Freedom of Speech in the United States

eighth edition

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Annual Update — Autumn 2022

The U.S. Supreme Court issued consequential decisions dealing with COVID-19 in health care facilities and the workplace, executive privilege, state secrets, the right to bear arms, abortion rights, Native Americans, immigration, and climate change during its 2021–2022 term. Free speech cases received less attention, but there were noteworthy decisions involving censure votes by elected bodies, commercial signs, government speech, school prayer, and campaign finance. Significantly, the justices declined three more opportunities to revisit *New York Times v. Sullivan* (1964), the landmark decision that set out the actual malice rule. This update also previews cases involving compelled speech and copyright infringement that the justices agreed to hear during the 2022–2023 term.

Recent terms have generally produced a mix of rulings, some favoring conservatives (often involving voting rights or government regulations) and others liberals (often involving health care or LGBTQ rights). The 2021–2022 term was different, as the three justices nominated by former President Donald Trump shifted the Court's ideological balance to the right. The appointment of conservative Justice Amy Coney Barrett was particularly significant, as she replaced Justice Ruth Bader Ginsburg, a liberal icon who died in 2020. In total, six of the nine justices now serving were nominated by Republican presidents, creating a conservative supermajority on the Supreme Court. Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Barrett share a commitment to an originalist interpretation of the U.S. Constitution, firmly grounded in the document's text and history.

Nineteen of the fifty-eight cases during the term were decided by 6-to-3 votes. In thirteen of these cases, the three justices (Sonia Sotomayor, Elena Kagan, and Stephen Breyer) nominated by Democrat presidents dissented. Speaking for the dissenters in a case about suing federal officials for violating the Constitution, Justice Sotomayor, the most liberal of the nine justices, worried that "a restless and newly constituted Court" might reverse established precedent. A Gallup poll released in June 2022 found the Supreme Court's approval rating had fallen to its lowest in the survey's history. Only 25 percent of respondents reported they had "a great deal" or "quite a lot" of confidence in the Court. The plummeting approval numbers suggest recent decisions may be out of step with public opinion.

President Joe Biden nominated Judge Ketanji Brown Jackson to replace Justice Breyer, who retired at the end of the 2021–2022 term. The confirmation hearing was contentious,

but the Senate approved her nomination on a 53-47 vote on April 7, 2022. Justice Jackson's appointment as the 104th associate justice is notable, as she is the first Black woman to serve on the U.S. Supreme Court. For the first time in history, the Court will have four women as justices and three justices of color. Justice Jackson is not expected to change the ideological balance, as her liberal views are believed to be similar to those of Justice Breyer, for whom she clerked from 1999 to 2000.

The complete text of this update and a library of landmark free speech decisions can be found on the website for the book:

http://www.tedford-herbeck-free-speech.com

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Chapter 3: Political Heresy: Sedition in the United States since 1917
Houston Community College System v. Wilson (censure resolution)

Chapter 4: Defamation
Coral Ridge Ministries Media v. Southern Poverty Law Center (actual malice rule)

Chapter 8: Commercial Speech
City of Austin, Texas v. Reagan National Advertising Inc. (restrictions on off-premise signs)

Chapter 11: Constraints of Time, Place, and Manner
Shurtleff v. City of Boston (government speech and the public forum doctrine)

Chapter 12: Institutional Constraints: Freedom of Speech in the Schools, the Military, and Prisons
Kennedy v. Bremerton School District (free speech rights of public employees)

Chapter 14: Access
Federal Election Commission v. Ted Cruz for Senate et al. (campaign finance law)

Looking to the Future

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Chapter 3: Political Heresy: Sedition in the United States since 1917

U.S. Supreme Court

Case: *Houston Community College System v. Wilson,* 142 S.Ct. 1253 (decided March 24, 2022).

Subject: Does the First Amendment limit an elected governing board's authority to adopt a resolution censuring a board member's speech?

Summary: David Wilson was elected to serve on the Board of Trustees of the Houston Community College System (HCCS) for a five-year term, from 2013 to 2018. He disagreed with other board members about the direction of the college and challenged several of the group's decisions in court. In 2016, the board publicly reprimanded Wilson, who responded in the media and with more lawsuits. The situation continued to deteriorate, and at a 2018 meeting, the board censured Wilson, adopting a resolution declaring his conduct was

"not consistent with the best interests of the college" and was "not only inappropriate, but reprehensible."

Wilson, a conservative Republican, sued the HCCS, alleging he was punished for exercising the freedom of speech guaranteed by the First Amendment. A federal district court dismissed Wilson's complaint, but the Fifth Circuit of Appeals reversed the decision and allowed the case to continue. "The Supreme Court has long stressed the importance of allowing elected officials to speak on matters of public concern," the Fifth Circuit majority declared. "A reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim." Dissenting from the Fifth Circuit's decision to deny a rehearing en banc, Judge Edith H. Jones argued that the board could express its disapproval without violating Wilson's free speech rights. She added, "Political infighting of this sort should not be dignified with a false veneer of constitutional protection and has no place in the federal courts."

Wilson appealed to the Supreme Court, but the justices unanimously held that the board did not violate the First Amendment when it censured one of its members. Writing for the Court, Justice Neil Gorsuch observed, "As early as colonial times, the power of assemblies in this country to censure their members was 'more or less assumed.'" The adoption of the First Amendment did not change this practice: the U.S. Senate issued its first censure in 1811, and more censure votes followed. "What history suggests," Justice Gorsuch continued, "contemporary doctrine confirms. Under this Court's precedents, a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an 'adverse action' in response to his speech that 'would not have been taken absent the retaliatory motive.'" Wilson could not meet this burden, Justice Gorsuch continued, as the board's only action against Wilson was the censure resolution. Just as Wilson had the right to criticize the board, the board had a reciprocal right to criticize Wilson. In the words of Justice Gorsuch: "The First Amendment surely promises an elected representative like Mr. Wilson the right to speak freely on questions of government policy. But just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same." He concluded, "Argument and 'counterargument,' not litigation, are the 'weapons available' for resolving this dispute."

Justice Gorsuch took care to limit the decision. The issue before the Court, he said, was a "narrow one [that] involves a censure of one member of an elected body by other members of the same body. It does not involve expulsion, exclusion, or any other form of punishment." Nor does it deal with other forms of censure (such as censure accompanied by a punishment) or apply to the censure of a private individual by a government body. Gorsuch's opinion leaves open the possibility, albeit a slight one, that there might be an instance in which a verbal reprimand or censure could give rise to a First Amendment retaliation claim.

Chapter 4: Defamation

The Supreme Court declined to hear appeals in three defamation cases: *Tah v. Global Witness Publishing* (991 F.3d 231 (D.C. Cir. 2021), *Pace v. Baker-White* (850 Fed.Appx. 827 (3rd Cir. 2021)), and *Coral Ridge Ministries v. Southern Poverty Law Center* (6 F.4th 1247 (11th Cir. 2021)). The justices did not explain their decision to deny certiorari, but Justice Thomas, in his dissent in the *Coral Ridge* case, reiterated his position that the Supreme Court should reconsider the "actual malice" rule set out in the *New York Times v. Sullivan* (1964) decision. The *Coral Ridge* case drew considerable attention, as some commentators had feared the

justices would grant certiorari and subsequently weaken a celebrated precedent that protects the press from defamation suits.

U.S. Supreme Court

Case: *Coral Ridge Ministries v. Southern Poverty Law Center,* 142 S.Ct. 2453 (cert. denied on June 27, 2022).

Subject: Should the Supreme Court reconsider the "actual malice" standard established in *New York Times v. Sullivan?*

Summary: Coral Ridge Ministries Media, a television and radio ministry, grew out of a Fort Lauderdale, Florida, megachurch that D. James Kennedy founded. In 2017, Coral Ridge applied to participate in AmazonSmile, a program that allows Amazon customers to donate 0.5 percent of eligible purchases to approved nonprofits. Amazon declined the application, excluding Coral Ridge because the Southern Poverty Law Center (SPLC) had designated the ministry a "hate group." According to the SPLC, "a central theme of anti-LGBTQ organizing and ideology is the opposition to LGBTQ rights, often couched in demonizing rhetoric and grounded in harmful pseudoscience that portrays LGBTQ people as threats to children, society and often public health."

Coral Ridge sued the SPLC for defamation under Alabama law. While the group admitted that it "opposes homosexual conduct" on religious grounds, Coral Ridge denied being a hate group and claimed it "has nothing but love for people who engage in homosexual conduct." The lawsuit alleged the SPLC knew Coral Ridge was not a hate group, but deliberately applied the designation to "destroy the Ministry" by "dissuad[ing] people and organizations from donating to [it]." In its defense, the SPLC argued that its characterization of Coral Ridge was political speech protected by the First Amendment.

A federal district court ruled in favor of the SPLC. Because Coral Ridge admitted it was a public figure, U.S. District Judge Myron H. Thompson held that the "hate group" designation had to be (1) provably false, (2) actually false, and (3) made with actual malice. In this instance, the judge reasoned, "the meaning of the term 'hate group' is so 'debatable, loose and varying,' that labeling Coral Ridge as one is 'insusceptible to proof of truth or falsity.'" Allowing a lawsuit over the definition of a "hate group," Judge Thompson added, "would severely undermine debate and free speech about a matter of public concern," a result that "would be anathema to the First Amendment."

The Eleventh Circuit Court of Appeals upheld the district court decision, finding that the "actual malice" rule set out in *New York Times v. Sullivan* (1964) required a public figure such as Coral Ridge to prove the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." In this instance, the Eleventh Circuit found that the evidence did not prove that the SPLC "'actually entertained serious doubts as to the veracity' of its hate group definition and the application of the definition to Coral Ridge, or that SPLC was 'highly aware' that the definition and its application was 'probably false.'"

Coral Ridge appealed to the U.S. Supreme Court, asking the justices to revisit the actual-malice test. David C. Gibbs III, the attorney for Coral Ridge, argued that the standard set out in *Sullivan* was "a more-often-than-not insurmountable bar for a public figure to plead and prove a defamation claim." Instead of serving as a shield intended to protect civil rights, Gibbs claimed, the actual-malice rule "is now a sword used to bludgeon public figures with impunity while hiding behind this Court's mistaken view of the First Amendment."

The Supreme Court declined to hear the case, effectively ending the lawsuit. The case is significant, however, as Justice Clarence Thomas penned a three-page dissenting opinion in which he said he would have granted the writ of certiorari so the Court could revisit the actual-malice standard. He cited his concurring opinion in *McKee v. Cosby,* a 2019 defamation case in which the Court declined to hear an appeal in a defamation case. Once again, he reiterated his belief that the "actual malice" test is a policy-driven decision "masquerading as constitutional law." As a result of *Sullivan* and its progeny, Justice Thomas lamented, media organizations and interest groups are able "to cast false aspersions on public figures with near impunity."

None of the other justices joined the Thomas opinion in *Coral Ridge Ministries Media v. Southern Poverty Law Center,* although several other justices have, at various times, expressed concerns about the actual malice rule. For example, in *Berisha v. Lawson* (2021), Justice Neil Gorsuch argued that the "momentous changes to the Nation's media landscape" suggested the Supreme Court should revisit the *Sullivan* decision.

Under the "rule of four," the Supreme Court only hears a case if there are four votes to grant a petition for review. Anyone interested in freedom of speech should pay particular attention to developments in this area, as *New York Times v. Sullivan* is a pillar of modern First Amendment jurisprudence.

Chapter 8: Commercial Speech

U.S. Supreme Court

Case: *City of Austin, Texas v. Reagan National Advertising of Austin,* 142 S.Ct. 1464 (decided April 21, 2022).

Subject: Is a municipal ordinance that distinguishes between on-premises and off-premises signs subject to strict scrutiny analysis under the First Amendment?

Summary: The City of Austin (Texas) adopted a sign code that distinguished between on-premise signs (signs advertising a business on the same location as the sign) and off-premise signs. Under the code in effect at the time, the construction of new off-premise signs was prohibited. Existing off-premise signs were protected by a grandfather clause, under which nonconforming signs could remain in place so long as they were not altered in ways that would violate the code—a restriction that did not apply to on-premise signs. (Austin, like many communities, restricts off-premises advertising for aesthetic and public safety reasons.)

When Reagan National Advertising, a company that owns and operates commercial and noncommercial billboards, applied to digitize 84 off-premise billboards, the city invoked its sign code and denied the application. Reagan National Advertising sued in state court in 2017, arguing that Austin's code unconstitutionally distinguished between on-premise and off-premise signs.

A federal district court upheld the sign code, but the Fifth Circuit Court of Appeals reversed that decision. Although the district court had held that the code was content-neutral, the Fifth Circuit held that the code's distinction between on-premise and off-premise signs was content-based because the observer would need to read the sign to determine whether the goods and services advertised were offered on-premise. This determination was significant, as content-based restrictions are assessed using a strict scrutiny test. Under this test, a restriction must be narrowly tailored to achieve a "compelling government interest." Reasoning that a ban

on new off-premise signs was not the least restrictive means to address the aesthetic and public safety concerns associated with digital signs, the Fifth Circuit concluded that this part of the sign code was unconstitutional. The city appealed the decision, and the Supreme Court granted certiorari.

In a 6-to-3 decision, the Supreme Court held that Austin's sign code was content-neutral and not subject to strict scrutiny analysis. Writing for the majority, Justice Sonia Sotomayor characterized the Fifth Circuit's analysis as "too extreme an interpretation of this Court's precedent." In particular, she noted, the Fifth Circuit had relied on the Supreme Court's decision in *Reed v. Town of Gilbert* (2015). In that case, the justices struck down a Gilbert, Arizona, ordinance that restricted the size, number, duration, and location of certain types of signs. Under the terms of the Gilbert ordinance, there were far more restrictions on "Temporary Directional Signs Related to a Qualifying Event" than on "Ideological Signs" or "Political Signs." Because the restrictions differentiated among signs based on content, the justices applied a strict-scrutiny test and struck down the Gilbert ordinance.

"Unlike the sign code in *Reed*," Justice Sotomayor argued, the Austin code does "not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations." Under the Austin code, she continued, the content "matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions." Having resolved the constitutional question, Justice Sotomayor remanded the case to the lower court to review the code using an intermediate scrutiny standard. Although intermediate scrutiny is less rigorous than strict scrutiny, Austin must still demonstrate that the sign code serves a legitimate government interest.

Justice Steven Breyer concurred with the result, but disagreed with the Court's approach. In his view, "the Court's reasoning in *Reed* was wrong." Instead of applying "judge-made categories (like 'content discrimination')," he favored a more nuanced approach that considers "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." In this instance, Justice Breyer concluded, "there is no evidence that the city regulated off-premises signs in order to censor a particular viewpoint or topic, or that its regulations have had that effect in practice. There is consequently little reason to apply a presumption of unconstitutionality to this kind of regulation." He was satisfied that the city had legitimate reasons for regulating off-premise signs.

Justice Samuel Alito staked out a position between the majority and the dissent. He concurred with the majority in reversing the Fifth Circuit decision holding the Austin sign code unconstitutional. At the same time, he disagreed with the majority's claim that "the sign code provisions challenged here do not discriminate" based on "the topic discussed or the idea or message expressed." Justice Alito was unwilling to make any broad pronouncements because, in some instances, a strict scrutiny analysis might be the appropriate standard in circumstances in which an on-premise sign might promote an off-premise activity.

Justice Clarence Thomas dissented, in an opinion joined by Justices Neil Gorsuch and Amy Coney Barrett. In *Reed,* he noted, the Court held that "a speech regulation is content based—and thus presumptively invalid—if it 'draws distinctions based on the message a speaker conveys.'" Under this standard, he continued, the Austin sign code was content-based,

as "it discriminates against certain signs based on the message they convey—*e.g.,* whether they promote an on- or off-site event, activity, or service." Because the code was content-based, Justice Thomas argued that strict scrutiny was the appropriate legal standard. "Because Austin has offered nothing to make that showing," he concluded, "the Court of Appeals did not err in holding that the off-premises rule violates the First Amendment."

Chapter 11: Constraints of Time, Place, and Manner

U.S. Supreme Court

Case: *Shurtleff v. City of Boston,* 142 S.Ct. 1583 (decided May 2, 2022).

Subject: Did the City of Boston violate the free speech clause of the First Amendment when it refused an application to fly a Christian flag over city hall?

Summary: Three 83-foot flagpoles tower over Boston City Hall, the seat of local government. On most days, the United States flag flies on the first pole, the Massachusetts state flag on the second pole, and the City of Boston flag on the third pole. On special occasions, the city lowers its banner and raises a flag selected to celebrate a day of observance, a public institution, or a moment of civic pride. In addition, a private citizen, group, or organization can apply to host a flag-raising event on City Hall Plaza. When Harold Shurtleff and his organization, Camp Constitution, sought permission to fly the Christian Flag during an event, the city denied their application. When pressed for an explanation, local officials claimed flying a religious flag on the third flagpole might be perceived as "an endorsement of a particular religion," which would be "contrary to the concept of separation of church and state or the constitution's establishment clause."

Shurtleff and Camp Constitution challenged this decision in federal court, but a federal district judge and the First Circuit Court of Appeals sided with the city. The decisions framed the selection of which flags to display as a form of government speech. Because, in flying a flag on the City Plaza, the government was speaking, city officials could choose not to fly religious flags. Shurtleff and Camp Constitution appealed to the Supreme Court, arguing that the First Circuit's decision "unconstitutionally expands the government speech doctrine" and that the third flagpole functioned as a designated public forum. In other words, they argued, once the city opened the forum for private flags, officials engaged in unconstitutional viewpoint discrimination when they refused to fly the Christian Flag.

In a unanimous decision, the Supreme Court ruled in favor of Shurtleff and Camp Constitution. Writing for the majority, Justice Steven Breyer noted that the case required the Court to distinguish between government speech and private expression that occurred in a public forum created by the government. This required, he explained, a "holistic inquiry" that included "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression."

When Justice Breyer applied this framework to the record, he found some evidence favored the city, and some favored Shurtleff. He noted that the history of flag raising supported the city, as flags "have long conveyed important messages about government." It was less clear how a passerby would view the flags, as the city occasionally allowed private parties to display their banners over Boston City Hall. Even if "the public would ordinarily associate a

flag's message with Boston," a viewer might not believe all flags conveyed the city's preferred message.

The most important consideration, Justice Breyer noted, is "the extent to which Boston actively controlled these flag raisings and shaped the messages the flag sent." On this issue, he concluded, "Boston's record is thin." The application for requesting permission to fly a flag "asked only for contact information and a brief description of the event, with proposed dates and times." He added that "the city employee who handled applications testified by deposition that he had previously 'never requested to review a flag or requested changes to a flag in connection with approval'; nor did he even see flags before the events. The city's practice was to approve flag raisings, without exception. It has no record of denying a request until Shurtleff's. Boston acknowledges it 'hadn't spent a lot of time really thinking about' its flag-raising practices until this case." The absence of control was confirmed, Justice Breyer concluded, by the fact that "the city had nothing—no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate."

Having established that the flag raisings were private speech, Justice Breyer considered whether the city's denial of the request to raise the Christian flag constituted unconstitutional viewpoint discrimination. On this point, he noted, the evidence was clear, as "Boston concedes that it denied Shurtleff 's request solely because the Christian flag he asked to raise "promot[ed] a specific religion." Under established precedent, Justice Breyer concluded, "that refusal discriminated based on religious viewpoint and violated the Free Speech Clause."

Chief Justice John Roberts and Justices Sonia Sotomayor, Elena Kagan, Brett Kavanaugh, and Amy Coney Barrett joined the Breyer opinion. Justice Samuel Alito agreed with the result, but disagreed with Justice Breyer's reasoning. In a concurring opinion (joined by Justices Clarence Thomas and Neil Gorsuch), he rejected the "holistic" approach and the multi-factor test in the majority opinion. "To prevent the government-speech doctrine from being used as a cover for censorship," Justice Alito warned, "courts must focus on the identity of the speaker. The ultimate question is whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the 'regulation of private speech.'"

The decision in favor of Shurtleff and Camp Constitution does not mean that the Christian Flag will fly over Boston City Hall. On October 18, 2021, three weeks after the justices granted certiorari and seven months before the Court's decision, the city announced on its website that it was "no longer accepting flag-raising applications." The statement added, "We're re-evaluating the program in light of the U.S. Supreme Court's recent decision to consider whether the program as currently operated complies with Constitutional requirements."

This news was expected, as a decision for Shurtleff and Camp Constitution would set a dangerous precedent that extends beyond the Christian Flag. "If the flagpole is subject to the rule against viewpoint discrimination," Ian Millhiser warned in *Vox,* "then this rule is absolute. Not only would Boston be forbidden from excluding religious flags, but it would also be forbidden from rejecting swastikas, Confederate flags, or flags endorsing the failed January 6 effort to install former President Donald Trump as an unelected leader."

To prevent such things from happening, the city has several options. The simplest would be to declare that the third flagpole is not a public forum and to permanently display the city's flag. Justice Breyer hinted at this possibility in his majority opinion, noting that "nothing prevents Boston from changing its [flag raising] policies going forward." As an alternative, the

city could adopt a policy that tightly linked flag raising with the city's preferred message. So, for example, flag raisings could be limited to holidays or days of observance that the mayor or city council recognizes officially. To make it clear when the City of Boston is speaking, the policy could require a city official or department to cosponsor any public event that includes a flag raising. The city could help design, shape, and implement activities to ensure these events communicate the government's preferred message.

Chapter 12: Institutional Constraints: Freedom of Speech in the Schools, the Military, and Prisons

U.S. Supreme Court

Case: *Kennedy v. Bremerton School District,* 142 S.Ct. 2407 (decided June 27, 2022).

Subject: Did a public school district violate the rights of a high school football coach when it banned him from praying on the field after games?

Summary: Joseph Kennedy was hired by the Bremerton School District near Seattle, Washington, to coach the school's junior varsity team and to serve as an assistant for the varsity team in 2008. After games, Kennedy would walk to the 50-yard line, kneel, and engage in "thanks through prayer on the playing field." Over time, players from Bremerton and opposing schools began joining Kennedy. The players would kneel around Kennedy, who would hold a helmet from both teams aloft, as he led the students in prayer. There is no evidence that the coach pressured his players to participate, but Kennedy did not dissuade them, and most of the Bremerton team participated.

In September 2015, a coach from an opposing team alerted the Bremerton principal that Kennedy was leading prayers. In a phone call with the coach, school officials voiced their disapproval. On September 17, they sent a letter that identified "two problematic practices." First, the letter said, Kennedy had delivered "inspirational talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of . . . game[s]." Second, the coach had led "students and coaching staff in a prayer" in a locker-room tradition that "predated [his] involvement with the program." The letter instructed Kennedy to avoid any motivational "talks with students" that "include[d] religious expression, including prayer," and to avoid "suggest[ing], encourag[ing] (or discourag[ing]), or supervis[ing]" any prayers of students, which students remained free to "engage in."

After receiving the letter, Kennedy ended the tradition of offering locker-room prayers and stopped delivering motivational talks on the field after games. For several weeks, he abandoned his practice of kneeling for a post-game prayer. Then, on October 14, after hiring a lawyer, Kennedy informed the school district that he planned to resume post-game prayers. Two days later, he offered a silent prayer with players and coaches from both teams, members of the public, and members of the media around him at midfield. Kennedy also began making media appearances in which he presented himself as a devout Christian who had "made a commitment with God" to pray after games.

On October 23, shortly before that evening's game, the administrators sent another letter to Kennedy acknowledging the coach's effort to comply with school policy. He had, for example, discontinued the prayers in the locker room. At the same time, the letter warned that

a "reasonable observer" could think the school was endorsing religion when a school employee engaged in "overtly religious conduct" after games. If Kennedy wanted to pray after games, he needed to do so from a "private location" behind closed doors and "not observable to students or the public."

When Kennedy led prayers after games on October 23 and 26, school officials placed him on administrative leave. Instead of applying for another coaching job for the 2016 season, Kennedy filed suit in federal court, alleging the school district had violated his First Amendment rights. The suit also sought a preliminary injunction requiring the Bremerton School District to reinstate the coach while the case was being litigated. A federal district court declined to issue an injunction, arguing that Kennedy was a public employee, which meant the First Amendment did not protect his speech. The Ninth Circuit Court of Appeals upheld the decision not to reinstate the coach in 2018. Kennedy appealed to the Supreme Court, but the justices declined to intervene "until the factual question of the likely reason for the school district's conduct is resolved." Four justices did sign Justice Samuel Alito's opinion, warning that the lower court's decision demonstrated an "understanding of the free speech rights of public school teachers [that] is troubling and may justify review in the future."

The case was remanded to the federal district court, which sided in favor of the school district. On appeal, the Ninth Circuit narrowly affirmed the decision, citing cases that limited public employees' speech rights and reasoning that the school district was legitimately worried that allowing prayers would violate the Establishment Clause's prohibition on government endorsement of religion. The Ninth Circuit denied the request for an en banc hearing and Kennedy appealed to the Supreme Court.

On a 6-to-3 vote, the Supreme Court held that the school district had erred when it instructed a teacher to refrain from leading organized prayer during an extracurricular activity on school grounds. Chief Justice John G. Roberts, Jr., and Justices Clarence Thomas, Samuel A. Alito, Jr., and Amy Coney Barrett joined Justice Neil Gorsuch's majority opinion. Justice Brett Kavanaugh agreed with most of the majority opinion, but did not join the section concerning free speech.

Writing for the majority, Justice Gorsuch rejected both arguments made by the school district. First, he responded to the Bremerton School District's claim that Kennedy was a government employee and, as such, that the First Amendment did not protect his speech. To answer this claim, Justice Gorsuch stressed that Kennedy's prayers were a form of "private speech" that did not fall within the scope of his duties as a football coach. "He did not speak to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the district paid him to produce as speech. Simply put: Kennedy's prayers did not owe their existence to Mr. Kennedy's responsibilities as a public employee." Since he was speaking as a private person, Kennedy's speech was protected by the First Amendment.

Second, Justice Gorsuch rejected the school district's claim that a reasonable observer might interpret the prayers as an endorsement of religion. He explained there was no Establishment Clause violation, as "Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion." Even if someone had observed the prayer, Justice Gorsuch added, "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'"

Justice Sonia Sotomayor's dissenting opinion (joined by Justices Elena Kagan and Stephen Breyer) offered a different conceptual frame. The majority considered whether Kennedy could pray privately, but Justice Sotomayor said the relevant question was "whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event." By siding with Kennedy, Justice Sotomayor continued, the Court erred by "paying almost exclusive attention to the free exercise clause's protection for individual religious exercise while giving short shrift to the establishment clause's prohibition on state establishment of religion." This emphasis was a mistake, Justice Sotomayor reasoned, because it privileged Kennedy's religious rights over those of his students, many of whom might feel pressured to participate lest they run afoul of the coach. "In doing so," she concluded, "the court sets us further down a perilous path in forcing states to entangle themselves with religion, with all of our rights hanging in the balance."

The difference between the majority and the dissent extended beyond the issues. Several commentators highlighted the stark difference in how the opinions characterized the facts of the case. Writing for the majority, Justice Gorsuch said that Kennedy wanted to offer a brief, silent and solitary prayer. By this account, the coach prayed after games, "during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied." While the coach's behavior was innocuous, "the Bremerton School District disciplined him anyway." Later in his opinion, Justice Gorsuch provided more detail, adding, "The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate."

In her dissent, Justice Sotomayor challenged this benign account of the facts. "To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet," she complained, "it misconstrues the facts." To substantiate this point, she added, "The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The court ignores this history. The court also ignores the severe disruption to school events caused by Kennedy's conduct." To substantiate her version of the facts, Justice Sotomayor included three photographs that showed players from both teams, members of the public, and the media during a prayer led by Kennedy.

Chapter 14: Access

U.S. Supreme Court

Case: *Federal Election Commission v. Ted Cruz for Senate,* 142 S.Ct. 1638 (decided May 16, 2022).

Subject: Does Section 304 of the Bipartisan Campaign Reform Act of 2002, which caps the amount of post-election contributions candidates can use to repay loans to their campaigns, violate the First Amendment?

Summary: Section 304 of the Bipartisan Campaign Reform Act (BCRA) of 2002 allows candidates to use up to $250,000 in post-election contributions to repay loans made to their campaigns before the election. To test the constitutionality of this provision, Ted Cruz loaned

$260,000 to the Ted Cruz for Senate Committee. After the 2018 election, in which Cruz defeated Democrat Beto O'Rourke, the Committee repaid the $250,000 allowed by the law, intentionally leaving $10,000 of the loan unpaid. Cruz and the Committee then filed suit in federal district court, alleging that Section 304 of the BCRA violated the First Amendment.

In a 6-to-3 decision, the Supreme Court held that Section 304 was unconstitutional. Writing for the majority, Chief Justice John Roberts dismissed the Federal Elections Commission's claim that Senator Cruz did not have the standing to sue. Even though Cruz had deliberately exceeded the $250,000 cap on loans to create a test case, the majority held that the Court has never held that a party who "purposely incurs" an injury loses standing to challenge the constitutionality of a law.

The Chief Justice then turned to whether the cap limited a candidate's freedom of speech. By limiting how much a candidate can be reimbursed for loans to their campaign, he said, the law "inhibits candidates from loaning money to their campaigns in the first place, burdening core speech." He continued, "This 'drag' on a candidate's First Amendment right to use his own money to facilitate political speech is no less burdensome 'simply because it attaches as a consequence of a statutorily imposed choice.'"

The Chief Justice then argued there was only one legitimate reason for restricting political speech: "the prevention of '*quid pro quo*' corruption or its appearance." In this instance, he reasoned, it was unlikely that candidates would trade political favors for campaign contributions. "Individual contributions to candidates for federal office," he stressed, "are already regulated in order to prevent corruption or its appearance. Such contributions are capped at $2,900 per election."

Justice Elena Kagan's dissenting opinion (joined by Justices Stephen Breyer and Sonia Sotomayor) defended the $250,000 limit. She explained that the justification for the limit "is easy to grasp. Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption. The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return." This is dangerous, she reasoned, as "donors well understand this situation, and are eager to take advantage of it. In short, everyone's incentives are stacked to enhance the risk of dirty dealing." Even if nothing illegal happens, Justice Kagan continued, "the public will predictably perceive corruption in post-election payments directly enriching an officeholder. Congress enacted Section 304 to protect against those harms."

In the final paragraph of her dissent, Justice Kagan issued a blunt warning: "Democracy works only if the people have faith in those who govern. And the people cannot have faith in representatives who trade official acts for financial gain." In holding Section 304 unconstitutional, she concluded, "the Court fuels non-public-serving, self-interested governance. It injures the integrity, both actual and apparent, of the political process."

In his opinion of the Court, the Chief Justice addressed the concern with corruption that the dissent had identified. It was not enough, he argued, to offer a "handful of media reports and anecdotes" that "hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidates." To justify Section 304, he said, the government must offer "record evidence or legislative findings" to demonstrate the corruption. In this instance, he concluded, "the Government is unable to identify a single case of *quid pro quo* corruption in this context—even though most States do not impose a limit on the use of post-election contributions to repay candidate loans."

Looking to the Future

The Supreme Court has already granted certiorari in two cases involving freedom of speech that will be heard during the 2022–2023 term.

The first case, *303 Creative LLC v. Elenis,* involves LGBTQ rights, religious beliefs, and freedom of speech. In agreeing to hear the case, the justices took up a set of facts similar to those in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* a 2017 case involving a baker who refused to create a wedding cake celebrating a same-sex marriage. In that case, the Court ruled in favor of the baker on free exercise grounds, while avoiding the free speech question.

The *303 Creative* case involves a lawsuit filed by Lorie Smith, the owner of a graphic design firm in Colorado. Smith opposes same-sex marriage on religious grounds, does not want to create websites for same-sex weddings, and wants to post a statement explaining that decision on her website. The problem is that, under Colorado's Anti-Discrimination Act (CADA), businesses that are open to the public may not "directly or indirectly . . . refuse . . . to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." The CADA also prohibits a public accommodation from communicating a statement "that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused . . . or that an individual's patronage . . . is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation."

Smith went to court seeking an order prohibiting Colorado from enforcing the CADA. A federal district judge rule in favor of the state. The Tenth Circuit Court of Appeals affirmed that decision. The appellate court acknowledged that the "creation of wedding websites is pure speech" and that CADA "compels" Smith to create speech that "celebrates" same-sex unions. However, the CADA withstands constitutional scrutiny, the Tenth Circuit continued, as the law is narrowly tailored to ensure LGBTQ couples have access to the same goods and services available to straight couples. While acknowledging that "LGBT consumers may be able to obtain wedding-website design services from other businesses," the Tenth Circuit concluded, "LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer. Thus, there are no less intrusive means of providing equal access to those types of services."

Chief Judge Timothy M. Tymkovich dissented, arguing "The Constitution neither forces Ms. Smith to compromise her beliefs nor condones the government doing so. In fact, this case illustrates exactly why we have a First Amendment. Properly applied, the Constitution protects Ms. Smith from the government telling her what to say or do." In siding with the state, he said, "the majority concludes not only that Colorado has a compelling interest in forcing Ms. Smith to speak a government-approved message against her religious beliefs, but also that its public-accommodation law is the least restrictive means of accomplishing this goal." He added that this was a clear example of "paradigmatic compelled speech." Citing Justice Jackson's opinion in *West Virginia v. Barnette,* he concluded: "The 'freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.'"

The Supreme Court agreed to decide whether a public-accommodation law that required an artist to speak or to stay silent violated the Free Speech Clause of the First Amendment. It is impossible to know what the Court will decide in *303 Creative LLC v. Elenis,* but the case

gives the justices the chance to balance two guarantees, the protection against government-compelled speech and protection from discrimination based on sexual orientation.

The second case, *Andy Warhol Foundation for the Visual Arts v. Goldsmith,* deals with the transformative use test, an essential concept in copyright law. According to Section 107 of the Copyright Act of 1976, the "fair use of a copyrighted work . . . for purposes such as criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." The statute also sets out four factors to inform fair use determinations: (1) the purpose and character of the issue, including whether such use is of a commercial nature or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.

For many years, the effect on the market was the decisive consideration. More recently, the purpose and character of the use have come to the foreground, especially if the copyrighted work is "transformed" into something new, with a different purpose or character, and does not substitute for the original use of the work. Courts have struggled to develop a standard for assessing whether a work is transformative.

While on assignment for *Newsweek* magazine in 1981, photographer Lynn Goldsmith took a series of portraits of Prince Roger Nelson, a promising musician later known as "Prince." The images were never published, but in 1984, *Vanity Fair* licensed one of Goldsmith's black-and-white portraits to use in an article about the artist. Using that image, Andy Warhol created a highly colorized work using Prince's head and a small portion of his neckline from the portrait. Warhol's image, along with a story about the musician titled "Purple Fame," by Tristan Vox, appeared in the November 1984 issue of the magazine.

Without permission, Warhol subsequently created fifteen additional works, all variations on the same Goldsmith photograph. The result was the acclaimed "Prince Series," which includes twelve silkscreen paintings, two screen prints on paper, and two drawings. Although it is not known how Warhol created these images, his usual practice was to start with a reproduction of a photograph and then alter it.

After Warhol died in 1987, the Andy Warhol Foundation (AWF) transferred custody of the works to the Andy Warhol Museum, which licensed the images for editorial, commercial, and museum usage. Sometime after Prince died, in 2016, Goldsmith became aware of the Prince Series. When Goldsmith informed the AWF that she believed Warhol's works infringed on her copyright, the AWF went to court seeking a declaratory judgment of noninfringement or, alternatively, a ruling that the Prince Series was fair use. Although Goldsmith acknowledged licensing the portrait to *Vanity Fair,* she countersued, claiming the Prince Series infringed on her intellectual property.

Federal District Judge John G. Koeltl ruled in favor of the AWF, arguing that the Prince Series "transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure." Warhol's images "have a different character," giving them "an aesthetic and character different from the original." This explains why each of the images "is immediately recognizable as a 'Warhol' rather than as a photograph of Prince—in the same way that Warhol's famous representations of Marilyn Monroe and Mao are recognizable as 'Warhols,' not as realistic photographs of those persons." Because Warhol transformed the portrait, the use of Goldsmith's copyrighted work was deemed fair use and not actionable copyright infringement.

The Second Circuit Court of Appeals disagreed, noting that "Warhol created the series chiefly by removing certain elements from the Goldsmith Photograph, such as depth and contrast, and embellishing the flattened images with 'loud, unnatural colors.'" Although the "alterations may change the Goldsmith Photograph in ways that give a different impression of its subject, the Goldsmith Photograph remains the recognizable foundation upon which the Prince Series is built." Finally, the court dismissed the claim that "each Prince Series work is immediately recognizable as a 'Warhol.'" "Entertaining that logic," the Second Circuit argued, "would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist's style, the greater leeway that artist would have to pilfer the creative labors of others."

The AWF appealed the decision. In its writ for certiorari, AWF cited *Google v. Oracle America* (2021), a recent decision in which the Supreme Court held that work is transformative if it "alter[s] the copyrighted work 'with new expression, meaning or message.'" Under this standard, the Prince Series qualifies as transformative because Warhol created new content with an entirely different meaning. (The Ninth Circuit decision discounted the *Google v. Oracle* decision, emphasizing that "the usual context of that case, which involved copyrights in computer code," made its conclusion "less applicable to an artistic context.")

This Supreme Court agreed to hear *Andy Warhol Foundation for the Visual Arts v. Goldsmith,* in which the justices will be required to decide whether Warhol transformed a series of black-and-white portraits into new works of art. The case has drawn considerable interest among artists and copyright holders. Modes of artistic expression are changing, raising a substantive question about how transformative a work needs to be to qualify for fair use protection.