanoy City Works Department,[69] not a lawyer. But he was really good at advocating for his daughter. With papers and notes all around him, he argued that Brandi's punishment was unfair and extreme. As Brandi said, "[H]e was trying to tell them that a different punishment would seem fair, maybe benching me for a month or telling me I can't do one game, or do away games. . . . [n]ot fully kicking me off."[70]

Molly Tack-Hooper remembers:

> Whenever we talked, [Larry] was like, "Look, I'm not thrilled that she did this. Like, you know, I

---

[65] Interview with Brandi Levy, *supra* note 31.
[66] Zoom interview with Tack-Hooper, *supra* note 59.
[67] School Handbook, page 83, paragraph 8.
[68] While the school board minutes for the June 29, 2017, school board meeting do not record Levy's comments, both the Levys and the school district agreed that he did speak. *See* Nancy Boyle, *Regular Meeting Immediately Following Workshop—June 29, 2017* [Minutes], MAHANOY AREA SCH. DIST. (June 29, 2017), https://mabears.net/pdfs/2017-2018/Board%20Minutes/june2017.pdf. *But see* Verified Complaint, *supra* note 49, at 9; Answer to Complaint, Affirmative Defenses, and Jury Remand at 6, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-01734); Statement of Undisputed Facts in Support of Plaintiff Part 1, *supra* note 43, at 16; Defendant's Statement of Undisputed Facts, *supra* note 44, at 9.
[69] Deposition of Lawrence Levy, at 8, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-01734). Levy is now the Public Works foreman. *See also* Zoom interview with Larry Levy, *supra* note 60.
[70] In-person interview with Brandi Levy, *supra* note 30.

> think a little bit of punishment would have been fine, but like this is a whole year." I think he probably might have gone to the School Board . . . [but if] the punishment was only going to be[] in effect for two weeks, or something, I don't think he would have filed a pro se lawsuit over it. I think he would have basically said[] "give it up" at that point, even though it was unjust, because it was such a small punishment.[71]

Brandi and her parents were willing to accept a small punishment, even if it was not completely legal under the First Amendment. But Levy thought it was critical for the School Board to understand the law on school speech and a public school's limited power to curb it.

As he had in his letter to the administration, Levy explained that the Supreme Court had ruled several times on the issue of school speech. He told them that off-campus speech can only rarely be regulated, and then only if it causes "substantial disruption."[72]

But after the meeting, the Superintendent sent Levy a message advising him that the School Board would support the principal's decision. The full-year suspension would stand. Ironically, the Superintendent sent her message through social media.[73] Brandi's reaction? "I wasn't really heated. I was just more or less pissed that they weren't listening to what I had to say and what my dad had to say."[74]

Having reached a brick wall, Larry Levy looked back at his notes. It seemed like the ACLU was the legal organization that had brought most of the other school speech cases.[75] Maybe they could help Brandi? It was worth a call. "I had the meeting with the School Board, and at that point I thought, okay, now, I need to bring in some bigger guns, because all my research showed that this is wrong. This is a civil rights violation. This has to be."[76]

---

[71] Zoom interview with Tack-Hooper, *supra* note 59.
[72] *Tinker*, 393 U.S. at 514.
[73] *See* Verified Complaint, *supra* note 49, at 9.
[74] In-person interview with Brandi Levy, *supra* note 30.
[75] The ACLU represented the students and/or collaborated with their private attorneys in the *Tinker*, *Hazelwood*, *Fraser*, and *Frederick* cases. *See, e.g*, *Court Cases > Student Speech and Privacy*, ACLU, https://www.aclu.org/court-cases?issue=student-speech-and-privacy (last visited Jan. 19, 2026) (discussing major student speech cases argued by the ACLU including *Morse v. Frederick*).
[76] Zoom interview with Larry Levy, *supra* note 60.

Larry was determined. "This might be a case that might change some things," he said.[77] Although he never thought it would reach the United States Supreme Court, he thought "once we got the ACLU involved and said, 'Hey? You can't do this. You need to fix this now.' I thought at that point that would have been the end of it."[78]

Rose remembers:

> [Brandi's] case came to us through our intake process. . . . I actually don't remember whether it was a phone call or an electronic complaint. But we got, as you can imagine, thousands of complaints a year. And one of the reasons that we devote resources to sifting through those, because 95% of them would never even come to any of the lawyers' attention.[79]

Molly Tack-Hooper was concerned, however, because it didn't seem like the other ACLU attorneys were very interested in taking the case:

> [One of our lawyers] vetted it and brought it to one of our weekly case review calls, and I really wanted to take it. I think I was the only one . . . We were a little bit worried that this case could go badly by having a court try to distinguish between punishments where a student was expelled like in [two previous cases] and this lesser punishment of just kicking somebody off the JV squad for a year . . . or that the we might end up with a rule of law, that, like cheerleaders, can be held to a higher standard, because the nature of their job is to represent the school. [Maybe] they can be held to some kind of like morals clause type thing. . . . I wanted [to take the case] because it just seemed really unfair. The law seemed really clear to me that they couldn't do this . . . It just seemed like such a massive overreach by school administrators. . . . They dig in the hardest and use their power against people least able to defend

[77] *Id.*
[78] *Id.*
[79] Zoom interview with Sara Rose, *supra* note 58.

> themselves, and it just like gets me when school administrators abuse their power against kids who are just being kids.[80]

Molly Tack-Hooper was initially assigned the case because the Mahanoy Area School District was closer to her home in Philadelphia than to Pittsburgh.

And what Brandi and Larry Levy had to say was arguably supported by the law. Larry Levy's argument that the First Amendment did not allow the school to punish Brandi for her off-campus speech had merit. Mahanoy Area High School was a public school.[81] The coaches and the principal were employees of the public school district. Because they worked for the government, they were "state actors."[82] And under the First Amendment to the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech."[83] Because the First Amendment has also been held to apply to states and municipalities,[84] the school was potentially in violation of the First Amendment when it punished Brandi for her speech.

But deciding whether the school violated Brandi's First Amendment rights required analyzing a number of different legal approaches. In a line of four cases beginning in 1969 during the Vietnam War, the Supreme Court had outlined the types of speech that a school could regulate, prohibit, or punish. First, in *Tinker v Des Moines Independent Community School District*, the Court had declared that students retained at least some of their free speech rights at school.[85] In one of the most famous lines in modern constitutional jurisprudence, the Court held that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[86] In order for a school to punish or limit student speech in school, it needs "evidence that [school action]

---

[80] Zoom interview with Tack-Hooper, *supra* note 59.
[81] *Educational Names & Addresses: Mahanoy Area JSHS*, PA. DEP'T OF EDUC., http://www.edna.pa.gov/Screens/wfInstitutionDetails.aspx?ID=63095 (last visited Jan. 19, 2026).
[82] For background, see Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99 (2004).
[83] U.S. CONST. amend. I.
[84] *See* Bruce E. Auerbach, *Incorporation of the First Amendment*, FREE SPEECH CTR. (June 23, 2025), https://firstamendment.mtsu.edu/article/incorporation-of-the-first-amendment/ (tracing the incorporation of the First Amendment into the due process clause of the Fourteenth Amendment).
[85] 393 U.S. 503 (1969).
[86] *Id.* at 506.

is necessary to avoid material and substantial interference with schoolwork or discipline."[87] In other words, differences of opinion or politics were inadequate when a school wanted to limit a student's speech. Because children, like adults, have First Amendment rights, they are allowed to express their views unless doing so would cause disruption in the school's operations.[88]

Once the Court had decided that classroom-based speech could only be limited under narrow circumstances, more questions arose as to what kinds of speech outside of the classroom but still related to school activities were protected. In 1986, in *Bethel School District v. Fraser*, regarding student election speeches at an assembly, the Court decided that schools could limit "vulgar and lewd speech . . . [if it] would undermine the school's basic educational mission."[89] Two years later, in *Hazelwood School District v. Kuhlmeier,* the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns."[90] Activities like the publication of a school newspaper were therefore subject to the approval of school officials. And finally, in 2007, the Court held in *Morse v. Frederick* that schools could prohibit student speech promoting the use of illegal drugs if the speech occurred at school events.[91]

For Brandi's lawyers to argue on her behalf, then, they needed to turn over several school speech stones. First, they had to ask whether Brandi's speech was actually "school speech" at all, such that the school might be permitted under a long line of case law to limit what she said. Second, if it was school speech, would it "materially and substantially disrupt the work and discipline of the school?"[92] If it was school speech–and even if it wasn't disruptive–was it vulgar or lewd?[93] Was it "a school-sponsored . . . expressive activity that students, parents, and

---

[87] *Id.*
[88] *See id.*
[89] 478 U.S. 675, 684 (1986).
[90] 484 U.S. at 273.
[91] *See Morse*, 551 U.S. 393.
[92] *Tinker*, 393 U.S. at 506.
[93] *Bethel*, 478 U.S. at 683 ("Surely it is a highly appropriate function of public-school education to prohibit the use of vulgar and offensive terms in public discourse.").

members of the public might reasonably perceive to bear the imprimatur of the school?"[94]

Certainly, as it did not mention or refer to drug use in any way (as did the "Bong Hits 4 Jesus" banner in *Morse v. Frederick*), Brandi's snap could not reasonably be classified as "[s]tudent speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers."[95]

When the ACLU filed a case in federal court to advocate for Brandi's rights, it asked the court to decide the disruption and offensive issues, using *Tinker* and *Fraser* as precedent.[96]

The case began in the Middle District of Pennsylvania at the end of September 2017, several months after Brandi was suspended from the cheerleading team and a few weeks after the start of the 2017–18 academic year.[97]

Sara Rose was somewhat of an expert in school speech cases. Before attending law school at the Georgetown University Law Center, she worked for the Student Press Law Center, an organization that is, according to its website,[98] "the nation's only legal organization devoted exclusively to defending and advancing the free press rights of student journalists." As Rose puts it, "student speech cases were very near and dear to my heart already, and when I was there from 1999 until 2001 was . . . right when all of the Internet student speech stuff was blowing up."[99]

Once Rose began working at the ACLU of Pennsylvania as a staff attorney:

---

[94] *Hazelwood*, 484 U.S. at 570.

[95] *Morse*, 551 U.S. at 408.

[96] *See* Memorandum of Law in Support of Plaintiff B.L.'s Motion for Summary Judgment at 7–14, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-cv-01734).

[97] The Mahanoy Area School District schools started the 2017–18 school year on August 28. *See* Nancy Boyle, *Regular Meeting Immediately Following Workshop—April 27, 2017* [Minutes], MAHANOY AREA SCH. DIST. (Apr. 27, 2017), https://www.mabears.net/pdfs/2016-2017/Board%20Minutes/april2017.pdf.; John Usalis, *Mahanoy Area Board Sets New Graduation Date*, STANDARD SPEAKER (May 4, 2017, at 14:00 ET), https://www.standardspeaker.com/news/mahanoy-area-board-sets-new-graduation-date/article_ccf940b2-6049-5b0f-9b4d-1bd5da5e6e69.html.

[98] *About the Student Press Law Center*, SPLC, https://splc.org/about/ (last visited Aug. 1, 2025).

[99] Zoom interview with Sara Rose, *supra* note 58. Rose is referring to several cases involving internet speech in Pennsylvania and beyond during this approximate time period, including J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000), *aff'd*, 807 A.2d 847 (Pa. 2002); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001); and Walker *ex rel*. Walker-Serrano v. Leonard, 168 F. Supp. 2d 332 (M.D. Pa. 2001), *aff'd sub nom.*, Walker-Serrano *ex rel*. Walker v. Leonard, 325 F.3d 412 (3d Cir. 2003).

> [A] real goal was to try to get this standard in the Third Circuit that *Tinker* doesn't apply to off-campus speech. And then we didn't get a decision going that far in those two of those cases.[100] But we felt like we had a pretty solid outside-of-school student speech standard in the Third Circuit. It was a big focus for a while. And then we kind of shifted to other kind of priority areas, [but we were] still interested in student speech.[101]

Still, the ACLU was convinced that it was unlikely to get a decision on point if a court had not yet ruled on the issue.

But no one in either office imagined that the case would go very far. Rose recalls that they thought that one letter to the school district would end the controversy. For most cases, she says:

> [W]e send a demand letter and nine times out of ten that resolves the situation. We thought in Brandi's case, that it would absolutely resolve the situation, because the case law in the Third Circuit . . . thanks to many of the cases that we brought, is pretty clear on this right.[102]

So the ACLU lawyers were surprised, to say the least, when the school district balked at reversing the suspension. As Rose remembers it, Jack Dean, the City Solicitor at the time, did not even respond to the letter. Tack-Hooper tried following up by phone several times, but as the start of the school year grew nearer, it looked like Brandi's legal team was going to have to take formal action. "Seriously?" they thought.

---

[100] Zoom interview with Sara Rose, *supra* note 58.

[101] *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011) (en banc) (holding that a school district cannot "reach[] beyond the schoolyard to impose what might otherwise be appropriate discipline" "for expressive conduct that originated outside of the schoolhouse, did not disturb the school environment and was not related to any school sponsored event"); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc) (holding that "[b]ecause [the student] was suspended from school for [off-campus] speech that indisputably caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school, the School District's actions violated [the student]'s First Amendment free speech rights").

[102] Zoom interview with Sara Rose, *supra* note 58.

Meanwhile, Larry Levy was hearing that the school district was trying to figure out just how much power it had.

> I'm the Public Works Foreman. One of these School Board members was our borough manager at the time. And I said to him, "Dan, what are you doing? And he says '[w]e need to know where we stand, what are our bounds? Where could we do this? Can we not do this? You know it's not a matter of anything personal with you, but we want to see where this [will] go, what the judges [will] say.'"[103]

Even though the borough manager said that the refusal to reverse the suspension was not personal, Larry was not so sure. As in so many cases that seem to make a mountain out of a molehill, it seemed like there must have been an underlying motive for the school district to care so much about Brandi's Snapchat post. Surely, the school wouldn't punish every kid who swore, especially those who did so off-campus. And as it turned out, there was some tension bubbling below the surface, in the form of, as Rose puts it, "small-town Pennsylvania politics."[104] Brandi's dad, Larry Levy, had run for school board in 2017 as a Democrat.[105] A Republican member of the School Board, Steve Gnall[106] was married to the cheerleading coach, April Gnall.[107] It seems likely to Larry's legal team that Gnall wanted to protect and support his wife, especially against Larry Levy, who had dared to challenge Gnall's ally in the school board election.[108] As Larry puts it: "[S]mall town politics play a role–population of 3,000 people. Everybody knows everybody."[109]

Still, without proof, it's possible that the school district just didn't want to admit that it was wrong. Molly Tack-Hooper thinks that this was a case of stubborn school administrators who didn't want to back down.

---

[103] Zoom interview with Larry Levy, *supra* note 60.
[104] Zoom interview with Sara Rose, *supra* note 58.
[105] *See Write-In Votes Cause Some Upsets Across Schuylkill County*, REPUBLICAN HERALD (May 24, 2017, 14:00 ET), https://republicanherald4.rssing.com/chan-15221936/all_p840.html.
[106] *See* Nancy Boyle, *supra* note 67.
[107] *See, e.g.*, *Steven Gnall Obituary*, REPUBLICAN HERALD (June 9, 2017) https://www.republicanherald.com/obituaries/steven-gnall-mahanoy-city-pa/.
[108] Zoom interview with Larry Levy, *supra* note 60.
[109] *Id.*

> You know, I will say that was [Larry Levy's] theory. . . . I never put a ton of stock in that because I've done so much student speech work, and it just was not at all surprising that there . . . was a vague rule that got applied in a kind of arbitrary way. And then everybody dug in, because that's what happens in every student speech case. Nobody ever is like, 'Oh, all right, having read the law, I'm gonna retract this punishment.' It's just never how it goes. So I know he thought it was a little personal [but] I never . . . saw a lot of evidence of that.[110]

Still, even with adults acting like children (remember Steven Pico, who talked about having to be the adult in the room?),[111] Brandi's priority was getting back on the cheerleading team, and so Tack-Hooper filed a motion for a temporary restraining order ("TRO") to require the school to reinstate the then high-school sophomore.

According to Rose, Richard Caputo, the judge in the case, did not even seem to consult with counsel for the school district. Instead, in under twenty-four hours, he issued what Rose called "the fastest TRO we've ever gotten, and we do a number of TROs."[112] She speculates, "I think the judge [thought] 'This is ridiculous.'"[113]

But to make sure that Brandi could be returned to the team long-term, the ACLU needed to ask the court for a hearing to extend the order, or ask for a preliminary injunction. And that meant Brandi would have to testify in court. The ACLU team wanted to make sure that Brandi was comfortable, confident, and prepared for what that experience would entail.

Molly Tack-Hooper remembers:

> So I'd met with Brandi and Larry in Mahanoy City, where they live . . . mostly in their basement bar. . . . That's where we did most of our chatting. We didn't do a ton of [] formal prep. . . .We just mostly focused on what to expect . . . different lines of questioning. . . . It was really a lot of like

[110] Zoom interview with Tack-Hooper, *supra* note 59.
[111] Interview with Steven Pico, *supra* note 10.
[112] *See* Zoom interview with Sara Rose, *supra* note 58.
[113] *Id.*

> stress management with kids. Right? It's like, . . . "[D]on't worry. If they ask you this thing, it won't lose the case. Your only job is to be honest. Tomorrow isn't gonna make or break the case." I think it was really just expectation management. I do think . . . "the world is not on your shoulders" is the biggest part of it for me. . . . Because . . . the great thing about student speech cases is that they really turn on the speech is the speech, right? . . . And then the case really turns on the school's justification for punishing them for it. Not on anything else the kid could say. . . . Especially like this [case]! She could sort of explain why she was thinking "fuck, cheer." But it wasn't like there [were] really [] things she could say that would lose the case. I think [in] her deposition, they were trying to get her to say things that they thought might make her lose the case, like concede principles of law, right? Which is obviously not what you use. A fifteen-year-old plaintiff's testimony [isn't about] the law. So a lot of the [preliminary injunction hearing] prep was like, "They may try to ask you this. It doesn't really . . . matter. Don't get stressed out by the things they say." She cared about getting on the cheer team, right? I was like, "This is our stress." And by the time I met her in person, we'd already gotten a TRO, right? So . . . she [was] already . . . back on the team the first time I saw her in person. She was already . . . doing the thing that she cared about the most.[114]

Another fun part of preparing for the preliminary injunction hearing involved the lawyers practicing their arguments. Because Brandi's snap had included the word "fuck," the legal team had to decide how to address the Snap's content in court.

According to Molly Tack-Hooper:

> So the one thing we talked through a lot was . . . what to do with the "F word." . . . Do we write the "F word"? Do we write "F - -" in our briefs?

[114] Zoom interview with Tack-Hooper, *supra* note 59.

> Do we say it in court? . . . I think everyone was pretty much in agreement that we needed to . . . take the sting out of the word "fuck" a little bit. So that was another goal of the PI hearing . . . to stand up and say "fuck" a lot . . . wearing a suit and [acting] full of respect in a way that was professional and . . . made [the use of the word] . . . not a thing, right? So I said "fuck"' so many times in that court. It was really fun."[115]

Molly Tack-Hooper smiles as she remembers going to court with the Levy family.

> The [preliminary injunction] hearing was in Wilkes-Barre [a city of approximately 45,000 people.][116]To me, Mahanoy City [and] Wilkes-Barre [are] not hugely different. To Brandi, it was like she was in Paris or New York City. She could not stop talking about how tall the buildings were. [It was] exciting to get to go to big city Wilkes-Barre.[117]

Even more exciting was that Brandi got to miss school to attend the preliminary injunction hearing. Because she had to go back to school afterwards, Brandi wore her school uniform, khakis and a polo shirt. As Molly Tack-Hooper comments, "It's not like she owns a suit. She's a student. She can look like a student. . . . This is what the district thinks is a respectful form of dress."[118] Molly memorialized the occasion. "I took a cute photo of her sitting on the steps of the courthouse. . . . She was so tiny!"[119]

---

[115] *Id.*
[116] *Id.*; *see* U.S. CENSUS BUREAU, *QuickFacts: Wilkes-Barre City, Pennsylvania, Population Estimates, July 1, 2024*, https://www.census.gov/quickfacts/fact/table/wilkesbarrecitypennsylvania/PST045223 (last visited March 17, 2026).
[117] Zoom interview with Tack-Hooper, *supra* note 59.
[118] *Id.*
[119] *Id.*

At the hearing, the cheerleading coach seemed to confirm the ACLU's impression that this case was not about disruption, but about profanity. "[Then Deputy Legal Director of the ACLU of Pennsylvania] Mary Catherine Roper had a great idea to ask the cheerleading coach, 'Well, would the punishment have been the same if Brandi had said, 'cheerleading is fucking awesome?'"[120] And the coach said, "Yes" so for us that meant, "this is clearly about the language and not about anything else."[121] And it seemed that was the angle the school district was adopting; in its court filings, it referenced the *Fraser* lewdness standard, saying that Brandi's snap included "profane comments and photograph"[122] and that "[t]he conduct of B.L. was repugnant to the images of the School District."[123]

After the court granted the preliminary injunction requiring the school to allow Brandi to stay on the cheerleading team, the ACLU lawyers again thought the case should be over. Surely, the school would see that it could not win and relent? But no. The school district dug its heels in, seemingly with no explanation. Brandi's legal team moved for summary judgment . . . and won.[124] Why the school district kept going was mystifying to Rose. "I've always talked to other school solicitors, and they're . . . also perplexed about why the school district kept

[120] Zoom interview with Sarah Rose, *supra* note ___.
[121] *Id.*
[122] Def.'s Answer to Compl. at 9, B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019) (No. 3:17-CV-01734).
[123] *Id.*
[124] *See Mahanoy*, 376 F. Supp. 3d. at 445.

pushing this case."[125] It wasn't like Brandi was a problem kid. She hadn't gotten into any other trouble at school. She hadn't used language that was not routinely used by other high school students. In fact, Brandi was a bit soft-spoken and reserved. She didn't make waves. And, as Rose notes, "she . . . just happened to be . . . at this convenience store doing something that . . . so many teenagers do."[126]

The case continued, and the ACLU sought to make the order to reinstate Brandi on the cheer team permanent. In ruling on summary judgment, the District Court rejected the school district's argument that extracurricular activities should be treated differently from academic pursuits. It noted, "[C]ourts have not held that mere exclusion from an extracurricular activity reduces or fails to raise constitutional concerns. . . . That this is a cheerleading case does not change the result."[127] Considering whether Brandi's snap was school speech, it held, "The District's concession that B.L.'s speech occurred off-campus is all but fatal."[128] Of particular concern to the court was the school district's attempt to control its students at all times. "If [a school could circumvent *Tinker*, *Fraser*, and *J.S. ex rel. Snyder* by simply defining its educational mission in a way that prohibits off-campus vulgarity], public schools would 'possess absolute authority over their students' and become 'enclaves of totalitarianism.'"[129] And, finally, there were no allegations of *Tinker*-doctrine substantial disruption from Brandi's Snap.[130] In short, said Judge Caputo:

> All of this discussion can be distilled into a single point: Coaches cannot punish students for what they say off the field if that speech fails to satisfy the *Tinker* or *Kuhlmeier* standards. . . . Even then, whether *Tinker* applies to speech uttered beyond the schoolhouse gate is an open question. . . . The undisputed evidence shows that neither of these standards has been met, so B.L.'s speech was protected.[131]

---

[125] Zoom interview with Sara Rose, *supra* note 58.
[126] *Id.*
[127] *Mahanoy*, 376 F. Supp. 3d at 440, 442.
[128] *Id.* at 441.
[129] *Id.* at 442 (citing *Tinker*, 393 U.S. at 511).
[130] *See id.* at 444.
[131] *Id.* at 444–45.

It was a conclusive victory for Brandi and the ACLU. Again, however, for reasons that were unclear, the school district refused to drop the matter.

Molly Tack-Hooper and Larry Levy were confused: continuing the litigation would cost this very small school district a lot of money. Molly explains:

> Every school speech case I'd worked on, or . . . that my colleagues had worked on . . . had involved the administration and the board digging in, but usually fees become limiting factor. And so, every step it was like, "[R]eally, you want to spend more money on this one? Okay, we're happy to keep doing it." But . . . I wasn't that surprised they dug in. I just thought . . . someone would tell them . . . "this is going to cost you a lot of money, and you're going to lose," and that would matter to someone.[132]

However, fees were not an issue for the school district. According to Larry Levy:

> It was all covered by the insurance, and that was an argument I had with some of the School Board officials. [They said,] "It's not really hurting." I said, "Yes, it is because you think they're going to pay a near 1 million dollar payout and not expect a premium increase? Somehow you're paying this, no matter how you look at it."[133]

By this time, Brandi had been back on the cheer team for quite a while. The litigation started to have less and less of an impact on her daily life. As Larry Levy remarked:

> At first, when it first started and the articles started popping up, she'd be all excited sending them to me, but then, as time progressed . . . she kind of mellowed out with it, and . . . she's living the life she's living now, she's back cheerleading. It was kind of like . . . a wound that you took the Band-Aid off and it healed. The scar was still there. . . .

[132] Zoom interview with Tack-Hooper, *supra* note 59.
[133] Zoom interview with Larry Levy, *supra* note 60.

> So [the litigation] was still moving along, but at that point the ball was in my court with [the ACLU team]. I kind of did most of the work without Brandi, even knowing . . . I wanted her to focus on what she was doing. Focus on school, focus on her. This is stuff that I can handle, that she really wouldn't understand.[134]

Importantly, unlike some of the other kids who were involved in the other school speech cases, Brandi did not encounter much bullying or negative attention from her peers. Aside from a few comments, the other kids pretty much left her alone.[135]

But the internet is made for trolls. And the trolls were having a field day with this case, bashing Brandi and her parents. While a few commenters were supportive, saying, for example, "The nasty nasty cheerleader coach was trying to take the little 14 year old down because she offended her. You can't do that. She should be fired. The Admin completely let it happen. I'm so proud of Brandi Levy,"[136] many more were nasty, cruel, and sometimes almost threatening. These posts and comments called Brandi a "brat,"[137] a "bitch," [138] a "foul-mouthed little snot,"[139]

---

[134] *Id.*

[135] In-person interview with Brandi Levy, *supra* note 30; zoom interview with Larry Levy, *supra* note 60.

[136] u/Ka_55, REDDIT (r/politics), Comment on u/AmericasComic's post: *"Student's Snapchat profanity leads to Supreme Court speech case: Fourteen-year-old Brandi Levy was suspended from cheerleading over a profanity-laced posting on Snapchat*," (June 25, 2021, 17:56 ET), https://www.reddit.com/r/politics/comments/mz3z38/students_snapchat_profanity_leads_to_supreme/ [https://perma.cc/3JV2-EJQA].

[137] u/stuckmeformypaper, REDDIT (r/Conservative), Comment on u/AmericasComic's post: "*Supreme Court set to hear major school speech case after cheerleader booted from squad over Snapchat post,"* (Apr. 27, 2021, 20:52 ET), https://www.reddit.com/r/Conservative/comments/mzx4ec/supreme_court_set_to_hear_major_school_speech/ [https://perma.cc/L6AZ-MNPK] ("This honestly reeks of an entitled little brat who seeks to be validated for her lack of maturity. Sets a horrible precedent for kids on how to handle setbacks in life.").

[138] Joan Jeffrie, FACEBOOK, Comment on 6abc Action News's post (June 24, 2021, 10:41 ET), https://www.facebook.com/share/p/16kdL3SpRe/ [https://perma.cc/5CUE-FAS9] ("I agree with the court's decision regarding free speech outside of school. But, as many of you probably agree, a bitch is a bitch & she will most likely lose out on many opportunities she may have had because she is a bitch! She thought she was good, but evidently she was not, because the school chose more highly qualified individuals to be on the cheering squad.").

[139] John Lala, FACEBOOK, Comment on 6abc Action News's post (June 23, 2021, 11:02 ET), https://www.facebook.com/share/p/16kdL3SpRe/ [https://perma.cc/4X7X-HT6J] ("A big F to the parents who raised such a foul mouthed little snot.").

an "immature vulgar child," [140] "[s]poiled, obnoxious, small minded, [and a] future Jerry Springer guest," [141] "hot-headed, confrontational, and not a particularly good athlete," [142] "unsportsmanlike,"[143] "privileged," [144] and "entitled." [145] They implied that she was acting like a baby: "oh poor me someone stepped on my rights boo f*ckin hoo...let's make a big deal about it --I am taking you all to the supreme court for not letting my freedom of speech just be ok and you have to argue with me . . ."[146] And they made below-the-belt comments about Larry and

---

[140] Lisa Kirwan Renninger, FACEBOOK, Comment on Republican Herald's post, (June 23, 2021, 12:40 ET), https://www.facebook.com/share/p/1F2J8tvJaM/ [https://perma.cc/JZN9-SFW7] ("I think she was an immature vulgar child BUT she does have the right to express herself. I don't have to like her but I respect her right to be vulgar.").

[141] u/Walkthebluemarble, REDDIT (r/politics), Comment on u/AmericasComic's post:*"Student's Snapchat profanity leads to Supreme Court speech case: Fourteen-year-old Brandi Levy was suspended from cheerleading over a profanity-laced posting on Snapchat*," (June 30, 2021, 08:37 ET), https://www.reddit.com/r/politics/comments/mz3z38/students_snapchat_profanity_leads_to_supreme/ [https://perma.cc/3JV2-EJQA] ("I do support the decision, just loathe the person and situation. Her interviews tell it all Spoiled - obnoxious - small minded - future Jerry Springer guest. Parents leave you no doubt how she got that way. Speaks volumes about when our high courts get it right. Wish the lowers were near the same caliber.").

[142] u/RocketYapateer, REDDIT (r/atlanticdiscussions), Comment on u/JasontheHappyHusky's post: *"Cheerleader Punished For Snapchat Is On Her Way To The Supreme Court"*, (April 28, 2021, 15:28 ET), https://www.reddit.com/r/atlanticdiscussions/comments/n0efgj/cheerleader_punished_for_snapchat_is_on_her_way/ [https://perma.cc/XF24-5AKD] ("It seems likely to me that the girl was hot-headed, confrontational, and not a particularly good athlete. A lot of competitive (especially if it's *very* competitive) teams are glad to be rid of those.").

[143] u/klubkouture, Comment on "Cheerleader Punished For Snapchat Is On Her Way To The Supreme Court," REDDIT (April 29, 2021, 00:38 ET), https://www.reddit.com/r/atlanticdiscussions/comments/n0efgj/cheerleader_punished_for_snapchat_is_on_her_way/ [https://perma.cc/XF24-5AKD] ("But she's unsportmanlike and it is too bad that other girls had to fly with her as a base and that the freshman didn't get an apology.") (unavailable).

[144] u/Scarlet109, REDDIT (r/politics), Comment on u/AmericasComic's post: *"Student's Snapchat profanity leads to Supreme Court speech case: Fourteen-year-old Brandi Levy was suspended from cheerleading over a profanity-laced posting on Snapchat*," (Apr. 27, 2021, 18:33 ET), https://www.reddit.com/r/politics/comments/mz3z38/students_snapchat_profanity_leads_to_supreme/ [https://perma.cc/3JV2-EJQA] ("It shows how privileged she is. She wasn't suspended or expelled from school. She was kicked off the cheer squad.") (unavailable).

[145] u/stuckmeformypaper, *supra* note 134 ("This honestly reeks of an entitled little brat who seeks to be validated for her lack of maturity. Sets a horrible precedent for kids on how to handle setbacks in life.").

[146] Karen Reis, Comment on lehighvalleylive.com's post, FACEBOOK (June 24, 2021, 08:46 ET), https://www.facebook.com/share/p/1F2J8tvJaM/ (unavailable).

Betty Lou Levy, saying that her father was a criminal,[147] that Brandi's parents were raising her poorly,[148] and that the Levy family was enabling Brandi's bad behavior.[149]

Larry Levy does not remember the online comments.[150] He just wanted to vindicate kids' rights. And so, with Larry Levy leading the charge, the case began to make its way through the courts. Not only did the case not proceed as the legal team predicted, but the courts immediately seemed to engage in an analysis of a legal theory that seemed tangential, at best, or inapplicable, at worst. To Tack-Hooper, Rose, and the other ACLU attorneys, this was a case about *Fraser,* or lewd speech, because Brandi had used the word "fuck" repeatedly in her Snapchat message.[151] But to the trial court and the courts that would follow, there was a *Tinker* substantial disruption component that Brandi's legal team just did not see. "We didn't think this was a vehicle to raise the *Tinker* issue, because there

---

[147] Michelle Mcgurl Lempfert, FACEBOOK, Comment on Republican Herald's post, (June 23, 2021, 15:21 ET), https://www.facebook.com/share/p/1F2J8tvJaM/ [https://perma.cc/7SDC-JCH9] ("Betty Lou Levy you mustn't be a homeowner so your taxes won't go up that live in the school district I wouldn't be too proud to be glad that she sued oh that's right her father like someone he sued the township that he worked that he works for and he has one hell of an arrest record to I guess low class people have no pride.").

[148] u/bluefootedpig, REDDIT (r/Libertarian), Comment on u/johntwit's post: "*Supreme Court sides with high school cheerleader in free-speech dispute over off-campus social media rant | Brandi Levy was kicked off her high school JV cheer squad by administrators who said her Snapchat missive sent to friends violated policy*," (June 23, 2021, 16:03 ET), https://www.reddit.com/r/Libertarian/comments/o6e0y6/supreme_court_sides_with_high_school_cheerleader/ [https://perma.cc/P7MD-ST8L] ("I would like to point out a key here is she was not allowed to do cheerleading, not kicked out of the school, not suspended. Boomers talk about the trophy children, we are raising children who expect to be free of consequences."); Michelle Mcgurl Lempfert, Comment on Republican Herald's post, FACEBOOK (July 1, 2021, 21:53 ET), https://www.facebook.com/share/p/1F2J8tvJaM/ [https://perma.cc/6Q63-9Q6F] ("Betty Lou Levy teach your daughter to have respect and follow rules...and it's ok that she suck at cheerleading not to bitch and fowl mouth.").

[149] REDDIT (r/atlanticdiscussions), Comment on u/JasontheHappyHusky's post: *"Cheerleader Punished For Snapchat Is On Her Way To The Supreme Court*", (Apr. 29, 2021, 15:26 ET), https://www.reddit.com/r/atlanticdiscussions/comments/n0efgj/cheerleader_punished_for_snapchat_is_on_her_way/ [https://perma.cc/XF24-5AKD] ("So, she doesn't cut the mustard to get on the Varsity squad, and, instead of reflecting on the why and improving, she runs off and does what most her age do: complain on the Internet. Then, her daddy gets involved and the school bends and puts her on the Varsity squad?").

[150] *See* message from Larry Levy to Lisa Tucker, RICH COMMUNICATION SERVICES, (Aug. 11, 2025, at 07:22 ET) (on file with author).

[151] *See Bethel*, 478 U.S. at 683 ("The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by [Fraser].").

was no disruption. So from the very beginning, we viewed this as a *Fraser* case, that they were punishing her for using the F word."[152]

And the school district still thought it could win–or perhaps it was just concerned about the message it would send if it dropped the matter. After all, it couldn't still be about getting revenge on Larry Levy for running for school board, could it? But by this point, no one on the Levy team was surprised when the school district appealed the trial court's ruling to the Third Circuit, the federal appeals court in the area. After another year of waiting, Sara Rose of the ACLU was back in court in Philadelphia, arguing that Brandi's snap was protected speech and was not "school speech" such that the school could regulate.

But the school district was like a dog with a bone. Michael Levin, the school district's attorney, opened his argument by disagreeing with the trial's court underlying premise. "School districts can create reasonable rules for eligibility for participation in extracurricular, noncompulsory, voluntary activities, including rules of conduct."[153] In other words? The trial court got it totally wrong.

Immediately, however, the three-judge panel pushed back, playing the fundamental role of devil's advocate. "This activity took place on a Saturday? . . . and so it was outside of class, outside of the grounds of the school?"[154] And weren't the activities in other, precedent cases things like school dances and graduations? In other words: extracurricular activities?[155] "[W]e're talking about something that's off school grounds, not during school hours, with a group of friends, and somebody . . . ends up leaking it."[156]

Another judge on the panel was concerned about students knowing when their speech was protected and when it was not. "How is a student to know when it's outside [the] [boundaries], particularly if a student is speaking on [the] weekend outside of school . . .?"[157]

---

[152] Zoom interview with Sara Rose, *supra* note 58.
[153] Oral Argument at 03:05, B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020) (No. 19-01842), https://www2.ca3.uscourts.gov/oralargument/audio/19-1842B.L.v.MahanoyAreaSchoolDistrict.mp3
[154] *Id.* at 3:36-38.
[155] *See id.* at 4:37 (suggesting precedent dealt with "the inability to attend a dance . . . and graduation").
[156] *Id.* at 13:38.
[157] *Id.* at 11:03.

In other words, the appeals court was expressing the exact same concerns that the trial court had raised.

When Sara Rose stood to argue Brandi's side of the case, she immediately countered the school district's message.

> Counsel for [the] [school district] just said that [he] is asking this Court to rule that school districts can create reasonable rules for participation in extracurricular activities, including rules of conduct. We agree. But school districts cannot impose rules on students involved in extracurricular activities that violate their First Amendment rights. And that's what this case is about. It's about the First Amendment rights of students to engage in nondisruptive speech outside of school.[158]

Remember how Brandi's team hadn't seen the *Tinker* issue as particularly relevant, because witnesses for both sides seemed to testify that there had been no substantial disruption?[159] Rose's argument was a paradigmatic case of arguing the issues the court cares about. The trial court had ruled relying on *Tinker.* Rose therefore cited the *Tinker* standard–disruption–to the Third Circuit panel.

Predictably, the court had some line-drawing concerns. How could they–or a student–know what was "school speech" and what was not in this age of smartphones? "What if she had posted the same image and the same words to a Facebook group for all members of the sophomore class? Would we treat that as on-campus or off?"[160] Another judge followed up: "What if she sends it to the cheerleading team's coach's school email or to a school listserv? It's on the internet, but it's a school part of the internet."[161] And, importantly, "What if it is clearly off campus speech, but it's in effect what we call today cyberbullying?"[162]

Again, Rose returned to the facts. Brandi had been off campus. It had been a weekend. She had not mentioned the school in her Snap. She had not been wearing clothing identifying her school. While the situations the court was

---

[158] *Id.* at 14:24.
[159] *See* Statement of Undisputed Facts Supp. Pl., *supra* note 43, at 14.
[160] Oral Argument, *supra* note 150, at 16:06.
[161] *Id.* at 16:38.
[162] *Id.* at 17:57.

considering were perhaps difficult, this case was not, she argued. This case? This case was easy.

And then she returned—yet again—to *Tinker*:

> [I]f you're looking at this from the school district's perspective, they're clearly arguing for a standard less than *Tinker* to apply to out-of-school speech. And the Supreme Court has made it clear – made it clear 50 years ago – that at the very least, schools have to meet *Tinker* to punish students for in-school speech. So applying a less stringent standard to out-of-school speech would vest school districts with dangerously broad discretion to censor student expression.[163]

It was a master class in having solid answers to the court's anticipated questions. Rose reinforced the trial court's concern about totalitarianism. She argued *Tinker* (in fact, continued to do so for the rest of her argument), because that was what the court cared about, even though she didn't see it as a central issue. Her perceived issue—the lewdness standard from *Fraser*, which might conceivably apply because Brandi used the word "fuck" four times in her Snap? It never even came up in the appellate oral argument.

It was no surprise to anyone when, at the end of June, 2020, the appeals court ruled in Brandi's favor, with all three judges agreeing on its central holdings. In its opinion, the court trod familiar ground: Brandi's snap was off-campus speech,[164] a school could not claim that speech related to an extracurricular activity was less protected,[165] *Tinker* did not apply to off-campus speech,[166] and—even if *Tinker* were to apply—Brandi's snap did not violate the *Tinker* substantial disruption standard.[167]

After a federal appeals court, there's only one place to go. Still, through all the years that the case lingered, no one ever imagined that Brandi's case would make its way all the way to the United States Supreme Court. Rose remembers:

---

[163] *Id.* at 19:54.
[164] *See* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 178 (3d Cir. 2020).
[165] *See id.* at 182.
[166] *See id.* at 189.
[167] *See id.* at 191.

> I told Brandi and her dad, after the cert petition was briefed, I was like, "there's no way [cert will be granted], cause *Tinker* wasn't even an issue." Why would you use this case as the vehicle to decide *Tinker*'s application to out of school speech, when–that–it doesn't even matter to the outcome of the case? Right? Which is the point we made in our [opposition briefs]. I [thought], "this isn't going anywhere," and so when it did, I [told Brandi and her dad], "Well, sorry."[168]

Rose was very surprised—and somewhat disheartened—when the Supreme Court actually granted cert, agreeing to hear the case. Rose says:

> They granted cert in late 2020, early 2021. We were coming off the heels of the 2020 election plus COVID. [A Supreme Court case] was the last thing I wanted to have! I said the same word that Brandi said when I saw that come across the docket. I couldn't—I was in disbelief.[169]

What was even worse than having this slam dunk go to the Court, extending the litigation for many more months? The Court told the parties that they would grant no extensions, an uncommon edict in a Court where extensions are usually routine.[170] According to Rose, "[I]t was [] January and [the Court] wanted to decide the case that Term. It was like, 'Oh, no.' So, at that point, I think I maybe wanted it to go away more than–more than the Levys did."[171]

By this time, Brandi had graduated from Mahanoy Area High School and was enrolled nearby at Bloomsburg University, a state school. At age nineteen, the issues her fifteen-year-old self had faced seemed distant and unimportant to her life today.

---

[168] Zoom interview with Sara Rose, *supra* note 58.
[169] *Id.*
[170] Adam Feldman, *To Extend or Not to Extend*, EMPIRICAL SCOTUS (Apr. 25, 2018), https://empiricalscotus.com/2018/04/25/to-extend/ (examining 200 randomly chosen extension applications from the 2015–2017 terms and finding that the justices denied or reduced the requested time by more than a week in just 17.5% of those cases).
[171] Zoom interview with Sara Rose, *supra* note 58.

Like a typical college student, she was sleeping when morning news broke that the Supreme Court would hear her case. As she tells the story:

> [I] just started getting phone calls from my parents and stuff and they called me and they're like, yo, your case is going to the Supreme Court. And I was just, [] didn't know what to say. I was just shocked . . . It was exciting. Honestly, I was a little nervous because all these people are now going to know who I was . . . And I came from a small town . . . I felt like if I was going to make a difference, people should know where it came from and who it came from. So, it says "B.L." on the courts only because I was a minor, but if I had the choice, it would've said my name.[172]

While, under Third Circuit rules,[173] Brandi was permitted to be anonymous in the litigation. With the caption to the case bearing only her initials, everyone at the school and in the community still knew who she was. Now people across the world would.

But if Brandi's name was going to stand for kids' First Amendment rights, she wanted to win. She thought she would, based on her own gut feeling and what her lawyers were telling her. "I thought there was a good chance I was going to, more or less. I thought I was more going to win than lose, but I thought there was going to be those arguments that were with the school."[174]

Even though Brandi was the plaintiff in the case, the ongoing litigation had not impacted her very much, especially after the first year of the case and the hearing in the District Court. After all, she was back on the cheerleading squad, and she had even—at last—made varsity. At the appellate stage, most of the action was on the ACLU's end. To Rose, Larry Levy seemed more excited than Brandi did as the case dragged on. Brandi enjoyed the attention that came with the Supreme Court stage of

---

[172] In-person interview with Brandi Levy, *supra* note 31.

[173] *See* FED. R. CIV. P. 10(a) (discussing rules for captioning). *But see* Doe v. Megless, 654 F.3d 404, 410 (3d Cir. 2011) (citing Doe v. Provident Life & Acc. Ins. Co., 176 F.R.D. 464 (E.D. Pa. 1997)) (setting forth a non-exhaustive list of factors to be considered when balancing privacy and openness).

[174] In-person interview with Brandi Levy, *supra* note 31.

the case,[175] but, in truth, everyone, including the lawyers and Brandi's family, wanted the case to go away.

And this was one of those cases that was difficult in terms of client goals versus attorney and ACLU perspectives. Brandi had won her case all the way through the federal court of appeals. Going to the Supreme Court could mean she might lose, and, equally as alarming, bad precedent on school speech might be set for the entire country. On the other hand, getting the case to the Supreme Court would be a huge deal for the attorneys and ACLU: Who doesn't want the chance to argue his case at the highest court in the land? As Sara Rose put it, "That's the only Supreme Court case I've been involved in. As the case went on, it was actually really fun." The fact pattern was interesting. The ACLU was fairly confident it could win. And drawing the legal line between what was school speech and what was not was a very satisfying task.

By the time the case reached the United States Supreme Court, it had attracted interest from a number of "amici," or friends of the court—groups and people who had a legal interest in the outcome of the case or specialized knowledge about the issues presented by the case. The amici included school districts;[176] teachers', other educators', school board, and administrators' organizations;[177] anti-bullying advocates;[178] student journalist advocacy groups;[179] a coalition of states;[180] student and non-student school boards;[181] religious freedom

---

[175] *See* zoom interview with Sara Rose, *supra* note 58.

[176] *See* Br. Huntsville, Alabama City Bd. Educ. & Eleven Additional Alabama Sch. Dist. Amici Curiae Supp. Pet'r., Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (2021) (No. 20-255).

[177] *See* Br. Nat'l Educ. Ass'n Amicus Curiae Supp. Neither Party, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. Pa. Sch. Bd.'s Ass'n & Pa. Principals Ass'n Amici Curiae Supp. Pet'r, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. Nat'l Sch. Bd.'s Ass'n et al. Amici Curiae Supp. Pet'r, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[178] *See* Br. Amici Curiae Cyberbullying Rsch. Ctr. et al. Amici Curiae Supp. of Pet'r, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. Nat'l Ass'n Pupil Serv.'s Adm'rs, Pa. Ass'n Pupil Serv.'s Adm'rs Amici Curiae Supp. Pet'r, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[179] *See* Br. of the Student Press Law Ctr. et al. as Amici Curiae in Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[180] *See* Br. Massachusetts et al. Amici Curiae Supp. Neither Party, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[181] *See* Br. Current and Former Student Sch. Bd. Members as Amici Curiae Supp. Resp'ts, Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (No. 20-255).

organizations;[182] college athletic organizations;[183] law and education professors;[184] civil rights, civil liberties, and constitutional rights groups;[185] parents' groups;[186] high school student groups;[187] parties to former Supreme Court school speech cases;[188] and a law firm representing juveniles.[189] Through amicus briefs, or letters from these concerned organizations to the Court, each of these groups aimed to educate the Court about how a ruling for either side would affect schools and society as a whole.

In their briefs, a number of issues arose. Should public schools or parents have the power to punish children for poor manners or bad behavior?[190] What are school boundaries, especially at a time in history when the "classroom" for most schoolchildren was their own home as a result of a worldwide

---

[182] *See* Br. Amicus Curiae First Liberty Institute Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. Amicus Curiae Becket Fund for Religious Liberty Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[183] *See* Br. Amicus Curiae College Athlete Advocates Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[184] *See* Br. Law and Educ. Professors as Amici Curiae Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. of First Amendment and Educ. Law Scholars as Amici Curiae Supp. Pet'rs, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. Amici Curiae Jane Bambauer et al. Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[185] *See* Br. Nat'l Women's Law Ctr. et al. Amici Curiae Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. Amici Curiae Elec. Frontier Found. et al. Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); Br. Amici Curiae Found. for Individual Rights in Educ. et al. Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. Advancement Project, Juv. Law Ctr. et al., Amici Curiae Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. for the Independent Women Law Ctr. Amicus Curiae Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); Amicus Curiae Br. Liberty Justice Cetr. and Firearms Pol'y Coal. Amici Curiae Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Amicus Br. Am. Ctr. for Law and Justice Amicus Curiae Supp. of Neither Party, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255); *see* Br. Amici Curiae Amer.'s for Prosperity Found. and the Rutherford Institute Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[186] *See* Br. for Amicus Curiae Parents Defending Educ. Supp. Resp'ts, Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (No. 20-255).

[187] *See* Br. for the HISD Student Congress et al. as Amici Curiae in Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[188] *See* Br. for Mary Beth Tinker and John Tinker as Amici Curiae Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[189] *See* Br. VanHo Law as Amicus Curiae Supp. Resp'ts, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255).

[190] *See supra* note 189 at 1. ("[There are] concerns with . . . the diminishment and subjugation of parental rights and responsibilities to governmental officials, including school officials.").

pandemic?[191] Without a defined standard, how would schools know whether they could punish off-campus speech at all?[192] What if a student engaged in off-campus speech that constituted cyber-bullying or harassment?[193] Does the advancement of technology mean that schools can monitor and punish student speech, no matter where in the world that student may be?[194] Does the advancement of technology mean that schools can monitor and punish student speech, no matter where in the world that student may be?[195] Would suspending even a few

---

[191] *See, e.g.*, Amicus Br. of First Amendment and Educ. Law Scholars as Amici Curiae Supp. Pet'r at 13, Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (No. 20-255) ("It invokes the specter of signaling to students that they cannot express bona fide disagreement with what is happening at school, even when they use their own device at home, not on school time."); *see* Br. of Amici Curiae Jane Bambauer et al. in Supp. of Resp'ts at 3, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255) ("During the pandemic, the classroom itself has become a virtual space, in which neither the teacher nor any of the students is on school grounds.").

[192] *See, e.g.*, Br. of First Amendment and Education Law Scholars as Amici Curiae Supp. Pet'r at 2-3, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255) ("[A three-part test would] clarif[y] the broad scope of those rights and offer[] certainty and predictability for schools' legitimate regulation in this sphere.").

[193] *See supra.* ("The new First Amendment challenge for public schools is how to address the hostile student cyberspeech without infringing on students' right to offer bona fide commentary and critique online."); *see* Br. of Massachusetts et al. as Amici Curiae in Supp. Neither Party at 2–3, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255) ("[M]ost States recognize that cyberbullying and in-person bullying, even when they occur off campus, can result in such interference or infringement of student rights. A categorical rule that the *Tinker* framework does not apply to off-campus speech would undermine state efforts to address all forms of bullying that substantially interfere with the work of the school or impinge upon other students' rights to be secure and to be let alone."); *see* Br. for Amici Curiae Cyberbullying Research Ctr. et al. in Supp. Pet'r at 3, *Mahanoy Area Sch. Dist.*, 594 U.S. 180 (No. 20-255) ("[S]chools' ability to confront bullying is, quite literally, a matter of life and death for roughly 56 million children attending about 131,000 public schools across the Nation.").

[194] *See* Brief of Amici Curiae Electronic Frontier Foundation et al. in Support of Respondents at 8, Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (No. 20-255) ("[W]ith the pervasive use of technology blurring the boundaries between students' school and private lives, it is more critical than ever for courts to draw a clear line protecting off-campus speech."); *see* Amicus Curiae Brief of the Liberty Justice Center and Firearms Policy Coalition in Support of Respondents at 3, Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180 (No. 20-255) ("This Court should affirm the decision below, and find that school administrators have no power to censor students or teachers speaking outside the context of the school. To do otherwise would license the bad actors described herein to exercise panoptic control over their charges, wherever they may wander.").

[195] *See* Brief of Amici Curiae Electronic Frontier Foundation, *supra* note **Error! Bookmark not defined.**, at 8, *Mahanoy*, 594 U.S. 180 (No. 20-255) ("[W]ith the pervasive use of technology blurring the boundaries between students' school and private lives, it is more critical than ever for courts to draw a clear line protecting off-campus speech."); *see* Amicus Curiae Brief of the Liberty Justice Center, *supra* note **Error! Bookmark not defined.**, at 3, *Mahanoy*, 594 U.S. 180 (No. 20-255) ("This

students over their off-campus speech chill the speech of others and deter them from calling out for change and/or engaging in important political and social conversations?[196] Would student journalists feel restricted in what they could publish off-campus?[197] Would girls feel like their speech was more restricted than that of boys?[198] Did the uneven power dynamic between students and teachers already chill speech, such that allowing schools to discipline off-campus speech would exacerbate students' fears about speaking out about issues important to them?[199] Would allowing schools to discipline off-campus speech lead to schools—and the government at large—further intruding into students' homes and other private spaces?[200] Would a ruling in favor of the school district lead school officials down a slippery slope in which religious expression might also be chilled?[201]

Court should affirm the decision below, and find that school administrators have no power to censor students or teachers speaking outside the context of the school. To do otherwise would license the bad actors described herein to exercise panoptic control over their charges, wherever they may wander.").

[196] *See* Brief of Current and Former Student School Board Members as Amici Curiae Supporting Respondents at 2, *Mahanoy*, 594 U.S. 180 (No. 20-255) ("[T]he expansive and unprecedented authority to regulate off-campus speech claimed by the school district here would subject a great deal of core political speech to regulatory scrutiny and chill students from critiquing the school or freely using their voices to advocate for change.").

[197] *See* Brief of the Student Press Law Center et al. as Amici Curiae in Support of Respondents at 1-2, *Mahanoy*, 594 U.S. 180 (No. 20-255) ("In today's media environment where independent publications and online mediums are often the only platforms available to student journalists, *Amici* believe that reducing the First Amendment protections for off-campus speech would improperly expose student journalists and student "whistleblowers" to school discipline and chill their socially valuable speech. . . . Because of the heavy censorship of school publications, student journalists are increasingly taking their speech off campus in order to address issues important to their lives.").

[198] *See* Brief for the Independent Women Law Center as Amicus Curiae Supporting Respondents at 1, *Mahanoy*, 594 U.S. 180 (No. 20-255) ("[A]llowing school officials to punish student speech on the basis of its content will disproportionately chill the speech of female students at a time when many are just starting to use their voices to advocate—online and elsewhere—for themselves and for others.").

[199] *See* Amicus Brief of the American Center for Law and Justice, *supra* note 182, at 1, *Mahanoy*, 594 U.S. 180 (No. 20-255) ("The imbalance of age and authority between student and teacher or administrator make the mere assertion of free speech rights daunting for most public school children.").

[200] *See* Brief for Amici Curiae Americans for Prosperity Foundation, *supra* note 182 at 2, *Mahanoy*, 594 U.S. 180 (No. 20-255) ("While this case turns on the use of Snapchat, expanding school authority over off-campus speech naturally implicates other technologies, allowing schools to observe students' homelife, including spaces in which parents or other family members have a right to privacy and autonomy.").

[201] *See* Brief Amicus Curiae of The Becket Fund for Religious Liberty, *supra* note 179, at 2, *Mahanoy*, 594 U.S. 180 (No. 20-255) ("[G]iving public school administrators the power to police student speech whenever and wherever it occurs…would chill students' religious expression and restrict parental rights.").

All of these questions were critically important in deciding the rights of school children. But because the country was still in the thick of the COVID pandemic and the Supreme Court was not holding in-person arguments, Brandi and the Levy family did not get the opportunity to attend.[202] In fact, the oral argument in Brandi's case was over the phone. Not Zoom—the Supreme Court has never allowed cameras of any kind—but the telephone. Brandi didn't listen to much of it. "I listened to some, I don't know, it kind of took four hours. It was a long while."[203]

As is typical in Supreme Court litigation, the case had by now changed hands. Because the Supreme Court's rulings become law across the nation and therefore affect hundreds of millions of people, most cases before the Court are now argued by members of the Supreme Court bar, or experts in Supreme Court litigation.[204] The head of the ACLU, David Cole, argued on Brandi's behalf. Lisa Blatt, a veteran Supreme Court litigator, argued for the school district. And Malcolm Stewart, the Deputy Solicitor General, argued for the United States, urging the Court to adopt a nuanced stance which recognized that schools should be able to address off-campus speech when it related to harassment and bullying of students, potentially depriving them of educational opportunities protected by federal law.

The argument opened with Lisa Blatt asserting that calling off-campus speech *Tinker*-proof was unworkable and likely to lead to confusion.[205]

> When it comes to the Internet, things like time and geography are meaningless, and it makes absolutely no sense whatsoever to say that the same speech is somehow within the school's regulation if it's one foot on campus or one foot off campus or at the Starbucks or at the CVS or in

---

[202] Zoom interview with Larry Levy, *supra* note 60.

[203] In-person interview with Brandi Levy, *supra* note 30. In actuality, although the argument was indeed long by Supreme Court standards, it was only one hour and fifty-one minutes long. *See* Oral Argument, *Mahanoy*, 594 U.S. 180 (No. 20-255), https://www.supremecourt.gov/oral_arguments/audio/2020/20-255.

[204] *See, e.g.*, Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1491 (2008); *See* Tracey E. George et al., *The SCOTUS Tournament: Winning Isn't Everything*,VA. PUB. L. & LEGAL THEORY RSCH. PAPER NO. 2025-09; VA. L. & ECON. RSCH PAPER NO. 2025-03; VANDERBILT L. RSCH PAPER NO. 5110783 (Jan. 28, 2025), https://ssrn.com/abstract=5110783.

[205] *See* transcript of Oral Argument at 5:8–11, 13–17, *Mahanoy*, 594 U.S. 180 (No. 20-255).

> your car or on the school bus. The Internet is ubiquitous. It -- it -- it just doesn't have a geography.[206]

Pushing back, one Justice applied Blatt's argument to the facts of Brandi's case, asking:

> Did that cause a material and substantial disruption? I don't see much evidence it did. And if swearing off campus did, I mean, my goodness, every school in the country would be doing nothing but punishing. And it certainly didn't help others -- I mean disrupt others. It didn't hurt others as far as I'm aware . . . [U]nless you meet Tinker, you can't punish it, at least in the context of protests, and, here, pretty clearly, it didn't satisfy what Tinker says is necessary to satisfy.[207]

Another Justice agreed:

> [The coach] spent a few minutes talking to students, reporting this incident. How is that a substantial disruption, number one? And how is this, the nature of the speech, such that it intends to provoke disrespect when she put it to a page that was supposed to disappear and it was only a classmate taking a snapshot who showed it to anybody?[208]

Several Justices offered hypotheticals designed to test the rule. What if a student wore a T-shirt with a potentially offensive message to school?[209] What if a student refused to use another student's chosen pronouns?[210] "[What if a s]tudent e-mails his classmates the answer to the geometry homework every day after school?"[211]

Like the appeals court judges, the Justices reached for clarity. "I think, if we're going to -- if schools are going to have

---

[206] *Id.* at 10:8–16.
[207] *Id.* at 12:17–24, 13:1–5.
[208] *Id.* at 20:25, 21:1–8.
[209] *See id.* at 23:2–8.
[210] *See id.* at 18:1–7.
[211] *Id.* at 51:16–18.

any authority under *Tinker* outside of school, there has to be a clear rule. That's what I'm looking for."[212]

The Court also sought to define what exactly constituted school speech. Was a statement in the school parking lot close enough geographically?[213] What about on the city sidewalk on the way to school?[214] What if "it's . . . a text or a snap that you send . . . from . . . the park and it's read in the cafeteria, is that off campus or . . . on campus?"[215]

When Mr. Cole's turn to argue came around, he disagreed with Blatt and Stewart's interpretation of *Tinker*, saying the case was "limited to school-supervised or school-sanctioned settings."[216] He argued that to say otherwise was to "transform a limited exception into a 24/7 rule that would upend the First Amendment's bedrock principle and would require students to effectively carry the schoolhouse on their backs in terms of speech rights everywhere they go."[217]

It did not take long for the Court to hand down its decision in Brandi's case. Less than two months after the oral argument, on June 23, 2021, the Court held that *Tinker* did not reach off-campus speech. With eight of nine Justices agreeing, the Court said:

> [The Snap] did not involve features that would place it outside the First Amendment's ordinary protection. B. L.'s posts, while crude, did not amount to fighting words . . . And while B. L. used vulgarity, her speech was not obscene as this Court has understood that term . . . To the contrary, B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. . . . Consider too when, where, and how B. L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private

[212] *Id.* at 17:9–12.
[213] *See id.* at 22:11–13.
[214] *See id.* at 81:20–23.
[215] *Id.* at 63:12–15.
[216] *Id.* at 62:1–2.
[217] *Id.* at 62:12–17.

> circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless . . . diminish the school's interest in punishing B. L.'s utterance.[218]

The Court continued by saying that even if the *Tinker* standard applied in this kind of case, the standard would not be met.

> The school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action . . . Rather, the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats . . .But when one of B. L.'s coaches was asked directly if she had 'any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking ... about it," she responded simply, "No." . . . The alleged disturbance here does not meet *Tinker*'s demanding standard.[219]

Because the Supreme Court almost always hands down its decisions by the end of June, Court watchers, including the attorneys in this case, knew a decision had to be coming when an unusually mild-for-summer June 23[220] dawned in Washington, D.C. But just like on the day when the Court granted certiorari, Brandi was still asleep at 10:00 a.m. when the Court announced its decision in her case.

---

[218] *Mahanoy*, 594 U.S. at 191.
[219] *Id.* at 192–93.
[220] The high temperature that day was 73 degrees. *Weather in Washington, D.C. in June 2021*, WORLD WEATHER, https://world-weather.info/forecast/usa/washington_1/june-2021/ (last visited Jan. 23, 2026).

> I was at my house . . . it was summer, so I wasn't at college, and I don't even know exactly how, but I got a notification, and it was on Facebook. . . . [My lawyers] texted me literally a minute after I seen it. I seen it on Facebook, screenshotted it and sent it to them. And as I sent it to them, they texted me. . . . They just kept texting me saying, congratulations. . . . It was just, there was so much text messages from them.[221]

Molly Tack-Hooper was not surprised by how the Court ruled, but she did have a thought about how one small-town business might be surprised by its sudden fifteen minutes of fame. "I texted Larry, and I was like, 'does the owner of the Cocoa Hut know it's famous?' . . . 'I don't think so. . . . [g]o tell him.'"[222]

For Brandi and her team, it was the end of a long road. It was time to let out a deep breath and celebrate. Molly Tack-Hooper remembers:

> I was working from home because [we hadn't gone back to the office since] COVID so I did a little victory dance by myself in my living room/office, then texted with Brandi and Larry and Vic and Sara, then finished reading the opinion, then a little bit more grinning and dancing by myself :-).[223]

And how did Brandi celebrate? "Honestly, I had . . . pizza and ice cream."[224]

***

While the ACLU and the Levy family celebrated, legal scholars and practitioners have been mixed in their reactions to the Supreme Court's decision in *Mahanoy Area School District v. B.L.* As Professor Justin Driver describes, "*B.L.* initially elicited celebration from some staunch protectors of student speech

---

[221] In-person interview with Brandi Levy, *supra* note 30.
[222] Zoom interview with Tack-Hooper, *supra* note 59.
[223] *See* text message from Molly Tack-Hooper, Staff Att'y, ACLU of Pa., to Lisa Tucker, Author, (Aug. 11, 2025, at 1:22 p.m.) (on file with author).
[224] In-person interview with Brandi Levy, *supra* note 30.

rights."[225] Driver quotes advocate David Cole, who stated after the opinion was handed down that "[p]rotecting young people's free speech rights when they are outside of school is vital and this is a huge victory for the free speech rights of millions of students who attend our nation's public schools."[226]

But concerns are many that, while Brandi Levy certainly benefited from the decision, not all students will. In fact, as Mary-Rose Papandrea, a leading First Amendment scholar has put it, many feel that "*Mahanoy* is no victory for students."[227] Professor Papandrea posits that "The [*Mahanoy*] Court offers no guardrails to prevent schools from overextending their authority over student speech aside from essentially warning judges to 'be careful.'"[228] Many scholars agree with her assertion that "[the case] raises complicated questions not only about the proper scope of school authority but also about the rights of minors more generally, the distinction between public (or political) and private speech, protections for harassment and bullying, and the constitutionality of restrictions on lewd or profane speech."[229] In part, Papandrea asserts, the Court's approach was surprising and underwhelming for the very same reason that the ACLU was taken aback—*Mahanoy* is not really a *Tinker* case.[230]

And it is not really a *Tinker* case for many reasons. Professors Dailey and Rosenbury argue that:

> [O]n its face, the decision reaffirmed *Tinker*'s fundamental protection for the free speech rights of children even when off campus. In that regard, it was a major win for children's free speech rights, the first in over fifty years. . . . Properly understood, . . . *Mahanoy* may be better described

---

[225] Justin Driver, *The Coming Crisis of Student Speech*, 76 STAN. L. REV. 1511, 1516 (2024).
[226] Adam Liptak, *Supreme Court Rules for Cheerleader Punished for Vulgar Snapchat Message*, N.Y. TIMES (June 23, 2021), https://perma.cc/Q8XP-2VXK.
[227] Mary-Rose Papandrea, *Mahanoy v. B.L. & First Amendment "Leeway*,*"* 2021 SUP. CT. REV. 53, 54 (2021).
[228] *Id.*
[229] *Id.* at 55.
[230] *See id.* at 67 ("Rather than resolve the difficult question of whether and when schools should have the authority to regulate these troublesome types of expression, the Court simply embraced the *Tinker* standard."). Papandrea goes on to explain that "failing to address what *Tinker* permits schools to do—and not do—is a big omission. Without a robust discussion about when school administrators can regulate speech under *Tinker*, it is impossible to make a judgment about whether it is constitutional to give them the authority to rely on *Tinker* to regulate their students' speech on social media or wherever else it might occur." *Id.* at 70.

> as a parental rights case rather than a children's rights case. [231]

Even to the extent that *Tinker* may be an appropriate analytical framework for off-campus speech, scholars have criticized the Court's failure to be specific in just how the *Tinker* doctrine applies outside the schoolhouse gates.[232] In simple terms, say many, "The Court sidestepped the primary constitutional inquiry in this case, which is what type of off-campus speech, if any, may be regulated by school officials."[233]

And the question may come back, as the ACLU always believed, to *Fraser.* Professor Driver argues that the *Mahanoy* opinion "affords insufficient protection to off-campus student speakers who criticize school officials using harsh, even vulgar language."[234]

In short, did the Supreme Court go far enough in posing its Question Presented? Was *Mahanoy* a question of "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus"?[235] Or was *Tinker* the wrong starting point altogether? The legacy of the case of the cursing cheerleader will be in asking this question and in the progeny cases that seek to answer it.

***

---

[231] Anne C. Dailey & Laura A. Rosenbury, *Beyond Home and School*, 91 U. CHI. L. REV. 567, 584–85 (2024). *See also* Frances Williamson, Note, *The Meaning of "Public Meaning": An Originalist Dilemma Embodied by Mahanoy Area School District*, 46 HARV. J.L. & PUB. POL'Y 257, 275–84 (2023) (discussing the *in loco parentis* analysis in *Mahanoy*).

[232] *See, e.g.*, Laura McNeal, *Integrating the Marketplace of Ideas: A New Constitutional Theory for Protecting Students' Off-Campus Online Speech*, 76 STAN. L. REV. 1575, 1597–98 (2024) ("What was the Court's response to whether *Tinker*'s test applies to off-campus student speech? It depends . . .The Court asserted that the *Tinker* test may apply to off-campus speech because, unlike the Third Circuit, the Court did not believe that 'the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus.' But the Court failed to clarify to what extent, if any, a school's special interests in regulating student speech apply when the expression is off campus.").

[233] *Id.* at 1598.

[234] Justin Driver, *The Coming Crisis of Student Speech*, 76 STAN. L. REV. 1511, 1519 (2024).

[235] Mahanoy Area Sch. Dist. v. B. L., 594 U.S. 180, 187 (2021) (citing Pet. for Cert. 1).

Larry Levy never got the $1.00 he was owed by the school district for winning the case. He had planned to frame it and hang it in the same basement bar where he and Brandi had first met Molly Tack-Hooper all those years before. Perhaps unsurprisingly, he has not let that go. "I gotta talk to Molly or one of them about that."[236]

Brandi attended college for a year and a half at Bloomsburg University, where she majored in accounting. She tried out for college cheer, but "it was nothing like high school cheer," and she didn't make the team.[237]

Today, Brandi Levy still lives in Mahanoy City. She and her boyfriend, Matt, share an apartment with their two kittens, Bratt and Skitz. Brandi has worked as a cashier at a local grocery store and as an employee at an Amazon warehouse. People still recognize her and ask her about her case. Will she tell her future kids about it someday? "Yeah, definitely. Before they go to school."[238]

[236] Zoom interview with Larry Levy, *supra* note 60.
[237] *See* text message from Brandi Levy, to Lisa Tucker, Author, (June 26, 2024, at 10:29 a.m.) (on file with author).
[238] In-person interview with Brandi Levy, *supra* note 30.

SEEING ISN'T BELIEVING: POLITICAL SATIRE AND THE EXPANDING POWER OF AI DEEPFAKES TO FOOL AUDIENCES

Ethan C. Brinkley*

"Are you a politician or does lying just run in your family?"[1]

ABSTRACT

Infamously, lying has a longstanding association with politics. While politicians are notorious for making promises to voters that they cannot keep, candidates are not the only "liars" in the political arena. Of course, anyone can lie about politics: candidates, government entities, government employees, and the common voter. Though very few people openly say they are lying. That is, except for comedians. When somebody tells a joke, especially about a political candidate, many people tend not to rely on that content to make a voting decision. However, what if the person hearing the joke "actually" believes what they are being told? With AI deepfakes, that notion is becoming a reality. When AI deepfakes depict candidates doing or saying something entirely fabricated for the sake of "satire," the joke becomes dangerous when a reasonable person starts to believe it. Not just a reasonable person, but a voting constituent who may form their opinion on a candidate based upon their depictions in an AI deepfake and act accordingly at the ballot box. This danger has been recognized by state legislatures, which have reacted by banning the production of AI deepfakes during election periods. But is this practice constitutional?

INTRODUCTION

From caricatures of Thomas Jefferson as an anarchist to late-night sketches that distort candidates into comic archetypes, political culture has long embraced sharp-edged satires.[2] The First Amendment's protection for such expression is unusually strong, crystallized in *Hustler v. Falwell,*[3] where the Supreme Court refused to make liability turn on whether a public figure took a joke seriously. Satire thrives precisely because it blurs that line between exaggeration and reality.

---

* Juris Doctor Candidate at the University of North Carolina School of Law, Class of 2027.

[1] FRIED GREEN TOMATOES (Universal Pictures 1991).

[2] "Mad Tom in a Rage," *Presidential Campaigns: A Cartoon History, 1789-1976*, INDIANA UNIVERSITY LIBRARIES, https://collections.libraries.indiana.edu/presidentialcartoons/items/show/30 (last visited Mar. 29, 2026).

[3] *See* 485 U.S. 46 (1988).

Deepfakes produced using artificial intelligence (AI) threaten to blur that line in an entirely different way. Deepfakes use AI technology to make people appear to say or do things that they never said or did.[4] Deepfakes "merge, combine, replace, and superimpose images and video clips to create fake videos that appear authentic", and with the speed of modern social media, a convincing deepfake of a politician can quickly reach millions.[5] These AI deepfakes can turn a politician's face and voice into a seemingly authentic statement or action. The viewer may not know whether they are encountering a *Hustler*-style parody/intentionally obvious joke, a fabricated event designed to mislead, or if they are watching reality. State legislatures, including California and Hawaii, have responded by attempting to ban "materially deceptive" political deepfakes during election periods.[6] Yet these laws interact uneasily with doctrines built to protect political satire from government reach.

Part I of this note begins by summarizing the use of political satire throughout history, both in the United States and abroad. It examines the line between political satire and blatant lying, and how that line has been severed by the use of AI deepfakes that have the ability to fool a reasonable person. Part II then addresses the legislative response to these "materially deceptive" media as state legislatures try to prevent them from impacting voters during election periods. This will be done through a case study of recent legislation coming out of California and Hawaii. These statutes will help in framing the constitutional question that arises when satirical AI deepfakes meet First Amendment doctrine. Part III both describes and applies existing First Amendment doctrine to the aforementioned laws. Once the relevant doctrine is applied, an analysis using the proper scrutiny level will be conducted to determine the constitutionality of the California and Hawaii's bills. Part IV will end by offering recommendations to the drafters of the bills to help survive constitutional scrutiny. Ultimately, this note asks if political AI deepfakes that claim to

---

[4] *See* John Villasenor, *Artificial intelligence, deepfakes, and the uncertain future of truth*, BROOKINGS (Feb. 14, 2019), https://www.brookings.edu/articles/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth/.

[5] *See* Mika Westerlund, *The Emergence of Deepfake Technology: A Review*, TECHNOLOGY INNOVATION MANAGEMENT REVIEW (Nov. 2019), https://www.researchgate.net/publication/337644519_The_Emergence_of_Deepfake_Technology_A_Review.

[6] Cal. Elec. Code § 20012(a)(3) (West 2024); Haw. Rev. Stat. §11-303 (2024).

be used satirically are protected under current First Amendment doctrine.

I. HISTORY OF POLITICAL SATIRE – FROM BC TO AI

A. Historical Foundations of Political Satire and Deception

As long as politics has existed, so has political comedy and satire.[7] Take for example Aristophanes, a Greek playwright who lived from approximately 446 to 386 BCE during the Classical Athens era, who used his plays to target politicians and mock societal norms in ancient Athens.[8] In his comedies, Aristophanes would present Cleon, a prominent Athenian politician and general, only in a state of anger, and "when he sp[oke], his voice sound[ed] like a scalded pig."[9] In other works, Aristophanes would skip the angered voice altogether and simply depict Cleon as an actual dog, as he did plays like *Wasps* and *Peace*.[10] Even dramatic representations of political figures, such as Shakespeare's *Julius Caesar* (1599), which depicts the infamous Roman dictator ignoring the warnings of his assassination resulting in war and the death of his assassination conspirators, has been reproduced by countless theaters since the 1600s.[11] While these examples are centuries old, it's easy to draw similarities to modern political satire. Some even draw *direct* links to modern politics as a New York production of Shakespeare's *Julius Caesar* lost sponsorships from Bank of America and Delta Airlines in 2017 for depicting a "distinctly Trumpian Caesar."[12]

These European roots of political satire were the launching pad for modern American political comedy. This is

---

[7] *See* Sue M. Poremba, *Probing Question: How old is political satire?*, PENNSTATE (Jun. 19, 2008), https://www.psu.edu/news/research/story/probing-question-how-old-political-satire.

[8] *See Aristophanes and Political Satire*, THE FIVEABLE, https://fiveable.me/history-theatre-i-classical-athens-elizabethan-london/unit-3/aristophanes-political-satire/study-guide/b8BRJrjOhSASNUsi.

[9] Jona Lendering, *Cleon*, LIVIUS.ORG (Oct. 28, 2020), https://www.livius.org/articles/person/cleon/.

[10] *See* Costas Apostolakis, *Aristophanes' Knights and Fifth-Century Political Rhetoric*, CLASSICS@ JOURNAL (2023), https://classics-at.chs.harvard.edu/aristophanes-knights-and-fifth-century-political-rhetoric/.

[11] *See Julius Caesar: Synopsis and plot overview of Shakespeare's Julius Caesar*, SHAKESPEARE BIRTHPLACE TRUST (2025), https://www.shakespeare.org.uk/explore-shakespeare/shakespedia/shakespeares-plays/julius-caesar/.

[12] Emma Talkoff, *'Julius Caesar' Isn't Unique. Americans Love Talking About Politics Through Shakespeare*, TIME (Jun. 12, 2017), https://time.com/4815178/julius-caesar-trump-shakespeare-play/.

evident in the works of even the founding fathers, including Benjamin Franklin, who has been described as "a prolific political satirist, in works such as Rules by Which a Great Empire May Be Reduced to a Small One, written in 1773."[13] The breadth of early-American satire is still felt today as the distinct two-party political divide was exacerbated by political cartoons of the 19th century when cartoonist Thomas Nast created the symbols of the elephant for Republicans and the donkey for Democrats.[14] American pop culture continued to see the growth of political comedy throughout the 20th century, notably with the airing of Saturday Night Live in 1975, which is known for its topical parodies, impersonations, and "pushing boundaries with its sketches."[15] The growth of technology and internet articles provided room for political parody to flourish, with satirical "news" platforms such as *The Onion* and *The Babylon Bee* rising in popularity.[16] Articles, such as one headlined "Congress Takes Group of Schoolchildren Hostage" accompanied by the quote, "[w]e need $12 Trillion Or All These Kids Die" and a photoshopped image of then-House Speaker John Boehner brandishing a gun pointed towards the stock-image of a school-age child, have been widely shared for the better part of the last decade.[17]

These examples throughout political history have one thing in common: most reasonable people at the time did not believe that the political depiction at issue was the *literal* reality. Greek playgoers did not believe that Cleon had physically morphed into a dog in the same way that *Onion* readers did not actually believe that Congress held a group of visiting schoolchildren hostage. While these political media can definitely make an impact on elections through their humor and commentary, it does not take a political scientist to conclude that if voters *actually* believed that their representatives were holding schoolchildren at gunpoint (or physically manifested into canines like Cleon), then they would not vote for them at the ballot box. Historically, these jokes were delivered in contexts

---

[13] Poremba, *supra* note 6.
[14] *See id.*
[15] *"Saturday Night Live" debuts*, HISTORY.COM (May 27, 2025), https://www.history.com/this-day-in-history/october-11/saturday-night-live-debuts.
[16] *See generally* Stephen Skalicky, *Free speech as a unifying punchline for The Onion and The Babylon Bee,* COMEDY STUDIES (Apr. 24, 2025), https://www.tandfonline.com/doi/full/10.1080/2040610X.2025.2497018?af=R#abstract.
[17] *Congress Takes Group of Schoolchildren Hostage*, THE ONION (Sept. 29, 2011), https://theonion.com/congress-takes-group-of-schoolchildren-hostage-1819572988/.

where audiences understood the genre and the intent of the speaker, such as plays or newspapers that were clearly labeled as satire. This transformation from comedy that viewers clearly saw as jokes into comedy that viewers are unable to decipher from reality has already occurred.

There is even a term derived from the Onion News Network called "eating the Onion," which occurs when someone takes satirical news seriously.[18] Cases where individuals are said to have "ate the Onion" and fell for satirical headlines are easy to come by. [19] Under a satirical article headlined "In Pearl Harbor Remembrance Day Address, Kamala Harris Urges Nation Not To Forget January 6" a viewer commented "[t]here are times I just simply cannot stand this woman. She is an utter failure and puts her agenda above everything else." (edited for clarity).[20] Under another headline stating "In Bold Anti-Trump Statement, Pelosi Rips Up Bible," commenters voiced concerns that "she needs to be gone," "what was the point she was trying to make," and "she's an evil person."[21] However, it's not just constituents that are being fooled by these political jokes, but even politicians themselves. President Donald Trump himself was fooled by an article headlined "Twitter Shuts Down Entire Network To Slow Spread of Negative Biden News."[22] President Trump retweeted the post stating "[w]ow, this has never been done in history … [w]hy is Twitter doing this."[23]

However, maybe the fact that individuals are being fooled by tricky headlines is not the fault of those who write them. Instead, it may say more about the political state the world is in today. As Seth Dillon, CEO of Babylon Bee, said when questioned about fake headlines that ended up becoming true, "the problem isn't that our satire is too close to reality. It's that

---

[18] *See* Final Fox, *Eating the onion*, URBAN DICTIONARY (Mar 10, 2020), https://www.urbandictionary.com/define.php?term=Eating+the+onion.

[19] *See generally* r/AteTheOnion, REDDIT, https://www.reddit.com/r/AteTheOnion/ (last visited Mar. 29, 2026). (Reddit is an online discussion platform which contains "subreddits" dedicated to certain topics. Cited here is an entire subreddit with nearly 600 thousand members that post daily on individuals/news reports that "ate the Onion," or believed a satirical headline).

[20] The Babylon Bee Podcast, *Ten Times People Thought The Babylon Bee Was Real*, YOUTUBE (Jan. 17, 2023), https://www.youtube.com/watch?v=kmE3Jdl8SPI, at 3:10.

[21] *Id.* at 7:50.

[22] *Id.* at 8:30.

[23] *Id.*

reality is too close to satire, so our jokes keep coming true."[24] This is a sentiment that a reasonable person would likely agree with. However, where is the tipping point between a headline being satire versus a plain old lie?

B. Lying as a Political Norm

Lies are everywhere. Behavioral studies suggest the average person tells one to two lies per day.[25] Politicians, however, have long been culturally (and sometimes empirically) associated with a far higher output. Take for instance CNN's fact-check report which claimed that Donald Trump delivered more than 30 false claims during the 2024 presidential debate against Kamala Harris.[26] Shortly after the release of that article, social media lit up with the assertion that a CNN official said "Kamala lied seventeen times in the first ten minutes" and that "it would be easier to count truths."[27] This post asserting Harris' seventeen lies caught the attention of Reuters, a global news agency, which fact-checked the social media post and determined that it was a lie posted by a satirical Facebook page.[28] In short, Reuters conducted a fact-check of a fact-check of a fact-check, and determined that the original statement was a lie. Politics often operates in this recursive hall of mirrors.

Political satire is no different. Even the most obviously exaggerated parody is still a deliberate falsehood. But as the adage goes, sometimes seeing is believing.[29] That is where AI deepfakes pose a real problem in tricking voters, regardless of whether they are produced with the intention of humor or manipulation.

---

[24] Kassy Dillon, *When satire becomes reality: Nearly 100 Babylon Bee joke stories have come true,* FOX NEWS (Mar. 26, 2023), https://www.foxnews.com/entertainment/satire-reality-nearly-100-babylon-bee-joke-stories-come-true.

[25] *See* Chirstian B. Millier, *Are Most People Liars?*, FORBES (Oct. 17, 2022), https://www.forbes.com/sites/christianmiller/2022/10/17/are-most-people-liars/?fbclid=IwAR0i3yanJHKI_usF7-RpZwcIQ1RQp1Fkw5VuaoKHamBO54FrGy2na2Ls7jk&sh=1d7f1719bd58.

[26] *See Fact-checking the ABC News presidential debate*, CNN POLITICS (Sep. 11, 2024), https://www.cnn.com/2024/09/10/politics/fact-check-debate-trump-harris#:~:text=When%20can%20passengers%20expect%20air%20travel%20to%20return%20to%20normal?&text=Former%20President%20Donald%20Trump%20delivered,remarks%20made%20by%20each%20candidate.

[27] *Fact Check: CNN did not report that Harris made 17 false claims during the debate*, REUTERS (Sept. 23, 2024), https://www.reuters.com/fact-check/cnn-did-not-report-that-harris-made-17-false-claims-during-debate-2024-09-23/.

[28] *See id.*

[29] *See generally* THE POLAR EXPRESS (Warner Bros. Pictures 2004).

C. The Rise and Implementation of AI in Politics

In recent political history, there have been several depictions of politicians that were edited or entirely falsified using AI. In July 2024, a video surfaced online appearing to show Philippine President Ferdinand Marcos Jr. snorting cocaine off a tray.[30] The low-quality video made rounds on social media and went viral before being debunked days later as an AI-generated fake.[31] That same year in the U.S., a deepfake robocall featuring a cloned voice of President Joe Biden urged New Hampshire voters not to participate in their primary election.[32] Also, in the lead-up to the 2024 U.S. presidential election, fabricated videos falsely accusing then-Vice President nominee and Minnesota Governor Tim Walz of sexual assault spread across political forums before being flagged as a deepfake.[33] These incidents are not outliers, but instead are representative of the rapidly growing threat that is AI-generated deepfakes and its capability to manipulate voters through permanently damaging a candidate's reputation within a single news cycle.

Deliberate, non-comedic uses of AI to impact elections, as seen in the aforementioned cases about the fake phone calls from President Biden and the false sexual assault accusations about Tim Walz, are not satire. But AI's role in satire is growing rapidly. Famous novelist Salman Rushdie commented on AI's role in comedy in saying that he believes "AI will not be a threat to authors until ChatGPT can write 'a funny book.'"[34] That is for literature, though. Online is a different story. Some experts studying the development in AI predict that "up to 90% of online content will, at least in part, be synthetic by 2027."[35] Acclaimed comedian Jordan Peele warned of AI's use in politics by making

---

[30] *See* Celine I. Samson & Bryan D. Manalang, *'Polvoron' video crumbles, AI experts find traces of facial manipulation*, VERA FILES (Sep. 16, 2024), https://verafiles.org/articles/polvoron-video-crumbles-ai-experts-find-traces-of-facial-manipulation.

[31] *See id.*

[32] *See* Max Matza, *Fake Biden robocall tells voters to skip New Hampshire primary election*, BBC (Jan. 22, 2024), https://www.bbc.com/news/world-us-canada-68064247.

[33] *See* Bill McCarthy, *Tim Walz targeted by unfounded sexual abuse claim*, AFP FACT CHECK (Oct. 28, 2024), https://factcheck.afp.com/doc.afp.com.36KE2QZ.

[34] Anna Broinowski, *From South Park v Trump to AI slopaganda: deepfakes are now part of the news cycles, for better and for worse*, THE GUARDIAN (Sept. 25, 2025), https://www.theguardian.com/technology/2025/sep/26/deepfakes-ai-slop-now-part-of-news-cycle-south-park-v-trump.

[35] *Content credentials: Strengthening multimedia integrity in the generative AI era*, AUSTRALIAN SIGNALS DIRECTORATE (Jan. 30, 2025), https://www.cyber.gov.au/business-government/secure-design/artificial-intelligence/content-credentials-strengthening-multimedia-integrity-in-the-generative-ai-era.

a deepfake himself in 2018 depicting President Barack Obama speaking of the dangers that AI plays in politics and urging voters to rely on credible news sources, lest we become a "f***ed up dystopia."[36]

The question of what happens when satire blends with politically charged AI deepfakes came to a head in 2024 when Christopher Kohls, a content creator known for his satirical posts of political figures, produced an AI-edited campaign video of then-Vice President and presidential candidate Kamala Harris.[37] At the time, Kohls maintained approximately 80,000 followers on X and 360,000 subscribers on YouTube.[38] The AI-generated Harris said the following in the video:

> I, Kamala Harris, am your Democrat candidate for president because Joe Biden finally exposed his senility at the debate. Thanks Joe. I was selected because I am the ultimate diversity hire. I'm both a woman and a person of color. So if you criticize anything I say, you're both sexist and racist. I may not know the first thing about running the country, but remember, that's a good thing if you're a deep-state puppet. I had four years under the tutelage of the ultimate deep state puppet; a wonderful mentor, Joe Biden. Joe taught me rule number one: carefully hide your total incompetence. I take insignificant things and I discuss them as if they're significant. And I believe that exploring the significance of the insignificant is itself significant.[39]

In the original post, Kohls clearly labeled the video as a parody and included a disclaimer noting that "sound[s] or visuals were significantly edited or digitally generated" and that it

---

[36] Broinowski, *supra* note 33.

[37] *See* Lara Korte, *Creator of Kamala Harris parody video sues California over election 'deepfake' ban*, POLITICO (Sept. 18, 2024), https://www.politico.com/news/2024/09/18/california-deepfake-ban-lawsuit-harris-00179975.

[38] *See* Columbia Global Freedom of Expression, *Christopher Kohls v. Bonta; X Corp. v. Bonta; The Babylon Bee v. Bonta*, GLOBAL FREEDOM OF EXPRESSION (Oct. 2, 2024), https://globalfreedomofexpression.columbia.edu/cases/christopher-kohls-v-bonta/#:~:text=Facts,candidate%20Kamala%20Harris's%20campaign%20ad [https://perma.cc/DL3K-L3E5].

[39] MR. REAGAN, *Kamala Harris Ad PARODY* (YouTube, July 26, 2024), https://www.youtube.com/watch?v=sVspeqNnoWM.

featured AI-generated content mimicking Harris's voice overlaid with clips from her actual campaign videos.[40] The popular reach of the parody was heightened exponentially when the video gained significant traction after Elon Musk shared it on the social media platform X, describing it as "amazing 😂."[41] Musk's repost of the parody netted over 100 million views and notably did not include the disclaimer deliberately telling viewers of its AI use.[42] Understandably, when AI-edited videos that tell knowing lies about elected officials are spread to hundreds of millions of potential voters, lawmakers (who are of course elected officials themselves) take notice.[43]

II. THE LEGISLATIVE RESPONSE TO AI DEEPFAKES AND POLITICAL SATIRE – NOT A JOKING MATTER

A. The Nationwide Trend in Deepfake Regulation[44]

As previously alluded to, state legislatures are swiftly taking action nationwide to address the very acute bipartisan concern that AI-generated deepfakes in election communications raise. Since 2019, forty-seven states have enacted legislation addressing some component of AI deepfakes (Alaska, Missouri, and Ohio are the three states that have not).[45] The growth of this wave of legislative action beginning in 2019 spiked dramatically, albeit unsurprisingly, in 2024.[46] Between 2019-2023, only twenty-four pieces of deepfake legislation were passed nationwide, and only seven of those bills related to political communications.[47] However, in 2024, eighty-one pieces of deepfake legislation were passed with twenty-two dealing with political communication.[48] The pace of states passing deepfake legislation is still picking up in 2025 with a total of seventy bills being passed as of July, 2025, but only eight of

---

[40] Columbia Global Freedom of Expression, supra note 37.
[41] *See* Elon Musk (@elonmusk), X (July 26, 2024), at 19:11 ET), https://x.com/elonmusk/status/1816974609637417112.
[42] *See id.*
[43] *See generally* Lara Bonatesta, *Forty-seven states have enacted deepfake legislation since 2019*, BALLOTPEDIA (Jul. 22, 2025), https://news.ballotpedia.org/2025/07/22/forty-seven-states-have-enacted-deepfake-legislation-since-2019/ (discussing deepfake legislation that has been enacted by states since 2019 and the increase in legislation since 2024).
[44] Data in the following section is recent as of November 2025.
[45] *See* Bonatesta, *supra* note 42.
[46] *See id.*
[47] *See id.*
[48] *See id.*

which dealt with political communication.[49] Instead of delving into the specific clauses of all thirty state bills restricting the use of AI deepfakes in political communication passed in the last two years, a deeper look into two particular bills may be more helpful. The first bill is California's AB-2839 (hereinafter "CA AB-2839"), which was passed in direct response to the previously mentioned deepfake video produced by Christopher Kohls who used AI to mimic Kamala Harris's voice in a campaign video.[50] The second is Hawaii's SB-2867 (hereinafter "HI SB-2867"), which is set to be effective in 2026.[51]

B. California's Statutory Approach (CA AB-2839)

A helpful touchstone for examining California's approach to combating AI deepfakes in elections is understanding the legislative purpose behind the statute's passage, which is no secret in the case of CA AB-2839. Elon Musk reposted Kohls's satirical deepfake in July 2024 and the California legislature passed CA AB-2839 in September 2024.[52] Section 6 of the bill helpfully explains why the drafters thought that urgency was necessary in passing the statute, citing that "[i]n the lead-up to the 2024 presidential election, candidates and bad actors are already creating and distributing deepfake images and audio and video content."[53] Additionally, California Governor Gavin Newsom posted on X just days after Musk's repost of the deepfake stating that "[m]anipulating a voice in an 'ad'" like Kohls had done "should be illegal."[54] This indicates that, at a minimum, Kohls's satirical AI deepfake was part of the reason why California passed CA AB-2839.

CA AB-2839 creates a new section of the California Elections Code that adds protections for candidates (state, local, and federal, including presidential candidates who appear on California ballots), election officials, elected officials, and election infrastructure (i.e. ballots, voting sites, voting machines, and other related equipment) against the distribution of "materially deceptive content."[55] Within the statute, "deepfake" means "media that is digitally created or modified such that it would falsely appear to a reasonable person to be an authentic

[49] *See id.*
[50] *See* Columbia Global Freedom of Expression, *supra* note 37.
[51] HAW. REV. STAT. §11-303 (2024).
[52] *See* Columbia Global Freedom of Expression, *supra* note 37.
[53] CAL. ELEC. CODE § 20012(a)(3) (West 2024).
[54] *See* Columbia Global Freedom of Expression, *supra* note 37.
[55] CAL. ELEC. CODE § 20012(b)(1).

record of the actual speech or conduct of the individual depicted in the media."[56] For the purposes of the present discussion, this analysis will narrowly focus on the provisions relating to candidates for any federal, state, or local elected office, despite the bill also having provisions relating to elected officials, election officials, and even the voting equipment itself.[57]

Section 3(b)(1)(A) provides that:

> A person, committee, or other entity shall not…with malice, knowingly distribute…an advertisement or other election communication containing materially deceptive content of…[a] candidate for any…elected office in California portrayed as doing or saying something that the candidate did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of a candidate. [58]

This prohibition applies only during a defined pre-election window of the 120 days leading up to any election in California.[59] Outside that period, the statute does not impose liability for distributing materially deceptive content about candidates.[60] The statute also creates two carve-outs that exempt certain uses of materially deceptive content when accompanied by a proper disclosure: (1) self-referential manipulation by candidates themselves, and (2) content that constitutes satire or parody.[61] This analysis focuses on the satire/parody exception because it is the most relevant to identifying the statute's operative language for protected expressive content.

Under Section 3(b)(3):

"This section does not apply to an advertisement or other election communication containing materially deceptive content that constitutes satire or parody if the communication includes a disclosure stating 'This _____ has been manipulated for the purposes of satire or parody,'"

with the blank filled by the appropriate media descriptor ("image," "audio," or "video").[62]

---

[56] § 20012(f)(4).
[57] *See id.*
[58] CAL. ELEC. CODE § 20012(b)(1)(A).
[59] § 20012(c)(2).
[60] *Id.*
[61] *See* § 20012(b)(3).
[62] § 20012(b)(2)–(3).

The bill then sets out detailed disclosure requirements tailored to the type of media. For visual media, the disclosure must appear in an easily readable font size (and no smaller than the largest font in the communication) and, for video, remain visible for the entire duration.[63] For audio-only media, the disclosure must be spoken clearly at the beginning, the end, and if the audio exceeds two minutes, at intervals not greater than two minutes.[64] There are also some provisions protecting broadcasting stations, newspapers, magazines, and other outlets of the sort from liability so long as the publication clearly states that "the materially deceptive content does not accurately represent any actual event, occurrence, appearance, speech, or expressive conduct."[65]

For the purposes of this analysis, there are three key definitions that the bill provides: (1) "Malice," (2) "Materially deceptive content," and (3) "Deepfake." "Malice" means the entity distributing the media did so "knowing the materially deceptive content was false or with a reckless disregard for the truth."[66] "Materially deceptive content" is "media that is intentionally digitally created or modified, which includes, but is not limited to, deepfakes, such that the content would falsely appear to a reasonable person to be an authentic record of the content depicted in the media."[67]

While long-winded, this analysis of CA AB-2839 will prove handy when applying the potentially convoluted First Amendment doctrine to the relevant language within the bill.

C. Hawaii's Statutory Approach (HI SB-2687)

HI SB-2687 amends Chapter 11 of the Hawaii Revised Statutes by creating two new sections (§11-A and §11-B) regulating the distribution of "materially deceptive media" in the context of state elections.[68] Like California's statute, HI SB-2687 aims to curb the use of AI-generated deepfakes in electioneering.[69] However, it differs in its scope, the level of mens rea required, the length of the regulated period, the types of exemptions provided, and its enforcement mechanisms. Because the present analysis focuses on expressive content affecting

[63] *See* § 20012(b)(2).
[64] *Id.*
[65] § 20012(e)(3).
[66] § 20012(f)(7).
[67] § 20012(f)(8).
[68] HAW. REV. STAT. §11-303 (2024).
[69] *See id.*

elections, the discussion below narrows to §11-A's regulation of materially deceptive media concerning candidates for elected office.[70]

Under §11-A(a), Hawaii prohibits any person from *recklessly* distributing, or agreeing to distribute, materially deceptive media "in reckless disregard of the risk of harming the reputation or electoral prospects of a candidate…or changing the voting behavior of voters."[71] The prohibition applies during a substantially broader time window than California's: from the first working day of February in every even-numbered year through the general election, effectively covering the bulk of the entire election cycle.[72] The statute's triggering standard ("reckless disregard") is also notably lower than California's "with malice, knowingly," which mirrors the *New York Times v. Sullivan*[73] actual-malice formulation (foreshadowing).[74] As a result, HI SB-2687 regulates a broader swath of speech, raising distinct doctrinal issues when compared to California's more tailored approach.

Similar to California, HI SB-2687 provides several carve-outs. §11-A(b) exempts certain communication infrastructure entities, including broadcasters and various service providers, so long as they were not involved in creating or having knowledge that the content was deceptive and had the intent to deceive.[75] Notably, Hawaii provides no specific carveout for satire/parody, but instead would have to be analyzed through a standard disclaimer as detailed below.[76]

Like California, HI SB-2687 includes a disclaimer-based exception. Under §11-A(c), distribution is not prohibited if the media contains a disclosure informing viewers that the content "has been manipulated by technical means and depicts appearance, speech, or conduct that did not occur."[77] The statute prescribes highly specific, mandatory formatting requirements depending on the medium: continuous on-screen display for video; visibility and font size requirements for images; spoken disclaimers at the beginning and end (and in the same language)

---

[70] *See id.*
[71] §11-303(a).
[72] *See id.*
[73] *Compare id.* with CAL. ELEC. CODE § 20012(b)(1). 376 U.S. 254 (1964).
[74] *See* HAW. REV. STAT. §11-303(a) (2024). *See infra* notes 106–107.
[75] *Id.* §11-303(b).
[76] *See id.* §11-303(c).
[77] *Id.*

for audio-only media.[78] An additional requirement not present in California's statute is that, where the deceptive media is derived from an existing recording, the distributor must include a citation directing viewers to the original unedited sources.[79] This traceability requirement functions as an additional transparency mechanism that goes beyond what California demands.[80]

HI SB-2687 defines several terms that shape the scope of regulated speech. "Materially deceptive media" includes any video, image, or audio advertisement depicting an individual engaging in speech or conduct the individual did not actually engage in, that would cause a reasonable viewer to believe the depicted content is real, and that was created by use of AI, generative adversarial networks, or other digital techniques.[81] Unlike California's definition, Hawaii expressly ties the definition to the use of AI or other specified technologies, thereby excluding traditional forms of manipulation (e.g., selective editing or splicing) that do not involve digital alteration.[82] Relatedly, "distribute" is broadly defined to encompass conveying information "by any means," expanding liability substantially beyond the California statute's specific focus on "advertisements or other election communications."[83]

Overall, HI SB-2687 is much broader than CA AB-2839, thus making it more restrictive on speech. It covers a longer time period, applies a lower mens rea standard, defines deceptive media more expansively with respect to the technological methods of creation, and adds an unprecedented source-citation requirement.[84] Due to these stark differences, it is surmisable that if CA AB-2839 is deemed to not be narrowly tailored enough to survive the determined level of constitutional scrutiny (which as discussed below is the seldom-survived strict scrutiny), then neither will HI SB-2687. For this reason, a majority of the analysis will be done in the backdrop of CA AB-2839 due to it being less restrictive on free speech overall.

D. Framing the Constitutional Question

While the U.S. Supreme Court has yet to address the constitutionality of states restricting the use of AI deepfakes in

---

[78] *Id.*
[79] §11-303(c)(4).
[80] *See id.*
[81] *Id.* §11-303(h).
[82] *See id.*
[83] *Compare id. with* CAL. ELEC. CODE § 20012.
[84] *See* Haw. Rev. Stat. § 11-303 (2024).

parody or satire, that day may be on the horizon. After the passage of CA AB-2839, Christopher Kohls, the individual who created the previously mentioned AI deepfake of Kamala Harris, filed suit against Rob Bonta, the attorney general of California, seeking a permanent injunction against the implementation of CA AB-2839 in the U.S. District Court for the Eastern District of California.[85] On August 29th, 2025, the judge in this case granted Kohls' motion for summary judgment and permanently prevented the Bonta from enforcing CA AB-2839 against Kohls.[86] This decision was promptly appealed by Bonta to the Ninth Circuit where proceedings are currently being held.[87]

Due to this ongoing litigation, the U.S. District Court for the Eastern District of California has already provided a framework for the constitutional analysis of the First Amendment concerns that bills like CA AB-2839 and HI SB-2687 raise. The following section of the paper will heed a similar chronology of analysis that Judge Mendez underwent in his opinion, with several additional points of doctrine thrown in. The framework for the constitutional validity of these bills hinges on the following questions: (1) does the restricted speech fall into a category of false speech that can be regulated under the First Amendment; (2) what is the nature of the content being restricted; and (3) what level of scrutiny applies?

III. DEFINING AND APPLYING THE EXISTING FIRST AMENDMENT DOCTRINE

A. Political Speech at the Core of the First Amendment

Political speech is "at the core of what the First Amendment is designed to protect."[88] First Amendment doctrine has developed in a way that grants considerable deference to even threatening language posed in a political context, as the "language of the political arena … is often vituperative, abusive, and inexact."[89] The First Amendment affords the "broadest protection" to the "discussion of public issues" and "political expression in 'order to assure [the] unfettered interchange of ideas for bringing about of political and social changes desired

[85] *See* Kohls v. Bonta, 752 F. Supp. 3d 1187, 1191 (E.D. Cal. 2024).
[86] Kohls v. Bonta, 797 F.Supp.3d 1177, 1181 (E.D. Cal. 2025).
[87] Notice of Appeal Processed 1, Kohls v. Bonta, 2025 WL 2495613 (E.D. Cal. 2025) (No. 2:24-CV-02527-JAM-CKD).
[88] Virginia v. Black, 538 U.S. 343, 365 (2003).
[89] Watts v. United States, 394 U.S. 705, 708 (1969).

by the people.'"[90] The Court has maintained that within the field of political speech, "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."[91]

The Court affords political speech such heightened protection and approaches it in a distinctive manner, some scholars have described this approach as "electoral exceptionalism"[92] The First Amendment has been observed to be at "its fullest and most urgent application precisely to the conduct of campaigns for political office."[93] Some scholars suggest that the premise of exceptionalism does not rest on giving electoral speech more protection, but instead it is about giving it less protection.[94] Some have observed the opposite.[95] Together, however, they agree that speech in an electoral context is considered special. Exceptionalism is not unique to elections or politics, but it is present in a variety of contexts such as schools, prisons, the military, and the courtroom.[96] The Court may ultimately treat artificial intelligence as an "exceptional" category, necessitating a unique doctrinal framework, particularly when AI speech overlaps with other exceptional First Amendment contexts.

While not directly on the point for AI deepfakes, an analysis of any statute implicating the use of political satire would be incomplete without further mentioning *Hustler Magazine, Inc. v. Falwell*.[97] This case serves as a key reminder of the First Amendment's protection for political satire as the Court held that public figures cannot recover for emotional distress from outrageous parody absent a false statement made with actual malice.[98] Although *Hustler*'s holding does not neatly apply to deepfakes that could mislead voters, it underscores that obvious jokes and political satire have independent value and must be safeguarded, even when offensive.[99]

---

[90] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995).
[91] Meyer v. Grant, 486 U.S. 414, 419-420 (1988).
[92] Geoffrey R. Stone, *"Electoral Exceptionalism" and the First Amendment: A Road Paved with Good Intentions*, 35 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 665, 666 (2011).
[93] Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).
[94] *See* Stone, *supra* note 90, at 667.
[95] *See id.*
[96] *Id.* at 669.
[97] 485 U.S. 46 (1988).
[98] *Id.* at 56–57.
[99] *See id.* at 57.

Now, with the notion that politics is treated "exceptionally" by the Court and obvious political satire being deliberately protected in *Hustler*, a proper analysis of the constitutionality of CA AB-2839 and HI SB-2687 can follow. The analysis begins with what AI deepfakes and political satire are: lies.

B. False Speech and Historically Recognized Exemptions

To what extent does the First Amendment protect lying? The Court confronted this question directly in *United States v. Alvarez* (2012), striking down the Stolen Valor Act's criminal prohibition on falsely claiming military honors.[100] At the core of the Court's decision is the unmistakable principle that the First Amendment does not allow the government to criminalize lies in the abstract.[101] Instead, the First Amendment only tolerates government limitations on false statements when they fall within a historically recognized category of unprotected expression, such as defamation, fraud, or speech integral to criminal conduct, where the falsehood produces a "legally cognizable harm."[102] With this reasoning, it seems that if California or Hawaii could convince a court that the speech they are seeking to restrict in CA AB-2839 and HI SB-2687 respectively falls into one of the "historic and traditional categories long familiar to the bar," or marshal persuasive evidence that said content is part of a long tradition of prescription, then the argument that the bills are constitutional strengthens immensely.[103] If the States in question are unable to convince a Court of this, then the statutes will be subject to strict scrutiny. Below are the tests that are most relevant in determining if the speech regulated by CA AB-2839 and HI SB-2687 falls within the historically unprotected categories.

1. Defamation

a. *Existing Defamation Doctrine*

Definitionally, defamation is a false statement of fact that damages a person's reputation.[104] Defamation is only able to be restricted if the speaker has the appropriate mens rea

[100] U.S. v. Alvarez, 567 U.S. 709, 730 (2012).
[101] *See id.* at 729–30.
[102] *Id.* at 719.
[103] *See id.*
[104] *See New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

requirement, which turns on (1) whether the plaintiff is a public official/public figure or a private figure, and (2) whether the speech is on a matter of public or private concern.[105] Understandably, defining what constitutes a public/private figure or public/private concern is of grave importance during a defamation analysis. While the doctrine of distinguishing private/public figures can be muddy, the answer is fairly clear for the purposes of analyzing CA AB-2839 and HI SB-2687, as candidates for office, even if they are not currently serving, are treated as public officials/public figures.[106]

The next inquiry is whether the topic of the defamatory statement is on a matter of public or private concern. The Court defines a matter of public concern as speech that can be "fairly considered as relating to any matter of political, social, or other concern to the community" or that is "a subject of legitimate news interest," meaning "a subject of general interest and of value and concern to the public."[107] Courts evaluate this by looking at the content, form, and context of the speech as revealed by the "whole record."[108] The Court has noted that "anything which might touch on an official's fitness for office," even when the alleged misconduct is in the distant past, is of public concern.[109] Speech is considered private concern when it addresses purely private matters, especially disputes that are "solely in the individual interest of the speaker and its specific business audience," and that lack broader relevance to public debate.[110] This distinction between topics of public and private concern is notoriously ambiguous, but the result of the distinction is crucial.

Once the initial inquiries of who the speech is about and what the topic is are answered, the final step of a defamation analysis is to look at the mens rea requirement. When the speech is about a public figure (which definitionally it is within the confines of the relevant statutes) and of public concern, then the plaintiff must prove that the speaker acted with "actual malice."[111] In *New York Times v. Sullivan*, the Court adopted this actual malice standard marking false statements on matters of public concern that defame public officials as unprotected if (1)

---

[105] *See id.* at 281–82.
[106] *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971).
[107] Snyder v. Phelps, 562 U.S. 443, 453 (2011).
[108] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).
[109] *Monitor Patriot*, 401 U.S. at 273.
[110] *Dun & Bradstreet*, 472 U.S. at 762.
[111] *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

the speaker knows them to be false, or (2) the speaker is aware of a high likelihood that the statement is false but publishes it anyway.[112] While failing to investigate facts before publishing will not alone support a finding of actual malice, publishing while "in fact entertain[ing] serious doubts as to the truth of [the] publication" constitutes acting with actual malice.[113] Additionally, "purposeful avoidance of the truth" or "a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges" would constitute actual malice.[114] This test changes drastically when the topic is on a matter of private concern. When defamatory speech involves a matter of purely private concern, the First Amendment affords reduced protection, and states may permit the recovery of damages without requiring the plaintiff to prove actual malice, although liability must still be based on at least negligence.[115]

b. *Applying the Doctrine to CA AB-2839 and HI SB-2687*

Again, defamation doctrine permits regulation only of false statements that harm reputation and only when the speaker has the constitutionally required mens rea. That mens rea turns on two threshold inquiries: (1) whether the subject is a public/private figure, and (2) whether the speech concerns a public or private matter. For the purposes of statutes like CA AB-2839 and HI SB-2687, candidates for office are unquestionably treated as public officials/public figures. Additionally, because the alleged misinformation in these statutes generally targets electoral contexts, it overwhelmingly falls on the public-concern side of the line. Although these laws target false statements, they do not fit within the First Amendment's defamation exception because they regulate far more than the narrow core of defamation doctrine.

The statutes at issue do not require actual reputational injury, but proscribe even content that is merely "reasonably likely" to cause harm.[116] This is inconsistent with defamation doctrine as traditionally "actual injury" is a constitutional requirement when the speech involves matters of public

---

[112] *Id.*
[113] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
[114] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 692 (1989).
[115] *See Dun & Bradstreet*, 472 U.S. at 762–63.
[116] CAL. ELEC. CODE § 20012(b) (2024).

concern.[117] Additionally, the wide-sweeping nature of the bills which broadly prevent misleading or deceptive content cause it to fall outside the scope of protecting reputational harm but instead protects election integrity more holistically. This is not what defamation is, so CA AB-2839 and HI SB-2687 will have trouble fitting into this category.

2. Fraud

a. *Existing Fraud Doctrine*

Fraud, one of the previously stated historically recognized categories of speech that may be regulated without triggering strict scrutiny, is a knowing falsehood told for financial gain.[118] The commonly cited case for establishing that fraudulent statements fall outside of First Amendment protection is *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, in which the Court upheld a bill restricting fraudulent actions against charitable solicitors who intentionally misled donors about how their contributions would be used, stressing that the First Amendment "does not shield fraud."[119] Cases involving fraudulent speech, while not saying so explicitly, tend to undergo a similar tort-like analysis for fraud, requiring (1) a false statement of fact, (2) knowledge of falsity or intent to deceive, (3) materiality, and (4) a causal connection to a legally cognizable harm.[120]

b. *Applying the Doctrine to CA AB-2839 and HI SB-2687*

Applying the Court's analysis method of fraud through a classic, tort-style element test of intentional deception, materiality, and demonstrable harm to the victim, statutes like CA AB-2839 and HI SB-2687 do not fit within the narrow fraud category. The statutes do not require intent to obtain money or property, nor do they require material reliance or causation of a

---

[117] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).
[118] *Fraud 101: What Is Fraud?*, ASSOCIATE OF CERTIFIED FRAUD EXAMINERS (2025), https://www.acfe.com/fraud-resources/fraud-101-what-is-fraud (last visited Apr. 2, 2026).
[119] Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003).
[120] *See, e.g., id.* (held that charities that told knowingly false statements to their donors constituted fraud); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that a law banning pharmacists from advertising drug prices was unconstitutional because the truthful, non-misleading commercial speech about lawful products is protected); Donaldson v. Read Magazine, 333 U.S. 178 (1948) (held that a mail-based promotional scheme that relied on misleading representations use to obtain money through fraudulent solicitations was unprotected by the First Amendment).

concrete, legally cognizable harm in the way fraud demands. Instead, these laws target politically deceptive statements in an election context that are aimed at influencing public opinion or voter behavior, rather than securing a material benefit through deception. While one could certainly come up with a hypothetical situation of fraud that could implicate this statute as applied,[121] the statutes lack the core elements of fraud and cannot be justified as falling within the First Amendment category.

3. Speech Integral to Criminal Conduct

a. *Existing Speech Integral to Criminal Conduct Doctrine*

Speech integral to criminal conduct is the last historically recognized category that laws such as CA AB-2839 and HI SB-2687 have a colorable argument to fit into, and the reason is two-fold. One, this category covers speech that is intended to induce or convince another to engage in illegal activities.[122] In previous decisions, the Court has determined this to be the case in order to uphold an injunction on union picketing because the picketers' speech was the "inseparable part" of a conspiracy to restrain trade[123] as well as to uphold a prohibition on sex-segregated job ads as they facilitated employers' unlawful discriminatory hiring.[124] The second reason is because this category serves as living evidence of the Court creating an additional category of unprotected speech. In *New York v. Ferber*, the Court essentially underwent a cost-benefit analysis of why child pornography should be unprotected.[125] The Court held that categories of speech do not receive First Amendment protection when "the evil to be restricted so overwhelmingly outweighs the expressive interest, if any."[126] Thirty years later, when *U.S. v. Williams* (another child pornography case) was decided, the Court recharacterized its reasoning in *Ferber* as not relying on a cost-benefit inquiry, but that depictions of child pornography are

[121] For example, an AI deepfake video depicting a candidate saying that their campaign has discovered an urgent voting-rights crisis and needs immediate contributions to fund emergency litigation, accompanied by a link to a payment portal controlled not by the candidate, but by the producer of the deepfake. This sort of situation would fall within both the definition of "fraud" and the implication of the statutes.

[122] *See* U.S. v. Williams, 553 U.S. 285, 307 (2008).

[123] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 491–92 (1949).

[124] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels., 413 U.S. 376, 391 (1973).

[125] *See* New York v. Ferber, 458 U.S. 747 (1982).

[126] *Id.* at 763–64.

unprotected because it is speech integral to unlawful conduct, a historically recognized category of unprotected speech.[127]

b. *Applying the Doctrine to CA AB-2839 and HI SB-2687*

Again, while the regulated speech occurs in an election context and may be politically deceptive, the statutes do not *require* that the speaker intend to induce illegal activity, nor that the false statements constitute an "indispensable" component of any independently unlawful act. Election deception, while normatively troubling, is not, itself, defined as a separate criminal scheme that the speech materially advances. Instead, the statutes create new prohibitions on certain kinds of misleading speech; they do not target speech already integral to an existing crime. Because the Court has rejected attempts to expand this category through free-floating cost-benefit reasoning (and has expressly walked back *Ferber*'s broader language in *Williams*), the "speech integral to criminal conduct" exception cannot be stretched to include general political falsehoods or misleading election communications. As a result, the statutes fall outside this historically recognized category.

C. Content Determination

Up until this point of the analysis, everything that has been discussed has been content-based speech restrictions. That is, statutes that target speech based on its communicative content."[128] Typically, as will be discussed later, content-based speech restrictions require the survival of strict scrutiny to be deemed constitutional.[129] However, this survival is bypassed entirely if it can be established that the content of speech that a statute is restricting falls into one of the aforementioned historically unprotected categories of speech.[130] The content of defamation is *just not protected*.[131] The content of speech integral to criminal conduct is *just not protected*.[132] Outside of these historically unprotected categories, the restriction's characterization of content-based or content-neutral *really* matters because it gives rise to one of two different levels of scrutiny: (1) strict scrutiny, or (2) something less than strict scrutiny.

---

[127] *See Williams*, 553 U.S. at 307.
[128] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).
[129] *Id.* at 164.
[130] *See* U.S. v. Stevens, 559 U.S. 460, 468–69 (2010).
[131] *See id.* at 468.
[132] *See id.*

1. Doctrine for Content-Neutral vs. Content-Based Speech Restrictions

The basic difference between a content-neutral restriction versus a content-based one is that content-neutral laws target non-communicative aspects of speech (time, place, manner, etc.) while content-based laws target speech based on its communicative content (what is *actually* being said).[133] If a law, on its face, singles out certain speech because of the topics discussed or the ideological message expressed, it is deemed to be content-based.[134] This inquiry does not consider the government's motive for passing the law.[135] The Court does not seem to care if the government was thinking good thoughts or bad thoughts about the potential speech or those who would be affected. However, the Court *does* care about the government's motives if a facially content-neutral law "cannot be 'justified without reference to the content of the regulated speech'" or adopted "because of disagreement with the message [the speech] conveys.".[136]

If a law is deemed to be content-based, then it is subject to strict scrutiny.[137] To satisfy strict scrutiny, the government must convince a court that it has a compelling interest and that its law is narrowly tailored toward serving that interest.[138] The compelling governmental interest prong, at least in election-related cases, has been a straightforward hurdle to satisfy. It is the narrow tailoring that governments tend to have the most trouble with, so much so that the Court on many occasions just operates on the presumption that a compelling government interest exists just to ultimately find the law unconstitutional for lack of narrow tailoring. In First Amendment doctrine, there are four key aspects to the narrow tailoring prong of strict scrutiny: (1) the relevant law must materially advance the government's stated interest, (2) the relevant law cannot be overinclusive with respect to the government's stated interest, (3) a less-restrictive alternative to advancing the government's stated interest must not exist, and (4) the restriction cannot be underinclusive, meaning it fails to cover speech that also implicates the

---

[133] *See Reed*, 576 U.S. at 163.
[134] *Id.*
[135] *Id.* at 165.
[136] *Id.* at 164 (alteration in original) (citations omitted).
[137] *Id.*
[138] *Id.* at 163.

government's stated interest.[139] The government will have to go four-for-four on the above aspects to satisfy the narrow tailoring prong of strict scrutiny.[140]

2. Are CA AB-2839 and HI SB-2687 Content-Neutral or Content-Based?

This may be one of the easiest inquiries (second easiest) of the entire analysis as the speech that laws like CA AB-2839 and HI SB-2687 restrict is unquestionably content-based. Laws that prohibit any kind of false speech will have to target the speech on its communicative aspects, namely, its truthfulness. On top of the speech restriction being content-based due to its restrictions hinging on truthfulness, it is also content-based as the "law applies to particular speech because of the topic;"[141] a political candidate, elected official, elections official, ballot, or voting mechanism. For these reasons, the laws are a content-based speech restriction and strict scrutiny will apply.

D. Strict Scrutiny Analysis

1. Compelling State Interest

If determining whether the speech restriction in CA AB-2839 and HI SB-2687 were content-based was the second easiest analysis, then finding that these laws serve a compelling state interest is the first. The Court has noted that a "State indisputably has a compelling interest in preserving the integrity of its election process."[142] And "a State has a compelling interest in protecting voters from confusion and undue influence."[143] As shown by the numerous examples of AI deepfakes and political media, this form of expression that the laws seek to restrict poses a risk to the stated compelling state interest of election integrity and preventing voter confusion.

2. Material Advancement of the Interest

The name of the prong is fairly self-explanatory, but there is some nuance. The government is not required to prove at a scientific level that implementation of the law has a quantifiable impact on the stated interest.[144] A simple common-sense

---

[139] *See, e.g., id.*
[140] *Id.*
[141] *Id.* at 163.
[142] Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989).
[143] Burson v. Freeman, 504 U.S. 191, 199 (1992).
[144] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000).

argument connecting the law to the stated interest is persuasive enough for the Court, if well argued.[145] There has been some indication that there is a sliding scale on how much "evidence" is persuasive enough to the Court based on the facts presented as the amount of needed evidence "will vary up or down with the novelty and plausibility of the justification raised."[146]

In this case, a common-sense approach would likely convince a court that restricting deceptive AI deepfakes would materially advance the government interest in election integrity. However, there is no need to speculate as a California district court already decided that it did. In the *Kohl* litigation, California showed research and studies which confirmed that political deepfakes have "proliferated online and can influence voters' behavior, choices, and trust in the electoral process and electoral outcomes."[147] This prong would likely be satisfied.

3. Overinclusiveness

This aspect of narrow tailoring hinges on the premise that a law should not restrict a significant amount of speech that does not implicate the government's interest. The general rule is if the government can serve the interest while burdening less speech, without having to construct "unworkable" lines, then it should do so.[148] For example, in *Schneider v. State*, the Court struck down city ordinances that banned all hand-to-hand leafleting on public streets in order to reduce litter because the ban was overinclusive in that many leaflets would not become litter.[149]

The government will have severe trouble overcoming this aspect of narrow tailoring. These bills restrict a large amount of protected political speech that does not meaningfully advance the government's interest in preventing election interference or voter deception. Here, the statutes prohibit all "materially deceptive" or manipulated media about a candidate that is "reasonably likely" to harm electoral prospects, even when the speech does not mislead voters about voting procedures, does not induce illegal activity, and does not interfere with ballot integrity.[150] This sweep captures satire, parody, and expressive hyperbole. The statute's ban on *all* materially deceptive political content, even though much of it will never undermine election

---

[145] *See id.* at 394–95.
[146] *Id.*
[147] Kohls v. Bonta, 797 F.Supp.3d 1177, 1185 (E.D. Cal. 2025) (citation omitted).
[148] Williams-Yulee v. Florida Bar, 575 U.S. 433, 453 (2015).
[149] *See* Schneider v. New Jersey, 308 U.S. 147, 165 (1939).
[150] *See* CAL. ELEC. CODE § 20012(b) (2024).

administration or mislead voters, is analogous to the leafletting ban in *Schneider*.

4. Least Restrictive Alternative

This aspect of narrow tailoring requires the government to pursue less speech-restrictive means that would serve its interest essentially as well as their current law would. Notably, the alternative must be the "least restrictive means among available, effective alternatives,"[151] meaning that the government is not required to choose an alternative that "fall[s] short of serving" its asserted government interest.[152] Using the same example from *Schneider* about the overinclusive leafleting ban, the Court also noted that a less speech-restrictive means for achieving the government's asserted anti-littering interest was to just enforce anti-littering laws against those who tossed paper on the ground rather than prohibiting core political pamphleteering.[153]

When restricting speech that is "reasonably likely" to cause harm, it has historically been difficult for governments to show that a less restrictive alternative does not exist. This is because, as the California district court noted in the *Kohl* case as well as the court in *Schneider*, the government could directly regulate conduct that *actually* undermines elections or *actually* inflicts reputational harm.[154] Additionally, as the California district court points out, another less-restrictive alternative to limiting satirical deepfakes would be to engage in the free market itself and use counter speech/fact checkers to potential misconceptions for the constituent base.[155] While AI deepfakes, or perhaps the social media websites that share them, notoriously move too quickly for governments to react, the California district court notes that AI fact-checking mechanisms like Community Notes and Grok are already scalable solutions being adopted.[156] Since California did not show that these alternative methods would fail to achieve the government's interest, it is difficult to see the government overcoming this aspect of narrow tailoring.[157]

5. No Underinclusiveness

---

[151] Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666 (2004).
[152] Burson v. Freeman, 504 U.S. 191, 206 (1992).
[153] *Schneider*, 308 U.S. at 162.
[154] *See* Kohls v. Bonta, 797 F.Supp.3d 1177, 1186 (E.D. Cal. 2025).
[155] *Id.*
[156] *Id.* at 1186–87.
[157] *See id.* at 1187.

If a law fails to restrict a significant amount of speech that harms the government's interest to about the same degree as does the restricted speech, then it is deemed to be underinclusive.[158] Chief Justice John Roberts' own definition states that underinclusivity occurs "when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way."[159] An example would be in *Carey v. Brown*, where a bar on "nonlabor" residential picketing was underinclusive as "labor" residential picketing was just as intrusive to the State's asserted interest of residential privacy.[160]

Applying this underinclusiveness framework to CA AB-2839, the statute appears to be meaningfully underinclusive. For starters, the bill targets only digitally manipulated content while leaving untouched a wide range of non-digital but equally deceptive election misinformation. Additionally, these laws impose liability only during narrow windows before elections. Deceptive political content distributed outside these windows, though equally harmful to voter understanding, falls entirely outside the statute.

E. Viewpoint Discrimination?

The laws in contention punish only content that could "harm" a candidate's electoral prospect or content that could "undermine confidence" in the outcome of an election.[161] This language favors a certain viewpoint of false speech. It fails to consider the real possibility that the use of AI deepfakes of a candidate that makes them look appealing or helps a candidate's electoral prospects. Kohls's production of Kamala Harris is a clear example of an AI deepfake that has the potential to harm, but if Kohl produced a video of Harris "saying" something that appealed to voters, it would still be false speech being used to influence the decision-making of voters under untrue pretenses. This distinction of only prohibiting AI deepfakes that can harm a candidate's reputation rather than help is the "essence of viewpoint discrimination."[162] Even though the statutes likely fail strict scrutiny anyways, the Court in cases like *Iancu v. Brunetti*[163]

---

[158] *See* Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After Williams-Yulee*, 48 ARIZ. ST. L.J. 525, 560 (2016).
[159] Williams-Yulee v, Florida Bar, 575 U.S. 433, 451 (2015).
[160] Carey v. Brown, 447 U.S. 455, 471 (1980).
[161] CAL. ELEC. CODE § 20012(b) (2024).
[162] Iancu v. Brunetti, 588 U.S. 388, 393 (2019).
[163] *See id.* at 388.

and *Rosenberger v. Rector*[164] have all but explicitly said that viewpoint-based restrictions are typically automatically invalid. This evidence is the final nail in the coffin for the statute's constitutionality.

F. Other Considerations

Existing free speech doctrine is not limited to the historically recognized categories of unprotected speech or the strict scrutiny analysis applied to content-based regulations. A complete analysis must also consider several additional doctrinal principles. Statutes like CA AB-2839 and HI SB-2687 implicate doctrines like vagueness,[165] overbreadth,[166] and compelled speech.[167] While this note focused primarily on the actual speech being restricted, vagueness and overbreadth look to the language of the statute and how it is being applied.

Compelled speech is implicated in both statutes through the disclosure requirements. CA AB-2839 provides an exemption for AI deepfakes used for the purpose of satire that contains a disclosure with specific requirements for font size, visibility, duration (if video), and even frequency of the disclaimer being spoken (if audio-only).[168] Likewise, HI SB-2687 expands on these disclosure specifications by requiring a link to original unedited sources of the video that was

---

[164] *See* Rosenberger v. Rector, 515 U.S. 819 (1995).

[165] A statute restricting speech may be unconstitutionally vague if it fails to "provide[] an ascertainable standard of conduct." Baggett v. Bullitt, 377 U.S. 360, 372 (1964). Vagueness doctrine is about fairness and not punishing people without providing clarity on what actions are punishable. *See, e.g.*, *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that a statute is unconstitutionally vague when persons "of common intelligence must necessarily guess at its meaning and differ as to its application"). Courts may, however, construe allegedly vague statutory terms to supply a clarifying construction and uphold the statute, so long as the construction is not "unexpected" or "unforeseeable." *Marks v. United States*, 430 U.S. 188, 192 (1977).

[166] Under the First Amendment overbreadth doctrine, a statute is unconstitutional if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." U.S. v. Stevens, 559 U.S. 460, 473 (2010). As the Court explained in *Board of Airport Com'rs of the City of Los Angeles v. Jews for Jesus, Inc.*, an individual may challenge a law on its face "because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." 482 U.S. 569, 574 (1987).

[167] The First Amendment not only protects the right to speak freely, but also the right to refrain from speaking at all. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977). Even disclosure requirements may raise compelled speech concerns where they alter the content or message of expressive works. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795–96 (1988).

[168] CAL. ELEC. CODE § 20012(b)(2) (2024).

manipulated.[169] When a statute compels someone to say something they either do not believe or just do not want to say, the Court takes it very seriously. While everyday people generally don't like being told what to do or say, it's fair to say that comedians are less willing to happily oblige with required government disclosures of the parodies they create. Scholars say that one of the primary goals of comedy throughout history has been to "illuminate the ways in which we live in the world politically and to critique our legislature and laws."[170] So, when a State *requires* a comedian to tell the public that their political satire or parody was altered with the use of AI, the comedic value inherently goes down. Put simply by esteemed author E.B. White, explaining a joke is like dissecting a frog. While you may understand it better, the frog dies in the process.[171] The issue that arises in the age of AI deepfakes is that unlike a patron at a comedy show who knows they are watching a comedian telling jokes, people who watch AI parodies of elected officials on the internet do not always recognize that what they are watching is comedy.

Considerations of challenges against the California and Hawaii statutes on the grounds of vagueness, overbreadth, and compelled speech would require notes of their own and cannot be sufficiently analyzed in just a few pages. However, the relevance of these challenges is important to flag when reading the statutes and recognizing how the doctrines' implications could have a consequential impact on a constitutional analysis.

IV. RETHINKING THE STATUTES

Is all hope lost for California and Hawaii? Will AI deepfakes just be a new normal in politics? A new normal in political satire? Not necessarily. State governments would have to change the language of their statutes to satisfy the strict

---

[169] HAW. REV. STAT. §11-303(c) (2024).

[170] NANCY GOLDMAN, COMEDY AND DEMOCRACY: THE ROLE OF HUMOR IN SOCIAL JUSTICE 6 (Nov., 2013), https://www.americansforthearts.org/sites/default/files/Humor%20Trend%20Paper.pdf.

[171] ELWYN BROOKS WHITE, A SUBTREASURY OF AMERICAN HUMOR xvii (E.B. White & Katharine S. White eds., 1941) ("Humor can be dissected, as a frog can, but the thing dies in the process and the innards are discouraging to any but the pure scientific mind.").

scrutiny standard for content-based speech restrictions. Despite seeming like an impossible task, it has been done before.[172]

To align with First Amendment requirements, California and Hawaii could amend their bills in several ways. First, the statutes could limit their scope to knowingly or recklessly false statements about candidates, requiring proof that the speaker intended to deceive or acted with actual malice, consistent with the constitutional standard established in *New York Times Co. v. Sullivan* for regulating false statements about public officials and public figures. Second, the statutes could focus on statements that cause concrete, demonstrable harm rather than broadly regulating all "materially deceptive content," thereby tying liability to the types of legally cognizable injuries that historically justify restrictions on false speech, such as those recognized in *United States v. Alvarez*. Third, the laws could incorporate a narrow tailoring mechanism, such as limiting enforcement to speech that is the proximate cause of voter confusion or election interference. Alternatively, California and Hawaii could scrap these sorts of bills altogether and instead rely on their defamation laws to serve the same purpose.

CONCLUSION

Ultimately, the tools of the First Amendment, while sometimes unclear, are workable. AI deepfakes do not require a rewriting of the First Amendment. Instead, they require courts and legislatures to confront a more difficult question: how do we preserve both electoral integrity and the constitutional value of political satire? With the current framework of First Amendment doctrine, it is difficult to argue that the statutes discussed, as written, will be subjected to anything besides strict scrutiny. And under a strict scrutiny analysis of CA AB-2839 and HI SB-2687, alongside almost every other strict scrutiny analysis, the government will lose.

While it is possible to survive strict scrutiny, major improvements will have to be made to the bills to make them more narrowly tailored in serving the government's interest. Perhaps it is best to let existing defamation and election fraud statutes do their job and swoop in once actual reputational harm has been done instead of banning the potentially-harmful speech to begin with. This, of course, causes problems in politics as

[172] *See* Holder v. Humanitarian L, Project, 561 U.S. 1 (2010) (upholding a statute under strict scrutiny because restricting coordinated advocacy with foreign terrorist organizations was narrowly tailored to compelling national-security concerns).

reputation is everything, and it is extremely difficult to reverse a voter's mind when they already have a settled opinion on a candidate's reputation. While the Court has yet to hear a case on AI deepfakes used for political satire, *Kohls v. Bonta* will be heard in the 9th Circuit soon, where First Amendment scholars everywhere will be eagerly awaiting a decision.[173]

[173] Notice of Appeal at 1, Khols v. Bonta, 797 F.Supp.3d 1177 (2025) (No.25-6138).

PARTISAN GERRYMANDERING AS AN UNCONSTITUTIONAL RESTRICTION OF FIRST AMENDMENT RIGHTS

Koen Rodabaugh

INTRODUCTION

In 2016, a debate over new congressional district maps was raging within the North Carolina General Assembly. The state, which had operated under Democratic control for over a century until Republicans swept the state in 2010, had long been the site of various challenged electoral schemes. Repeatedly, North Carolina maps had been drawn along racial lines. This has regularly led state and federal courts to strike them down as unconstitutional, both as violations of Section 2 of the Voting Rights Act of 1965 and as violations of one-person, one-vote under the Equal Protection Clause. When Republicans overcame this immense obstacle, retaining control of the General Assembly for the first time in 112 years, they unfortunately did not turn the other cheek.[1] Instead, little changed in terms of redistricting practices. Despite the opportunity to change course and draw maps that more accurately reflect the voters of North Carolina along cultural, racial, and political lines—especially given their securing the legislature in a census year—Republicans instead took the enticing opportunity to turn the tables in their favor.

The result was new maps that continued the endemic issues plaguing the state's electorate prior to Republican rule. The maps Republicans drew in 2011 following the 2010 census were challenged almost immediately as a racial gerrymander. After years of litigation, the Supreme Court, in a rather unique majority, struck down the maps as racial gerrymanders in violation of the Equal Protection Clause.[2]

Undeterred, Republicans took up the task again, presenting new maps in the 2016 session, this time, with profound clarity in the reason for their composition. Speaking in defense of the maps during a debate on February 16, 2016, one of the chief architects of the new maps, Representative David Lewis, a Republican from Harnett County, insisted on making one point abundantly clear, providing in a closing statement: "Mr. Chairman, the only thing that I could add is that we want

---

[1] *See* Gary D. Robertson & Mike Baker, *Republicans Control N.C. General Assembly in Historic Shakeup*, STARNEWS ONLINE (Nov. 3, 2010, at 9:29 ET), https://www.starnewsonline.com/story/news/2010/11/03/republicans-control-nc-general-assembly-in-historic-shakeup/30844967007/.

[2] *See* Cooper v. Harris, 581 U.S. 285, 291, 319, 322–23 (2017).

to make clear that . . . it is to gain partisan advantage on the map. I want that criteria to be clearly stated and understood."[3]

Defending the maps he constructed, he noted that Republicans had "draw[n] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [they did] not believe it's possible to draw a map with 11 Republicans and 2 Democrats."[4] In a January 26, 2017, deposition, Lewis defended this and other statements he made along similar lines, stating that he believed "electing Republicans is better than electing Democrats[, s]o I drew this map in a way to help foster what I think is better for the country."[5] Lewis even took to the national media, going so far as to publish his clear partisan intent in an article titled, "We Drew Congressional Maps for Partisan Advantage. That Was the Point."[6]

His candor, while refreshing in a way coming from a politician, does little to dissuade the voter of the clear threat to democracy that his intentions and his maps push forward. Today, partisan gerrymandering is reaching a new fever pitch, as state political parties have become more brazen in securing the increasingly razor-thin margins that make up the partisan composition of the U.S. House of Representatives.[7] Rhetoric from Republicans in the 118th Congress has reflected the natural outcome of this tightness—as Speaker of the House Mike Johnson, a Republican from Louisiana, explained when speaking to reporters in the wake of the 2024 election, "Do the math. We have nothing to spare."[8]

President Trump, for his own part, has recognized this desperation within the incumbent party to hold onto their thin majority by any means possible, demanding on his social media platform, Truth Social, that Republicans in Texas—and later in

---

[3] COMMON CAUSE NC, *NC Republicans Draw Blatantly Partisan Gerrymander*, at 1:18–1:42, YOUTUBE (May 22, 2017), https://www.youtube.com/watch?v=yBweZMNIm2M.

[4] Joint Appendix at 310, Rucho v. Common Cause, 588 U.S. 684 (2019) (No. 18-422).

[5] *Id.* at 460.

[6] Ralph Hise & David Lewis, *We Drew Congressional Maps for Partisan Advantage. That Was the Point.*, THE ATLANTIC (Mar. 25, 2019), https://www.theatlantic.com/ideas/archive/2019/03/ralph-hise-and-david-lewis-nc-gerrymandering/585619/.

[7] *See* Katherine Schaeffer, *Slim Majorities Have Become More Common in the U.S. House and Senate*, PEW RESEARCH CENTER (Dec. 17, 2024), https://www.pewresearch.org/short-reads/2024/12/17/slim-majorities-have-become-more-common-in-the-us-house-and-senate/.

[8] *Speaker Johnson Reacts to Possible GOP Slim Majority*, ABC NEWS (Dec. 4, 2024), https://abcnews.com/video/116460489/.

other states following Texas's successful gerrymander, like Missouri[9] and North Carolina[10]—gerrymander mid-cycle to get him five more seats.[11] Democrats have not taken these actions passively, contributing to this "race to the bottom" with their own reactive gerrymandering schemes.[12]

Much of the modern discussion on partisan gerrymandering has revolved around discussions of equal protection, largely matching the discussions within election law regarding equal representation and vote dilution. In *Davis v. Bandemer*, for example, a plurality of the Court took issue with a partisan gerrymander in Indiana on equal protection grounds analogous to vote dilution, but ultimately held that such a claim can only succeed upon a greater showing that consideration of partisanship actually led to unequal outcomes.[13] In *Vieth v. Jubelirer*, the plurality grappled with the antidemocratic nature of partisan gerrymandering, but believed the issue to be too complex for courts to decide, as it had no "judicially manageable standards" for evaluation under the Equal Protection Clause.[14] Finally, in *Rucho v. Common Cause*, the Court gave full endorsement to Scalia's view in *Vieth*, holding the issue to be unanswerable by courts which were unequipped to provide a cohesive and workable definition of "fairness."[15]

But in focusing only on Equal Protection, the Court has ignored the clear harm to First Amendment rights. The Court in *Rucho* gripes ad nauseam about the challenge that partisan gerrymandering presents as requiring the Court to define 'fairness.'[16] Notwithstanding this disputed complaint from Chief

---

[9] *See* Mitch Smith, *Missouri Governor Signs Congressional Map Redrawn to Boost Republicans*, N.Y. TIMES (Sept. 28, 2025), https://www.nytimes.com/2025/09/28/us/missouri-redistricting-governor-congress.html.

[10] *See* Sarah Clements, *North Carolina Republicans Pass New Congressional Maps Aimed at Creating 11-3 Majority*, THE DAILY TAR HEEL (Oct. 22, 2025), https://www.dailytarheel.com/article/city-ncga-republicans-redrawing-congressional-maps-20251023.

[11] *See* J. David Goodman et al., *Texas Republicans Unveil Gerrymandered House Map, Trying to Please Trump*, N.Y. TIMES (July 31, 2025), https://www.nytimes.com/article/texas-republican-redistricting.html.

[12] *See* Neera Tanden et al., *Trump Ordered Texas to Gerrymander 5 New Republican-Leaning Congressional Districts—This Is How Other States Can Fight Back*, CTR. FOR AM. PROGRESS (Aug. 27, 2025), https://www.americanprogress.org/article/trump-ordered-texas-to-gerrymander-5-new-republican-leaning-congressional-districts-this-is-how-other-states-can-fight-back/.

[13] *See* Davis v. Bandemer, 478 U.S. 109, 135–36 (1986) (plurality opinion).

[14] 541 U.S. 267, 291 (2004) (plurality opinion).

[15] *See* 588 U.S. 684, 705–708 (2019).

[16] *See id.*

Justice Roberts, there is no reason for the Court to conclude that adjudication of partisan gerrymandering claims inevitably circles around concepts of 'fairness' under equal protection. There are other interests that partisan gerrymandering harms, namely, the rights to free expression and association. At its core, partisan gerrymandering makes the political expression and activity of individuals, identified by the state as politically disfavored, ineffective.[17] In drawing maps along partisan lines, the state legislature is identifying the political parties and ideologies it believes should be excluded or devalued by the state—as much as a conservative or liberal government may believe its political rivals are not good for the State, that cannot be a justification for these politicians, acting in their official capacity, to decide which ideologies may coalesce to form actionable, politically influential parties.

Further, there is fundamentally no reason for the government to be barred almost entirely from regulating political speech if that speech ultimately cannot make a difference at the ballot box.[18] If the protection of political speech and debate is to preserve the free marketplace of ideas, the ballot box in such an analogy would be the check-out station. A marketplace with no checkout is no marketplace at all, just as free speech with no means of converting political speech to political change is no free speech at all. This Article seeks to explain how partisan gerrymandering poses a clearly unconstitutional restriction on the First Amendment rights of the voters of a given state.

Part I will provide a brief history of partisan gerrymandering, showing that the practice is endemic in our constitutional system and has been detested since its inception. Part II will discuss what doctrines ought to be considered for partisan gerrymandering, first tackling the political questions doctrine the Court presently relies on before presenting the First Amendment principles on which the practice impinges. In Part III, I will show how partisan gerrymandering violates voters' associational rights by explicitly promoting or favoring—and

---

[17] *Cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 579 (1995) ("While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."); *accord* Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

[18] Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.").

correspondingly discriminating against and demoting—the political ideologies of one section of voters over others. Part IV will discuss the alternative First Amendment harm that partisan gerrymandering presents as a *de facto* restriction on political speech with no legitimate justification whatsoever.

I. A BRIEF HISTORY OF PARTISAN GERRYMANDERING TO TODAY

Partisan gerrymandering is not a new practice—its name dates back to the map-making tactics of Elbridge Gerry, who, when drawing congressional districts to favor Massachusetts Democratic-Republicans in the 1812 election, garnered widespread criticism for the egregious and blatant partisanship baked into the maps.[19] One popular political cartoon from the time depicted a particular district, which sprawled around the state, with the caption, "The Gerry-Mander, a New Species of Monster, which Appeared in Essex South District in January 1812."[20]

21

[19] *See* Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN MAGAZINE (July 20, 2017), https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/.
[20] Elkanah Tisdale, *The Gerry-Mander. A New Species of Monster*, BOS. GAZETTE 2 (Mar. 26, 1812), https://www.loc.gov/item/rbpe.00000100/.
[21] Elkanah Tisdale, *The Gerry-Mander. A New Species of Monster* (political cartoon 1812).

A portmanteau of the district's salamander shape and the name of its Frankensteinian creator, Elbridge Gerry, the cartoon, and the phrase it popularized, reflected the sentiment of the time that such a practice was monstrous and birthed from an undemocratic "gubernatorial vengeance . . . which would naturally produce an uncommon degree of inflammation and acrimony in the body politic."[22] But the practice itself, and the "uncommon degree of inflammation and acrimony" it wrought, was actually an invention of petty democratic infighting which emerged almost immediately after the ratification of the Constitution.[23]

In fact, there is ample evidence to show that gerrymandering was employed by Patrick Henry during Virginia's debates over its very first congressional maps to apply to the election of representatives to the First Congress.[24] Patrick Henry, the commanding leader of the strong anti-Federalist faction in Virginia,[25] saw to it that James Madison, or "Little Jimmy" as Henry referred to the future fourth President of the United States, would not be elected to the U.S. House of Representatives.[26] This was, in part, a plot to prevent the Federalists from rejecting the Bill of Rights due to be addressed by the First Congress. Henry appeared to take special animus against Madison, the reason for this being that Madison was a chief architect and defender of the newly ratified U.S. Constitution, of which anti-Federalists remained strongly opposed.[27] In devising the Fifth Congressional District of Virginia, Henry at once ensured that Madison, a resident of Federalist-dominated Orange County,[28] would have to contend with the voting population of five anti-Federalist counties,[29] as well as the comparable name-recognition and popularity of his opponent, another man of high stature among the Virginia elite, the future fifth President of the United States, and his seemingly perennial foe, James Monroe.[30]

---

[22] *Id.*
[23] *See supra* notes 19–21.
[24] *See* Thomas Roger Hunter, *The First Gerrymander? Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 EARLY AM. STUD.: AN INTERDISC. J. 781 (2011).
[25] *See id.* at 785.
[26] *See id.* at 791.
[27] *See id.* at 791–92, 795–96.
[28] *See id.* at 792.
[29] *See id.* at 794.
[30] *See id.* at 782–83, 794.

While Madison would ultimately prevail—in part due to the limited nature by which the Virginia General Assembly could accurately assess the political leanings of the voters[31] as well as the general Federalist domination of the political sentiments of the nation at the time[32]—the actions by Henry were seen by some as anti-democratic. Henry's actions were described as an effort to thwart the will of the voters, driven by "the bitter gall of personal hatred," and "contrary to the inclinations of the natural majority to be affected."[33] As one article concluded, Henry's plan "to form [Madison's District] so, [wa]s only in other words, to deny [voters] the right of choosing for themselves."[34] Were it not for the failure of Henry's political plot, we might be calling the practice "henrymandering" today.[35]

Since then, gerrymandering has come in all shapes and sizes. In the lead-up to the 1852 state election in Indiana, the Democrat-controlled legislature engaged in such aggressive and tactile gerrymandering—spurred on by the debates over slavery roiling the state at the time[36]—that the incumbent party secured ten of a total of eleven congressional districts despite earning only 53 percent of the vote.[37] As Black suffrage grew, partisan gerrymandering gave way to racial gerrymandering, still incorporating the strategies first devised by Henry and Gerry, but towards a more sinister but nonetheless ideological goal.

It is faulty to assume that racial gerrymandering is anything but a particular form of partisan gerrymandering—its only defining difference, and one the Court relied on when eventually addressing it, is that the ideology that was trying to cement its power was that of white supremacists. Though election law scholarship often separates the two—as the Court, through its jurisprudence has done—it is essentially the same practice elucidated above put to the ends of a racially driven political ideology. The Court eventually found the means in strong textualist terms under the Fourteenth and Fifteenth Amendments to address this particular form of partisan gerrymandering, but, as with many other issues of

---

[31] *See id.* at 794.
[32] *See id.* at 800.
[33] *Id.* at 805.
[34] *Id.*
[35] *See id.* at 783.
[36] *See* Dale Beeler, *The Election of 1852*, 11 IND. MAG. HIST. 301, 322 (1915).
[37] *See* Sam Stall, *Speed Read: Indiana Gerrymandering*, INDIANAPOLIS MONTHLY (Apr. 1, 2025), https://www.indianapolismonthly.com/arts-and-culture/circle-city/indiana-gerrymandering/.

discrimination, has not extended the protections beyond the racial redline enumerated by the Reconstruction Amendments.

During the 20th century, states and localities across the country regularly redrew their districts to carve out racial minorities, effectively forcing them out of political representation and, upon their successful exclusion, depriving them of their voting rights in the event they ever garnered enough political will to overcome this oppression. These schemes took many forms, and the courts did eventually address many of them, but only on the narrower, more explicit prohibitions in the Fourteenth Amendment. For example, many cities redrew their municipal boundaries to exclude Black voters from participating in the elections for the municipal governments that nonetheless controlled their daily lives.[38] States have historically developed schemes designed to decrease the value of Black voters' voices through compositions of at-large districts, multimember districts, or clear-cut segregation.[39] While the Voting Rights Act of 1965 eventually served as a stalwart against these types of practices, the issue still persists today and the efficacy of the Act has been slowly whittled down by the Court in the 60 years since its passage.[40]

But the Court has noted the strong connection that racial gerrymandering has to broader partisan gerrymandering. The most notable example was *Easley v. Cromartie*, where the Court declined to strike down a challenged racial gerrymandering, positing that, where district boundaries seemingly drawn on race

---

[38] *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960); McCoy v. Chicago Heights, 6 F. Supp. 2d 973, 974–75 (N.D. Ill. 1998); Allen v. Milligan, 599 U.S. 1, 14–15 (2023).

[39] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 58 (1980) (at-large districts); Davis v. Bandemer, 478 U.S. 109, 114–15 (1986) (plurality opinion) (multimember districts); Shaw v. Reno, 509 U.S. 630, 633–34 (standard line-drawing).

[40] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 34–35 (1986). *But see* Shelby County v. Holder, 570 U.S. 529, 556–57 (2013) (finding §4(b) of the Voting Rights Act unconstitutional; *Id.* at 557 (Thomas, J., concurring) (calling for the rendering of §5 of the Voting Rights Act unconstitutional); *Id.* at 587 (Kagan, J., dissenting) (noting the practical invalidity of §5 upon declaring §4(b) unconstitutional); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 730 (2021) (Kagan, J., dissenting) ("But the majority today lessens the law—cuts Section 2 down to its own preferred size. The majority creates a set of extra-textual exceptions and considerations to sap the Act's strength, and to save laws like Arizona's. No matter what Congress wanted, the majority has other ideas."); Louisiana v. Callais, No. 24-109, 2026 WL 1153054, at *12–13 (U.S. Apr. 29, 2026) (narrowing §2 of the Voting Rights Act and adjusting the *Gingles* test to exclude considerations of race to remedy racial discrimination in redistricting); *Id.* at *19 (Thomas, J., concurring) (calling for the removal of §2 from all redistricting claims); *Id.* at 38 (Kagan, J., dissenting) ("Today's decision renders Section 2 all but a dead letter.").

can be equally supported based on purely political motivations, a greater showing is needed to be able to strike down a map as a racial gerrymander.[41] The obvious implication—and one which the Roberts Court in *Rucho v. Common Cause* seemingly relied on[42]—is that redistricting is okay where the goals are political, but not where those political goals are racist in nature.[43] As Justice Breyer explained, "The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior."[44] In its racial gerrymandering jurisprudence, the court has simply identified one particularly detestable form of viewpoint and speaker-identity discrimination: the exclusion of Black voters based on their identities and their general opposition to white supremacist political movements. But just because one form of viewpoint and speaker-based discrimination is more specifically unconstitutional, does not mean that other forms are any less protected under the First Amendment.

While gerrymandering remains widely detested today as it did then, its use has not declined in any respect. The Court has expressed its own distaste for the practice on numerous occasions.[45] Critics of this tactic have identified many reasons for it to be considered anti-democratic in nature. Reflecting the sentiments of the critics of Henry's primordial gerrymander, some have noted that the practice allows politicians and the politically powerful to "choose voters instead of voters choosing politicians, . . . where electoral outcomes are virtually guaranteed, even when voters' preferences at the polls shift dramatically."[46] It entrenches the incumbent political party by making many districts 'safe' or 'leaning' in favor of candidates of

---

[41] 532 U.S. 234, 242, 257–58 (2001).

[42] *See* 588 U.S. 684, 700 (2019) ("Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. . . . [But p]artisan gerrymandering claims have proved far more difficult to adjudicate.").

[43] *See Easley*, 532 U.S. at 243, 258.

[44] *Id.* at 257.

[45] *See, e.g.*, *Vieth*, 541 U.S. at 292 ("We do not disagree with that judgment" that "severe partisan gerrymanders [are incompatible] with democratic principles."); *see also* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015) ("'[P]artisan gerrymanders,' this Court has recognized, '[are] incompatible] with democratic principles.' (quoting *Vieth*, 541 U.S. at 292)); *see also Rucho*, 588 U.S. at 718 ("Excessive partisanship in districting leads to results that reasonably seem unjust" and "is 'incompatible with democratic principles.'" (quoting *Ariz. State Legis.*, 576 U.S. at 791)).

[46] Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 9, 2025), https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained.

the preferred, or more accurately, the incumbent political party.[47] As such, the practice has also been accused of being a "covert form [of] disenfranchisement that manipulates the redistricting process to privilege particular groups . . . [and] dilute equal representation."[48] It also makes the primary of the favored party decisive, effectively excluding from the political process a certain subset of voters and amplifying more partisan candidates that are responsive only to their political base of support and who are less likely to work across the aisle and form effective coalitions.[49]

II. WHAT DOCTRINES OUGHT TO BE CONSIDERED IN ADDRESSING PARTISAN GERRYMANDERING?

Partisan gerrymandering encompasses a number of interrelated constitutional doctrines. While a large portion of partisan gerrymandering cases have considered the practice on equal protection grounds under the Fourteenth Amendment—as is common in election law issues[50]—there are multiple areas of First Amendment law that are impinged. Chief among them are the rights of voters to express themselves in electoral systems, organize themselves into effective ideological movements that shape government policy, and the right of political parties to freely associate without undue government restrictions. However, following the holding of the Court in *Rucho*, no discussion of partisan gerrymandering can proceed without first

---

[47] *Gerrymandering Harms Democracy*, LEAGUE OF WOMEN VOTERS OF N.C. (last visited Sept. 30, 2025), https://my.lwv.org/north-carolina-state/gerrymandering-harms-democracy.

[48] Michal Sered-Schoenberg, *The Democratic Deficit: Rethinking Gerrymandering in the United States as a Human Rights Violation and Exploring Its Implications*, COLUM. UNIV. LIBRS.: ACAD. COMMONS (2023) https://academiccommons.columbia.edu/doi/10.7916/hcc8-0791.

[49] *What is Gerrymandering*, CAMPAIGN LEGAL CTR. (Nov. 29, 2021) https://campaignlegal.org/update/what-gerrymandering.

[50] *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."); *see also* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (granting Congress the power to pass any legislation necessary to enforce the equal protection so long as it is for the legitimate end of ensuring protection, plainly adapted to that end, and is not prohibited and consistent with the letter and the spirit of the Constitution); *see also* Reynolds v. Sims, 377 U.S. 533, 566 (1964) ("[W]e conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."); *see also* Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 736 (1964) ("An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause.").

addressing the political questions doctrine and the Court's claim that partisan gerrymandering has "no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral."[51]

A. Political Questions Doctrine

In the partisan gerrymandering context, the Court has fundamentally stripped away the ability of federal courts[52] to adjudicate challenges to partisan gerrymanders under the political questions doctrine. The political questions doctrine is imposed principally by the modern Court out of the standards set forth in *Baker v. Carr*. In that case, the Court said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[53]

Thus, no analysis of the constitutionality of partisan gerrymandering can proceed without first identifying and addressing how the Court has applied this test to the practice.

---

[51] Rucho v. Common Clause, 588 U.S. 684,707 (2019).

[52] State courts can still review partisan gerrymandering claims under their own state constitutions and have done so to some success. *Id*. at 719; *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 910 (2021) (discussing various state courts' approaches to partisan gerrymandering under their states' constitutions).

[53] Baker v. Carr, 369 U.S. 186, 217 (1962).

1. How the Court Applies the Political Questions Doctrine

The Court has focused mainly on the second factor of the *Baker* test in partisan gerrymandering claims regarding a "lack of judicially discoverable or manageable standards."[54] In *Bandemer*, the Court was fractured over a challenged partisan gerrymander in Indiana conducted by an all-Republican reapportionment committee and passed along partisan lines by the Republican-controlled General Assembly and the Republican governor.[55] There, the Court, in a plurality, rejected the contention that partisan gerrymandering was not "judicially manageable," noting that similar ambiguities exist in claims of racial gerrymandering, reapportionment, and vote dilution issues, for which the Court has nonetheless established workable standards.[56] But it is telling that the Court, in a great many instrumental election law decisions, sought, as best they could, to provide standards even in the most confounding issues. If the Court in *Reynolds* could devise the "one person, one vote" standard to address issues of reapportionment—one of the most complicated issues in election law—the Court clearly has the wherewithal to establish standards in partisan gerrymandering contexts.[57] As Justice White explained for the *Bandemer* plurality, "*Reynolds* surely indicates the justiciability of claims going to the adequacy of representation in state legislatures."[58] As such, though partisan gerrymandering reflects a different context of political organization, rather than racial discrimination as in *Reynolds*, the issue was the same: "Nevertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable."[59]

In *Vieth*, Justice Scalia, as part of the plurality, suggested that the conclusion in *Bandemer* was in error, arguing that the second factor—that there may be "a lack of judicially discoverable and manageable standards for resol[ution]"—likely applies.[60] Seeking to overturn *Bandemer*, which came to the opposite conclusion, Scalia said, "[e]ighteen years of judicial effort with virtually nothing to show for it . . . reveals[] no judicially discernible and manageable standards for adjudicating

---

[54] *Id.*
[55] Davis v. Bandemer, 478 U.S. 109, 113–17 (2013).
[56] *See id.* at 125–26.
[57] *See id.* at 123–24.
[58] *Id.* at 124.
[59] *Id.*
[60] Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004).

political gerrymandering claims have emerged."[61] He continued, concluding that the Court must find that "political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."[62]

Scalia's conclusion would prove influential, as his argument would be copied and pasted, this time with a full majority of the Court, in *Rucho*.[63] There, Chief Justice Roberts fully endorsed Scalia's conclusion on judicially manageable standards, indicating that lower courts in the years following *Bandemer* and *Vieth* had largely floundered in applying a standard that, as Justice Kennedy suggested in *Vieth*, was limited and precise in nature.[64] Further, Roberts suggested that partisan gerrymandering could be readily distinguished from other justiciable election law issues—namely racial gerrymandering and one person, one vote—because it has the added element of partisanship being an acceptable and expected consideration of the political act of redistricting, thus making the determination of the Court one of *degree* rather than straight, line-drawing adjudication.[65]

Without explicitly saying so, Roberts also shared the view that any consideration of partisan gerrymandering would require the Court to determine a standard of "fairness."[66] He expressed his concern thus: "The initial difficulty in settling on a 'clear, manageable and politically neutral' test for fairness is that it is not even clear what fairness looks like in this context."[67] Listing off many ways in which judges might differ on what constitutes a "fair" map, he concluded that "[d]eciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal."[68]

The concern over what "fairness" means was central to Roberts' ultimate conclusion that partisan gerrymandering appears too nebulous an issue for the Court to address without engaging in some manner of impermissible policymaking.[69] Taking a page out of Justice O'Connor's concurrence in *Bandemer*, Roberts cemented the longstanding concern with

---

[61] *Id.* at 281.
[62] *Id.*
[63] *Rucho*, 588 U.S. at 702, 705–06.
[64] *See id.* at 708 (citing *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring)).
[65] *See id.* at 708, 709–10.
[66] *See id.* at 708.
[67] *Id.* at 706.
[68] *Id.* at 707.
[69] *Id.* at 705.

partisan gerrymandering that the Court would be required to make an "initial policy consideration" before taking any action under *Baker*'s third factor.[70] In *Bandemer*, O'Connor claimed that, when the plurality "treat[ed] the claims of mainstream political parties as justiciable," it had abridged "precisely the sort of 'initial policy determination of a kind clearly for nonjudicial discretion' that *Baker v. Carr* recognized as characteristic of political questions."[71] Similarly, Roberts endorsed this view in his discussion of considerations of 'fairness,' explaining, "[I]t is only after determining how to define fairness that you can even begin to answer the determinative question."[72]

2. Errors in Application

The main error Roberts makes in *Rucho* is that he goes too broad in determining what is necessary to decide when a partisan gerrymander is unconstitutional. As the appellees in *Rucho* explained, the inquiry on constitutionality turns on an intent to discriminate, not on the mere presence of partisanship.[73] The argument that intent to discriminate is a determinative factor was central to the plurality's conclusion in *Bandemer*, not any questions of "how much is too much."[74] Roberts' concerns over competing definitions of "fairness" are an invention that is simply not present in district court application of the standards from the Court's decisions on partisan gerrymandering.[75]

Further, beyond equal protection, we can identify invidious viewpoint discrimination—as will be discussed later[76]—which the Court has no issue assessing in many other contexts. The mere presence of politics in an illegal practice, particularly in First Amendment issues, has never been a bar to adjudication. More precisely, where a decision is made on a partisan basis with the intent to harm or suppress others' political expression, the Court has gone to great lengths to involve itself

---

[70] *Id.* at 704.
[71] Davis v. Bandemer, 478 U.S. 109,155 (2013), *abrogated by* Rucho v. Common Cause, 588 U.S. 684 (2019) (O'Connor, J., concurring) (quoting Baker v. Carr, 369 U.S., 186, 217 (1962)).
[72] *Rucho*, 588 U.S. at 707.
[73] Brief for *Common Cause* Appellees at 25, *Rucho*, 588 U.S. 684 (2019) (No. 18-422).
[74] *Bandemer*, 478 U.S. at 127, *abrogated by Rucho,* 588 U.S. at 684 (plurality opinion). *Contra Rucho*, 588 U.S. at 707.
[75] *See Rucho*, 588 U.S. at 741 (Kagan, J., dissenting) ("Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness.").
[76] *See infra* Section II.B.ii.b.

and intervene to stop such actions.[77] Particularly in elections, the Court has had no problem involving itself where fundamental rights have been affected, even if such decisions have considerable political implications.[78] In *Wesberry v. Sanders*, Justice Harlan asserted that "nothing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction. . . ."[79]

The conclusion reached in *Rucho* boils down to the belief that, because partisan gerrymandering has too many factors to consider, the Court cannot make decisions on the matter. This is an egregious departure from the very basic role of the Court first prescribed in *Marbury v. Madison* that "if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."[80] As such, Justice Black continues in *Wesberry*, "[t]he right to vote is too important in our free society to be stripped of judicial protection. . . ."[81] It is not just the right to vote that is fundamentally implicated in the deleterious effects of partisan gerrymandering, but the highly interwoven rights to associate free from government penalty and to vocalize one's political desires. The Court in *Rucho* readily admits the harm to these rights when it endorses the view that "such gerrymandering

[77] The Court has repeatedly protected political speech demoted by the government for political, social, or moral reasons. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("Congress certainly cannot forbid all effort to change the mind of the country."); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("[C]onsistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed."); Speiser v. Randall, 357 U.S. 513, 528–29 (1958) ("We hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.").

[78] *See, e.g.*, Bush v. Gore, 531 U.S. 98, 111 (2000) ("None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

[79] 376 U.S. 1, 6 (1964).

[80] 5 U.S. (1 Cranch) 137, 178 (1803).

[81] 376 U.S. at 7.

is 'incompatible with democratic principles.'"[82] But it explicitly rejects the finding that, where legislatures overstep their bounds and violate constitutional rights, the onus is on the judiciary, in the absence of the task of correction being explicitly shifted to some other branch, to provide a remedy for harms inflicted.[83]

The simple fact of the matter is that just because an area of law is complex and there is significant open texture as to what relevant terms mean—the right to vote, equality, democracy, and representation are all broad terms that we have been trying to refine for centuries—does not mean that a Court is therefore justified in being derelict in their duty to provide clarity in these constitutional complexities. The right to free speech is comprised of only ten words,[84] but we've built mountains of doctrine nonetheless. The Constitution itself is only six pages long, yet tomes of court opinions, scholarship, and debate have and continue to be developed to better understand its meaning. Vagaries will inevitably exist in law, but that cannot justify the present judicial dereliction of duty to set and apply standards for how the law is meant to operate.[85]

B. First Amendment Rights

What makes *Rucho* most frustrating is its insistence that partisan gerrymandering may only be found to be violative of equal protection under the Fourteenth Amendment.[86] While there is significant credence to the argument that it is violative of equal protection, the Court seems wanting for some more

---

[82] 588 U.S. at 718 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

[83] *Marbury*, 5 U.S. (1 Cranch) at 7 ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."). *But see* Gill v. Whitford, 585 U.S. 48, 60 (2018) ("Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury."); *see also Rucho*, 588, U.S. at 718 ("Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is 'incompatible with democratic principles' does not mean that the solution lies with the federal judiciary." (quoting *Ariz. State Legislature*, 576 U.S. at 791)).

[84] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . .").

[85] *See* Reynolds v. Sims, 377 U.S. 533, 566 (1964) ("[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.").

[86] *Rucho*, 588 U.S. at 714–15 ("These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no 'clear' and 'manageable' way of distinguishing permissible from impermissible partisan motivation.").

precise, less interpretive rights that are being violated. The Court's reluctance to define "fairness" in the context of redistricting is stated almost as the exclusive means by which partisan gerrymandering may be examined—but it is not. In fact, the First Amendment provides entire doctrines which examine political speech in the context of elections which the Court could reasonably build on.

Instead, the Court comes to the simple, almost thoughtless conclusion that, because "[t]he plaintiffs are free to engage in [speech, association, or any other First Amendment activities] no matter what the effect of a plan may be on their district," there is no harm to their rights.[87] The argument seems to suggest that, so long as a person can nominally use their First Amendment rights, there is no constitutional harm which the Court is bound to respect. But the Court, particularly in cases involving political speech and the right to associate for purposes of elections, has taken great offense to any restriction on such grounds. Where political speech is burdened, the Court has largely imposed the standard of strict scrutiny.[88] Where the right of individuals to associate has been limited, or their effectiveness of association has been diminished, the Court has been similarly scrupulous in its review of such laws.[89]

Partisan gerrymandering presents a profound threat to the right to express one's political opinions and the right of individuals to coalesce into effective political associations.[90]

---

[87] *Id.* at 713–14.

[88] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech."); Citizens United v. FEC, 558 U.S. 310, 365 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 753 (2011) ("How the State chooses to encourage participation in its public funding system matters, and we have never held that a State may burden political speech—to the extent the matching funds provision does—to ensure adequate participation in a public funding system.").

[89] *See, e.g.*, Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or, as here, the freedom of political association." (citation omitted)); Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000) ("The burden Proposition 198 places on petitioners' rights of political association is both severe and unnecessary."); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451 (2008) ("Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are 'narrowly tailored to serve a compelling state interest.'" (quoting Clingman v. Beaver, 544 U.S. 581, 586 (2005)).

[90] Elrod v. Burns, 427 U.S. 347, 356 (1976) ("Our concern with the impact of patronage on political believe and association does not occur in the abstract, for

Voting should be considered an expressive function, albeit with compelling state interests which allow them to channel how voting may be done, particularly with time, place, and manner restrictions.[91] As such, the devaluation of votes for particular candidates or ideological associations through intentionally partisan redistricting is a violation of the core purpose of the preservation of political speech from government restriction. Further, where a government identifies a class of persons based on their association with a particular political party—especially one reflected in the two-party system—or their general affinity towards it, the devaluation of such individuals' voting power through partisan gerrymandering reflects unconstitutionally invidious discrimination based on their perceived ideology in violation of the First Amendment.

1. Free Expression

The Court has repeatedly come to the conclusion that political speech is of the highest protection under the First Amendment.[92] In nearly every situation that political speech has been even minimally affected, the Court has imposed strict scrutiny, often finding that such laws fail the standard.[93] Particularly when the speech revolves around elections, the Court has taken this doctrine to its fullest extent. The Court has been unambiguous in explaining why this is—as Justice Kennedy explains:

> It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or

political belief and association constitute the core of those activities protected by the First Amendment."(footnote omitted)).

[91] *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (upholding "reasonable, nondiscriminatory restrictions"); Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (limiting ballot access laws to only those that do not "unfairly or unnecessarily burden" associational rights and political opportunity).

[92] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) (upholding a boycott as protected political speech); Virginia v. Black, 538 U.S. 343, 365 (2003) (striking down a cross-burning ban as a burden on political speech); *Bennett*, 564 U.S. at 721 (invalidating a matching funds provision as suppressing the political speech of privately funded candidates).

[93] *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 915; *Black*, 538 U.S. at 365; *Bennett*, 564 U.S. at 721.

> reject certain ideas or influences without Government interference or control.[94]

What Kennedy describes is that political speech is protected so fervently because it is the bedrock means through which a democratic society expresses itself. There is fundamentally no purpose in protecting speech if the citizenry cannot do anything with the ideas expressed. A political message that is suppressed by the government is, in many ways, the government taking steps to guarantee that the message has no bearing on government policy, composition, or action.

Yet, the Court has failed to take this seemingly robust stance concerning the *commission* of elections. While political speech and conduct essentially serve the ultimate goal of influencing the outcome of elections—and therefore the policy, construction, and action of government[95]—the *means* through which elections are conducted are not themselves considered expressive. Thus, conversations around elections are protected vigorously, but the message voters can send through those elections via their ballots are not equally protected. This paradox is laid out most clearly in *Burdick v. Takushi*, where the Court stated, "Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."[96] Following this case, the Court went even further, stating in *Timmons v. Twin Cities Area New Party*, "Ballots serve primarily to elect candidates, not as forums for political expression."[97] No discussion of the protection of the right to vote under First Amendment protections for political speech can thus carry water without first showing these assertions are in error.

a. Voting is Protected Expressive Speech

The Court's finding in *Burdick* and later cases fundamentally misunderstands the power and purpose of voting. Where the majority and dissent both agreed that Burdick's "right to freedom of expression [was] not implicated," they missed a core issue with restricting voting—it does serve an expressive function at the individual level.[98] In all its concern for how

[94] U.S. v. Playboy Ent. Grp., Inc., 529 U.S. 803, 817 (2000).
[95] *See* Mills v. Alabama, 384 U.S. 214, 218–19 (1966).
[96] 504 U.S. at 438 (citation omitted).
[97] 520 U.S. 351, 363 (1997) (citing Burdick v. Takushi, 504 U.S. 428, 455 (1992) (Kennedy, J., dissenting)).
[98] *Burdick*, 504 U.S. at 445 (Kennedy, J., dissenting).

difficult it would be for states to 'winnow' candidates on a ballot and make elections realistically administrable and avoid voter confusion, exhaustion, and other concerns,[99] the Court never considers voting as an individual act. When it does consider the individual purpose of voting, it takes a very narrow view. For example, in *Burdick*, the Court narrows the individual interest in voting to consider the right to cast a *protest* vote.[100] The Court, however, has found the right to vote to be fundamental.[101] The question then becomes what about voting is fundamental?

At its core, the right to vote can be found in multiple areas of the Constitution. There are the obvious portions, like the Elections Clause, which assigns to the States and Congress the responsibility of coordinating the "Times, Places, and Manner of holding Elections for Senators and Representatives,"[102] and the Republican Guarantee Clause, which, as its name suggests, "guarantee[s] to every State in this Union a Republican Form of Government. . . ."[103] But that isn't the sole location for a broad, fundamental right to vote. Much litigation establishing this right has been located in the Equal Protection Clause of the Fourteenth Amendment. In the foundational case for this doctrine, the Court rooted the right to vote squarely under the Equal Protection Clause, saying that restricting the right to vote "present[s] questions of alleged 'invidious discriminations against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.'"[104]

What flowed from this case was a slate of equal protection objections to all manner of electoral schemes. But to stop the analysis of *Reynolds* to only the Equal Protection Clause is a major disservice to the ideals Chief Justice Warren imbued within his opinion. While the specific issue before the Court in *Reynolds* was rightly considered under the Equal Protection Clause as an example of invidious discrimination based on race, Warren made sure to note that it is not just Equal Protection that might be invoked or implicated, but *every* aspect of the Constitution—Equal Protection is not the beginning of a claim,

---

[99] *Id.* at 433, 438.
[100] *Id.* at 438.
[101] *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
[102] U.S. CONST. art. I, § 4, cl. 1.
[103] *Id.* art. IV, § 4.
[104] *Reynolds*, 377 U.S. at 561 (quoting Skinner v. Oklahoma, 316 U.S. 535, 536 (1942)).

but an additive to other constitutional violations.[105] For Warren, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[106] Such a broad mandate clearly cannot be confined merely to issues of racial discrimination, and to suggest otherwise is to fundamentally misunderstand his intentions. As the Court would explain in a later case, "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[107] Elaborating on the point, the Court stated, "'(T)he exercise of rights so vital to the maintenance of democratic institutions' cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents."[108]

Not to be uncertain, Justice Brennan makes the connection clear in *New York Times Co. v. Sullivan*, stating:

> [Freedom of expression] 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.'[109]

What cannot be suggested about the Court's sentiments throughout this seminal period of constitutional development is that free expression is in some way divorced from voting. In fact, free political expression is clearly protected primarily because it ultimately culminates in the decisions made by individuals in the ballot box. Thus, to suggest that what one marks on a ballot is in no way an expression of their political sentiments is fundamentally misunderstanding what undergirds the act of

---

[105] *See id.* at 557–58 (discussing *Gray v. Sanders*, where the Court applied the Equal Protection Clause only after finding a law implicated the Fifteenth and Nineteenth Amendments (citing Gray v. Sanders, 372 U.S. 368 (1964)).
[106] *Id.* at 555.
[107] Carrington v. Rash, 380 U.S. 89, 94 (1965).
[108] *Id.* (citation omitted).
[109] 376 U.S. 254, 269 (1964) (first quoting Roth v. United States, 354 U.S. 476, 484 (1957); then quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

voting. In this way, the Court in *Burdick* and its progeny have fully lost the plot concerning the purpose of democracy. As Jean-Jacques Rousseau describes of democratic government: "When in the popular assembly a law is proposed . . . [e]ach man, in giving his vote, states his opinion on that point; and the general will is found by counting votes."[110] Democracy is, at its core, the expression of individuals coalesced into one collective referendum, be it on the selection of a representative, a president, or a ballot measure. On each ballot is an essential decision expressed, a viewpoint put to action.

The Court has come close to this realization. In *Wesberry*, the Court noted that "[n]o right is more precious in a free country than that of having a *voice* in the election of those who make the laws under which, as good citizens, we must live."[111] In *Roth*, all sorts of expressive acts are protected at their core because they facilitate the "bringing about of political and social changes desired by the people."[112] And in *Nevada Commission on Ethics v. Carrigan*, Justice Alito, in his concurrence in part, chided the Court for concluding that the "expressive value" of votes is "not created by the conduct itself but by the speech that accompanies it."[113] In his view, "[v]oting has an expressive component in and of itself," and when "an ordinary citizen casts a vote in a straw poll on an important proposal . . . that act indisputably constitutes a form of speech."[114] The Court needs to take that final step to recognize that, because voting has "expressive value," it has a baseline level of protection as political speech. It must fully accept that, at the most basic level, a vote is the expression of the political will of the voter; an expression which cannot be fully divorced from the act of voting, regardless of one's capacity to fully comprehend the full message behind the vote. If "the political franchise of voting is . . . regarded as a fundamental political right, because [it is] preservative of all rights," then that logic should extend to the rights that themselves preserve the right to vote—First Amendment-protected political speech.[115]

---

[110] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 93–94 (Ernest Rhys ed., G.D.H. Cole trans., J.M. Dent & Sons, Ltd. & E.P. Dutton & Co. 1920) (1762).
[111] Wesberry v. Sanders, 376 U.S. 1,17 (emphasis added).
[112] 354 U.S. 476, 484 (1957).
[113] Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 127 (2011) (citing Rumsfeld v. F. for Acad. & Inst'l Rts., Inc., 547 U.S. 47, 66 (2006). *But see id*. at 133 (Alito, J., dissenting).
[114] *Id.* at 133, 134 (Alito, J., dissenting).
[115] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

The Court in *Burdick* and *Timmons*, and some scholars who are hesitant to endorse a First-Amendment-protected right to vote, have argued that, because voting is inherently and necessarily limited as a form of expression, it cannot be subject to the strict scrutiny that would otherwise be required.[116] While voting might contain communicative forms, they contend, it is not general—when a voter looks at their ballot, they may only do so on certain days, in certain places, and are limited to "yea" or "nea," or at its most expressive, a write-in.[117] But this argument seems to be overly generous to strict scrutiny. The Constitution allows for time, place, and manner restrictions on speech just as it does explicitly for voting.[118] This does not undermine the essence that, where voting is restricted in some way, it must comport with all other provisions of the Constitution, where burdens on fundamental rights require some degree of heightened scrutiny. The only difference between time, place, and manner restrictions on speech compared to elections is that the Founders felt it necessary to assign *who* may implement the time, place, and manner restrictions. In this way, the enumeration of time, place, and manner restrictions for elections specifically has nothing to do with the Founders granting a general constitutional power to regulate—they did not feel the need to do so, as they assumed that such restrictions are natural and necessary for government—but rather served as a clarification on the separation of powers as to who may regulate to begin with. The right, however, remains untouched in its centrality, importance, and connections to other constitutional protections.

For example, a state may prescribe a certain amount of polling places under the Constitution, but it may not restrict those polling places to only white neighborhoods, as that would violate equal protection standards. A state may have a

---

[116] *See* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 335 (1993) ("While the first amendment might serve as an adequate basis for protecting the right, it is unnecessary, and possibly even unwise, to use the first amendment as the textual basis for the constitutional right to vote."); *see also* Burdick v. Takushi, 504 U.S. 428, 438 (1992) ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."); *see also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression.").

[117] *See* Winkler, *supra* note 116, at 338.

[118] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980); U.S. CONST. art. 1, § 4, cl. 1.

compelling interest in restricting *how* a person may express their vote—as the Court in *Burdick* clearly denotes[119]—but they may not decide *what* is expressed at the most basic level.[120] For instance, a government cannot decide that votes for a Democrat are explicitly worth half that of a vote for a Republican in a statewide election. Critics contend that finding a right to vote under the First Amendment limits its other areas of protection under a fundamental rights analysis, but this argument is short-sighted—why can't the right to vote fall under both doctrines? The right to vote is fundamental because it is the means by which the government designed by the Constitution is itself constituted. But the right to vote itself is protected by the Constitution under several provisions, one of which is the First Amendment, which similarly exists as the basis for a functioning democratic society. Voting doesn't work in a democratic society without free speech and expression, and free speech and expression aren't protected—or even worth protecting—without elections to form the government and enact public policy consistent with that end.

b. Political Speech

The core assertion of *Burdick* and *Timmons* ignores the broad standard the Court has established across election law issues that political speech is vital. It is thus unclear why so many components of election law are vigorously justified under the First Amendment while the act of voting is considered not protected by the First Amendment. Particularly in the Roberts Court, where application of the First Amendment to election law has seen the most use, this distinction is abnormal. If we come to the conclusion that voting is, at its very heart, an act of political expression, the mountains of doctrine regarding political speech must be brought to bear on restrictions on voting.

The Court has repeatedly insisted that political speech is of the highest priority for protection under the First

[119] *See Burdick*, 504 U.S. at 438.

[120] While a state may go through a process of narrowing down choices for voters, it may not demand that voters choose Candidate A, as voters retain the right to *not* vote, even for an unopposed candidate. *See id.* at 441.

Amendment.[121] Across legal issues, from election law[122] to publisher liability,[123] the Court has maintained this belief. The Roberts Court, in particular, has been one of the doctrine's most ardent defenders, most notably in its election law jurisprudence.[124] The reason political speech is so passionately protected is clear—a democratic society cannot function without the free flow of political ideas and expression, and such expression is manifested in the ballot box, where we as a polity decide on who will make our decisions or what policy directions we wish to pursue.[125]

The right to cast a ballot then must be considered protected under the political speech doctrine. The idea is not novel under many of the current justices' jurisprudence, who assert that the First Amendment serves as a "vital guarantee of democratic self-government."[126] In fact, the Court historically has gone as far as to say that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[127] It does not comport with the broad purpose of political speech as "the essence of self-government" when the chief means by which we effectuate self-government does not fall under that mandate of protection.[128] Under *Roth*, "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political

---

[121] *See, e.g.*, NAACP v. Claiborne Hardware, 458 U.S. 886, 915 (1982) (upholding a boycott as protected political speech); Virginia v. Black, 538 U.S. 343, 365 (2003) (striking down a cross-burning ban as a burden on political speech); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011) (invalidating a matching funds provision as suppressing the political speech of privately funded candidates).
[122] *See* Buckley v. Valeo, 424 U.S. 1, 39 (1976) ("The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech . . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" (citation omitted)).
[123] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).
[124] *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010); *Bennett*, 564 U.S. at 748.
[125] Interestingly, Justice Alito, who sided with the majority in *Rucho*, criticized the Court's suggestion that "restrictions upon legislators' voting are not restrictions upon legislators' speech." Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 177, 132–33 (2011) (Alito, J., concurring in part). Alito found this statement to ignore the principle of *legislative* voting, contending that an action does not lose its "expressive character" when given legal effect. *Id.* at 134. Alito goes so far as to say, "[v]oting has an expressive component in and of itself," and that "the act of voting is not drained of its expressive content when the vote has a legal effect." *Id.* at 133, 134.
[126] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 427 (D.C. Cir. 2017) (mem.) (Kavanaugh, J., dissenting).
[127] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).
[128] *Id.*

and social changes desired by the people," the guaranteed protection of which applies to all ideas or expressions "unless [they are] excludable because they encroach upon the limited area of more important interests."[129] While the Court has recognized exemptions from protection for speech like obscenity, incitement, or fighting words,[130] it has never done so for the purpose of protecting partisan interests.

Quite the opposite, the Court has made clear that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics. . . ."[131] The Roberts Court itself has said that "[t]he First Amendment 'is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us. . . .'"[132] In saying such, Roberts extended that logic to apply to the "individual's right to participate in the public debate through political expression and political association," particularly in the context of campaigns.[133]

Further, the Court's decisions on political speech make clear that the protections for political speech exist for all speakers, regardless of their identities. In *Rosenberger*, the Court found that states were prohibited from regulating speech or expressive conduct "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[134] The Roberts Court, in particular, has taken a broad application of its bar, often controversially, as seen in *Citizens United v. FEC* where Justice Kennedy says, "The First Amendment protects speech and speaker, and the ideas that flow from each."[135] Continuing, Kennedy asserts, "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."[136] Certainly, it must be assumed that, if we grant

---

[129] Roth v. United States, 354 U.S. 476, 484 (1957) (footnote omitted).
[130] *See generally* Miller v. California, 413 U.S. 15 (1973) (obscenity); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).
[131] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[132] McCutcheon v. FEC, 572 U.S. 185, 203 (2014) (quoting Cohen v. California, 403 U.S. 15, 24 (1971).
[133] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 15 (1976)).
[134] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (citation omitted).
[135] 558 U.S. 310, 341 (2010).
[136] *Id.*

voting as a politically expressive act, we must afford it the highest protections under the fundamental right to political expression.

When it comes to speech in the electoral context, the Court has been unequivocally protective on the basis of political speech. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court struck down a matching public funds provision, contending that, in providing money to a candidate's opponent, the state is harming the political speech of a candidate.[137] In that case, the Court notes that the "'major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs' . . . . Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand."[138] Again, in *McCutcheon*, the Court affirmed this longstanding view, adding that "there is no right more basic in our democracy than the right to participate in electing our political leaders."[139] For the Court, the various forms of political expression within elections, including voting, are fundamentally protected by the First Amendment. While these cases focused on political contributions, the inclusion of political contributions—which the Court protects from regulations that are meant "to restrict the political participation of some in order to enhance the relative influence of others,"—alongside a list of general electoral activities is telling.[140] The Court has explicitly and repeatedly rejected the equalization rationale for political contributions, meaning that each individual can speak as much as they'd like without the government restricting that speech to increase the influence of others.[141] Fundamentally, to protect the right to vote, which is a clear form of political expression, the Court must

---

[137] 564 U.S. 721, 753 (2011).
[138] *Id.* at 755 (quoting *Buckley*, 424 U.S. at 14).
[139] McCutcheon v. FEC, 572 U.S. 185,191 (2014).
[140] *Id.* (placing contributions alongside expressive activities such as "run[ning] for office themselves, *vot*[*ing*], urg[ing] others to *vote* for a particular candidate, [and] volunteer[ing] to work on a campaign. . . ." (emphasis added)).
[141] *See, e.g.*, *Buckley*, 424 U.S. at 54 ("The ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights."); McConnell v. FEC, 540 U.S. 93, 227 (2003) (citing *Buckley*, 424 U.S. at 48); Citizens United v. FEC, 558 U.S. 310, 365 (2010) (overruling quasi-equalization rationale in Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990)); *Bennett*, 564 U.S. at 749 ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech." (quoting *Citizens United*, 558 U.S. at 350).

fundamentally "guard against undue hindrances to political conversations and the exchange of ideas" in elections.[142]

The Court summarized the dangers of regulating political speech well when it said:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, this Court has recognized that 'the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.[143]

Political speech is the bedrock of the First Amendment, and voting is its final, consummate, and paramount form. When a state regulates political speech, the Court requires the most stringent review. When political speech is limited in any way, however incidental, it is nonetheless afforded forthright protection—any law imposing such a burden is scathingly reviewed by the Court and must be narrowly tailored to meet interests of utmost and fundamental importance to justify its imposition.

2. Free Association

a. Associational Rights of Political Parties

In the electoral context, associational rights are the most oft-cited First Amendment rights claimed by litigants challenging voting regulations. This is because the Court has repeatedly recognized the right of individuals to associate as a core process through which people participate in democracies. At the most basic level, the structure of American elections requires the construction of political coalitions, as first-past-the-post systems incentivize two-party competition under

---

[142] Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 192 (1999) (citing Meyer v. Grant, 486 U.S. 414, 421 (1886)).

[143] Burson v. Freeman, 504 U.S. 191, 196 (1992) (internal quotations and citations omitted) (first quoting Mills v. Alabama, 384 U.S. 214, 218 (1966); then quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); and then quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

Duverger's Law.[144] As the Court has explained, "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."[145]

Much of the relevant litigation surrounding free association in elections has been brought by political parties, but the standards set within those cases are supremely relevant to questions of partisan gerrymandering. In fact, the act of partisan gerrymandering cannot be unwed from the right to associate politically because partisan maps are conducted not just on the basis of ideas but on the basis of party advantage. Generally, parties litigate based on their rights to associate freely in order to place the candidates of their choice on the ballot,[146] to ascribe their endorsements as they wish,[147] and to conduct their internal affairs without government intrusion.[148]

But at the heart of all of these discussions is the intrinsic right to hold political beliefs and organize around them. As Justice O'Connor explained in her concurrence in *Clingman v. Beaver*, "[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws."[149] As this right to speak in an election is crucial, "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."[150] What O'Connor is getting at is that voters will naturally coalesce around certain individuals, parties, and ideas—in fact, the First Amendment exists principally for that purpose. Although recognizing that electoral administration is left to the states, the "exercising [of] their powers of supervision over elections and in setting qualifications for voters . . . may not infringe upon basic

---

[144] Duverger's Law is a concept of political science and theory that suggests that consensus-driven political systems naturally shift and devolve to two-party systems, particularly in single-ballot and first-past-the-post electoral systems. For more, see Aaron Blake, *Why Are There Only Two Parties in American Politics?*, WASH. POST: THE FIX (Apr. 27, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/04/27/why-are-there-only-two-parties-in-american-politics/.

[145] Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

[146] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997).

[147] *See Eu*, 489 U.S. at 223.

[148] *See* Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 92–93 (Tex. 1997); Nader v. Schaffer, 417 F. Supp. 837, 844–45 (D. Conn. 1976), *aff'd mem.*, 429 U.S. 989 (1976).

[149] Clingman v. Beaver, 544 U.S. 581, 599–600 (2005) (O'Connor, J., concurring (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

[150] *Id.* at 600 (majority opinion) (quoting Kusper v. Pontikes, 414 U.S. 51, 57 (1973)).

constitutional protections."[151] As such, while states do have legitimate interests in regulating elections, those regulations may not "unnecessarily restrict constitutionally protected liberty."[152] Rather, "[i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."[153]

Put more bluntly, the freedom to associate politically is a long-recognized fundamental right protected by the First Amendment, and requires serious justification for its infringement by the state.[154] Any law, including those pertaining to elections, which places a substantial burden on such a fundamental right must undergo strict scrutiny.[155] Particularly where rules infringe on a group's political speech, the Court has been very protective, making sure that the state does not demote or disfavor certain groups for their political beliefs.[156] This is because one of the main goals of preserving political associational rights is to prevent the dominant political group from entrenching themselves in government—as Justice Kennedy phrased it: "[B]urdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views[,]" he says, "[is] unconstitutional absent a compelling government interest."[157]

The Court in *Rucho* would contend that the basic right to associate is not infringed here as The Court has repeatedly found that, where voters are still free to register with political parties, vote for them in their districts, fundraise and advocate for their candidates of choice, and might even be guaranteed a certain amount of representation within a partisan scheme, they have

---

[151] *Kusper*, 414 U.S. at 57.
[152] *Id.* at 59.
[153] *Id.*
[154] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").
[155] *Kusper*, 414 U.S. at 58–59 ("As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." (citations omitted)).
[156] *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.").
[157] Vieth v. Jubelirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

not experienced a deprivation of rights.[158] However, the effectiveness of a constitutionally questionable scheme should be a consideration in any such determination—what use is fundraising and campaigning to gain political office if, as is the case in North Carolina, the present minority party is so effectively "shut out" that any political power is completely outweighed by a legislative supermajority? What the Court is faced with in cases like *Rucho* is the establishment of a floor for partisan gerrymandering cases, and when considering political association as a means of posing worthwhile challenges to the dominant political party, the government should not design laws to make that challenge less effective based on the association's beliefs and opinions.[159]

b. Viewpoint Discrimination

Ultimately, when the government engages in partisan gerrymandering, it is practicing unconstitutional viewpoint discrimination. As already mentioned, the government may not restrict political speech on the basis of speaker identity, and it most certainly may not do so on the basis of political identity or speech.[160] The Court has been clear that regulations may not explicitly discriminate based on viewpoint,[161] but they've been just as insistent on blocking viewpoint discrimination even where laws are facially neutral.[162] While it might not be definitively factual or manageable to say maps that are politically drawn must survive strict scrutiny, it is exceedingly reasonable to suggest that maps like the ones in *Rucho* were drawn to suppress

---

[158] *See* Whitcomb v. Chavis, 403 U.S. 124, 149 (1971) (rejecting a vote dilution claim because there was no evidence that residents of the Center Township ghetto had less opportunity to participate in the political process and elect legislators of their choosing); Badham v. Eu, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (applying *Bandemer* to reject allegation that Republicans had been "shut out" of the political process as they could still register voters, organize, vote, fundraise, and campaign); Gaffney v. Cummings, 412 U.S. 735, 752 (1973) (accepting a bipartisan gerrymander where political parties were effective guaranteed a maximal amount of safe districts, thereby guaranteeing the minority party a share of the legislature, but eliminating a possibility of a competitive middle that could swing them into a majority in the future).

[159] *See* Rucho v. Common Cause, 588 U.S. 684, 744 (2019) (Kagan, J., dissenting) ("The majority's 'how much is too much' critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much.").

[160] *See Citizens United*, 588 U.S. at 350.

[161] *See* Reed v. Town of Gilbert, 576 U.S. 155, 169–70 (2015).

[162] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 812 (1985).

the point of view of the disfavored class—the authors and defenders of the map were quite explicit about that fact.[163]

The Court has set forth standards for determining when a facially neutral law nonetheless imposes unconstitutional viewpoint discrimination. The Court has applied scrutiny to laws that are "impermissibly motivated by a desire to suppress a particular point of view[,]" even if the exclusion is valid or reasonable, because it is an unconstitutional act of viewpoint discrimination by the state.[164] The Court has affirmed this standard, with Kennedy saying in his concurrence in *Matal v. Tam*, "Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys."[165] In that case, the Court provided a test for whether a law engages in viewpoint discrimination, asking whether "the government has singled out a subset of messages for disfavor based on the views expressed."[166] The state cannot subject disfavored "beliefs and associations to some state-selected orthodoxy" but, with partisan gerrymandering, States are doing just that.[167]

III. PARTISAN GERRYMANDERING VIOLATES VOTERS' ASSOCIATIONAL RIGHTS

As is apparent, when states engage in partisan gerrymandering, they are at the very least targeting individuals for their voting history. More often, they are drawing maps to target—more accurately, to diminish the inclusion of—opposition parties.[168] When the state engages in this form of targeting of speech, groups, or identities, they are usually subject to some form of heightened scrutiny. Traditionally, as voting rights have largely been litigated under the Equal Protection Clause—for good reason, as the Fourteenth Amendment

---

[163] *See* COMMON CAUSE NC, *supra* note 3; Joint Appendix, *supra* note 4 at 310, 460; Hise & Lewis, *supra* note 6.
[164] *Cornelius*, 473 U.S. at 812–13.
[165] 582 U.S. 218, 248 (2017) (Kennedy, J., concurring).
[166] *Id.* at 221 (majority opinion).
[167] Rutan v. Republican Party of Ill., 497 U.S. 62, 75 (1990); *see also* Bd. of Educ., Island Trees Free Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870–71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books.").
[168] Though it should be noted that the "minority" party is not always the numerical minority. Gerrymandering often is used to entrench a party that generally does not win the majority of the popular vote statewide, maximizing the extent of representation to the dominant party's voters.

undoubtedly has a role to play in any election restrictions—the claims against gerrymandered maps have largely taken the form of class-based discrimination claims on equal protection grounds. The theory, as seen in the Brief for Appellees in *Rucho,* shows that "[the 2016 Plan's] intentional invidious discrimination violates the Equal Protection Clause."[169] While this is not the only theory the appellees promoted, it is the one the Court engaged with the most, as it is the line of reasoning the Court has most often grappled with when discussing similar areas of election law like one-person, one-vote or vote dilution.[170] *Rucho* was no different, as the Court almost summarily dismissed any First Amendment claim, denying, almost without thought, any burden on speech, expression, or association.[171]

Engaging briefly with the Court's apparent expectation that a claim be brought under the Equal Protection Clause, discrimination against individuals based on their affiliation with certain political parties is obviously violative of the Clause. When states engage in partisan gerrymandering, they themselves are identifying a class they seek to deny access to government. Can they vote? Sure. Can they fundraise and run for office? Absolutely. Does any of that matter if the State decides that all of your efforts must be done in an area specifically designed to contain voters and candidates who won't respond to you to begin with? Not at all.

There are at least three cogent and definitive classes that the Court could identify based on the expressions of the legislature enacting an electoral map. First, you can identify the maps as discriminating against a group of voters who have historically not voted for candidates of the dominant party. As this can be a pretty inclusive class, a Court might consider such a group too large and containing too many multifarious interests to be properly described as a singular class with a singular

---

[169] Brief for *Common Cause* Appellees at 25, Rucho v. Common Cause, 588, U.S. 684 (2019) (No. 18-422).

[170] *Id.*

[171] The Court discusses the test used by the district court that affirmed Common Cause's First Amendment claims but dismisses any First Amendment harm by claiming it "would render unlawful *all* consideration of political affiliation in districting," contrary to our established precedent." *Rucho*, 588 U.S. at 715 (quoting Vieth v. Jubelirer, 541 U.S. 267, 294 (2004)). For the Court, this entire argument is useless to begin with however, because "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 588 U.S. at 713–14. What the Court fails to justify is *why* partisanship, particularly if used in a discriminatory manner, should be afforded any deference where the First Amendment is implicated.

harm.[172] Instead, you could create a class of voters using the state's own employed electoral data showing who, over a period of time, has actively voted for candidates of parties other than the dominant party. The difference here would be that you are identifying actual, politically active voters who are being targeted for their political activity that directly harms the interests of the dominant party. However, you might still have an issue of overinclusiveness when you lump in Libertarian and Green Party voters with Democrats against a Republican-favorable map. Finally, you could easily note that partisan maps identify, segregate, and devalue the votes of those who are registered for a specific, major opposition party. In such an instance, you would likely see patterns of "packing" and "cracking" where the opposition party is given a small set of *extremely* safe districts, and few competitive districts. Meanwhile, under such a scheme, the dominant party would have a significantly larger share of safe districts, albeit with less overwhelming dominance than that seen in opposition safe districts.

Not only would identifying such a class make the invidious compositional practices of partisan gerrymandering more apparent and traceable on a map, but it would also be hard to suggest that all members of an opposition party have multifarious interests such that they cannot be an identifiable class. If the Republicans are being drawn out of Maryland, as they were in *Rucho*, there can be no doubt in identifying who is a Maryland Republican and who isn't. And, as seen in the discussions and defenses of the maps in North Carolina under *Rucho*, the Republican drafters made very clear that they were targeting Democrats specifically, all of whom you could identify in the voter registration data.

When a class is identified, we must then note what fundamental right is being infringed. While easily chalked up as the "right to vote," what the Court has repeatedly suggested is that, where one can still register, fundraise, and vote, their right to vote has not been infringed—but where the mechanisms of voting "operate to minimize or cancel out the voting strength of . . . political elements of the voting population[,]" the Court has found harm under the Equal Protection Clause.[173] Thus, while the burden is heavy and placed on the challenger of an electoral scheme, it can be clearly shown that, in a state like North

[172] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–49 (2011).
[173] Whitcomb v. Chavis, 403 U.S. 124, 143 (1971) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

Carolina—largely seen as a purple state whose registration numbers are, on average, a one-third Republican, Democrat, and unaffiliated split[174]—a scheme which grants the dominant party a regular supermajority of the General Assembly[175] and 10 of 14 House seats in a given congressional election[176] clearly has the effect of "minimizing or cancelling out" the voting strength of the opposition party. The reason for this standard is clearly because voting strength is, in many respects, protected by the First Amendment's guarantee to keep the government from restricting, regulating, altering, or otherwise minimizing political speech.

You simply cannot chalk up the repeated results of such schemes to mere happenstance from electoral losses—like the Court eventually does in *Whitcomb*[177]—as the raw electoral data does not show that. In the decade since Republicans took over the North Carolina General Assembly, Democratic candidates have aggregated a greater number of total votes, but Republicans have nonetheless maintained solid, sometimes insurmountable majorities in both chambers.[178] In the 2020 U.S. House of Representatives races in the state, Democrats had half the total voters, and more than Republicans, statewide, but Republicans

---

[174] Nicholas Long, *Who Are North Carolina's 7.3 Million Registered Voters? (2023)*, CAROLINA DEMOGRAPHY: UNC CAROLINA POPULATION CTR. (Sept. 28, 2023), https://carolinademography.cpc.unc.edu/2023/09/28/who-are-north-carolinas-7-3-million-registered-voters-2023/.

[175] Republicans have held a supermajority of the State Senate in six of the last eight elections. *General Assembly of North Carolina*, BALLOTPEDIA (last visited Jan. 24, 2026), https://ballotpedia.org/General_Assembly_of_North_Carolina. In the State House, Republicans have held a supermajority straight out of the election three of eight elections but also gained a supermajority following the 2022 elections after Rep. Tricia Cotham switched party affiliations. *See id.*; Matthew Ablon et al., *State representative from Mecklenburg County Switching Parties*, WCNC CHARLOTTE (April 7, 2023, at 12:07 ET), https://www.wcnc.com/article/news/politics/north-carolina-politics/tricia-cotham-mecklenburg-county-nc-politics-party-switch/275-27a47dd3-62c1-4cfe-8cdc-7ffac0a92c89. In 2024, State House Republicans were again one vote shy of a supermajority and have consistently been close to a supermajority in the years they did not secure a supermajority since they first gained the chamber in 2010. *See General Assembly of North Carolina*, *supra* note 175.

[176] *See* Patricia Ortiz, *North Carolina Republicans Win Majority of Districts for the Federal House of Representatives*, ENLACE LATINO NC (Nov. 6, 2024), https://enlacelatinonc.org/en/North-Carolina-Republicans-win-majority-of-districts-for-the-federal-House-of-Representatives/.

[177] *See Whitcomb*, 403 U.S. at 153.

[178] Billy Corriher, *North Carolina Election Results Show the Persistence of Partisan Gerrymandering*, FACING S.: INST. FOR S. STUD. (Nov. 18, 2020), https://www.facingsouth.org/2020/11/north-carolina-election-results-show-persistence-partisan-gerrymandering.

still won eight seats to Democrats' five.[179] By comparison, when the State Supreme Court briefly found partisan gerrymandering unconstitutional under the State Constitution, it implemented court-drawn maps for the 2022 House of Representatives races.[180] The outcome of these maps was a 7-7 split between Republicans and Democrats, one of the State's most ideologically representative outcomes in recent memory.[181]

Thus, where the *Whitcomb* burden is met, strict scrutiny must apply. Even if we wish to remain within the *Anderson-Burdick* sliding scale test[182]—as we can under a bare Equal Protection, rather than First Amendment claim—strict scrutiny applies for this severe burden on opposition party voters. This could be an ideal scenario, providing courts the ability to set a floor on partisan gerrymandering wherein maps are afforded more lenience in their partisan construction where a plaintiff fails to show that partisan advantage severely burdened their ability to launch opposition campaigns—determined as blocs of voters that would have otherwise been able to organize in opposition under traditional redistricting standards as applied to the

---

[179] Research Staff, *The Misrepresentation of North Carolina*, CAROLINA FORWARD (Oct. 4, 2021), https://carolinaforward.org/blog/misrepresentation-north-carolina/.

[180] Harper v. Hall, 881 S.E.2d 156 (N.C. 2022), *enforcing* 868 S.E.2d 499 (N.C. 2022) *and* N.C. League of Conservation Voters v. Hall, No. 21-CVS-015426, 2022 WL 2610501 (N.C. Super. Ct. Feb. 16, 2022), *vacated and overruled on later appeal by* Harper v. Hall, 886 S.E.2d 393 (N.C. 2023).

[181] *United States House of Representatives Elections in North Carolina, 2022*, BALLOTPEDIA, https://ballotpedia.org/United_States_House_of_Representatives_elections_in_North_Carolina,_2022#District_map (last visited Jan. 24, 2026).

[182] Because the Court found that every election regulation burdens voting, it came to the concluded that applying strict scrutiny would be an unworkable standard. Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."). Instead, the Court created a flexible 'sliding scale' test, where they make an initial determination of the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). From there, the Court evaluates the State's interests and justifications, weighing them against the asserted injury. *Id.* What makes this a sliding scale rather than a simple balancing test is that strict scrutiny is applied where restrictions are considered "severe," *Burdick*, 504 U.S. at 434, but where restrictions are "reasonable [and] nondiscriminatory," "the State's important regulatory interests are generally sufficient to justify"—*i.e.*, a version of rational basis review, *Anderson*, 460 U.S. at 788. Of course, fundamental constitutional rights in nearly every other category are not conditional, and strict scrutiny is applied because laws limiting fundamental rights must be precise, measured, and carefully articulated and designed. Logically, if the Court openly admits the "rights of voters are fundamental," *id.*, the fact that laws and regulations on that right might be difficult to compose is not relevant—in fact, constitutional order demands such scrutiny precisely because of the fundamental nature of the right.

identified political opposition, such as compactness, contiguity, and community ties.

But ultimately, strict scrutiny is the constitutionally respectable standard, since intentional partisan gerrymandering presents clear restrictions on political speech, engages in viewpoint discrimination, and violates associational rights, thus requiring the Court's most strident review of such actions. Applying strict scrutiny does not remove all political considerations but imposes a narrow tailoring requirement and compelling justification for the use of political considerations. Where political considerations are marginal and seemingly natural, an act can be considered sufficiently tailored and justified by the state's interest in having maps designed by the political process in a timely and orderly manner. Where partisan advantage is the predominant goal, however, the State will struggle to justify actions, thus limiting the enterprise significantly.

When one relies on the Equal Protection Clause alone, they ignore the nature of invidious discrimination. Under the Equal Protection Clause, focusing solely on voting rights, the inquiry stops at invidious discrimination, but doesn't consider the greater implications of the type of discrimination in place: viewpoint discrimination. This is important to distinguish because the Court has been far less forgiving of laws which discriminate on viewpoint, particularly when laws make no attempt to hide their discrimination.

Cornelius makes abundantly clear that restrictions "impermissibly motivated by a desire to suppress a particular point of view" cannot stand without undergoing heightened scrutiny.[183] This demand is similarly seen in *Sorrell v. IMS Health Inc.*, where the Court imposed heightened scrutiny on a regulation of the dissemination of medical information, stating that the First Amendment "require[d] heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"[184] When considered in the context of partisan gerrymandering, the discrimination is palpably apparent. The state, in considering political data, is both explicitly and implicitly engaging in an intentional campaign of devaluing speech based on the speaker

[183] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 812–13 (1985).
[184] 564 U.S. 552, 566 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

and their viewpoint, in direct violation of the bedrock principles against those very acts set in *Citizens United* and *Cornelius*.[185]

The state, in any given case, may be able to justify its actions, as Chief Justice Roberts did in *Rucho*, by claiming that certain levels of political consideration are unavoidable in any redistricting scheme, particularly those not meant to be overtly discriminatory in composition.[186] In fact, their point is not without merit, as the Court in *Gaffney v. Cummings*, the progenitor of the Court's political gerrymandering line of cases, said, "Politics and political considerations are inseparable from districting and apportionment," so "it would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."[187]

But relying on this isolated quote ignores the context of this case and, by extension, what makes the maps in *Rucho* and the present redistricting wars among the states going into the 2026 midterms so insidious. The map in *Gaffney* was partisan only insofar as it engaged in proportional constructions to guarantee the state legislature would reflect the political composition of the state. The scheme at issue in the case was constructed by a bipartisan commission developed by the Speaker of the House, the Minority Leader of the House, and a third board member selected by the prior two appointers' appointees.[188] This board "consciously and overtly adopted and followed a policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties . . . [based on] the party voting results in the preceding three statewide elections."[189] While there are still issues with such a practice—incumbent entrenchment is also quite unhealthy to democracy—to compare the *bipartisan* maps composed by an *independent, bipartisan commission* to the maps made by a singular dominant party for the express purpose of making the state legislature and congressional delegation as disproportionately favorable to the dominant party as possible is to engage in the highest forms of delusion and willful ignorance. Did the court say that considering politics is acceptable and natural in redistricting? Yes. Did they say that there is no point

[185] Citizens United v. FEC, 558 U.S. 310, 365 (2010); *Cornelius*, 473 U.S. at 812–13.
[186] Rucho v. Common Cause, 588 U.S. 684, 701 (2019).
[187] 412 U.S. 735, 752, 753 (1973).
[188] *See id.* at 736.
[189] *Id.* at 738.

at which political considerations become so invidious that they cross into unconstitutional territory? No. The difference between the maps of *Gaffney* and the maps of *Rucho* is a matter of intent.

Roberts seems to ignore completely any discussion of degree in *Rucho*. He misconstrues Common Cause's First Amendment argument, believing that if the Court were to accept that considerations of partisanship in redistricting are simply acts of speaker discrimination, it would essentially lead to "any level of partisanship in districting [being] an infringement of their First Amendment rights."[190] But Common Cause never made such an assertion. In fact, they explicitly stated in their brief that reviewing partisan gerrymandering under First Amendment scrutiny "would not 'render unlawful *all* consideration of political' [activity]. It would ban only *invidious* discrimination on the basis of political expression and association, when not narrowly tailored to a compelling State interest."[191] As lower courts prior to *Rucho* consistently did, the finding of invidious discrimination turns on a finding of *intent*.[192]

Intent is not foreign, but rather is endemic in First Amendment jurisprudence. And it is erroneous to suggest that, because a decision might have political implications, the Court may forego its duty under the First Amendment to protect the citizenry from unjustifiable viewpoint discrimination by the state. The Court is no stranger to the conclusion that the use of political affiliation or motivation is improper without proper justification. In employment law, the Court has been unequivocal, protecting employees from demotion or other reprisal for engaging in political activity and discussion.[193] Further, the Court has held that, in non-policymaking government jobs, employment may not be conditioned on politics, nor can employees be fired for their affiliation with the "wrong" political party.[194] These cases show that the Court has no problem with drawing a line for considerations of partisanship. As Constitution scholar Justin Levitt explains in an apt thought-experiment:

---

[190] *Rucho*, 588 U.S. at 714.
[191] *See* Brief for *Common Cause* Appellees at 56, *Rucho*, 588 U.S. 684 (2019) (No. 18-422) (citations omitted).
[192] *See Rucho*, 588 U.S. at 735 (Kagan, J., dissenting).
[193] *See* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2014–15 (2018); *see also* Rankin v. McPherson, 483 U.S. 378, 386–87 (1987) (finding the firing of a non-public-facing employee who discussed the assassination attempt on Ronald Reagan to be violative of the First Amendment).
[194] *See* Elrod v. Burns, 427 U.S. 347, 359–60 (1976).

> That urge to earn partisan votes through choices among legitimate policies is distinct from invidious tribal action undertaken against opposing partisans to punish that partisan affiliation: it is the distinction between competition for or over voters, and competition against them. Tax decisions undertaken because Democrats will applaud them and Republicans will jeer them is responsive partisanship, and constitutionally unremarkable. Tax decisions undertaken because they will hurt voters who are Republican, because they are Republican, is invidiously tribal and unconstitutional.[195]

What is to be considered is the intent of the law when it comes to viewpoint discrimination. Taking the standards from *Cornelius* and *Sorrell*, a partisan map is unconstitutional where the lines are drawn to *demote* those of a particular affiliation. While they may still be able, as a matter of function, to "rais[e] money, attract[] candidates, and mobiliz[e] voters to support the political causes and issues such Plaintiffs [seek] to advance," these actions are meaningless when placed in the context of a system that devalues these actions while promoting those same actions by the dominant party.[196] This Court has incessantly rejected the equalization rationale regarding speech in elections,[197] but the conservative majority seems all too comfortable with the promotion and demotion of speech when it favors the party that appointed it. The delineation between constitutional and unconstitutional partisan gerrymanders, which lower courts can figure out amongst themselves as they had been doing to some success before *Rucho*,[198] lies in whether the maps are drawn to intentionally weaken identifiable and meaningful political opposition groups—as opposed to considerations like those in *Gaffney* intended to better reflect the will of the people.

When a state engages in invidious class-based discrimination infringing on a fundamental right, as was done in *Rucho*, the Court generally imposes strict scrutiny on the system,

---

[195] *See* Levitt, *supra* note 193, at 2017.
[196] *Rucho*, 588 U.S. at 713 (quoting Common Cause v. Rucho, 318 F. Supp. 3d 777, 932 (M.D.N.C. 2018)).
[197] *See e.g.*, Buckley v. Valeo, 424 U.S. 1, 48–49 (1976); McConnell v. FEC, 540 U.S. 93, 227 (2003); FEC v. Wis. Right to Life, 551 U.S. 449, 487 (2007); Citizens United v. FEC, 558 U.S. 310, 350 (2010).
[198] *See Rucho*, 588 U.S. at 735 (Kagan, J., dissenting).

asking for a compelling state interest for which the measure is narrowly tailored to achieve. Luckily, in *Rucho*, as well as the mid-cycle redistricting currently underway, we know exactly what the "state's" interests are—and they are nakedly partisan. As was the case in *Rucho*, where the drafters of the challenged North Carolina maps went to great lengths to say they were drawing Democrats out of power and drawing Republicans into power,[199] we see the same arguments today. In Texas, Republican State Senator Phil King defended the state's new maps, saying the plan "meets the critically important goals of legality, of political performance for Republicans and of improved compactness."[200] In California, Democrats have broadly defended their clear partisan intent, as Democratic State Representative Dave Min said, "I think all of us want to see a fair process, but if Republicans are going to try to cheat and redistrict, I think Democratic states are going to consider all options."[201]

It should be abundantly clear to the Court that demoting an opposition party's political power is not a valid interest of the state, but an interest of the dominant political party, and a vile one at that. Even granting that the interest of the dominant political party is indeed the interest of the state, the Court has repeatedly said that voter restrictions unrelated to voter qualifications constitute invidious discrimination requiring stringent review.[202] While the Court is hesitant to enter the political thicket, it is not required to stay out. And, though the Court has "not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States[,]" that does not mean that the "arranging for elections, or to achieve political ends or allocate political power, is [] wholly exempt from judicial scrutiny[.]"[203] Indeed, where "racial or political groups have been fenced out of the political process and their voting strength invidiously minimized," the Court is well within its power to rein in political

---

[199] *See* COMMON CAUSE NC, *supra* note 3; Joint Appendix, *supra* note 4 at 310, 460; Hise & Lewis, *supra* note 6.
[200] Colleen Deguzman, *Fresh Off Texas Senate's Approval, New Congressional Map is Target of Lawsuits*, TEX. TRIB. (Aug. 26, 2025, at 19:54 CT), https://www.texastribune.org/2025/08/23/texas-congressional-map-lawsuit/.
[201] Jeremy B. White & Nicholas Wu, *'Crazy Hill to Die On': Newsom Jolts California with Bid to Throw Out House Maps*, POLITICO (July 16, 2025, at 18:53 ET), https://www.politico.com/news/2025/07/16/newsom-jolts-california-house-maps-texas-00458927.
[202] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 199–200 (2008).
[203] Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

acts in mapmaking.[204] As such, the Court should take heed of the naked partisanship rotting away the democratic core of the Constitution and make meaningful strides to place a limit on such mapmaking designed intentionally to "fence out" political groups.

IV. PARTISAN GERRYMANDERING IS A *DE FACTO* RESTRICTION ON POLITICAL SPEECH WITH NO LEGITIMATE JUSTIFICATION

If we take the vote as a form of political speech—as the Court should, by the very nature of what a vote entails and conveys—then we should then ascribe the proper scrutiny for limitations on political speech. While the Court contends that partisan gerrymandering imposes no "restrictions on speech, association, or any other First Amendment activities," it ignores the *de facto* chilling effect partisan gerrymandering has on political speech both in and out of the polling place.[205] The fact is that in a winner-takes-all system, where a district is drawn to guarantee electoral outcomes, the state is engaging in *de facto* invalidation of certain components on a given ballot. What good does a vote for a Democrat for State House serve if the Republicans have guaranteed that card-carrying Republicans and longstanding Republican voters will make up the overwhelming majority of a curated electorate? What good does voting for a Democrat do if success is guaranteed, but that representative will be placed in a legislature guaranteed to largely ignore their advocacy in spite of their seeming political popularity? Why mount political campaigns, fundraisers, and other core politically expressive activities when their effect is limited to such an extent that their goals and initiatives will never be turned into action? The effect of partisan gerrymandering is either to guarantee that individuals of certain political persuasions will not have a representative, or that their representative will not have any means of enacting policies with like-minded individuals that would otherwise work alongside them.

Gerrymandering is, at the very least, monumentally chilling to political speech—the practice actively invalidates votes by throwing them into a sea of opposing votes, and it neuters and castrates political expression adjacent and peripheral to the ultimate act of voting. There is much to be said about the

[204] *Id.*
[205] Rucho v. Common Cause, 588 U.S. 684, 713 (2019).

harms of invalidating votes for the goal of protecting uni-party government, but the Court has been reluctant to preserve schemes meant to entrench two-party rule.[206] They should be even more diligent in extending this logic to reject any scheme meant to entrench one-party rule, particularly where one-party rule is forced rather than the natural outcome of the will of the electorate. At the very least, elections that result in one-party rule, particularly where the political data on the state suggests such control is abnormal, should be constitutionally suspect. And election maps tailored to achieve such a goal should be rejected at every turn.

As discussed above, the standard imposed for restrictions on political speech has largely been strict scrutiny, requiring that the state provide a compelling interest alongside a showing that its law was narrowly tailored to achieve said interest. The Court, particularly in the election context, however, has been hesitant to apply strict scrutiny, instead favoring a sliding-scale test formed in *Anderson v. Celebrezze* and *Burdick v. Takushi*.[207] Its purpose in doing so, apart from its erroneous finding that voting doesn't constitute expression, was that restrictions on ballot access—applicable to the general body of voting rights cases—naturally limit expression to some extent. But the Court, in allowing for lower bars where burdens are "reasonable," reflects a larger sentiment among the conservative majority that the strict scrutiny standard is, in some ways, an insurmountable wall through which few laws will pass.[208] This perspective is self-defeatist in nature and doesn't reflect the reality that States do

---

[206] *See e.g.*, Williams v. Rhodes, 393 U.S. 23, 39–40 (1968) (invalidating a signature requirement as overbearing such that it gave the two major parties an advantage over third parties). *But see* Munro v. Socialist Workers Party, 479 U.S. 189, 193, 199 (1986) (upholding a law that restricted primary ballot access to third-party and independent candidates not meeting a minimum threshold of support).

[207] *See* Anderson v. Celebrezze, 460 U.S. 780, 789–90 (1983); Burdick v. Takushi, 504 U.S. 428, 441 (1992). For explanation of the test and its errors, see discussion *supra* note 182.

[208] Free Speech Coal. v. Paxton 606 U.S. 461, 484–85 (2025) (perceiving strict scrutiny to be a general death knell for laws undergoing its scrutiny); *see also* Louisiana v. Callais, No. 24-109, 2026 WL 1153054, at *10 (U.S. Apr. 29, 2026) ("[O]ur precedents have identified 'only two compelling interests' that can satisfy that [strict scrutiny]. One compelling interest . . . is 'avoiding imminent and serious risk to human safety in prisons, such as a race riot.' The only other compelling interest we have found is 'remediating specific, identified instances of past discrimination that violated the Constitution or a statute." (citations omitted)). *But see id*. at 508–509 (Kagan, J., dissenting) ("Applying strict scrutiny in this context, however, need not be a death sentence. To the contrary, a State exercising care should be able to devise a regulatory means of achieving its objective consistent with the First Amendment.").

indeed have a number of compelling reasons, backed by properly drawn initiatives, to restrict voting in some way.

Burdick itself identifies a very strong interest that the state has when it comes to limiting the political expression of voters with regard to what can be expressed on a ballot. The case can be read and resolved in the same way under strict scrutiny review, wherein the state has a compelling interest in regulating elections for the purposes of equity and efficiency.[209] Elections, especially those employing first-past-the-post calculations, do ultimately require a basic choice between collectively agreed-upon popular candidates. When states require or regulate primaries, remove write-ins, or enact anti-fusion laws, they can justify these laws under the guise of effective administration of elections consistent with their constitutional powers to regulate the time, place, and manner of Elections under the Election Clause—the interest, more specifically stated, is in having a clear and precise question presented before voters (here, the election of candidates for office) that has clear, predetermined options that ultimately incentivize a popular decision. Hawai'i felt that write-ins detracted from this broader purpose and, while not as compelling in the specific race for which Burdick wished to use a write-in, the removal of that option as a general matter does not detract from the overall ability of candidates to get on the ballot, present cogent opposition to incumbents, or for voters' ability to express their disapproval for a given candidate or political process where ample alternative channels exist for such expression.[210]

Similarly, in *Democratic National Committee v. Wisconsin State Legislature*, the Court vacated a stay that extended the time for which Wisconsin could permit mail-in ballots to be received and counted in the 2020 general election amidst delays and setbacks brought on by COVID-19.[211] The Court considered application of heightened scrutiny under *Anderson-Burdick*, but found the burden imposed was not substantial—essentially, the Court noted that the state had an interest in expecting voters to express their political views in a timely fashion, a logic which extends to absentee and mail-in ballots.[212] Rather than going

---

[209] *See Burdick*, 504 U.S. at 433.
[210] *See id.* at 441; *see also* Frisby v. Schultz, 487 U.S. 474, 483–84 (1988) (providing that a content-neutral time, place, or manner regulation is narrowly tailored where it leaves open ample alternative channels for impeded speech).
[211] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring) (mem.).
[212] *Id.* at 33.

through some contorted burden-balancing schema, this could have been decided by applying strict scrutiny, noting the state's compelling interest in the timely conducting of elections—after all, an election cannot go on forever—and then saying the provisions meet that burden such that they don't require a stay.[213]

This has been the Court's implicit approach to voting rights cases for decades—in *Crawford v. Marion County Election Bd.*, the plurality, in its summation of voting rights analyses, noted that they've always applied a stricter standard for voting rights cases.[214] As Justice Stevens explained, "[U]nder the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."[215] While the case nonetheless affirmed the *Anderson-Burdick* standard of balancing state interests on a sliding scale, it said that invidious discrimination invokes the highest level of scrutiny on state interests. Such being the case, where political speech is restricted, the state's interest must be examined under the most stringent review, as it involves invidious discrimination which harms rights the Court historically has found to be of unparalleled constitutional value and protection.[216]

Thus, we return to the crux of the harms present in partisan gerrymandering. The state's interest in partisan gerrymandering doesn't fall into neat boxes of administrability, timeliness, or even compliance with federal law or other constitutional standards in *Reynolds* and the like. The interest here is not really coming from the state at all, but rather a self-interested political party that is simply exploiting its temporary access to the power of the state to simultaneously insulate itself from criticism and suppress the individuals engaging in that criticism at the ballot box. So long as their base of support is contorted properly, no amount of political opposition will matter. The dominant party is targeting its political opposition by identifying individuals through their protected speech—their electoral decisions, their party registration, their statistically perceived political leanings based on aggregated outward expressions of political viewpoints—to devalue their expression in the ballot box. When a state targets individuals based on the

[213] The basis for rejecting the stay was flawed to begin with for many reasons, but working within Kavanaugh's logic, the outcome would be the same under strict scrutiny as it is under the *Anderson-Burdick* test.
[214] 553 U.S. 181, 189–90 (2008).
[215] *Id.* at 189.
[216] *Id.*

content of their speech, that act is subject to strict scrutiny. When the state meaningfully restricts the right to vote, it is subject to, at the very least, heightened scrutiny. Partisan gerrymandering implicates both expressive and associational rights, thus requiring at least heightened scrutiny, most likely strict scrutiny. In this regard, the state has no compelling interest in devaluing, diluting, packing, and cracking voters who express opposition to the dominant party. It simply cannot be a legitimate state interest, in a healthy democracy, for legislators to select their voters, rather than the voters selecting them, especially where the Constitution provides a Republican form of government and the Supreme Court has enshrined democratic expansion as a political right and necessity undergirding the core of our governmental system.

Further, it seems selective at best—and disingenuous at worst—to consider political speech as receiving the most protection during campaigns for office, but not for the people who make decisions based on those campaigns at the end of the day. As it stands, legal speech protections are a one-way street, wherein the speakers and benefactors of campaign speech receive massive protection, while those receiving, debating, and deciding on the basis of that protected speech are not themselves protected. Under current doctrine, the Federal Constitution allows candidates to say as much as they'd like with utmost protection, particularly from viewpoint- and identity-based restrictions,[217] but voters trying to express their will in the ballot box can have their speech stifled for viewpoint- and identity-based restrictions because the restrictions are considered either incidental or natural in the course of redistricting. Neither of these contentions pass muster. Where a map is drawn for the express and central purpose of maximizing partisan advantage and disadvantage, it cannot be said that such limitations on voting power based on viewpoint are merely incidental. And, while political considerations can be taken into account, and are naturally involved in peripheral decision-making of all sorts by a

[217] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 53–54 (1982) ("When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."); Citizens United v. FEC, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

legislature, including redistricting,[218] viewpoint-discrimination has never been justified on such a basis. Every decision a legislature makes is political. That doesn't mean that targeting individuals for their political beliefs is an acceptable method of government action.

CONCLUSION

American democracy is in grave danger. While the balance of power within government and the operation of elections have always led to such assertions by scholars and the common person alike, none meet this concern more clearly than partisan gerrymandering. The practice, always apparent in our history, has always been met with condemnation at its use—a political disfavor which has fortunately made the practice's presence more limited than it otherwise could have been. But with the increasing hyper-partisanship, and the increasingly marginal composition of Congress, partisan gerrymandering has only grown more common. Now, with the 2026 midterms and the Trump presidency launching the practice into a new level of reproach, states have begun engaging in prior-to-unheard-of mid-cycle redistricting to gain their national party more safe seats for the U.S. House of Representatives. This has a downwind effect of making state elections more aggressively gerrymandered as well. While President Trump has called on Republican-leaning states to provide him with more seats in the House, Democrats have engaged in retributive redistricting of their own—an act no less pernicious and damaging to democracy than the Republicans they claim to be counteracting.

Unfortunately, the Supreme Court has been derelict in its core responsibilities as the highest Court in the land. If the government the Constitution presently describes is allowed to persist alongside partisan gerrymandering, that government will not survive for long—it's a modern miracle the present government has existed this far since its initial inception, and we've seen the rot rear its ugly head many times throughout our history and into our present circumstances. At the very core of the Constitution is a democratic guarantee of representation in the federal and state governments. Also included is an implied, but very clearly present right to vote as well as an enumerated right to free speech, free expression, and free association. Partisan gerrymandering suppresses all of these rights,

[218] *See* Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment.").

particularly those latter three derived from the First Amendment. If the right to vote exists anywhere, it is in the First Amendment. The Court has consistently protected free speech, expression, and association as a means of preserving "uninhibited, robust, and wide-open debate" on public issues, particularly related to government affairs.[219] This protection is meant to ensure that the government is elected by a thoughtful electorate, not by a citizenry that is compelled by any "official, high or petty" to believe only what those officials believe "shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]"[220]

When states engage in partisan gerrymandering, they invidiously discriminate against groups based on their association with oppositional political parties. This practice should be recognized for what it is: the state deciding what "shall be orthodox in politics" and penalizing organization under oppositional political banners that do not harm the state in any way whatsoever. In that same vein, where partisan gerrymandering collects political data on voting history and draws districts favorable to the controlling party, they engage in clear viewpoint and identity-based discrimination against protected political speech. When a voter expresses common and regular disapproval of the dominant party and is subsequently put in a district where their voice will be intentionally rendered either less effective in the grand scheme of the state's legislative proportions or made *de facto* invalid by virtue of their placement in a district flooded with countervailing voters, they are being penalized for their speech expressed at the ballot box.

In both the associational and political speech rights contexts, heightened scrutiny at a minimum is required; more likely, strict scrutiny specifically should be applied. Regardless, the state cannot have a compelling interest in guaranteeing majority control to the political party that happens to be in control during the redistricting process. Far from being a valid *state* interest—instead being a self-centered interest of the political party presently in power—it is an impermissible and constitutionally prohibited interest. Simply put, the practice cannot be justified where political interests are intentionally weighted in favor of the dominant party and at the expense of the opposition party. Our democracy demands better of our government than crass partisanship. It demands collaborative,

[219] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Mills v. Alabama, 384 U.S. 214, 218–19 (1966).
[220] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

debative, and vigorous intellectual competition, with the strongest ideas rising to the top and being effectuated through thoughtful government policy. In drawing one perspective into majoritarian power and all opposition into political purgatory, a state engages in the lowest form of politics and directly contravenes the political process meant to emerge through the political debate preserved by the First Amendment and culminated through elections. The Constitution demands nothing more stridently than a government that is designed by the will of the voter; as the Great Liberator, President Abraham Lincoln, described, "a government of the people, by the people, and for the people."[221] A partisan gerrymander cannot devise an electoral system more at odds with that call and command and must be rejected at every turn.

[221] Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).